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# PREGNANT AND PREJUDICED: THE CONSTITUTIONALITY OF SEX- AND RACE-SELECTIVE ABORTION RESTRICTIONS

Justin Gillette\*

*Abstract:* Six states currently restrict a woman's access to abortion based on her personal motivations for seeking the procedure. These laws, which prohibit abortions that are sought based on the fetus's sex or race, raise challenging constitutional issues, as the restrictions do not fit neatly into the U.S. Supreme Court's abortion jurisprudence framework. The constitutionality of these laws is also unclear because no legal challenge has been brought against them. This Comment argues that motive-based abortion restrictions are unconstitutional on several grounds. First, the laws violate the woman's constitutional liberty rights, which protect the personal beliefs and motivations behind her decision to terminate a pregnancy. Second, the laws conflict with the Court's holding that governments cannot prohibit abortions before the fetus has reached viability. Third, while the Court's decision in *Gonzales v. Carhart* may support abortion restrictions motivated by moral concerns, the interests recognized in *Gonzales* are distinguishable from those furthered by motive-based restrictions. For these reasons, reviewing courts should strike down motive-based abortion restrictions as unconstitutional.

## INTRODUCTION

On December 1, 2011, Representative Trent Franks of Arizona introduced the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act (PRENDA).<sup>1</sup> The bill imposed criminal sanctions, including up to five years of jail time, on abortion providers who conduct the procedure when they know that the "abortion is sought based on the sex . . . or race of that child, or the race of a parent of that child."<sup>2</sup> In the House Judiciary Committee hearing, Representative Franks proclaimed that while the country had made great strides in protecting the civil rights of women and minorities, it had not yet adequately protected the civil rights of the unborn.<sup>3</sup> He illustrated this

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\* Disclosure: The author served as an intern for the ACLU of Washington, a non-profit organization that does legal advocacy and lobbying in support of women's reproductive rights.

1. Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. (2011).

2. *Id.* § 3.

3. *Hearing on H.R. 3451 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 1 (2011) (statement of Rep. Trent Franks).

point with dramatic statistics:

[T]oday in America between 40 and 50 percent of all African American babies, virtually one in two, are killed before they are born, which is a greater cause of death for African Americans than heart disease, cancer, diabetes, AIDS, and violence combined. . . . Fourteen million Black babies have been aborted since *Roe v. Wade*. . . .

Now, you add to that the thousands of little girls who have been aborted in America simply because they are little girls instead of little boys. And these are travesties that should assault the mind and conscience of every American.<sup>4</sup>

PRENDA is part of a larger trend of legislation banning abortions based on the motives of women.<sup>5</sup> Before the introduction of the federal bill, three states had already banned sex-selective abortions.<sup>6</sup> In 2011, Arizona became the first state to ban both sex- and race-selective abortions.<sup>7</sup> Many other state legislatures introduced similar legislation in 2012.<sup>8</sup> Some states have even considered banning selective abortions on grounds other than sex or race. In 2005, a state representative in Maine introduced a bill that would have prohibited abortions based on the sexual orientation of the fetus.<sup>9</sup> The North Dakota legislature passed a law in 2013 banning abortions based on genetic abnormalities.<sup>10</sup>

Proponents of PRENDA and similar motive-based restrictions claim that the laws are a response to a grave problem—the abortions of

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4. *Id.* at 1–2.

5. Joerg Dreweke, *Sex-Selective Abortion Bans—A Disingenuous New Strategy to Limit Women’s Access to Abortion*, GUTTMACHER INST. (May 30, 2012), <http://www.guttmacher.org/media/nr/2012/05/30/index.html> (noting that “abortion rights opponents have advanced legislation during the last four years to ban sex selective abortion . . . in 13 states”).

6. 720 ILL. COMP. STAT. 510/6(8) (2012); OKLA. STAT. tit. 63, § 1-731.2.B (2012); 18 PA. CONS. STAT. ANN. § 3204(c) (West 2012).

7. ARIZ. REV. STAT. ANN. § 13-3603.02 (2013). On March 30, 2011, Governor Jan Brewer signed HB-2443 into law. *Arizona: Abortion Banned for Race Selection*, N.Y. TIMES, Mar. 31, 2011, at A14, available at [http://www.nytimes.com/2011/03/31/us/31brfs-ABORTIONBANN\\_BRF.html](http://www.nytimes.com/2011/03/31/us/31brfs-ABORTIONBANN_BRF.html).

