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Kelly M. Plummer

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**ENDING PARENTS' UNLIMITED POWER TO CHOOSE:
LEGISLATION IS NECESSARY TO PROHIBIT PARENTS'
SELECTION OF THEIR CHILDREN'S SEX AND
CHARACTERISTICS**

I. INTRODUCTION

“We’ll take a blond haired, brown eyed girl, who will reach a height of 5’8” with musical talent, athletic prowess, and an IQ of 145,” requested Steve and Kristie Robinson. The couple already had a healthy, adorable four-year old son who exhibited intellectual aptitude and amazing physical capabilities, and the couple now wanted a baby daughter who would exceed her peers in every facet of life. While at first glance it may appear these parents only want the same things all parents want for their children—the “best” life possible—parents’ power to select the sex or other characteristics of their offspring may render harmful moral, social, and biological consequences.¹

Parents have had the ability to decide when they want to have children, how many children they want to have, and how these children will be conceived. Subsequent to advances in reproductive technology in 2001, parents now have another option—to select the sex of their children prior to conception.² Further innovations in technology may soon allow parents to give their children a tool for becoming the “best” of which their parents never dreamed—the ideal genes.³ In light of the impact of procreation not only to

1. *See Girls Discriminated Against before Birth, Childrens Special Session Preparatory Committee Told*, M2 PRESSWIRE, Feb. 2, 2001, at 2001 WL 4183506. In a follow up meeting of the United Nations 1990 World Summit for Children, a panel expressed concern about the discrimination against females in certain parts of the world, especially in Asian countries, and the likelihood that emerging reproductive technologies would result in an expansion of discrimination against female children. *Id.*

2. Frederic Golden, *Boy? Girl? Up to You*, TIME.COM, Sept. 21, 1998, at http://www.time.com/time/magazine/1998/dom/980921/medicine.boy_girl_up_to17a.html (last visited Mar. 11, 2002) (reporting that a fertility center in Virginia can now offer an 85% chance of ensuring couples that they will have a girl); Sarah Boseley, *Boy or Girl? Just Sort the Sperm: Boy or Girl? Let Machine Sort the Sperm*, THE GUARDIAN (Manchester, UK), July 1, 2001, at 1.1 (reporting that English couples are likely to travel to Virginia to utilize a sperm-sorting machine at a Virginia reproductive clinic which permits parents to select the sex of their child with 92% accuracy for girls and 72% accuracy for boys). *See also infra* notes 16-26 and accompanying text.

3. Legal institutions have yet to deal with parents’ relentless search to use reproductive technologies to create the “best” offspring. The most striking example of how far some

oneself, but also on one's children, others in the present environment, and humans who will live centuries into the future, the rights related to procreation should be considered with respect to their potentially broad impact.⁴

Legislation is needed to prohibit parents' ability to use reproductive technologies to select the sex and traits of their children prior to conception.⁵ Section I of this Comment addresses the concerns associated with the selection of traits and characteristics, methods of sex selection which are currently available and the history and culture related to sex selection. Section II discusses the constitutional decisions involving an individual's choices concerning family, conception and child rearing, and the manner in which these cases implicate certain legal issues in relation to the regulation of preconception selection of offspring sex and characteristics. In addition, the potential harms associated with the use of these reproductive technologies will be discussed to show that these tribulations meet the legitimate state interests necessary for legislation to be upheld. Section III proposes that because the use of these reproductive techniques should not be considered a fundamental right of parents nor a matter protected within the realm of personal privacy, the Supreme Court is likely to uphold legislation in this area. Finally, Section IV discusses the legislative measures enacted in other nations and emphasizes the need for the United States to regulate reproductive technologies that permit preconception sex and trait selection.

prospective parents go to fulfill their desire for a genetically perfect child is the internet site at which female and male models auction their sperm and eggs. Rons' Angels, at <http://ronsangels.com/index2.html> (last visited Nov. 1, 2002). "The prices for gametes on sale at ronsangels.com begin at \$15,000 for sperm and egg donations and go as high as \$150,000 for an egg donation from a buxom, blond, blue-eyed 'pop artist' and 'international model.'" Vida Foubister, *Reproductive Technologies Outpacing Ethical Concerns*, AMEDNEWS.COM, Jan. 17, 2000, at http://www.ama-assn.org/sci-pubs/amneww/pick_00?prsb0117.htm (last visited Mar. 29, 2002).

4. See Owen D. Jones, *Reproductive Autonomy and Evolutionary Biology: A Regulatory Framework for Trait Selection Technologies*, 19 AM. J.L. & MED. 187, 188 (1993) (noting that as technology affords individuals, particularly women, heightened powers to influence the genetic makeup of children, novel questions arise regarding the far-reaching implications for the social order); Marian D. Damewood, *Ethical Implications of a New Application of Preimplantation Diagnosis*, 285 JAMA 3143, 3144 (2001) (arguing that the prevention of transmitting sex-linked diseases is the only reason strong enough to override the concerns regarding sex selection). See also Chrisian Byk, *The Ethical and Legal Sense of Medically Assisted Procreation*, in THE ETHICS OF GENETICS IN HUMAN PROCREATION 277 (Hille Haker & Deryck Beylevald eds., 2000) (indicating that procreation "is a manifestation of our culture, our identity, our individuality, relations we establish with others, and the perception that we have of our future and the future of our descendants").

5. Legislation will be needed as these technologies rapidly become available to the public.

A. *Harmful Consequences of Parents' Selection of the Sex and Traits of their Children*

One concern of gender manipulation is that parents will use prebirth genetic manipulation to give their offspring genes for intelligence, physical attractiveness, and other positive characteristics, because it will enhance their children's opportunities in life without considering the far-reaching effects of their decision.⁶ Since parents naturally hope for their children to be successful in life and exemplify a certain image, parents try to provide their children with the tools to fulfill their hopes.⁷ However, despite the resources parents provide to their offspring to enhance the children's success, children's potential is limited by their genetic composition and abilities.

Under typical circumstances, babies begin their lives with a unique set of characteristics resulting from a random blending of their parents' genes.⁸ Instead of this natural random combination of parents' genes, parents may soon be able to select the genetic makeup of their children.⁹ The ability to select children's genes—which are thought by some to be the primary determinants of health, longevity, and success—will give parents the power to give their offspring certain characteristics according to their personal preferences.¹⁰ Sex selection technology fulfills parents quest for the perfect

6. John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 436 (1996) (concluding that procreative liberty leaves parents with a fair amount of discretion over who they want their offspring to be).

7. Multiple books, articles, and tools exist which provide parents with suggestions for successful child-rearing strategies. See generally <http://www.ridgeviewmedical.org/services/childcare/newsletter/learning.asp> (last visited Oct. 15, 2001) (discussing the types of behavior parents should exhibit during the first twelve months of a baby's life to enhance the baby's socialization and learning); WILLIAM SEARS & MARTHA SEARS, *THE BABY BOOK: EVERYTHING YOU'LL NEED TO KNOW ABOUT YOUR BABY FROM BIRTH TO AGE TWO* (1st ed. 1993) (discussing actions parents can take to benefit their babies at various stages of babies' development).

8. See <http://www.ridgeviewmedical.org/services/childcare/newsletter/learning.asp> (last visited Oct. 15, 2001).

9. See Steven Wheatley, *Human Rights and Human Dignity in the Resolution of Certain Ethical Questions in Biomedicine*, 3 EUR. HEALTH L. REV. 312, 318 (2001).

10. See Robertson *supra* note 6, at 421 "The human genome project—the international effort to map and sequence the entire human genome—is a major contributor to genetic consciousness, and will continue to produce genetic discoveries for years to come." *Id.* Robertson weighs parents' interests in procreative freedom and the unprecedented control that parents could have over the lives of their offspring. *Id.* at 421-24. Ultimately, Robertson contends that the procreative rights involved justify only limited interference. *Id.* at 479-82. See also Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 1038 (1995). According to Browne, the field of behavioral genetics offers evidence of a biological basis for traits. *Id.* Two avenues which evidence the influence of genes on human behavior are studies of twins and adopted children. *Id.* For instance, the fact that biological siblings who are raised separately from one another tend to

child, with parents' expectations and fantasies of what the child will be.¹¹ The wake of reproductive technological advances foreshadows a world populated with "designer" offspring whose every characteristic may be carefully selected and produced.¹²

Some bioethicists express concern that sex selection will "turn children into something 'we make to order, like an object of our choice, a commodity.'" ¹³ United States culture tends to equate genetic alterations with "playing God."¹⁴ By equating genes with destiny, some believe that any attempt to alter the genes of humans is an attempt to alter the destiny of the human race itself.¹⁵

B. *Current Reproduction Technology Techniquet for Preconception Sex Selection*

The two most commonly used methods of sex selection, amniocentesis and chorion villus biopsy, permit sex selection by terminating a pregnancy between eight and twenty weeks into the pregnancy.¹⁶ Most people are disgusted with

exhibit more similarities to one another than unrelated children who are reared together supports the proposition that human traits are influenced by genes to a greater degree than by environment. *Id.* See generally ROBERT TRIVERS, SOCIAL EVOLUTION 19-40 (1985) (explaining the way humans evolved through natural selection to inherit the genes that are beneficial to human's survival and reproduction); RICHARD DAWKINS, THE SELFISH GENE (1976).

11. See Marilyn H. Karfeld, *Selecting a Baby's Gender Raises Ethical Problems*, CLEVELAND JEWISH NEWS, Sept. 25, 1998, at 18 (indicating that Judaism sees as a virtue the procreation of all children, girls and boys, healthy and unhealthy, such that Judaism would frown upon wholesale, widespread sex selection because it reduces the overall uniqueness of the child).

12. Jodi Danis, *Sexism and "The Superfluous Female": Arguments for Regulating Pre-implantation Sex Selection*, 18 HARV. WOMEN'S L.J. 219 (1995). See also Wheatley, *supra* note 9, at 318 (noting there is nothing novel about parents' desire to have children of a certain sex or with certain characteristics, but until very recently, parents did not have the ability to "design" their prospective children); Damewood, *supra* note 4, at 24 (warning that the selection of sex and desirable physical attributes of children through pre-implantation genetic diagnosis may be the precursor to designer genes).

13. Karfeld, *supra* note 11, at 19-20.

14. SUSANNA HORNIG PRIEST, A GRAIN OF TRUTH: THE MEDIA, THE PUBLIC, AND BIOTECHNOLOGY 77 (2001).

15. See *id.* See also John B. Attanasio, *Science Tests Human Dignity: The Challenges of Genetic Engineering*, 53 SMU L. REV. 455, 458-59 (2000) (discussing a hypothetical in which the amazing results achieved in experiments aimed at increasing babies' intelligence by injecting a new drug into eggs prior to in-vitro fertilization and the constitutional implications of this research).

16. M.C. Macnaughton, *Prenatal Sex Selection*, in REPRODUCTIVE MEDICINE AND THE LAW 47 (A. Allan Templeton & Douglas J. Cusine eds., 1990) (discussing the advantages and disadvantages of these methods of sex selection). See also Antoinette Sedillo Lopez, *Privacy and the Regulation of the Technologies: A Decision-Making Approach*, 22 FAM. L.Q. 173, 194 (1988) (indicating that other methods of reproductive genetic manipulation include alteration of the fetus

the notion of aborting a fetus based on the unborn child's sex, but recent technological innovations do not even require the production of an embryo for sex selection to occur.¹⁷ When couples undergo in vitro fertilization, eggs and sperm combine in a lab dish to create an embryo and specialists can tell with almost 100 percent accuracy which embryos are male or female by genetically testing a single cell.¹⁸ "Fertility clinics long have used this technique to help couples at high risk of bearing children with gender-linked genetic diseases to pick which embryo to have implanted."¹⁹

A very recent advance in reproductive technology provides parents with an accurate method of selecting the sex of their children prior to conception.²⁰ Pre-implantation genetic diagnosis (PGD) and sperm sorting through flow cytometry are two innovative reproductive methods, which offer parents the chance to select the sex of their progeny.²¹ Scientists at a fertility clinic in Fairfax, Virginia, announced in May 2001 that they developed a sperm-separation method, which will allow parents to choose the sex of their child.²² Sperm carrying the Y-chromosomes, which create male offspring, contains two and a half percent less DNA than X-chromosomes, which create female offspring.²³ By separating and removing sperm more likely to produce boys or

using in utero fetal therapy and that the future may bring gene substitution and modification, pathogenesis, and cloning).

17. See Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 AM. J.L. & MED. 329, 330-33 (1991) (summarizing a review of reports, bills, and legislation from around the world from 1987-1999 to indicate that a general world consensus indicates that "neither sex selection of embryos, except for sex-linked diseases, nor eugenic selection should be allowed").

18. *Picking Baby's Sex Gets Support*, L.A. TIMES, Sept. 29, 2001, at A24 (announcing the statement of a fertility clinic ethics chairman that it is ethical for parents to select the sex of their offspring).

19. *Id.* "Critics long have considered gender selection for non-medical reasons as a form of sex discrimination and the start as a slippery slope toward choosing children on the basis of other traits." *Id.*

20. See Rachel E. Remaley, "The Original Sexist Sin": *Regulating Preconception Sex Selection Technology*, 10 HEALTH MATRIX 249, 252-53 (2000) (explaining the uses in the rapidly emerging reproductive technology in the forms of pre-implantation genetic diagnosis and sperm-sorting, both of which permit parents to select or avoid certain features in their offspring). See also John O'Farrell, *Secrets of the Sperm Machine*, THE GUARDIAN, July 7, 2001, available at 2001 WL 24302449, at *1 (indicating that a clinic is charging \$2,000 for couples to use the "sperm sorting machine" to choose the sex of their child).

21. Remaley, *supra* note 20, at 253-54 (noting that prospective parents who use in vitro fertilization are more likely to have a child of the desired sex than parents who use innovative sperm sorting techniques).

22. See Karfeld, *supra* note 11. Once the sperm are sorted, pregnancy is achieved through artificial insemination. *Id.*

23. *Id.* This method is "remarkably accurate." *Id.* "Using this technology for parents who wanted girls, 10 out of 11 babies born were female." *Id.* The rate of success is slightly lower for boys. *Id.*

girls and then using the preferred sperm for artificial insemination, this technology allows parents to choose the sex of their offspring with remarkable accuracy.²⁴

Sperm-separation techniques are the most reliable method available of sex selection currently available, with estimates of an eighty-six percent success rate.²⁵ In May 2001, the chairman of the American Medical Association ethics group published a policy saying that, under certain conditions, doctors could offer preconception sex selection services to families who already have children and now want another baby of the opposite gender.²⁶

C. *The History of Sex Selection Indicates that Parents Will Use Reproductive Technologies to Select their Children's Sex and Traits*

Considering the historical use of sex selection methods, parents will take advantage of innovative reproductive technologies to select the sex and traits of their children. For centuries, parents practiced various techniques to ensure that their progeny would be of a certain sex, usually male. Even in ancient times, people attempt to control the sex of their offspring. Old wives' tales claimed that by tying the left testicle or by having the husband lie on a certain side of the bed ensured the birth of a male offspring.²⁷ Parents attempted to copulate on certain dates, believing this would ensure the birth of a child of a certain sex.²⁸ In the Talmud, Jewish rabbis instruct men in methods to ensure the birth of male children.²⁹ The Greek physician Hippocrates advised parents that if a daughter was desired the man "should tie off the right testicle as much as he can bear it;" if a son was desired, the man "should have relations with his

24. See *Picking Baby's Sex*, *supra* note 18, at A24. At this early stage in the technology, the success rates are higher for female offspring than for male offspring. *Id.*

25. ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 139 (1995) (indicating that at least seventy clinics in the United States used variations of the sperm separation procedure to select sex chromosome-specific sperm).

26. *Picking Baby's Sex*, *supra* note 18, at A24 (indicating that this is only the opinion of the committee's chairman and the committee's position discouraging sex selection stands until the committee reaches an updated conclusion).

27. See also *Choosing Your Baby's Sex: The Folk Wisdom*, at <http://www.womencentral.msn.com/babies/articles/preconception.asp> (last visited Aug. 5, 2002) (offering the following methods to conceive a baby of the desired sex: eating vegetables and chocolate, having sex in the missionary position and dancing the "baby dance" when the moon is full to conceive a female child; eating red meat, cola, and salty snacks, having sex when there is a quarter moon in the sky and making love standing up to conceive a male child).

28. The Selnas method is one of natural selection of the gender of mammal babies based on the alternating polarity cycle in the ovum membrane, which selects the sperm containing the X or the Y chromosome. See http://www.babygenderselection.com/scientific_review.html. (last visited Oct. 15, 2001)

29. See Karfeld, *supra* note 11 (explaining that parents have historically been interested in selecting the sex of their offspring).

wife at the end of her period and should thrust as hard as he can until ejaculation.”³⁰ Other methods over the centuries included high potassium and sodium diets and turning the nuptial bed to face the north wind, and precise timing of intercourse.³¹ Pro-Care Industries manufactured a “child-selection kit” in 1986, which was sold for \$49.95, which purported to allow parents to monitor vaginal mucus to select the sex of their offspring.³²

Some parents take extreme measures to assure the birth of a child of the preferred sex. Parents’ practice of infanticide to secure their offspring’s gender is a common phenomenon in many cultures.³³ In an investigation of two hospitals in India that used abortion as a method of selecting the birth of male children, the study found that at one hospital in 1976-1977, almost twenty-five percent of the women admitted wanted to know the sex of their fetus so they could abort it if the fetus was female.³⁴

In the United States, some couples will abort a fetus after genetic testing determines the fetus is of the undesired sex.³⁵ Some measures of ensuring the birth of a child of the “right” sex are less drastic, but still suggest that parents are likely to use this technology if available. There is a growing belief among individuals, geneticists and physicians that people are entitled to sex selection if they request it.³⁶ In a survey of genetic clinic patients, sixty percent of those surveyed believed they had a right to referrals for any service they could pay

30. ROGER GOSDEN, *DESIGNING BABIES: THE BRAVE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 163 (1999).

31. *Id.* at 164. In ancient Egypt, the methods for predicting the sex of children was to sprinkle the urine of a woman on a few grains of barley and emmer. *Id.* If both sprouted, the woman was pregnant. *Id.* If only barley sprouted, the child was male; if only emmer sprouted, the child was female. *Id.*

32. See BLANK & MERRICK, *supra* note 25, at 139 (noting that the product was shortly taken off the market when the Federal Drug Administration reported that some of the product’s claims were unsupported).

33. *Id.* at 138.

34. A. Ramanamma & Usha Bambawale, *The Mania for Sons: An Analysis of Social Values in South Asia*, 14B SOC. SCI. & MED. 107, 108 (1980). The study revealed that of the 700 pregnant women who visited the hospital during the year of the study, 430 of the 450 women that carried female fetuses aborted their fetuses. *Id.*

35. See Karfeld, *supra* note 11. The number of parents who abort children of the undesired sex is difficult to determine because most parents do not admit that they abort a fetus because they desire a child of the other sex. *Id.*

36. Dorothy C. Wertz, *Patients’ and Professionals’ Views on Autonomy, Disability, and “Discrimination”: Results of a 36-Nation Survey*, in *THE COMMERCIALIZATION OF GENETIC RESEARCH: ETHICAL, LEGAL, AND POLICY ISSUES* 171, 173 (Timothy A. Caulfield & Bryn Williams-Jones eds., 1999). *But see* Mark I. Evans, et al., *Attitudes on the Ethics of Abortion, Sex Selection, and Selective Pregnancy Termination Among Health Care Professionals, Ethicists, and Clergy Likely to Encounter Such Situations*, 164 AM. J. OBSTET. GYNECOL. 1098 (1991) (reporting findings on an empirical study indicating that the attitudes of health care providers is that sex-selective abortions are unethical).

for, including sex selection.³⁷ Given this history of parents' utilization of techniques to enhance the possibility of the birth of a child with a certain sex, it is likely that parents will take advantage of technology allowing them to select the sex and other characteristics of their offspring as this technology becomes available.³⁸ As the number of children in American families decreases, couples will be more likely to utilize technologies for controlling the characteristics of their children.³⁹

Many prenatal diagnostic technologies are currently being used in the United States to reduce the incidence of birth defects, especially for women at risk of producing abnormal offspring.⁴⁰ The problem arises as to where the

37. See Wertz, *supra* note 36, at 173 (noting the emphasis on autonomy displayed by patients in the United States).

38. See J.M. Berkowitz, *Two Boys and a Girl Please and Hold the Mustard*, 114 PUBLIC HEALTH 5, 5 (2000) (noting that the desire to select the sex of one's children has remained strong since at least the time of Hippocrates, so it is likely that parents will utilize this technology when it becomes available).

39. BLANK & MERRICK, *supra* note 25, at 138 (indicating that this trend is already present among families in the United States).

40. *Id.* at 134. Parents attempt to avoid the birth of a child with sickle-cell anemia through the use of preimplantation genetic diagnosis. *Id.* Although the first pregnancy achieved by preimplantation genetic diagnosis to avoid the transmission of a sex-linked disorder occurred nearly a decade ago, the first unaffected pregnancy using preimplantation genetic diagnosis occurred in 1997. *Id.* See Kangpu Xu et al., *First Unaffected Pregnancy Using Preimplantation Genetic Diagnosis for Sickle Cell Anemia*, 281 JAMA 1701, 1706 (1999) (concluding that the study's first unaffected pregnancy resulting from preimplantation genetic diagnosis for sickle cell anemia demonstrates that the technique can be a powerful diagnostic tool for carrier couples who desire a healthy child but wish to avoid the difficult decision of whether to abort an affected fetus); Lindsey Tanner, *Gene-Screening Cases Raises Doubts*, STAR-LEDGER (Newark N.J.), Feb. 27, 2002, at 8 (discussing the usefulness of preimplantation genetic selection to avoid having a child with early-onset Alzheimer's). Preimplantation genetic diagnosis is an unregulated, market-driven area of science, with some clinics already using the test for gender selection and others willing to test for whatever is scientifically feasible. Some parents use sex selection methods to avoid giving birth to a child with a sex-linked genetic diseases. However, such sex-linked diseases are rare, and most people use sex determination for other reasons. Sex selection for medical purposes is a distinct phenomenon from sex selection for personal or cultural reasons. Many believe that determining a child's sex prior to birth is unconditionally justified if there are reasons to presume the child will be born with an incurable pathology, but would be unethical if such selection methods were used only for social reasons. See Macnaughton, *supra* note 16, at 50 (indicating that most people agree the use of sex selection to avoid sex-linked diseases is justifiable on medical grounds). See also Damewood, *supra* note 5 (reviewing various arguments for sex selection from a physician's point of view and concluding that avoidance of sex-linked genetic disease is the only justification strong enough for the use of sex selection technology); A.Y. Ivanyushkin, *New Reproductive Technologies in Russia*, in CREATING THE CHILD 273 (Donald Evans ed., 1996); Gian Carlo Di Renzo et al., *Control of Human Reproduction*, in CREATING THE CHILD 41 (Donald Evans ed., 1996) (discussing the current technologies which will permit humans growing control over the physical characteristics of their descendants); 139 CONG. REC. S4716 (daily ed. Apr. 2, 1992) (statement of Sen. Gorton) (indicating that 195,000

line should be drawn between what constitutes a disorder, which is serious enough to warrant selecting a child of the other sex.⁴¹ Because the issues involved in the use of reproductive technologies to select offspring characteristics for medical reasons is distinguishable from the use of these methods to select the sex and characteristics for personal reasons, medical selection of offspring characteristics will not be addressed in this Comment.

II. CONSTITUTIONAL IMPLICATIONS

A. *A Deferential Rational Review Analysis Applies to Preconception Sex and Trait Selection Because a Fundamental Right Is Not Implicated in Parents' Decisions to Use Reproductive Technologies for the Purpose of Sex and Trait Selection*

The traditional due process analysis involves a consideration of when a regulation impinges on a fundamental right. The first step entails determining whether a right is, in fact, fundamental.⁴² Where certain fundamental rights are involved, the Supreme Court has held that regulations limiting these rights may be justified only by a "compelling state interest" and that legislative enactments must be narrowly drawn to express only the legitimate state interest at stake.⁴³

abortion follow prenatal testing for genetic defects each year). Because of the distinct issues presented, sex selection for therapeutic reasons will not be discussed in detail in this Comment.

41. See D. Morgan, *Legal and Ethical Dilemmas of Fetal Sex Identification and Gender Selection*, in *REPRODUCTIVE MEDICINE AND THE LAW* 53, 66 (A. Allan Templeton & Douglas J. Cusine eds., 1990).

42. If the Court determines that a fundamental right is implicated, the Court must rigorously scrutinize the government interests in regulating the area to determine whether the government interests are substantial and whether the regulation is the only practical means of furthering those state interests. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (striking down a Wisconsin statute denying marriage licenses to any Wisconsin resident who is under an obligation to support a child not in the person's custody and is unable to demonstrate compliance with the order to pay child support and that the child is not likely to become a charge of the state).

43. See *Roe v. Wade*, 410 U.S. 113 (1973). See also *Lochner v. New York*, 198 U.S. 45 (1905) (holding that to be fair, reasonable and an appropriate use of a state's police power, an act must have a direct means-end relationship with an appropriate and legitimate state objective); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (striking down as unconstitutional a Nebraska law which prohibits the teaching of any subject in any language other than the English language in schools below the eighth grade; the law could not be sustained because it bore no reasonable relation to any end within the competency of the state, and deprives teachers and parents of liberty without due process of law). The state may not interfere with the liberty interests protected by the Due Process Clause by legislative actions, which are arbitrary, or without reasonable relation to some purpose within the competency of the state to effect. *Id.*

When a fundamental right is not implicated, the Court will analyze the statute using the highly deferential rational basis standard of review.⁴⁴ The test used by the Court considers whether the law is rationally related to a legitimate government purpose.⁴⁵ Courts almost always uphold the challenged legislation when the rational basis review applies.⁴⁶

This Comment proposes that parents' right to select the sex and traits of their children should not be deemed a fundamental right under the constitutionally protected right of personal privacy. This section will demonstrate that the use of reproductive technologies to select the sex and traits of one's offspring does not implicate the same guarantees of personal privacy and autonomy implicit in the Supreme Court decisions relating to pregnancy, abortion, children and family. Given this, the legitimate government interest in preventing the harmful effects of the use of this reproductive technology should allow a ban to pass the rational basis test.⁴⁷ Therefore, state regulations in this area of reproductive technology will be upheld by a mere showing that the state has a rational basis for the law.⁴⁸

44. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486-88 (1955) (The rational basis standard of review is applied to most social and economic regulations.). *See also Addington v. Texas*, 441 U.S. 418, 425 (1979) (holding that loss of liberty by confinement for mental illness called for showing that the individual suffers from a condition more serious than idiosyncratic behavior; reasonable doubt standard is inappropriate in civil proceedings attempting to deprive a citizen of the substantial right of freedom from confinement). The Court has stated that when considering individual rights, the standard of proof, at a minimum, reflects the value society places on individual liberty. *Id.* However, this is not the circumstance when considering preconception sex and trait selection.

45. The burden is on the challenger of the regulation.

46. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (refusing to continue analyzing a federal statute after determining that the rational basis review applied). *See also Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833 (1992). Even if preconception sex and trait selection were considered an exercise of an individual's fundamental personal liberty interest, the magnitude of the state interests in preventing the harms associated with the use of these techniques outweighs the individual rights implicated, such that a ban on preconception sex selection procedures would have to pass a strict scrutiny test under the Constitution.

47. *See Casey*, 505 U.S. at 871 (noting that a regulation to which strict scrutiny applies can survive only if it furthers a compelling state interest, such as health).

48. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Although education is one of the most important services performed by the State, it is not within the limited category of rights recognized by the Supreme Court as guaranteed by the Constitution. *Id.* at 35. Therefore, education is not subject to heightened protection as a fundamental liberty interest and it would be inappropriate for the Court to apply strict scrutiny in this case. *See id.* at 36-70. Given the broad range of harms resulting from the use of this technology, the Court will unquestionably locate a rational basis for regulation.

B. Constitutional Sources of Protection of Procreation, Reproduction and Family Interests

When considering the reach of constitutional protections afforded to rights related to family, procreation and children, the Supreme Court often bases its decisions on a combination of rights implicated under the Due Process Clause, constitutional guarantees in the realm of personal privacy and the Equal Protection Clause. Since the Court and the legislature have yet to address the constitutionality of the regulation of preconception sex and trait selection, rights related to contraception, abortion, marriage and family will be considered in this Comment. Advocates of the unregulated use of reproductive technologies for parental sex and trait selection erroneously cite these cases as lending support for their position. In response, this section will examine the extent of those constitutional guarantees and why they should not be extended to permit the use of these harmful reproductive technologies.⁴⁹

1. Protection of Personal and Family Decisions Under the Due Process Clause

Guarantees of substantive due process protect matters relating to marriage, family and procreation.⁵⁰ The scope of the pre-birth liberty rights to select offspring sex and characteristics depends upon inquiries into whether the characteristic in question is central or material to a reproductive decision, and the nature, severity and probability of harms that flow from the pre-birth selection of characteristics.⁵¹ The Due Process Clause of the Constitution includes a substantive component, which provides heightened protection

49. See John A. Robertson, *Noncoital Reproduction and Procreative Liberty*, in *THE ETHICS OF REPRODUCTIVE TECHNOLOGY* 252 (Kenneth D. Alpern ed., 1992) (discussing the “scope of procreative liberty and the extent of constitutional protection for noncoital conception and its collaborative variations”).

50. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citing family law cases in a criminal procedure case, the Court addressed its reluctance to expand the rights protected by substantive due process).