8. In the past three years, eight state legislatures have received bills proposing motive-based restrictions on abortions, with Oklahoma and Arizona passing these measures. Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 UCLA L. REV. 2, 27 n.130 (2012). The bills in Georgia, New Jersey, Massachusetts, Idaho, Minnesota, New York, and Rhode Island failed to pass. *See id.* at 27 n.131.

9. *Bill Would Ban Abortions of ‘Gay’ Fetuses*, WND (Feb. 25, 2005, 8:45 PM), <http://www.wnd.com/2005/02/29120/>. Representative Brian Duprey claimed that the law was needed for when scientists discover a “gay gene.” *Id.*

10. John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. TIMES, Mar. 27, 2013, at A1, available at <http://www.nytimes.com/2013/03/27/us/north-dakota-governor-signs-strict-abortion-limits.html?pagewanted=all>.

thousands of African-American and female fetuses in the United States.<sup>11</sup> Opponents of these measures argue that the claims of sex- and race-motivated abortions are unfounded and that the legislation is a dishonest attempt to chip away at women's reproductive rights.<sup>12</sup>

While the veracity of claims that certain fetuses are being specifically targeted for abortions is debatable, it is true that advances in reproductive technology have made it possible to identify more characteristics of a fetus at earlier stages of pregnancy.<sup>13</sup> These technological developments are relevant to the parents' decision whether or not to have a child, as they will have more relevant data on which to base their decision.<sup>14</sup> Forms of noninvasive prenatal diagnosis, such as the analysis of fetal DNA found in the mother's bloodstream, have the potential to reveal the sex of the fetus, along with other genetic traits, early in the first trimester.<sup>15</sup> Preimplantation genetic diagnosis allows parents to screen embryos for certain conditions and traits, including sex, prior to in vitro fertilization.<sup>16</sup> While some of these emerging

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11. See Shaila Dewan, *To Court Blacks, Foes of Abortion Make Racial Case*, N.Y. TIMES, Feb. 27, 2010, at A1, available at <http://www.nytimes.com/2010/02/27/us/27race.html?pagewanted=all> (describing pro-life organizations' use of racial arguments against abortion); see also Michael Stokes Paulsen, *It's a Girl*, PUBLIC DISCOURSE (Oct. 24, 2011), <http://www.thepublicdiscourse.com/2011/10/4149> (arguing that sex-selective abortions are occurring in the United States).

12. See NARAL PRO-CHOICE AM., SUSAN B. ANTHONY AND FREDERICK DOUGLAS NON-DISCRIMINATION ACT (H.R. 3541): AN ATTACK ON THE REPRODUCTIVE RIGHTS OF WOMEN OF COLOR 3 (2011), available at <http://www.prochoiceamerica.org/assets/download-files/hr3541-testimony.pdf> ("It is clear that this bill is a thinly veiled attempt to block access to abortion for communities of color under the guise of anti-discrimination policy."); Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER POL'Y REV., Summer 2008, at 2, 3 (arguing that higher abortion rates in communities of color are a product of inadequate access to contraception rather than a result of efforts by abortion providers to concentrate on minority communities); see also *Hearing on H.R. 3451 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 21 (2011) (statement of Rep. John Conyers) ("What does the bill do? Oh, well, it makes it more difficult for women of color to obtain basic reproductive health-care services that should be available to all women. . . . I think that this is a way of chipping away at *Roe v. Wade*.").

13. Jaime S. King, *And Genetic Testing for All . . . The Coming Revolution in Non-invasive Prenatal Genetic Testing*, 42 RUTGERS L.J. 599, 599 (2011).

14. John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 370 (2011) (predicting that advances in technology will likely lead to a "great upsurge in the number of early abortions"); Elyse Whitney Grant, Note, *Assessing the Constitutionality of Reproductive Technologies Regulation: A Bioethical Approach*, 61 HASTINGS L.J. 997, 1007 (2010).

15. King, *supra* note 13, at 600; Heidi Anne Duerr, *New Blood Test Reveals Fetus's Gender Five Weeks After Conception*, OBGYN.NET (Feb. 1, 2012), <http://hcp.obgyn.net/pregnancy-and-birth/content/article/1760982/2025382>.