51. See Robertson, *supra* note 6, at 429. The harms may include “destruction of embryos and fetuses, harm to offspring, instrumentalizing or commodifying human life, discrimination on the basis of gender or disability, and easing the way to non-medical enhancement.” *Id.* Whether the characteristic is central or material to the reproductive decision is one aspect that also implicates the question of whether the characteristic *should be* central or material to the reproductive decision. *Id.* Generally, it is unacceptable for any characteristic selected for non-medical reasons to influence parents’ decision whether or not to give birth to such a child. *Id.* at 436. For instance, our society accepts the notion that parents may choose not to have a child who will suffer from a serious genetic disease, but will not tolerate the idea that parents may choose not to have a child because the child has the wrong hair color. *Id.*

against government interference with individual liberty interests under the First and Fourteenth Amendments.⁵²

The Fourteenth Amendment of the Constitution extends to the states the Fifth Amendment Due Process Clause's guarantee that "no person shall be deprived of life, liberty, or property without due process of law."⁵³ "Liberty" denotes

not merely freedom from bodily restraint[,] but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men [and women].⁵⁴

The right to have children has also been upheld on the ground that an individual has a right protected by the Fourteenth Amendment of equal protection under the law.⁵⁵ The Supreme Court considered the right to have children one of the "basic civil rights of man" which deserved protection as a fundamental right.⁵⁶ Liberty protection is also afforded in some circumstances to marry, have children, direct the education and upbringing of one's children, use of contraception, bodily integrity, and abortion.⁵⁷ However, the Court

52. The Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment extends this prohibition to the states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. See *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (holding that the Washington child visitation law violated parents' fundamental right to make decisions related to the care, custody, and control of their children by permitting any person to seek visitation of the children even though the parents object to such visitation).

53. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

54. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted). In *Meyer*, an instructor at a parochial school in Nebraska was convicted of unlawfully teaching the subject of reading in the German language to a ten-year-old child. *Id.* at 396-97. At the time the court convicted the instructor, a Nebraska law prohibited the teaching of any language other than English at any public or private school. *Id.* at 397. Justice McReynolds' majority opinion held that the statute infringed upon parents' liberty interests guaranteed by the Fourteenth Amendment. *Id.* at 400. In striking down the Nebraska law, the Court focused on the importance of education. The Court rejected the state's argument that a rational state interest existed, holding that a child's learning the German language was *not* injurious to the health, morals, or understanding of the ordinary child. *Id.* at 403. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (emphasizing the Court's precedent that commercial activities are not "private" matters protected by constitutional rights of privacy).

55. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In *Skinner*, the Supreme Court struck down an Oklahoma law as violating the Equal Protection Clause of the Fourteenth Amendment in which the state law called for sterilization of criminals convicted of two or more felonies involving moral turpitude. *Id.*

56. *Id.*

57. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Chief Justice Rehnquist's majority opinion made it evident that people do not have an unlimited right to do with their

limits fundamental liberty interests and urges restraint when considering expanding fundamental liberty interests.⁵⁸ For instance, fundamental liberty interest protection has not been extended to the right of children's education and the right to engage sexual activity in the privacy of one's own home between two consenting adults.⁵⁹

2. Constitutional Guarantee of Personal Privacy

A personal right of privacy, or at least a guarantee of certain areas or zones or privacy, is constitutionally protected. While no explicit textual basis exists for the right of privacy, the Supreme Court has recognized this right on several occasions.⁶⁰ Under certain circumstances, the right of personal privacy encompasses the right to marry,⁶¹ procreate,⁶² use contraception⁶³ and abort a

bodies as they please. The Court in *Glucksberg* held that the right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. *Id.* at 728.

58. See *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986) (upholding the constitutionality of a Georgia sodomy statute).

59. See *id.* at 191. See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 34 (1973) (holding that education is not a fundamental right in an equal protection case challenging a state educational funding plan on the basis that it discriminated against students who resided in poorer districts).

60. The Court has cited various sources for this right of privacy, including the Ninth Amendment, and the "penumbras" or "emanations" of provisions of the Bill of Rights. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). In *Griswold*, the Planned Parenthood League's directors were convicted under the Connecticut birth control law for providing contraceptive devices and relevant information to married couples. *Id.* at 480. The Supreme Court, per Justice Douglas, held that the Connecticut law unconstitutionally intrudes upon the right of marital privacy. *Id.* at 485. The law, by "forbidding the use of contraceptives rather than regulating their manufacture or sale, [sought] to achieve its goal by means having a maximum destructive relationship on a marital relationship." *Id.*

61. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (referring to the right to marry as a "basic civil right"). In *Loving*, Warren's majority held that the miscegenation statutes adopted by Virginia to prevent marriages between persons solely on basis of racial classification violated equal protection and due process clauses of the Fourteenth Amendment. *Id.* at 2. States have the power to regulate marriage, but only to a certain degree. *Id.* at 7. The Court found an invidious racial discrimination in Virginia's statute prohibiting marriage between different races. *Id.* at 12.

62. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 543 (1942) (invalidating a statute providing for the sterilization of "habitual criminals"). The Court held that the right to procreate is "one of the basic civil rights of [humans]" and classifications affecting it are judged by the strict equal protection test. *Id.* at 541.

63. See *Griswold*, 381 U.S. at 485 (recognizing marital privacy as one of the specific penumbras of privacy found in the Bill of Rights); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (holding that the right to use contraception was an individual privacy right which applied to single persons as well as to married persons); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 678 (1977) (holding that a state cannot prohibit distribution of non-medical contraceptives to adults except through license pharmacists, nor prohibit sales of such contraceptives to persons under age sixteen who did not have approval of a licensed physician). See generally *Roe v. Wade*, 410

fetus. “But it is a mistake to equate privacy with a general constitutional right to engage in any or all of these important activities free from governmental interference.”⁶⁴ The Court advocates the use of great restraint when expanding the contours of constitutional due process.⁶⁵

The right of personal privacy exists under the Constitution, and only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in the guarantee of personal privacy.⁶⁶ The right of privacy guaranteed by the Constitution includes only an individual’s personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.⁶⁷ This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, child rearing⁶⁸ and education.⁶⁹ It is broad enough to encompass a woman’s right to choose whether or not to terminate her pregnancy in certain circumstances.⁷⁰

U.S. 113, 152-57 (1973) (noting that this right of personal privacy is implicit in the concept of “liberty” within the protection of the Due Process Clause).

64. Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1078 (1998). “[T]he constitutional right of privacy casts a mantle of immunity from state interference around certain intimate and consensual relationships.” *Id.* When individuals call upon the state to assist them actively in their interactions with other individuals, this right of privacy dissipates. *Id.* at 1079. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding state criminal charges against a gay man charged with violating a state law criminalizing sodomy). In *Bowers*, Justice White’s majority opinion held that the Constitution does not grant a fundamental right to engage in consensual homosexual sodomy. *Id.* at 191. The Georgia statute was constitutional given the fact that a fundamental right was not involved and the state provided a rational basis for the statute. *Id.* at 196.

65. *Bowers*, 478 U.S. at 195 (refusing to expand fundamental rights even when the activity occurred in the privacy of one’s home). Historically, fundamental liberties identified by the Court include liberties implicit in the concept of ordered liberty or liberties deeply rooted in this nation’s history and traditions. *Id.* at 191.

66. *Roe*, 410 U.S. at 152. If a zone of privacy is identified, the state must narrowly draw a regulation to serve a compelling interest for the government to constitutionally intrude upon this zone. *Id.* at 155. The use of preconception sex and trait selection does not implicate a privacy right, so the courts will use a “rational basis” test to uphold laws in this area. *Id.* The security of one’s privacy against arbitrary intrusion from the government is basic to a free society and implicit in the concept of ordered liberty and as such it is enforceable against the states through the Due Process Clause of the Constitution. *Id.* at 152-53.

67. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973). Chief Justice Burger noted that conduct, which directly involves “consenting adults”, does not have, for that sole reason, special claim to constitutional protection. *Id.* at 68. The states have a legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation. *Id.* at 69. Georgia had a legitimate state interest in keeping adolescents from exposure to the obscene material. *Id.* Furthermore, there is no privacy right in a commercial theater. *Id.* Likewise, no special relationship exists when a couple visits a medical institution to control the gender fate of their potential child.

68. See *id.* at 65.

69. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that legislation that mandated normal children aged eight to sixteen attend public school unreasonably interfered with

The rights of privacy under the Constitution should not extend to parents' use of reproductive technologies to make these decisions since the matters involved in selecting a child's sex or characteristics are not fundamental rights. While precedent suggests some limits to these constitutional guarantees of privacy, the outer limits of protected liberty interests have yet to be definitively established.⁷¹ Based on family and reproductive precedent, some argue that parents' decisions to select the sex and traits of their children are within this realm of protected liberty interests.⁷² The Supreme Court cases analyzing the realm of protected liberty interests reveal that the interests implicated by parents' use of preconception sex and trait selection technologies are not as fundamental to the "common occupations of life" nor "as essential to the orderly pursuit of happiness by free men" as the rights involved in these prior decisions. Privacy should not be equated with a license to engage in any personal activity without state interference.⁷³ Constitutional privacy rights do not provide individuals with a right to enter the commerce of reproduction because such activities do not implicate private relationships.⁷⁴

C. *Historical Protection of Decisions Related to Procreation, Family and Children Does Not Extend to the Use of Preconception Sex and Trait Selection Technologies*

1. *Parents' Right in the Care and Upbringing of their Children Does Not Extend to the Right to Use Sex and Trait Selection Technologies.*

Freedom of personal choice in certain matters of marriage and family life are liberties protected by the Due Process Clause of the Fourteenth

parental rights); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (concluding that the right of parents to instruct their children was within the liberty of the Fourteenth Amendment).

70. *Roe*, 410 U.S. at 153.

71. See *Jones*, *supra* note 4, at 189 (noting that the boundaries of personal liberty into which the government may not enter continue to be the subject of considerable debate). See also *Rao*, *supra* note 64, at 1077-78 (arguing that privacy is currently miscast as a misunderstood individual right that must be reconceived as a relational right in order to capture its social dimension).

72. See *Robertson*, *supra* note 6, at 424-25 (asserting that a stronger argument may be made for the use of reproductive technologies as a liberty interest under reproductive freedom than under parents' rights to control their child's upbringing because of the close connection between the characteristics of the child and the decision whether or not to reproduce). See also *Robertson*, *supra* note 49, at 252 (focusing on the rights of married persons to reproduce through the use of reproductive technologies).

73. See *Rao*, *supra* note 64, at 1078. The right of privacy, according to *Rao*, "casts a mantle of immunity from state interference around certain intimate and consensual relationships," but should not be equated with a general constitutional guarantee to engage in any family, child rearing or sexual activity without governmental interference. *Id.*

74. *Id.* at 1079 (discussing the applicability of the right to privacy to a variety of assisted reproductive technologies).

Amendment.⁷⁵ The Supreme Court recognized parents' fundamental liberty interest in the care, custody, upbringing, management⁷⁶ and control of their children.⁷⁷ These matters may involve the intimate and personal choices, which are central to personal dignity and autonomy, and liberty interests, which are protected by the Fourteenth Amendment.⁷⁸

In 1925, the Supreme Court in *Pierce v. Society Sisters* recognized parents' constitutionally protected interest in raising their children in accordance with their preferences.⁷⁹ In *Pierce*, the Court declared that an Oregon law requiring attendance at public schools unconstitutionally violated parents' Fourteenth Amendment liberty interest in directing the upbringing and education of their children.⁸⁰ In his majority opinion, Justice McReynolds recognized that parents who "nurture [a child] and direct [the child's] destiny have the right, coupled with the high duty, to recognize and prepare [her or] him for additional obligations."⁸¹ In establishing parents' right to select the forum for their children's education, the Court affirmed a state's authority to supervise all schools.⁸²

75. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). *See also* *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (including length of time grandparents may visit with the grandchildren). The Due Process Clause of the Fourteenth Amendment, like its Fifth Amendment counterpart, includes a substantive component that provides heightened protection from government interference with certain fundamental rights and liberty interests, including parents rights to make decisions as to care, custody and control of their children. *Id.*

76. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that a New York statute's "fair preponderance of the evidence" standard necessary to permanently take children away from their natural parents denied the parents' due process and that the state must support its allegations with at least clear and convincing evidence).

77. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (affirming parents' right to control their offspring except where, to here, that right conflicts with other state laws). The defendant, who was the children's custodian, was convicted of furnishing a child with magazines to unlawfully sell them on the street. *Id. Accord Troxel*, 530 U.S. at 64 (holding a Washington state statute providing that any person may petition the court for visitation with a child at any time and the court may grant such visitation rights, violated parents' liberty interests by substituting the judgment of the court for the parents' judgment).

78. *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 851 (1992) (reviewing the history of cases protecting family and procreative decisions to set the stage for the Court's analysis of the Pennsylvania abortion statute which restricted abortion).

79. 268 U.S. 510, 534-35 (1925). *Pierce* involved two lawsuits by religious academic institutions enjoining the State of Oregon from enforcing the Compulsory Education Act of 1922, which required children to attend public schools. *Id.* at 529-30.

80. *Id.* at 534-35 (noting that the state has authority to compel children to attend an educational institution and to inspect, supervise, and examine those institutions).

81. *Id.* at 535.

82. *Id.* at 534 (indicating that the state regulates educational institutions on the subjects taught, teachers, the requirement that children attend an educational institution, and the state's authority to inspect, examine, and supervise schools).

In reaffirming parents' limited freedom from state interference with the care, custody, and nurture of their children in *Prince v. Massachusetts*, the Court emphasized that the rights of parents are not beyond limitation.⁸³ In a five to four majority opinion, Justice Rutledge indicated that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare, even if parents' decisions rest on religious or ethical grounds.⁸⁴ The Court based its decision on the rationale that a "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens," and the state may take a broad range of actions to promote this goal.⁸⁵

The Constitution affords protection to the right to have and raise offspring without undue state interference.⁸⁶ In reaching its conclusion in *Skinner v. Oklahoma* that the Oklahoma regulation providing for the sterilization of certain criminals was unconstitutional, the Court stated, "Marriage and procreation are fundamental to the very existence and survival of [humans]."⁸⁷ The Court considered the subtle, far reaching, and devastating effects of sterilization.⁸⁸ The Court's majority argument in *Skinner* lends support to the argument that preconception selection of offspring sex and characteristics should be regulated. An individual's right to have children is based on the fact that procreation is essential to the proliferation of our species.⁸⁹ Similar to

83. 321 U.S. 158, 166 (1944).

84. *See id.* at 168 (noting that the state's power is not nullified by parents' claims that their acts in relation to their children's care and upbringing are based on religious or ethical rationales). The Court also noted that a parent's religious beliefs do not put parents at liberty to claim their children should not be subject to compulsory vaccination, therefore exposing their children to communicable diseases, ill health, or death. *Id.*

85. *See id.* (indicating that the state's right to regulate activities related to children is broader than its right to regulate adult's activities). Based upon this proposition, sex selection should be a prime candidate for legislation because it deeply impacts the lives of our children.

86. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that constitutional liberty includes the right to marry, establish a home, and bring up children).

87. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that the Oklahoma Habitual Criminal Sterilization Act which called for the operation of vasectomy to be performed on a criminal defendant who was convicted of stealing chickens and robbery with firearms violated defendant's equal protection rights).

88. *Id.* "In evil or reckless hands, [this method of punishment] can cause races or types which are inimical to the dominant group to wither and disappear." *Id.* The majority focused on the irreparable harm that may result if the state is permitted to meddle with eugenics in this fashion. *See id.* Interestingly, the Court addressed concerns in its *Skinner* opinion that are analogous to the hazards inherent in the use of preconception sex and trait selection. In both instances, the state attempts to use eugenics to build a race with more favorable qualities, but the dangers in engaging in this type of science outweigh the grave risks.

89. *Id.* Justice Douglas focused on the fact that Oklahoma's statute deprives an individual's basic right to have offspring. *See id.* The Court's opposition to Oklahoma's Habitual Criminal Sterilization law seemed to be based, in part, on the state's alteration of the natural reproductive process by sterilizing criminals. *Id.*

sterilization, the selection of offspring characteristics jeopardizes the future of humanity.⁹⁰ Moreover, if parents select the sex and characteristics of their offspring, they will alter the natural reproductive process, which may result in serious adverse consequences to both the child herself or himself and to others in the child's environment.⁹¹

The Court elaborated in a subsequent decision, *Wisconsin v. Yoder*, that "the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."⁹² The government should not include preconception methods in the realm of child rearing and upbringing decisions previously protected by the Court. Parents make child-rearing decisions throughout the child's life-time, while adjusting their decisions to accommodate for the changing needs of the child. In contrast, parents' choice to select the sex and traits of their children is a single decision made prior to birth, at a time when it is difficult for parents to ascertain whether the decisions they implement are in the best interest of their child.

In *Stanley v. Illinois*, the Court stated that another fundamental right under the Due Process Clause is the right to be free, except in limited circumstances, from unwanted governmental intrusions into one's privacy.⁹³ Justice White's majority opinion in *Stanley* held that an unwed father was entitled to a hearing testing his fitness as a father before his children could be taken away from him subsequent to the death of the children's mother.⁹⁴ The policy under Illinois law for considering unwed fathers as unfit parents but considering married fathers as fit parents violated the Equal Protection Clause of the Constitution.⁹⁵ Following the *Meyer* line of cases, White's majority opinion struck down the law as "it needlessly risk[ed] running roughshod over the important interests of

90. *See infra* Part III.

91. *Id.*

92. 406 U.S. 205, 232 (1971).

93. 405 U.S. 645, 658 (1972).

94. *Id.* An unwed father whose children, on the mother's death, were by Illinois law declared state wards and placed in guardianship, attacked the Illinois statutory scheme as a denial of equal protection of the laws. *Id.* at 646. Under the Illinois law, the children of unmarried fathers, upon the death of the mother, were declared dependents without any hearing on parental fitness and without proof of neglect, although such hearing and proof were required for unmarried mothers in the father's situation. *Id.* at 646-47.

95. *Id.* Even if the State was correct that most unmarried fathers are unsuitable and neglectful parents, all unmarried fathers are not in this category. *Id.* at 650. To presume the father in this case was such an unsuitable father violated his Due Process rights. *Id.* at 657. The Court based its decision to promote the state of moral, emotional, mental and physical welfare of the minor child, the best interests of the community and the strengthening of the minor's family ties. *Id.* at 651-52.

both parent and child.”⁹⁶ This right of privacy protects Americans’ beliefs, thoughts, emotions and sensations.

The rights of biological parents are limited, and may be outweighed by public policy and the “best interests of the child.”⁹⁷ For instance, in *Michael H. v. Gerald D.*, the Supreme Court cited policy reasons when holding that a California statute which creates a presumption that a child born to a married woman living with her husband is the child of the husband (provided the husband is not impotent or sterile) did not violate procedural due process rights of the putative biological father.⁹⁸ With sex and trait selection, the public policy issues and the “best interests of the child” standard outweigh any rights parents may have in controlling the genetic makeup of their children.

The Supreme Court in *Troxel v. Granville* struck down a Washington statute providing that any person may petition a court for visitation at any time and that court may order visitation rights for any person when visitation may serve the best interests of the child.⁹⁹ The Court held that the statute violated substantive due process rights of parents.¹⁰⁰ In *Troxel*, the mother’s due process rights were violated by the application of the Washington statute which permitted the court to use its own discretion to award increased visitation to paternal grandparents, following the death of children’s father, in disagreement with the mother’s decision.¹⁰¹

96. *Id.* at 657. In *Stanley*, the child’s father lived with the child’s mother for eighteen years but never married. *Id.* at 646. Under the Illinois statutory scheme, the children of an unwed father upon the death of the mother, were declared dependents of the state without any hearing of parental fitness and without any showing of neglect. *Id.* Despite the possibility that unmarried fathers are unfit parents, Due Process dictates that fathers are entitled to an evidentiary hearing. *Id.* at 658. All Illinois parents are entitled to a hearing on their fitness before their children are removed from their custody. *Id.* The Court disregarded the state’s reasons for this regulation. *Id.*

97. See generally *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Accord *Henne v. Wright*, 904 F.2d 1208, 1213 (8th Cir. 1990) (holding that parents do not have a fundamental right to give their child a surname at birth with which the child has no legally established parental connection, and state statute bore a rational relationship to legitimate state interests); *Stanley*, 405 U.S. at 652 (indicating the state’s protection of the moral, emotional, mental and physical welfare of the minor and the best interests of the community and the strengthening of the minor’s family ties whenever possible are legitimate interests well within the power of the state to implement).

98. *Michael H.*, 491 U.S. at 125-30. Despite blood test results which indicated a 98.07% probability of paternity, the putative father was not permitted the opportunity to demonstrate paternity as it violated California’s public policy of protection of “family integrity and privacy.” *Id.* at 110, 120. The Court emphasized that the Due Process Clause affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Id.* at 122.

99. 530 U.S. 57, 64 (2000).

100. *Id.*

101. *Id.* (indicating that, at a minimum, the trial judge should have afforded special weight to a mother’s determination of the appropriate amount of visitation between children and grandparents when considering the best interests of the children).

The above cases do not consider the extent to which parents' interests in their children's "upbringing" extends to parents' rights to select the sex and characteristics of their children. In fact, federal courts have yet to decide whether the use of any reproductive technologies should be afforded constitutional protection. When courts make this decision, they should recognize the unique nature of the issues and harms presented by preconception sex and trait selection.¹⁰² While the courts traditionally recognized parents' freedom to make decisions for their children (or potential children), the rights and best interests of children are not unrecognized.¹⁰³ When considering sex and trait selection, both parent and child have compelling interests in this process. If sex and trait selection based on parental preference is prohibited, parents' rights in the care and upbringing of their children after birth will not be limited in any manner.¹⁰⁴ Parents will still enjoy the same freedoms to care and make decisions for their children as they had in the past.

When the Supreme Court decided *Pierce* in 1925 or *Prince* in 1944, it did not anticipate the potential meanings of a parent's duty to "[control] the [child's] destiny" eighty years later.¹⁰⁵ However, the fact remains that the government may regulate parents' decisions when necessary to avoid harm. Similar to parents' choice of education and religious upbringing of their children, parents' selection of the sex and characteristics of their children are methods for parents to give their children what the parents believe are the "best" options available to enhance their children's opportunities for success in life. However, parents' use of sex and trait selection reproductive technologies has more potential to cause devastating harm than education and religious decisions.

Permitting parents to select their children's sex and traits gives parents unprecedented control over their children's "destiny." The state has a strong interest in assuring that children are well-educated so that when the children reach adulthood, they will be capable to perform in the work place and support themselves. Similarly, the state also has a substantial interest in assuring that the United States does not incur problems which may be associated with the use of sex and trait selection technologies, such as gender imbalance in the population, serious psychological and social consequences to children resulting from knowledge that they were altered by their parents' whims or that they were a mistake whom their parents did not desire, adverse consequences due to alteration of natural selection, and discrimination against those who do not

102. See *infra* notes 160-66 and accompanying text.

103. See *Troxel*, 530 U.S. at 64.

104. Sex and trait selection based on parental preference is distinguished from sex selection for medical reasons, a topic which is not addressed in this Note.

105. See *Pierce v. Soc'y Sisters*, 268 U.S. 510, 535 (1925).

have the opportunities to utilize sex and trait selection technologies. Like education, sex and trait selection should be highly regulated by the state to ensure that when children are born and grow into adulthood they are prepared to meet the challenges they will face, and that society will not suffer as a result of parents' decisions.

C. *The Right to Choose Whether or Not to Have Children Does Not Extend to the Right to Use Sex and Trait Selection Technologies*

The Due Process guarantee of freedom from undue government interference extends to the decision to have a child without undue interference from the state.¹⁰⁶ In *Cleveland Board of Education v. LaFleur*, a regulation requiring teachers to take an unpaid mandatory maternity leave four to five months prior to the anticipated birth of their child violated the teachers' due process rights by penalizing teachers for asserting their rights to have children.¹⁰⁷

Privacy rights also include the right to choose measures to not have children.¹⁰⁸ The Supreme Court, per Justice Brennan, affirmed a right to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child in *Eisenstadt v. Baird*.¹⁰⁹ In *Griswold v. Connecticut*, the Supreme Court, per Justice Douglas, struck down a Connecticut statute forbidding the use of contraceptives because the Connecticut regulation unconstitutionally intruded upon the right of marital privacy.¹¹⁰ Justice Douglas' plurality opinion focused on the private nature of the decision to use contraceptives within the sanctity of

106. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651 (1974) (holding that mandatory school board rules denied the teachers' due process because the mandatory maternity leave burdens teachers' liberty interests by presuming that a teacher who is four or five months pregnant is physically incapable of performing her duties and provisions furthered no legitimate state interest); *Hodgson v. Minnesota*, 497 U.S. 417, 434 (1990) (affirming that a woman's decision to conceive or to bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment of the Constitution).

107. *LaFleur*, 414 U.S. at 650 (The school board impinged on teachers' right to be free from governmental intrusion on their decision whether or not to have a child.).

108. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (reversing the lower court's conviction of a medical director who provided information, instruction and medical advice to married persons regarding methods of conception).

109. 405 U.S. 438, 453 (1972) (holding a Massachusetts statute that permitted married persons to obtain contraceptives to prevent pregnancy, but prohibited distribution of contraceptives to single persons for that purpose violated the Equal Protection Clause).

110. 381 U.S. at 485. Justice Douglas did not rely on a specific Amendment for the guarantee of privacy in this case, but instead discussed specific guarantees in the Bill of Rights which create zones, or penumbras, of privacy. *Id.* at 486. The Connecticut law forbidding the use of contraception unconstitutionally intrudes upon the right of marital privacy. *Id.* at 486. This right may be found in first, third, fourth, fifth, ninth, and fourteenth amendments. *Id.* at 484-85.

the marital relationship.¹¹¹ Affirming *Griswold*, Justice Brennan's plurality in *Eisenstadt* further refined the boundaries of the realm of personal privacy in holding that, under the Equal Protection Clause, an individual's right of privacy extends to the right for both married and single persons to have access to contraceptives.¹¹²

While privacy rights include the right to choose to use measures to not have children¹¹³ and the right to have children,¹¹⁴ they do not extend to permit parents to choose to have children only with special characteristics. The decisions in *Griswold* and *Eisenstadt* focused on the personal and intimate nature of the couple's private decision to use contraception. The Court expressed its reluctance to enter a sexually intimate couple's bedroom, but the couple breaks their private sphere when it leaves its bedroom to visit a medical facility in contemplation of using reproductive technologies. Thus, the couple seeking a child with certain traits should not be afforded the same protection as a couple who maintains its privacy.

D. The Right to Have an Abortion Does Not Extend to the Right to Use Sex and Trait Selection Technologies

In 1973, Justice Blackmun's 7-2 majority opinion in *Roe v. Wade* first recognized a woman's right to elect to have an abortion prior to the viability of a fetus without undue government interference.¹¹⁵ The Court concluded that the right of personal privacy includes the right to choose an abortion, but this right is not unqualified and must be considered against important state interests

111. *Id.* at 485-86. The Court expressed disgust at the nature of enforcement mechanism which would require entering the marital bedroom. *Id.* at 485-86. In contrast, regulation of sex and trait selection would not require entering the marital bedroom. *Id.* at 485-86. The legislation would aim at medical facilities, which are the target of substantial regulation to maintain health and prevent harm.

112. *Eisenstadt*, 405 U.S. at 453. The Court did not address a person's right to access contraceptives themselves. *See id.* Instead, the Court, in following *Griswold*, indicated that if contraceptives are to be accessible to married persons, the same access to contraceptives must be available to non-married individuals. *Id.* at 454.

113. *Griswold*, 381 U.S. at 485-86.

114. *See Lifchez v. Hartigan*, 735 F. Supp. 1361 (N.D. Ill. 1990) (holding a woman's fundamental right to privacy encompasses the right to make reproductive decisions, free of governmental interference, to submit to medical procedures that bring about, rather than prevent, pregnancy). In *Lifchez*, the District Court in the Northern District of Illinois struck down an Illinois law as unconstitutionally vague and violative of fundamental privacy in that it was unclear whether it made it illegal for couples to submit to medical procedures permitting them to have children when the couples would otherwise be childless. *Id.* at 1372-77.

115. 410 U.S. 113, 164-65 (1973) (State's important and legitimate interest in potential life becomes a "compelling" interest at viability). In response to a class action, brought by a single pregnant woman who was denied an abortion, challenging a Texas statute, the Court struck down the Texas criminal abortion statute prohibiting abortions at any stage of pregnancy except as medically necessary to save the life of the mother. *Id.*

in regulation.¹¹⁶ Further constitutional protection of the woman's decision to terminate pregnancy before viability derives from the Due Process Clause of the Fourteenth Amendment.¹¹⁷

In determining that this right of personal privacy existed, the Court focused on the woman's distress during the pregnancy and in the future, including her imminent psychological harm, mental and physical health concerns involved with raising a child, the distress associated with having an unwanted child, the complications associated with bringing up a child in a family who does not want or is not prepared for the child, and the stigma found by unwed mothers.¹¹⁸ While the Fourteenth Amendment's concept of personal liberty was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy," the Court nonetheless placed the "basic responsibility" for the abortion decision with the physician and characterized the decision as "inherently, and primarily, a medical decision."¹¹⁹

In a 7-2 opinion issued with *Roe*, the Supreme Court in *Doe v. Bolton* struck down a Georgia statute banning abortions except when a pregnancy would endanger a woman's life or seriously and permanently injure her health, the fetus would be "very likely to be born with grave, permanent, and irremediable mental or physical defect," or the pregnancy resulted from a rape.¹²⁰ As in *Roe*, the Supreme Court, per Justice Blackmun, recognized that a pregnant woman does not have an absolute constitutional right to abortion on demand.¹²¹ States may, according to the Court, justify an abortion statute

116. *Id.* at 154. The Court noted that important State interests may include safeguarding health in maintaining medical standards and protecting potential life. *Id.* at 154. The State interests addressed in this opinion are congruent with the interests the State has in regulating preconception sex and trait selection. *Id.* at 156. It is clear from this opinion that a person does not have an unlimited right to do with one's body as one pleases. *Id.* The statute in this case outstripped the state's justifications and swept beyond any areas of compelling interest. *Id.*

117. *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 846 (1992) (affirming the central holding in *Roe*, while clarifying the source of the right of personal privacy). In *Roe*, the Court indicated that whether or not the right was founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, it was in the Ninth Amendment's reservation of rights to the people. 410 U.S. at 153.

118. *Roe*, 410 U.S. at 153. The Court specifically disagreed with Petitioner's argument that women are entitled to terminate pregnancies without constraints. *Id.* at 154. In defending a constitutionally protected "private sphere of individual liberty," Justice Blackmun stressed the personal, intimate, private, and individual dignity and autonomy involved in a woman's decision to have an abortion. *Id.* at 192.

119. *Id.* at 166.

120. 410 U.S. 179, 183, 197-201 (1973). Blackmun's majority indicated that the woman's health includes a consideration of all relevant factors, such as the woman's physical and emotional state, familial situation, and the woman's age. *Id.* at 192.

121. *See id.* at 189 (reaffirming *Roe*). *See also id.* at 221 (White, J., dissenting). Justice White, in his dissent in *Doe*, lamented about the Court's decision which seemingly valued the convenience of the pregnant woman over the potential life that she carries. *Id.* As reproductive

protecting the interest of embryonic and fetal life.¹²² Similar to the Court's concern in *Doe* that the government regulates medical procedures associated with pregnancy, the government has an interest in the use of reproductive technologies associated with preconception sex and trait selection.

The Constitutional protection afforded to women's right to abortion without state interference is not without limits.¹²³ The State has an obligation to regulate to safeguard health, maintain medical standards, and protect potential life.¹²⁴

The plurality opinion in *Casey* quoted the majority in *Roe* for the proposition that while the decision to have an abortion "is more than a philosophical exercise," it is also conduct "fraught with consequences for others."¹²⁵ The state may assert its interest in potential life throughout pregnancy.¹²⁶ *Casey* also stands for the proposition that stated that "[r]eproductive decisions affect offspring and may lead directly to burdens" on third parties.¹²⁷ While there have been few efforts to ensure reproductive responsibility and the notion of reproductive responsibility has not been addressed in countries without population problems, innovations in reproductive technology will force individuals and the legislature to consider issues of reproductive responsibility.¹²⁸

In *Michael H. v. Gerald D.*, a plurality defined "fundamental" rights as those rights which have traditionally been protected by the court.¹²⁹ The right

technologies such as preconception sex selection become available, the need to halt the slippery slope into unrestricted reproductive health that began with *Roe* is evident. *Id.*

122. *Id.* at 190-91.

123. *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 846 (1992). *See also* Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 133 (1992) (discussing the Court's decisions subsequent to *Roe* which permit a wide range of restrictions on access to abortion prior to viability).

124. *Roe*, 410 U.S. at 154.

125. *Casey*, 505 U.S. at 852. According to the Court, the others are "the persons who perform and assist in the procedure . . . the spouse, family, and society which must confront the knowledge that these procedures exist . . . and depending on one's beliefs . . . the life or potential life that is aborted." *Id.* *See* McClain, *supra* note 123, at 139 (indicating that this point is where tension arises between a woman's liberty and the state's interest in potential life).

126. *Casey*, 505 U.S. at 852.

127. Robertson, *supra* note 49, at 251.

128. *Id.*

129. 491 U.S. 110, 118-19 (1989). Not all sexual conduct is protected by the Fourteenth Amendment. *See id.* The Court in *Michael H.* rejected an adulterous natural father's claim that he had a due process right to maintain a paternal relationship with the child. *Id.* at 122-27. Under California law, the mother's husband who was living with her at the time of the child's birth was presumed to be the child's father. *Id.* at 117-18. The Court halted before expanding the contours of due process to protect men who sire children. *See id.* at 122-27. California's presumption that the mother's husband was the father's child protected higher values than those inherent in recognizing the rights of the biological father. *Id.* at 122-23. *See also* *Bowers v. Hardwick*, 478

to have an abortion is limited by medical and social interests.¹³⁰ While protecting the rights of women deciding whether or not to bear a child, the Court recognized that a woman's choice bears consequences for others which may be significant. Any right a woman has to terminate her pregnancy relies on the consequences the act may have on herself and others.¹³¹

No right exists "to enter the commerce of reproduction . . . because such activities do not implicate private relationships."¹³² Preconception sex and trait selection clearly does not fall within the realm of rights traditionally protected by the court as fundamental rights. The composition of families has rapidly evolved in the past couple decades, but the law does not protect the majority of these changes.¹³³ The Court will uphold laws prohibiting or restricting the use of these reproductive technologies by applying a rational basis review.

In *Casey*, the Supreme Court affirmed *Roe* in a joint opinion, where the Court's plurality held that a woman is afforded a constitutional right to obtain an abortion prior to viability without undue interference from the state.¹³⁴ The Supreme Court also recognized, "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹³⁵

U.S. 186, 192 (1986) (upholding Georgia sodomy laws while denying the argument that homosexual sodomy is a fundamental right deserving of constitutional protection).

130. See *Hogsdon v. Minnesota*, 497 U.S. 417, 448-49 (1990) (upholding a state requirement that a minor wait forty-eight hours after notifying a single parent of her intention to get an abortion). Justice Kennedy's majority opinion agreed with the state that this restriction on abortion furthered the State's legitimate interest in ensuring that the minor's decision is knowing and intelligent. *Id.* at 448. In reaching its decision, the Court explained that the time provided the parents with the opportunity to ensure that the doctor performing the abortion was qualified and to discuss the moral implications with their daughter who seeks an abortion. *Id.* at 448-49. The State has an interest in ensuring the welfare of the minor undergoing the abortion. *Id.*

131. *Casey*, 505 U.S. at 852.

132. See *Rao*, *supra* note 64, at 1079. *Rao* refers to all "new" reproductive technologies, including artificial insemination, in vitro fertilization, sperm donations, embryo donations, and surrogacy. *Id.* Some lower courts have upheld decisions prohibiting parents from paying for the adoption or surrogacy of children. *Id.* For instance, in *Doe v. Kelley*, the Michigan appellate court held that the parents' fundamental right to have a child is not impinged on by state laws making it illegal to pay consideration to adopt a child or to have another woman carry the child during pregnancy. 307 N.W.2d 438, 441 (Mich. Ct. App. 1981).

133. For example, families may presently incorporate homosexual couples, surrogate parents, babies born with the eggs or sperm of third parties, divorced parents, and single parents.

134. 505 U.S. at 846 (examining the constitutionality of a Pennsylvania statute which required minors to notify their parents prior to obtaining an abortion and required wives to notify their husband's prior to abortion).

135. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

Interpreting *Roe*, the Supreme Court, in *Maher v. Roe*, clarified that an unqualified constitutional right to have an abortion does not exist.¹³⁶ *Maher* stated that “[a] pregnant woman does not have an absolute constitutional right to have an abortion on her demand.”¹³⁷ While the right to have an abortion is protected by a general right of privacy and as a Fourteenth Amendment liberty interest, the right to have an abortion is not without limits and is afforded less protection than some constitutional rights, such as the right to free speech.¹³⁸ Further, the Constitution does not prohibit a state or city from expressing a preference for “normal” childbirth.¹³⁹

In order “[t]o protect the central right recognized in *Roe v. Wade* while at the same time accommodating the State’s profound interest in potential life,” the Court employed an undue burden analysis.¹⁴⁰ “An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion.”¹⁴¹

The rationale behind the constitutional protection afforded to a woman’s right to elect to have an abortion under certain circumstances is that considering a woman’s education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a woman.¹⁴² The Supreme Court explained that a pregnant woman’s suffering is “too intimate and personal for the State to insist, without more,

136. 432 U.S. 464, 473-74 (1977). See also *Planned Parenthood Ass’n of the Atlanta Area, Inc. v. Harris*, 670 F. Supp. 971, 983-85 (N.D. Ga. 1987). The Court, in *Harris*, held that the state has a legitimate interest in promoting parental consultation with a minor who is seeking abortion because of the minor’s presumed inability to make important decisions in an informed, mature manner, and serious concerns implicated by decision to have an abortion. *Id.* A statute requiring a minor to notify her parents prior to aborting a fetus can satisfy due process if it is narrowly tailored to promote the state’s significant interests. *Id.* In this case, Georgia’s broad statute violated due process. *Id.*

137. *Doe v. Bolton*, 410 U.S. 179, 189 (1973).

138. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 278 (1993). “Abortion clinics and abortion rights organizations applied for permanent injunction to enjoin anti-abortion organization and members from trespassing on, impeding, or obstructing ingress to or egress from facilities providing abortion services and related counseling.” *Id.* The Supreme Court, per Justice Scalia, held that the goal of preventing abortion does not qualify as an invidiously discriminatory animus directed at women in general, and an anti-abortion demonstration’s incidental effect on some women’s right to interstate travel did not suffice to show conspiracy to deprive those women of their protected interstate travel right. *Id.*

139. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989). See also *Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (involving the situation in which the government expresses a preference in funding childbirth).

140. *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 878 (1992) (emphasis added). The Supreme Court, per Justice O’Connor’s plurality opinion, abandoned the “strict scrutiny” standard. *Id.* The very notion that the state has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. *Id.*

141. *Id.*

142. See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

upon its own vision of [a] woman's role."¹⁴³ *Casey* links reproductive choice to a woman's existential decisions, her spirituality and her personhood.¹⁴⁴

The state interests are not strong enough to support the prohibition of abortion or interference with the women's election to obtain an abortion *prior to viability*.¹⁴⁵ However, the Court has upheld a state's power to restrict a woman's decision to elect to have an abortion after fetal viability, "if the law contains exceptions for pregnancies which endanger the woman's life or health."¹⁴⁶ According to the Court, the state has "legitimate interests from the [onset] of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."¹⁴⁷

E. Constitutional Protection of Family and Reproductive Decisions Does not Extend to Sex and Trait Selection

Supporters of preconception sex selection argue that the right to choose the sex and characteristics of offspring should be based on an extension of the constitutional protection afforded to individual's rights to make personal decisions in the areas of conception, pregnancy, child rearing and family.¹⁴⁸ Individual rights to make decisions concerning family, children, and procreation have traditionally found protection in the Due Process Clause of the Fourteenth Amendment and constitutional guarantees of privacy.¹⁴⁹ The values implicated, traditional reproduction and conception matters, are not present with sex and trait selection. While the government permits individuals to make family and reproductive decisions, the government limits the necessary medical procedures to ensure the health.

143. *Casey*, 505 U.S. at 852 (commenting on the sacrifices involved with child bearing that women have made throughout the centuries).

144. *See McClain*, *supra* note 123, at 140.

145. *Casey*, 505 U.S. at 846 (affirming the core of *Roe*).

146. *Id.*

147. *Id.* *See also* *Alexander v. Whitman*, 114 F.3d 1392, 1403-04 (3d Cir. 1997) (declining to address whether a woman's relationship with her unborn child during pregnancy is a fundamental interest). In *Alexander*, a mother whose child was stillborn challenged the constitutionality of a New Jersey wrongful death and survival statute that denied recovery on behalf of stillborn fetuses. *Id.* at 1396-97. Petitioner claimed to have a fundamental liberty interest in her relationship with the unborn child. *Id.* at 1402-03. Using a rational basis review because a fundamental right was not implicated, the Third Circuit Court of Appeals held that the mother's due process rights were not violated by the New Jersey legislation. *Id.* at 1404-06.

148. *Danis*, *supra* note 12.

149. *See, e.g., Roe v. Wade*, 410 U.S. 113, 152 (1973) (noting that although the Constitution does not explicitly mention any right of privacy, the Court has continually recognized a right of personal privacy).

F. Government Funding Should not be Wasted on the Use of Reproductive Technology to Select the Traits or Sex of Offspring

Even if Congress and the states are constitutionally prohibited from enacting legislation to restrain parents from selecting the sex and characteristics of their offspring, the federal and state governments are under no obligation to fund these detrimental uses of reproductive technologies. The commercialization of reproduction diverts medical resources away from more medically necessary research and treatment.¹⁵⁰

If laws are not implemented denying parents' power to select their children's sex and traits according to their whims, Congress and state legislatures should deny any funding for these reproductive technologies.¹⁵¹ States are not required to fund contraception or a woman's right to elect an abortion, even though these activities are protected from state interference. In *Maher v. Roe*, the Court upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for non-therapeutic abortions.¹⁵² The state imposed restrictions did not impinge upon a woman's right of privacy on the ground that *Roe* did not prevent a state from making a value judgment favoring childbirth over abortion and implementing that judgment by the allocation of public funds.¹⁵³ *Webster*

150. See Laura Shanner & Jeffrey Niskee, *Bioethics for Clinicians; 26 Assisted Reproductive Technologies*, 64 CAN. MED. ASS'N J. 1589, 1591 (2001) (lamenting about the way the sale of pregnancy, gametes, and embryos in assisted reproductive technologies take advantage of lower class women who are paid for their reproductive abilities while the sale of human tissues is strictly prohibited). Research of the long-term affects of reproductive technologies remains to be done, so the consequences are uncertain.

151. Considering the present cost of reproductive technologies to select a child's sex, it is likely that issues concerning the funding of these procedures will be an issue. The entire in vitro process must be carried out at least twice prior to the preimplantation genetic diagnosis, at a cost starting at \$11,000 per cycle. See Faith Lagay, *Preimplantation Genetic Diagnosis*, VIRTUAL MENTOR (Aug. 2001), available at <http://www.ama-assn.org/ama/pub/category/5717.html> (last visited Mar. 29, 2002).

152. 432 U.S. 464, 479 (1977) (applying a less demanding test of rationality to uphold a statute which provided funding for childbirth but not for non-therapeutic abortions). *Accord* *Beal v. Doe*, 432 U.S. 438 (1977) (holding by a 6-3 majority that a Pennsylvania statute limiting the funding of abortion to Medicaid-eligible women to abortions which threaten the woman's health or when the infant may be born with an incapacitating physical deformity or mental deficiency).