16. Dr. Samuel Marcus, *Preimplantation Genetic Diagnosis (PGD)*, IVF-INFERTILITY.COM,

technologies are costly and are not yet available to the majority of parents,<sup>17</sup> other forms of prenatal analysis, such as genetic testing for Down syndrome or cystic fibrosis, are already common practices in the United States.<sup>18</sup>

Recently, legislators have become increasingly concerned about women obtaining abortions for reasons related to specific fetal traits, which has resulted in the introduction of state and federal legislation to curb such practices.<sup>19</sup> These motive-based restrictions raise challenging constitutional issues, as the laws do not fit neatly within the U.S. Supreme Court's abortion jurisprudence framework. Currently, the State can fully restrict women's access to abortion once the fetus has attained viability, as long as there is an exception for the mother's health.<sup>20</sup> Before a fetus has reached viability, the State can only create mechanisms to influence and inform the woman's decisionmaking, but cannot pass measures that constitute an "undue burden" on the woman's ability to obtain an abortion.<sup>21</sup> The Supreme Court has arrived at these standards by weighing a variety of distinct interests: the State's respect for fetal life;<sup>22</sup> the State interest in women's mental and physical health;<sup>23</sup> and the woman's interest in her own reproductive autonomy.<sup>24</sup> Through weighing these competing interests, the Supreme Court has upheld several types of abortion restrictions, including restrictions on when an abortion can be performed,<sup>25</sup> what kinds of medical procedures

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<http://www.ivf-infertility.com/ivf/pgd.php> (last visited Mar. 6, 2013).

17. See, e.g., Robertson, *supra* note 14, at 372 (noting that "[preimplantation genetic diagnosis] is not cheap or easy and will not appeal to most people").

18. Sonia Mateu Suter, *The Routinization of Prenatal Testing*, 28 AM. J.L. & MED. 233, 270 (2002). These tests are also the subject of political debate and controversy. See, e.g., Tom Cohen, *Santorum Challenges Policy on Prenatal Testing*, CNN (Feb. 20, 2012), <http://www.cnn.com/2012/02/19/politics/santorum-prenatal-testing/index.html>.

19. See, e.g., Joanna Hlavacek, *Kansas Senate OKs Bill Prohibiting Sex-Selection Abortions*, KAN. CITY STAR (Feb. 19, 2013, 7:26PM), <http://www.kansas.com/2013/02/19/2682495/kansas-senate-oks-bill-prohibiting.html>; David Sherfinski, *Virginia Bill Targets Sex-Selective Abortions: Republican's Measure Would Ban the Practice*, WASH. TIMES (Oct. 16, 2012), <http://www.washingtontimes.com/news/2012/oct/16/virginia-bill-targets-sex-selective-abortions-repu/>.

20. *Stenberg v. Carhart*, 530 U.S. 914, 947–48 (2000) (O'Connor, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

21. *Casey*, 505 U.S. at 874.

22. *Id.* at 877–78; *Roe v. Wade*, 410 U.S. 113, 163 (1973).

23. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007); *Casey*, 505 U.S. at 879; *Roe*, 410 U.S. at 146, 149–50.

24. *Casey*, 505 U.S. at 852; *Roe*, 410 U.S. at 152.

25. *Casey*, 505 U.S. at 870 (holding viability as the appropriate framework for evaluating abortion regulations); *Roe*, 410 U.S. at 163 (using a trimester framework for determining

can be used,<sup>26</sup> and what information the State can require doctors to provide pregnant women who are seeking an abortion.<sup>27</sup> However, the Supreme Court has not yet weighed in on whether a woman's right to an abortion may be restricted based on her personal thoughts.

This Comment will examine the constitutionality of sex- and race-selective abortion restrictions. Part I details the state laws restricting sex- and race-selective abortions, and the 2011 federal bill. Part II provides an overview of the Supreme Court's right to privacy jurisprudence and the doctrinal shifts that have occurred in the Court's understanding of this right. Part III describes the Supreme Court's evolving jurisprudence on abortion, as evidenced by the doctrinal shifts in three landmark abortion cases: *Roe v. Wade*,<sup>28</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>29</sup> and *Gonzales v. Carhart*.<sup>30</sup> Part IV examines how, through these cases, the Court has refined the types of individual and State interests courts can consider when assessing abortion laws.

This Comment argues in Part V that the motive-based abortion laws infringe on women's constitutional rights on several grounds. First, a woman's liberty interest in reproductive decisionmaking extends to her personal beliefs and thoughts. Second, these laws deprive a woman of the chance to obtain an abortion prior to viability once she reveals her discriminatory motives. This result conflicts with *Casey*, in which the Court held that the State could not create an absolute bar to obtaining abortions previability. Third, the moral interests asserted in these statutes are dissimilar from the interests recognized by the Supreme Court in *Gonzales*. Although motive-based abortion laws may find some support in that decision—upholding a federal ban on “partial-birth abortions”—these laws differ from the Partial-Birth Abortion Act in that they do not prohibit actions that are analogous to criminal actions, protect women's mental health, or target specific medical procedures. For these reasons, this Comment proposes that courts reviewing motive-based abortion restrictions should find the laws unconstitutional.

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appropriate abortion restrictions).

26. *Gonzales*, 550 U.S. at 133 (upholding a federal ban on “partial-birth” abortion procedures).

27. See *Casey*, 505 U.S. at 880–87 (upholding informed consent and twenty-four-hour waiting period requirements); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) (upholding parental notification requirement).

28. 410 U.S. 113.

29. 505 U.S. 833.

30. 550 U.S. 124.

## I. STATES ARE INCREASINGLY INTERESTED IN ENACTING SEX- AND RACE-SELECTIVE ABORTION LAWS

Currently, six states ban abortions based on a woman's motives.<sup>31</sup> Even though some of these laws have existed for several decades, their constitutionality has yet to be challenged in court. The increasing interest in these laws, as evidenced by several state legislators recently proposing similar bills,<sup>32</sup> combined with the advances in technology that will make more fetal information available at earlier stages of pregnancy,<sup>33</sup> suggests that courts may have to consider the validity of these laws in the near future.

### A. Several States Have Passed Motive-Based Abortion Restrictions

Illinois became the first state to ban sex-selective abortions in 1975.<sup>34</sup> The law states that “[n]o person shall intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus,”<sup>35</sup> but contains an exception for abortions performed in connection with genetic disorders that are linked to sex.<sup>36</sup> During Senate debates over the bill, proponents of the law focused on the reporting requirements and informed consent provisions and gave very little attention to the sex-selection provision of the law.<sup>37</sup>

In 1989, Pennsylvania became the second state to ban sex-selective

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31. ARIZ. REV. STAT. ANN. § 13-3603.02 (2013) (effective July 20, 2011); 720 ILL. COMP. STAT. 510/6(8) (2012) (effective Nov. 20, 1975); OKLA. STAT. tit. 63, § 1-731.2 (2012) (effective Apr. 2, 2010); 18 PA. CONS. STAT. ANN. § 3204 (West 2012) (effective as amended Nov. 17, 1989); H.R. 2253, 2013 Leg., Reg. Sess. (Kan. 2013), available at [http://www.kslegislature.org/li/b2013\\_14/measures/documents/hb2253\\_enrolled.pdf](http://www.kslegislature.org/li/b2013_14/measures/documents/hb2253_enrolled.pdf); H.R. 1305, 63d Leg. Assemb., Reg. Sess. (N.D. 2013), available at <http://www.legis.nd.gov/assembly/63-2013/documents/13-0351-02000.pdf?20130417194356>; *Bill Actions for HB 1305*, NORTH DAKOTA LEGISLATIVE BRANCH, <http://www.legis.nd.gov/assembly/63-2013/bill-actions/ba1305.html> (last visited Apr. 17, 2013); *Brownback Signs Sweeping Anti-Abortion Bill*, KAN. CITY STAR (Apr. 19, 2013), <http://www.kansascity.com/2013/04/19/4191877/kansas-gov-brownback-signs-sweeping.html>.

32. See, e.g., S. 529, 2009-2010 Gen. Assemb., Reg. Sess. (Ga. 2010); H.R. 693, 60th Leg., 2d Reg. Sess. (Idaho 2010); Assemb. 162, 214th Leg., 1st Sess. (N.J. 2010).