153. *Rust v. Sullivan*, 500 U.S. 173, 192-94 (1991). In *Rust*, the Supreme Court upheld a regulatory scheme under Title X of the Public Health Service Act, which prohibited the use of Title X funds for abortion counseling, referral and provision of information regarding abortion as a method of family planning. *Id.* at 201-02. According to the Court, the state's decision to provide funding for live births, but not abortion, did not violate Title X recipients' Fifth Amendment rights to choose to terminate a pregnancy. *Id.* at 201. Recipients of family planning funds under Title X of the Public Health Service Act and doctors who administered Title X funds challenged the funding provisions which construed non-therapeutic abortions as beyond "family planning" with the meaning of the statute. *Id.* at 179. The majority emphasized that the

v. Reproductive Services upheld a prohibition on the use of public facilities for medical personnel for providing abortions, even if a woman's own physician plans to perform the abortion.¹⁵⁴ In a 6-3 ruling, the Court in *Maher* distinguished between direct state interference with protected activities and state encouragement of an alternative activity consistent with legislative policy.¹⁵⁵

The Supreme Court reached an analogous result in *Harris v. McRae*, a 5-4 decision which upheld the validity of the Hyde Amendment, a state regulation which severely limited the use of federal funds to reimburse the cost of abortions under the Medicaid program.¹⁵⁶ Justice Stewart's majority opinion focused on the fact that the state's decision not to fund non-medically necessary abortions placed no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.¹⁵⁷ *Maher*, *Poelker*, and *McRae* all

government has no duty to subsidize an activity merely because it is constitutionally protected. *Id.* at 201. The government, according to the majority, may validly choose to allocate public funds for medical services relating to child birth but not to abortion. *Id.* at 201-02. *See Beal*, 432 U.S. at 445-46 (holding that the Social Security Act did not require the funding of nontherapeutic abortions as a condition of participation in the Medicaid program; reaffirming the policy that the state has an important interest in encouraging childbirth, but that interest does not become sufficiently compelling until the third trimester to justify unduly burdensome state interference with the woman's constitutionally protected privacy interest).

154. 492 U.S. 490, 509-11 (1989).

155. 432 U.S. at 475. The State has a broad power to encourage actions deemed to be in the public interest. The Court sustained the Connecticut funding scheme which prohibited Social Security funding for non-medically necessary abortions. *Id.* at 478. Connecticut's distinction between childbirth and non-therapeutic abortion by the regulation was "rationally related" to a "constitutionally permissible" purpose. *Id.* The Court relied on *Roe's* acknowledgement of the State's strong interest in protecting the potential life of the fetus. *Id.*

156. 448 U.S. 297, 318 (1990) (holding that federal restrictions on the funding of abortions by states participating in the Medicaid program obligated under Title XIX of the Social Security Act to continue to fund those medically necessary abortions for which federal funding was unavailable under the Hyde Amendment were constitutional, as these provisions meet the "rational relation to the state interest" standard). *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). The Court, discussing *Rust*, held that a restriction prohibiting local recipients of Legal Services Corporation funds from engaging in representation to involving efforts to amend or challenge the validity of current welfare laws was an impermissible violation of First Amendment free speech. *Id.* at 545. The Supreme Court, Justice Kennedy, interpreted *Rust* not as singling out abortion for suppression when denying funding for abortion counseling, but considered abortion as outside the scope of the project and therefore ineligible for funding. *Id.* at 540-41. After *Velazquez*, state regulations imposing restrictions on funding of preconception sex and trait selection need to be carefully considered to avoid the statutes being struck down later as violating free speech.

157. *Harris*, 448 U.S. at 315 (holding that a woman's freedom of choice does not carry with it a constitutional entitlement to the financial resources to avail herself of the protected resources).

support the view that the state should not commit any resources to facilitating abortions, even if it can turn a profit by doing so.¹⁵⁸

Persons seeking to realize the advantages of fundamental liberty interests are not entitled to government funding to take advantage of those rights.¹⁵⁹ Even if a legislative scheme is not adopted which will prohibit the use of reproductive technologies to select the sex or characteristics of one's offspring prior to conception, funding schemes should not be implemented that would support the use of these reproductive technologies. Government funding needs to be used for essential medical care and research, instead of being wasted on research, development, or utilization of preconception offspring selection.

III. HARMS ASSOCIATED WITH PRECONCEPTION SEX AND TRAIT SELECTION DEMAND REGULATION

Where fundamental rights or interests are not implicated or infringed, courts review state statutes under a rational relations basis test, under which the statute withstands the due process challenge if the state identifies a legitimate state interest that the legislature could rationally conclude was served by the statute.¹⁶⁰

Congress has not yet decided where to draw the line around reproductive rights. The policy reasons for protecting reproductive freedoms should not extend to the use of reproductive technologies to design the sex and characteristics of offspring. While the right not to have a child has been established, no right has been established for parents to have children with certain characteristics. This right, therefore, should not extend to the right to have a child with certain characteristics.

Prebirth selection of offspring characteristics is not constitutional on the grounds that it bears a connection with the expected characteristics of the

158. *Webster*, 492 U.S. at 511. *See Maher*, 432 U.S. at 464. *See also* *Poelker v. Doe*, 432 U.S. 519, 524-25 (1977) (holding that no constitutional violation exists if a state provides public funds for hospital services for childbirth but not for nontherapeutic abortions).

159. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 201 (1991) (holding that regulations of the Department of Health and Human Services prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning do not violate a woman's Fifth Amendment right to choose whether to terminate a pregnancy); *Harris*, 448 U.S. at 317-18. Chief Justice Rehnquist's majority opinion in *Rust* elaborated that the government's failure to fund abortions does not place an obstacle in the place of a woman seeking an abortion. 500 U.S. at 201-02. Instead, the lack of funding places the woman in the same place she would be in if the government decided not to fund family planning activities at all. *Id.* *See also Maher*, 432 U.S. at 464 (holding that the state's refusal to fund abortions does not violate *Roe v. Wade*).

160. *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955)) (upholding an Oklahoma state regulation of visual care on the basis that an evil was present and the legislation was a rational way to correct the evil).

offspring, but may be constitutional based on the connection with the decision whether or not to reproduce.¹⁶¹ It is unconstitutional and unacceptable to decide whether or not to have a child based upon the child's characteristics or sex.¹⁶² The law recognizes certain reproductive rights which are protected from interference, but preconception sex and trait selection are not within these rights.

Since the use of preconception sex and trait selection technologies should not be considered a fundamental liberty right protected by constitutional guarantees of due process nor by constitutional guarantees of privacy, regulation in this area will only have to pass a "rational basis" test. The potential harmful consequences of the use of this technology to the children themselves and society in general are sufficiently substantial to meet this criterion.

New reproductive technologies present society with remarkable possibilities for manipulating practically every aspect of human reproduction.¹⁶³ As a result, they disrupt deeply embedded expectations about the ordering of family relationships.¹⁶⁴ Parents now have the option not only whether or not to have children and when to have them, but how to conceive them and even how to design them.¹⁶⁵ Lawmakers should not fall under the illusion that changes in reproductive technologies can be accommodated within our familiar understandings of families.¹⁶⁶ The potential harms implicated by parents' use of reproductive technologies to select the sex and traits of their offspring justify regulation.

A. *Interests of the Potential Children Demand Regulation*

The potential harm to children justifies regulation over preconception sex and trait selection, whether courts use the strict scrutiny or the rational relations standard. Interests of unborn children have also been recognized in certain situations.¹⁶⁷ The state unquestionably has a "strong and legitimate

161. Robertson, *supra* note 6, at 425.

162. *But see id.* at 425-31. Drawing the line between protected and unprotected traits and methods is likely to be difficult to draw. *Id.*

163. Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 501 (1997). *Contra* Joseph Fletcher, THE ETHICS OF GENETIC CONTROL: ENDING GENETIC ROULETTE 128 (1974) (discrediting the doubt as unobjective and without reasoning that the use of reproductive technology is disrespectful to human life if humans presume to be so arrogant as to exert control over the sources of life).

164. Dolgin, *supra* note 163, at 501.

165. *Id.* at 501-02.

166. *Id.* at 502 (suggesting that the use of reproductive technologies influences not only the way society views children, but also the way society views marriage and families in general).

167. *Roe v. Wade*, 410 U.S. 113, 159, 162-63 (1973) (acknowledging a state's interest in protecting the potential life of a fetus after viability). In *Roe*, the Court stated that because a pregnant woman carries a potential human being she "cannot be isolated in her privacy . . . [Her]

interest in encouraging normal childbirth.”¹⁶⁸ Children genetically altered and chosen by the parents’ whims cannot be considered children brought into the world through “normal childbirth.” Further, the government has the power to secure the health of children against “impeding restraints and dangers.”¹⁶⁹

The potential psychological and biological affects on children produced by the use of sex selection technology may be devastating.¹⁷⁰ For many parents, the birth of a child of the desired or unwanted sex (usually female) engenders happiness or unhappiness for the parents.¹⁷¹ Parents often hope their children will follow and exceed their own footsteps. This can lead to extreme pressures on children to fulfill their parents’ dreams. Children who know that they reflect the sex or characteristics that their parents choose may suffer from a damaging loss of self-esteem.¹⁷²

privacy is no longer sole and any right she possesses must be measured accordingly.” *Id.* A woman’s right of privacy in relation to an abortion is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education. *Id.* The woman’s rights must be considered in lieu of the potential life growing inside the woman. *Id.* While the Court explicitly denied any legal rights of the unborn child, the Court took the well-being of this potential life into account during its deliberation. *Id.*

168. *Beal v. Doe*, 432 U.S. 438, 446 (1977) (recognizing the state’s interest in the unborn child throughout the woman’s pregnancy).

169. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (referring specifically to the evils of child labor). The Court stated that a democratic society rests, for its continuance, upon the health and well-rounded growth of young people into full maturity as citizens. *Id.* It is well within the State’s police power to enact legislation to prevent these evils from corrupting children, who will be tomorrow’s citizens. *See id.* at 168-69. *See also* *Jehovah’s Witnesses v. King’s County Hosp.*, 278 F. Supp. 488, 504 (W.D. Wash. 1967), *aff’d*, 390 U.S. 598 (1968) (holding that the state is justified, over parents’ objections on religious grounds, to request court-ordered blood transfusions for children in need of the transfusions). While parents are generally presumed to act in the best interests of their children, parents decisions do not always reflect the best interest of the child, thus requiring court interference. *Id.* The right to practice religion freely does not include liberty to expose child to ill health or death. *Id.* Parents are unlikely to realize the realm of harms that may result from their decision to select the sex or characteristics of one’s children. Once the decision is made, however, it is impossible for parents to stop the harmful consequences.

170. *See* Shanner & Niskee, *supra* note 150, at 1589-94 (indicating that the long-term psychosocial implications of most assisted reproductive technologies remains incomplete).

171. Macnaughton, *supra* note 16, at 48 (discussing the reasons parents may use sex selection reproductive technologies). *See also* Greg Swift, *We Gave Up on Our Test Tube Baby*, THE EXPRESS, Mar. 5, 2001, at 1, available at 2001 WL 14336758 (telling the story of a couple who was outraged and disappointed when their efforts to obtain a female embryo failed, resulting in the pregnancy of a male child).

172. Mary Anne Warren, *Reproductive Technology & Women*, in THE ETHICS OF REPRODUCTIVE TECHNOLOGY 239 (1992) (focusing on the damaging effects of sex pre-selection on females).

Parents who focus on having a “designer” child are not prepared for the unconditional love and acceptance essential for parenting.¹⁷³ Parents with the attitude that their child may be designed to fit ideal specifications may be disappointed or feel guilty if their child does not live up to their expectations or if the child is born with a birth defect.¹⁷⁴

B. The Protection of Individuality Demands Regulation

At the heart of the liberty interests protected by the Fourteenth Amendment is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.¹⁷⁵ A person’s interest in defining one’s own destiny is violated if one’s parents are allowed to select the individual’s sex or characteristics.¹⁷⁶

It does not follow from Supreme Court decisions protecting contraception and child rearing decisions that prebirth control over offspring traits and characteristics follow those rights.¹⁷⁷ Unlike abortion and contraception decisions which result in a child’s existence or non-existence, preconception selection is a method of exhibiting extreme control over a child’s destiny. Constitutionally protected upbringing decisions of parents do not broach this level of control over their children’s lives.

Parents’ interests in the care and upbringing of their children is limited in some respects by the best interests of their children.¹⁷⁸ Certain rights of

173. See Remaley, *supra* note 20, at 270. Remaley is concerned that permitting parents to select “designer children” will sacrifice qualities inherent in the parent-child relationship. *Id.* By validating inappropriate notions of parenthood, the parent-child relationship will be harmed by parents’ expectations of the ideal child. *Id.* at 270. The child, while selected for certain traits, is set up for perfection, thus setting the child up for feelings of failure with any imperfection. *Id.*

174. *Id.* (quoting the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research).

175. *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 851 (1992).

176. See Lagay, *supra* note 151 (citing D.S. King, *Preimplantation Genetic Diagnosis and the “New” Eugenics*, 25 J. MED. ETHICS 176, 182 (1999)). In a discussion of the potential application of preimplantation diagnosis to permit parents to select the traits of their children, Lagay expresses her concerns that the “chosen child” faces a determinism more forceful and rigid than genes. *Id.* The child faces parental determinism that the child fulfill the intention or talent or skills the child was selected to embody. *Id.*

177. *But see* Robertson, *supra* note 6, at 427 (arguing that reproduction is a fundamental right and prebirth selection of offspring characteristics deserves the same protection). While certain decisions have offered protection for the right not to have children and the right to have children, the issues and policies behind these decisions are not relevant to the right to have offspring with certain characteristics.

178. See *King v. King*, 828 S.W.2d 630, 631 (Ky. 1992) (following *Meyer v. Nebraska*, 262 U.S. 390 (1923)) (holding that grandparent visitation statute did not violate fundamental rights of parents in consideration of the best interests of the child). In *King*, the court stated:

While the Constitution, as interpreted by various courts, does recognize the right to rear children without undue governmental interference, that right is not inviolate. Parents are

unborn children are afforded protection.¹⁷⁹ Protection of a woman's right to have an abortion that is not medically necessary may be outweighed when the fetus is viable.¹⁸⁰ Since a state may justify a statute restricting abortion as supporting the state's interest in protection of embryonic and fetal life,¹⁸¹ this suggests that that government may, under certain circumstances, seek to protect children prior to their conception.

Further, parental selection of children's sex could jeopardize their children's individuality.¹⁸² America's emphasis on individuality is based partially on one's unique genetic heritage.¹⁸³ As a result, some view the manipulation of genetic structures as a threat to individual identity of future children.¹⁸⁴ The use of genetic information prior to birth to shape an offspring's characteristics contradicts American ethics dedication to the dignity and worth of each individual.¹⁸⁵ This unprecedented exercise of control over the lives of one's children is an unacceptable harm justifying government regulation.¹⁸⁶

required by law to see that their children are educated. Children must be inoculated against disease. Parents cannot abuse their children. Severe restrictions are placed upon the employment of children. Children must be restrained when riding in a motor vehicle. Thus, over the years, there has been increased legislation guaranteeing the safety, education, and the physical and emotional welfare of the children.

Id.

179. *See Casey*, 505 U.S. at 853 (noting that one of the dimensions of the protection of a woman's right to have an abortion is the cruelty that may result to a child born to parents who do not want nor have the resources to care for the child).

180. *Id.* at 860.

181. *See supra* note 136. *See also Doe v. Bolton*, 410 U.S. 179, 190-191 (1973); *Roe v. Wade*, 410 U.S. 113, 163 (1973); *Casey*, 505 U.S. at 875. The Supreme Court rejected the trimester framework it established in *Roe* because the practical effect of this framework was that it undervalued the State's interest protecting the fetal life or potential life within the woman. *Id.* *Roe* and *Casey* established the State's "important and legitimate interest in potential life." *Id.*

182. Further, children created based upon their parent's whims may lose their sense of being a "unique and intrinsically valuable entity." *See also* Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 618, 648 (1973).

183. Since similar traits are valued by the majority of persons, the use of sex and trait selection technologies may result in children who are quite similar to one another, thus reducing each individual's unique qualities.

184. Priest, *supra* note 14, at 80-82. *See also* Beth Foraker, Editorial, S.F. CHRON., Oct. 8, 2000, at 6, available at 2000 WL 6493534.

185. Robertson, *supra* note 6, at 422.

186. *Id.* at 423.

C. *The Harms Associated with a Gender Imbalance in the Population Demands Regulation*

Another detrimental ramification of unrestricted use of reproductive technologies for preconception sex selection is the likelihood that a gender imbalance in the population will result. The preference for male children persists in most parts of the world.¹⁸⁷ In Asian countries where the birth of a male child is preferred over the birth of a female child, parents go to extreme measures to obtain a male child,¹⁸⁸ and the gender balance in the population is evident.¹⁸⁹ Studies suggest that if women in America were allowed to select the sex of their children, they would choose 161 boys for every 100 girls.¹⁹⁰ The historical quest for male offspring reflects the notions across societies that maleness is a form of social, political, and economic entitlement.¹⁹¹

Proponents of this use of reproductive technology argue that couples who have one or more children of a certain sex may be interested in having a child of the other sex, so sex selection will be used in these cases to even out a sex imbalance in families.¹⁹² The technology will be an attractive option for couples in cultures where one sex carries a higher status than the other sex.¹⁹³

187. ROGER GOSDEN, *DESIGNING BABIES: THE BRAVE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 166 (1999).

188. Mona Charen, *WASH. TIMES*, Oct. 18, 1999, at A16 (addressing the infanticide of female children in these countries).

189. *See id.* (reporting that in India, infanticide and abortion of female fetuses resulted in a gender imbalance of 40 million more men than women). *See also* Celia W. Dugger, *Modern Asia's Anomaly: The Girls Who Don't Get Born*, *N.Y. TIMES*, May 6, 2001, § 4 at 4 (commenting on the effect of sex-selective abortions in China and India, particularly that the ratio of girls to boys from birth to age six has dropped sharply in India). In China, the one child per family policy has resulted in the infanticide of an estimated ten million to twenty million female babies. *Id.* Ninety percent of the children in Chinese orphanages are female babies whose parents have abandoned the infant girls in hopes of obtaining a male baby. *Id.*

190. Remaley, *supra* note 20, at 275-77. Remaley indicates that parents are likely to select males as their firstborn children, thus denying females of benefits associated with being the firstborn child. *Id.*

191. Danis, *supra* note 12 (noting the historical and cross-cultural efforts to ensure the birth of a male offspring). *See also* EDWARD YOXEN, *UNNATURAL SELECTION* 137-73 (1986) (suggesting that sex selection will lead not to a significant sex imbalance in the population, but to a society of first-born males).

192. BRITISH MEDICAL ASSOCIATION, *OUR GENETIC FUTURE: THE SCIENCE AND ETHICS OF GENETIC TECHNOLOGY* 197 (1992). In 1990, Baroness Mary Warnock caused a furor when she expressed criticisms of sex selection based on the premise that this technique could be used to maintain class distinctions by allowing male heirs to continue family lines. SUSAN MERRILL SQUIER, *BABIES IN BOTTLES: TWENTIETH-CENTURY VISIONS OF REPRODUCTIVE TECHNOLOGY* 100 (1994).

193. SQUIER, *supra* note 192, at 100.

The devastating consequences of a gender imbalance justifies law prohibiting the use of sex selection reproductive technologies.¹⁹⁴

D. The Violation of Women's Rights Because Sex-Selection is Discriminatory Towards Women Demands Regulation.

Sex selection should be prohibited because it potentially discriminates against women.¹⁹⁵ The British Medical Association rejects permitting parents to use medical advances to select the sex of their children because it will increase sexual discrimination.¹⁹⁶ At the very least, sex selection violates a principal of equality between females and males and the psychological importance to parenting of unconditional acceptance of a child.¹⁹⁷ The discriminatory effect of selecting one sex over the other prior to conception is detrimental to children's self-esteem and well-being. If the child born is not the desired sex, the child is likely to feel hurt and suffer from low self-esteem.

E. Alteration of Natural Selection Resulting in a Loss of Genetic Diversity Demands Regulation.

Human characteristics evolved over thousands, possibly even millions of years to result in the current range of traits, behaviors, and physical features currently evident in people world wide.¹⁹⁸ Genetic alterations will lead to a loss of genetic diversity.¹⁹⁹ Genetic diversity helps species survive the hazards

194. See JOSEPH FLETCHER, *THE ETHICS OF GENETIC CONTROL: ENDING GENETIC ROULETTE* 128 (1974). For example, a gender imbalance will make it substantially more difficult for one sex to obtain mates. See generally Helen Bequaert Holmes, *Choosing Children's Sex: Challenges to Feminist Ethics*, in *REPRODUCTION, ETHICS, AND THE LAW* 148 (Joan C. Callahan ed., 1995) (applying feminist perspectives to oppose sex selection because it reflects the American patriarchal society in which maleness is equated with superiority and happiness). BRITISH MEDICAL ASSOCIATION, *supra* note 192 (condemning the abortion of fetuses based on their sex alone, but has yet to express an opinion on pre-conception sex-selection).

195. Macnaughton, *supra* note 16, at 48 (arguing that sex selection for social reasons should not be permitted because it is discriminatory and conflicts with societal ethical values). See Greg Freeman, *Mother Nature, Not Moms and Dads, Should Pick Child's Gender*, ST. LOUIS POST-DISPATCH, Feb. 3, 2002, at C3. Missouri State Representative Michael Reid's felt that nature, not parents, should pick children's sex. *Id.* Reid is concerned about discrimination against human embryos prior to transplantation, based on the embryo's gender. *Id.*

196. BRITISH MEDICAL ASSOCIATION, *supra* note 192, at 209.

197. See Morgan, *supra* note 41, at 74.

198. See generally 21 CHARLES DARWIN, *THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX* (Paul H. Barrett & Toby Linden eds., 1989).

199. BRITISH MEDICAL ASSOCIATION, *supra* note 192, at 156-57; Damewood, *supra* note 4 (expressing concerns that the use of pre-implantation genetic diagnosis to select the sex or specific traits of one's children could threaten innate human diversity). Some legal scholars argue that when considering legislative prohibitions on reproductive technologies, concerns regarding decreasing the gene pools so that genetic diversity that is curtailed can easily be characterized as a legitimate state interest in public health—typically a compelling state interest. See also June

of a changing environment, such as climate changes and pathogen resistance.²⁰⁰ This is especially important in an environment such as our own in which environmental and pathogenic conditions are constantly changing. When considering legislative prohibitions on reproductive technologies, concerns regarding decreasing the gene pools and curtailing genetic diversity can be characterized as a legitimate state interest in public health—typically a compelling state interest.²⁰¹

Sex and trait selection may be equated with a form of eugenics reflective of the practices represented in Nazi Germany or Huxley's *New World*.²⁰² This argument becomes particularly compelling in view of the "slippery slope" argument that if parents are allowed to select the sex of their children, parents will soon be permitted to select virtually every aspect of their offspring.²⁰³ By allowing parents to select the sex and other characteristics of their offspring, science is permitting parents to play a potentially dangerous role in genetic

Coleman, Comment, *Playing God or Playing Scientist: A Constitutional Analysis of State Laws Banning Embryological Procedures*, 27 PAC. L.J. 1331, 1346-48 (1996) (expressing grave concerns that parents might use the preconception sex selection process to select male children, which could ultimately lead to the extinction of humanity).

200. BRITISH MEDICAL ASSOCIATION, *supra* note 192, at 157 (indicating that species with diverse gene pools are more likely to overcome adverse circumstances because it is likely that some organisms which can overcome the unfavorable environment).

201. See Coleman, *supra* note 199, at 1346-48. In an analysis of a variety of embryological research procedures, Coleman hesitates to adamantly oppose reproductive technologies based on this fear. *Id.*

202. Danis, *supra* note 12, at 241 (indicating that a contrary view point is that "positive" eugenics should be distinguished from "negative" eugenics). See Tabitha M. Powledge, *Toward a Moral Policy for Sex Choice*, in SEX SELECTION OF CHILDREN 201, 204-06 (Neil G. Bennett ed., 1983); Mark I. Evans et. al., *Attitudes on the Ethics of Abortion, Sex Selection, and Selective Pregnancy Termination Among Health Care Professionals, Ethicists, and Clergy Likely to Encounter Such Situations*, 164 AM. J. OBST. GYNECOL 1092, 1098 (1991); Plato, *The Republic*, in THE PORTABLE PLATO 469-73 (1986) (discussing the notion that if only those with the highest intellectual capacity and physical abilities in a society were permitted to reproduce, the preference would result in a superior society). See generally ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932); CHARLOTTE HALDANE, *MAN'S WORLD* (1927) (portraying a society organized around prenatal sex selection in which women are reduced to biology, categorized by their reproductive and sexual roles, and ruled by a coterie of racist white male scientists through a network of cybernetic surveillance and biological controls). While this argument may, at first glance, appear extreme when compared with the sterilization methods used by Hitler to further the goals of the "purification" of the Aryan race, notions of improving the human race through selective breeding has been supported by some since, at least, the time of Plato's *Republic* and is continually met with fears that some will be excluded from the reproductive process.

203. Danis, *supra* note 12, at 241-42 (noting that because sex is analogous to these latter attribute genes, the advent of sex selection forbodes widespread genetic manipulation for the mere fulfillment of parents' personal preferences). See also David S. King, *Preimplantation Genetic Diagnosis and the "New" Eugenics*, 25 J. MED. ETHICS 176, 181 (1999) (worrying about "opening the human gene pool to the winds of social market forces," that is transient, culturally influences concepts of the ideal or perfect person).

alteration. Parents are likely to choose the traits which their culture deems preferable, but which may not necessarily be the most valuable to their child's health or survival or to the continuation of human kind.²⁰⁴ Further, since the same sex (male) and characteristics (intelligence, kindness, athletic ability and physical attractiveness) are valued cross-culturally, long-term use of genetic selection may lead to a genetically homogenous environment, thus making humans more susceptible to diseases and environmental changes and other potential unknown consequences. New genetic technologies need to be dealt with carefully because they could permanently and irreversibly alter the biology of life forms, the ecology, and natural evolution.²⁰⁵

F. If Preconception Sex and Trait Selection is Permitted, Children Will Suffer by Being Viewed as Commercial Products.

Many people object to reducing children to consumer products, and doctors warn against using this invalidated medical technology for purely social reasons.²⁰⁶ Sex selection is objectionable on the moral and ethical principles that sex and characteristics such as hair color, intelligence, or athletic ability are not the proper criteria for choosing children.²⁰⁷ Parents need to value their children for the child's sake and not for the child's sex, and permitting parents to engineer their offspring will commodify children.²⁰⁸

Modern reproductive technologies are a source of concern in our consumer-oriented society.²⁰⁹ Fears exist that parents will think of the child-

204. *But see* Jones, *supra* note 4, at 202-07 (proposing that the use of trait selection technologies is itself an exhibition of inclusive fitness, thus permitting the "fittest" of the present world to reproduce).

205. *See also* MICHAEL W. FOX, *BEYOND EVOLUTION* 157 (1999) (discussing the potential harmful ramifications of unregulated genetic engineering technologies; noting that the upheaval of the natural selection process by the raising of genetically altered crops has a more devastating effect on wildlife than conventionally and organically raised crops).

206. BRITISH MEDICAL ASSOCIATION, *supra* note 192, at 197 (indicating that the use of science to allow parents to select children with particular traits, such as sex, physical, emotional, and intellectual attributes, is unacceptable).

207. *See* Maria Dolanska & Donald Evans, *Patient Perceptions of Assisted Conception Services*, in *CREATING THE CHILD: THE ETHICS, LAW, AND PRACTICE OF ASSISTED PROCREATION* (Donald Evans ed., 1996).

208. *See* Vicki G. Norton, *Unnatural Selection: Nontherapeutic Preimplantation Genetic Screening and Proposed Regulation*, 41 *UCLA L. REV.* 1581, 1598-99 (1994) (discussing potential for abuse of nontherapeutic preimplantation genetic diagnosis and the ethical objections to the techniques). Norton's focus is on the prescreening of embryos for certain traits, but the most recent technology does not even necessitate the creation of an embryo to select a baby's sex.

209. GOSDEN, *supra* note 30, at 232 (discussing the damaging effects of commodification to children created through the use of reproductive technologies, specifically when parents purchase celebrity sperm and eggs at overpriced rates to produce "designer" children). *See* *Doe v. Att'y Gen.*, 487 N.W.2d 484 (Mich. Ct. App. 1992). In *Doe*, the court upheld a Michigan statute that outlawed paid surrogacy. *Id.* at 488. The court conceded that the statute encroached upon the

to-be as more of a fashion object—the designer baby—than a unique human being with its own needs. Parents who are disappointed because sex selection techniques failed for them may take their disappointment out on their child.²¹⁰

In the line of cases recognizing parental decision making rights at the expense of the rights of potential offspring, the interests of potential children do not risk degraded children in the same manner inherently involved with preconception sex and trait selection. Concepts of children seem to be based on the notion that children are the property of their parents.²¹¹ Children produced pursuant to their parents' genetic specifications might enjoy high social status as a result of these characteristics.²¹² As these children become highly valued, children who are not genetically altered will become undervalued.²¹³

constitutionally protected zone of privacy, which guarantees “freedom from government interference in matters of marriage, family, procreation, and intimate associations.” *Id.* at 487. The court concluded that given the state's compelling interests to warrant intrusion into the area of procreation generally protected by privacy, the statute should be upheld. *Id.* at 487-88. The court found a compelling state interest in protecting the best interests of the children by preventing them from becoming commodities and precluding the exploitation of women. *Id.* at 486-87.

210. GOSDEN, *supra* note 31, at 175. See Marjorie Maguire Shultz, *Surrogacy Legislation in California: Legislative Regulation of Surrogacy and Reproductive Technology*, 28 U.S.F. L. REV. 613, 617-18 (1994). According to Shultz, money is a proxy for other questions and consequences—the allocation of power and agency, the appropriateness of bargaining and enforcement models in family life, and the fear of treating persons as objects. *Id.* at 618. People of color as well as economically powerless individuals often find themselves being abused with the justification that this abuse is based on “the market.” See *id.* The commodification and commercialization of intimate life is a core concern. FOX, *supra* note 204, at 211-18 (lamenting about the greed present in humans today and the lack of reverence for nature). Fox suggests that humans now aim to control and manipulate life around them, while lacking wisdom and ethical responsibility. *Id.* Human beings are playing God. *Id.*

211. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1810 (1993) (arguing that children are seen as private, not public property, which are subject to their parent's successes and weaknesses).

212. Danis, *supra* note 12, at 236. The high cost of eugenic procedures might result in a lower class of genetically “imperfect” persons. *Id.* at 236-37. The advent of sex selection forbodes widespread genetic manipulation of the fulfillment of mere preference. *Id.* Women are likely to suffer as a result of being the less selected sex. *Id.* Parents would select male children more often than female children, and they would select male children to be first born offspring (thus permitting males to benefit from the advantages of being first born children). *Id.* Males, through their greater numbers, would know that they were selected more often and were thus more desired, increasing their sense of self-worth and self-importance while diminishing the self-esteem of their younger sisters or other women. *Id.*

213. Danis, *supra* note 12, at 242 (indicating that children created through these reproductive mechanisms may experience a loss of “selfhood” and they realize that they are genetically fabricated to another's design). See also Coleman, *supra* note 199, at 1351 (arguing that abuse of reproductive technologies could include discrimination against those not genetically engineered and those who do not get to select the preferred traits). Shultz, *supra* note 210, at 618 (addresses

G. *Existing Laws in the United States Do Not Apply to the Use of Sex and Trait Selection Technologies.*

No federal or state laws exist in the United States regulating the use of preconception sex and trait selection techniques.²¹⁴ Current laws that prohibit research or experimentation on embryos are the closest potential sources of regulation, but they fail to extend to preconception sex and trait selection.²¹⁵ A few states have laws prohibiting the use of abortion to selection the sex of one's offspring; similar legislation has been proposed at the federal level.²¹⁶ The National Bioethics Advisory Commission (Executive Summary, June 1997) called for a continuation of moratorium on any federal funding for research involving human cloning and a call for all private individuals and institutions to comply with this moratorium on human cloning.²¹⁷

Even if no laws are enacted prohibiting the use of reproductive technologies to select the sex and characteristics of one's offspring, funding should not be provided to support these decisions. The Due Process Clause of the Constitution generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual.²¹⁸ The government is under no obligation to provide funding in support of the advantages conferred by those rights which are protected as fundamental liberty interests.²¹⁹

the exploitation of persons from a lower socioeconomic background, certain ethnic groups, and women).

214. *See Lopez, supra* note 16, at 173 (noting that the only use of reproductive technology which is regulated is the use of artificial insemination and surrogate motherhood). The legislature failed to enact legislation regulating other areas of reproductive technology to any significant degree since that time.

215. Norton, *supra* note 208, at 1615-19 (considering federal regulations on fetal experimentation and state laws prohibiting fetal research).

216. *See, e.g.,* 720 ILL. COMP. STAT. 510/6(8) (2002) (prohibiting any person from intentionally performing an abortion when the person has knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus); Civil Rights of Infants Act, S. 76, 107th Cong. § 2(b) (2001) (making it a violation of a right secured by the Constitution and the laws of the United States to perform an abortion with the knowledge that the abortion is being performed solely because of the gender of the fetus).

217. LISA YOUNT, BIOTECHNOLOGY AND GENETIC ENGINEERING 269-270 (2000) (noting that bans on the use of reproductive technologies are often included with laws regulating human cloning).

218. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 491-92 (1989). The government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund one activity over another based upon the state's preferences. *See Harris v. McRae*, 448 U.S. 297, 316-18 (1980).

219. *See Rust v. Sullivan*, 500 U.S. 173, 192-194 (1991); *Harris*, 448 U.S. at 317-318.

H. Law Existing in Other Countries

Current legislation in other countries is aimed at restricting abortions for the use of fetus sex selection. In India, where fetuses are often aborted because they are female, the use of amniocentesis is limited to screen for potential medical abnormalities.²²⁰

In Canada, laws prohibiting the gender selection of children for non-medical purposes were introduced on May 3, 2001, and are currently under consideration.²²¹ Europeans express outrage at the concept of selecting the sex or characteristics of one's children for non-medical reasons.²²² However, this

220. Radhika Balakrishnan, *The Social Context of Sex Selection and the Politics of Abortion in India*, in POWER AND DECISION: THE SOCIAL CONTROL OF REPRODUCTION, 278 (Gita Sen & Rachel C. Snow eds., 1994). The author urges the enactment of legislation to remain current with advancing technologies which will permit the use of pre-birth sex selection in other ways. The expansion of medical technologies permitting sex selection may be more difficult to regulate.

221. See *Canada Proposes Reproduction Laws*, TIMES UNION (Albany), May 6, 2001, at A6, available at 2001 WL 6305119. The committee of health of the House of Commons is studying the legislation, with a report on the draft law anticipated in January 2002. See also Danis, *supra* note 12, at 261 (noting that the Canadian Royal Commission on New Reproductive Technologies has recommended a ban on all sex selection except where medically indicated for sex-linked diseases).

222. See *They're Opening Pandora's Box to Designer Babies Modern Dilemma: Tragic Couple's Bid for Baby Girl Unethical, Says Professor*, BIRMINGHAM POST, Oct. 5, 2000, at 9 (reporting the concern of a medical law and ethics professor in Scotland who is concerned that Europeans will use European Convention of Human Rights legislation to gain permission for gender diagnosis for non-medical reasons); GOSDEN, *supra* note 30, at 173. See also Deryck Beyleveld & Shaun Pattison, *Legal Regulation of Assisted Procreation, Genetic Diagnosis and Gene Therapy*, in THE ETHICS OF GENETICS IN HUMAN PROCREATION 215, 241 (Hille Haker & Deryck Beyleveld eds., 2000) (advising that the United Kingdom licensing authority advised reproductive clinics and sex selection for social reasons is unacceptable). The UK licensing authority advises the clinics that it licenses that sex selection for social reasons is unacceptable. Jurgen Simon, *Comment on Legal Regulation of Assisted Procreation, Genetic Diagnosis and Gene Therapy*, in THE ETHICS OF GENETICS IN HUMAN PROCREATION 289 (Hille Haker & Deryck Beyleveld eds., 2000). Portugal and Italy were considering legislation in this area in 2000 (noting that the resolution of the European Parliament from March 1997 condemns the use of pre-implantation genetic diagnosis, judging it to be a violation of human dignity that should not be accepted by any society). Sandra Dick, *Be It Boy or Girl, Let's Choose Life*, EVENING NEWS (Scotland), July 9, 2001, at 11, available at 2001 WL 24048983 (reporting that Scottish secretary Dr. Bill O'Neill is full of condemnation of a clinic opening in Glasgow which will allow would-be parents to choose the sex of their baby). The article addresses the "slippery slope" argument that the selection of sex will lead to the selection of characteristics such as hair color, intelligence, and the shape of the baby's fingernails. *Id.* Technology is available for patients utilizing IVF treatment to choose the sex of embryos, although in the United Kingdom sex selection is permitted only where a genetic disease is carried with the male sex. *Id.* Panagiota Dalla-Vorgia, *Assisted Reproduction in Greece*, in CREATING THE CHILD: THE ETHICS, LAW, AND PRACTICE OF ASSISTED PROCREATION 285 (Donald Evans ed., 1996). Similarly, in Greece, sex selection is prohibited except to prevent serious sex-linked hereditary disease. *Id.* at 285. However, no state legislation exists, so reproductive technologies may be used in the private sector to select sex. *Id.*

contempt for the use of reproductive technologies for arbitrary reasons is unregulated in many European countries with the laws governing preimplantation genetic diagnosis varying to a large degree.²²³ The large variation of restrictions imposed by foreign legislation on assisted reproduction suggests that foreign governments struggle to find a place within current regulation of conception, abortion, and family law under which assisted reproduction should fall.²²⁴ It is likely that legislators in the United States will face similar difficulties in finding a firm basis for laws regulating preconception sex and trait selection technologies under the present regulation scheme.

I. The Need for Legislation

It is now time to face the legal, ethical, and policy issues rising from parents' ability to select or shape the characteristics of their offspring and the potential of government regulation in this area.²²⁵ The need for legislation is apparent as the accuracy and availability of preconception selection technology becomes available.²²⁶ Because the decision to select the sex and characteristics of one's offspring does not fall into one of the well-established constitutional law areas, courts may flounder at reaching consistent decisions.

A statute regulating the use of nontherapeutic preimplantation genetic diagnosis must carefully define the term "nontherapeutic" in order to withstand a challenge for unconstitutional vagueness.²²⁷ Because this type of arbitrary

Further, the proposed French Bioethics Law attempts to maintain the "dignity of the individual" by prohibiting any research which threatens the integrity of humans. *Id.* at 285-86. While no government statement related this to preconception sex selection, choosing a child based upon arbitrary reasons such as sex and characteristics inherently undermines the child's worth.

223. Beyleveld & Pattison, *supra* note 222, at 238-49 (dividing the laws into the following groups: legislation permitting preimplantation genetic diagnosis—Denmark, France, Spain, Sweden, and the United Kingdom; Countries with legislation prohibiting pre-implantation genetic diagnosis; countries without legislation permitting pre-implantation genetic diagnosis by default—Belgium, Finland, Greece, Italy, Netherlands, and Spain; countries without legislation prohibiting pre-implantation genetic diagnosis by default—France, Ireland, and Luxembourg). Where laws do exist in the area of assisted procreation and genetic diagnosis, it typically prohibits reproductive cloning and germ-line therapy, either prohibits non-therapeutic embryo research or subjects it to conditions, permits abortion and preimplantation genetic diagnosis, and regulates those assisted reproductive techniques that involve the storage or use of embryos outside the body.

224. *Id.* at 216-21 (varying from no restrictions to no access to these services). Many European countries limit the use of assisted reproduction based on criteria such as marital status, sexual orientation, years of cohabitation, age of female, the absence of children, and health reasons. *Id.* at 224.

225. Robertson, *supra* note 6, at 423.

226. Danis, *supra* note 12, at 222 (proposing a complete ban on sex selection).

227. See Norton, *supra* note 208, at 1616 (discussing a less advanced reproductive technology to select offspring traits, but which implicates the same issues).

“ordering” of child characteristics does not fall under individuals’ procreative liberty interests of rights of privacy, no constitutional rights are jeopardized by regulation in this area.

Instead of leaving the judiciary to struggle to find a place for preconception sex and characteristic selection, regulation must be enacted to deal with these issues. States should have the power to regulate any form of genetic manipulation of the reproductive process to the extent necessary to protect autonomy, to prevent private gender discrimination, to prevent skewing of the gender and genetic pool and to prevent any one person or entity from controlling and upsetting the genetic development of future generations.²²⁸ Given the extensive harms which may result from the utilization of preconception sex and characteristic selection, regulation in this area meets the rationale state interest standard necessary to uphold state regulation where a liberty interest is not at stake.

The United States lags behind technological advances in developing a clear social policy regulating the use of technology to select the sex of one’s offspring.²²⁹ Some argue that legislation should be enacted to regulate the use of procreative technologies so scarce medical resources will be given priority over these procreative technologies.²³⁰ A complete ban on all types of pre-implantation sex selection technology is advocated by some as not being contrary to constitutional rights.²³¹ Others call, not for a complete ban of preconception sex selection, but for moderate measures to identify and prevent any serious harm as selective reproductive technology develops.²³² Even those persons who contend that parental use of trait selection technologies should be

228. See Lopez, *supra* note 16 (considering whether the use of sex selection technology implicates individual autonomy so strongly as to be deemed fundamental and emphasizing that the courts should seek solutions that maximizes autonomy and concurrently prevents harm to others.).

229. Danis, *supra* note 12, at 263. Considering the swift pace of evolution in this field, sex selection is already an established technology and is thus likely to become entrenched in medical practice and social consciousness unless an immediate response follows.

230. See Donald Evans, *Creating the Child*, in *CREATING THE CHILD: THE ETHICS, LAW, AND PRACTICE OF ASSISTED PROCREATION* 8 (Donald Evans ed., 1996).

231. Danis, *supra* note 12, at 245 (concluding that a ban on most types of pre-implantation sex selection technology is safely within constitutional bounds, but noting that some may argue that an individual’s choice to use alternative reproductive technology, including sex selection technology, is an exercise of personal liberty).

232. Remaley, *supra* note 20, at 297-98. These moderate steps would prevent serious harm. *Id.* Other measures include requiring couples to donate their left-over sperm or embryos, while could be used for infertile couples. *Id.* Remaley advocates enacting measures now to detect and evaluate the use and effects of preconception sex selection (and trait selection) so as to avoid delay if it becomes apparent that a prohibition is necessary. *Id.* at 292-98. One measure that is ripe for implementation is to create a waiting list for parents who want to use these reproductive technologies. *Id.* at 292.

afforded the same Constitutional protection as other matters of family, parenting, and procreation agree that some limitations must apply.²³³

One proposed solution is to enact legislation ensuring a sex balance in the population, but this solution fails to address the other harms created by preconception sex and trait selection, such as discrimination against women, social and psychological consequences for offspring, and deterrent affects on the parent-child relationship.²³⁴ This type of legislation is insufficient to deter the potential harms implicit in preconception sex and trait selection.²³⁵ Legislation is necessary to prohibit preconception sex and trait selection before the harms involved are beyond control. Trait and sex selection of children's characteristics should not be protected as fundamental rights. The use of these reproductive technologies suggest a realm of rights not yet addressed by the court, but involving different concerns, issues, rights, and harms that previous family and reproductive decisions have not addressed.

IV. CONCLUSION

Current legislation does not place any obstacles in the path of parents who want to choose the sex and traits of their offspring prior to conception. Previous Supreme Court decisions protecting decisions related to family and conception do not incorporate these preconception decisions. The harms associated with sex and trait selection are dissimilar from the harms involved in these previous cases. Preconception sex and trait selection pose detrimental consequences both to the children produced with the use of these reproductive technologies, other children in their families, and others in society. Seminal Supreme Court decisions deal with parents rights to choose measures related to the care, education, and upbringing of their children, and the rights of women and men to choose whether or not to have a child. The rights associated with these prior decisions does not extend to permit parents to choose the sex and traits of their offspring prior to conception. It is imperative that legislators draft regulations to prohibit the use of sex and trait selection for arbitrary reasons.

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233. See Jones, *supra* note 4, at 189 (arguing that trait selection technologies should be permitted to select for any trait using any method unless it is clearly and significantly damaging to the future child).

234. Remaley, *supra* note 20, at 292-93.

235. *Id.* at 293. Further, the difficulties inherent in enforcing a sex balance make this proposition undesirable.

236. J.D. candidate, Saint Louis University, May 2003. I would like to thank my parents, Lee and Joan Plummer, and my grandparents, John and Dorothy Kleinschnittger, for their support and encouragement.