33. See *supra* notes 13-18 and accompanying text.

34. Kathleen Gilbert, *Oklahoma Bans Gender-Selective Abortions*, LIFESITENEWS.COM (May 27, 2009, 11:15 AM), <http://www.lifesitenews.com/news/archive/ldn/2009/may/09052708>.

35. 720 ILL. COMP. STAT. 510/6(8) (2012).

36. *Id.* (“Nothing in Section 6(8) shall be construed to proscribe the performance of an abortion on account of the sex of the fetus because of a genetic disorder linked to that sex.”).

37. See 79TH GEN. ASSEMB., REG. SESS. 97 (Ill. Nov. 19, 1975) (statement of Sen. Egan) (listing the “important aspects of the bill” and not mentioning the sex-selection ban).

abortion.<sup>38</sup> The Abortion Control Act provides that physicians may only perform abortions that are deemed “necessary,”<sup>39</sup> and stipulates that “[n]o abortion which is sought because of the sex of the unborn child shall be deemed a necessary abortion.”<sup>40</sup> A physician who violates the law is guilty of a third-degree felony,<sup>41</sup> punishable by up to seven years in prison,<sup>42</sup> and can have his or her medical license suspended or revoked.<sup>43</sup> While Planned Parenthood challenged several provisions of the law, the sex-selective ban was not included in the suit because it was viewed as a provision that did not have a direct impact on women.<sup>44</sup> The lawyer filing suit on behalf of Planned Parenthood, Linda J. Wharton, described the sex-selection provision as a “red herring.”<sup>45</sup>

Over a decade went by without any states passing motive-based abortion restrictions until, in 2010, the Oklahoma legislature passed a law banning sex-selective abortions.<sup>46</sup> Another law passed months later requires a woman to fill out a lengthy questionnaire before an abortion is performed.<sup>47</sup> The form, which contains thirty-eight questions, asks about the woman’s race, education, income, relationships, and reasons for seeking an abortion, and specifically asks whether the woman is obtaining an abortion because she wants a child of a different sex.<sup>48</sup> The

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38. See Gilbert, *supra* note 34; see also *Pennsylvania Abortion Limits Become Law*, N.Y. TIMES (Nov. 19, 1989), <http://www.nytimes.com/1989/11/19/us/pennsylvania-abortion-limits-become-law.html>.

39. 18 PA. CONS. STAT. ANN. § 3204(a)(1) (West 2012).

40. *Id.* § 3204(c).

41. *Id.* § 3204(d).

42. *Id.* § 106(b)(4).

43. *Id.* § 3204(d).

44. Michael deCourcy Hinds, *Federal Judge Blocks New Anti-Abortion Law in Pennsylvania*, N.Y. TIMES, Jan. 12, 1990, at A18, available at <http://www.nytimes.com/1990/01/12/us/federal-judge-blocks-a-new-anti-abortion-law-in-pennsylvania.html?scp=9&sq=pennsylvania+abortion&st=nyt>.

45. *Id.*

46. See James C. McKinley, Jr., *Strict Abortion Measures Enacted in Oklahoma*, N.Y. TIMES, April 27, 2010, at A14, available at [http://www.nytimes.com/2010/04/28/us/28abortion.html?\\_r=0](http://www.nytimes.com/2010/04/28/us/28abortion.html?_r=0). A state court had found an earlier version of the law unconstitutional based on the state constitution’s “single subject” rule for legislation. Barbara Hoberock, *Judge Rules Oklahoma Law Unconstitutional*, TULSA WORLD (Feb. 19, 2010), [http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100219\\_14\\_0\\_OKLAHO398221](http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20100219_14_0_OKLAHO398221). The Oklahoma legislature then passed a second version of the sex-selection law that remedied the constitutional issue. McKinley, Jr., *supra*.

47. OKLA. STAT. ANN. tit 63, §§ 1-738i–738p (West 2013) (effective Nov. 1, 2010); *Oklahoma: Veto of Third Abortion Bill is Overridden*, N.Y. TIMES, May 25, 2010, at A19, available at [http://www.nytimes.com/2010/05/26/us/26brfs-VETOOFTHIRDA\\_BRF.html](http://www.nytimes.com/2010/05/26/us/26brfs-VETOOFTHIRDA_BRF.html).

48. OKLA. STAT. ANN. tit 63, § 1-738k(F) (West 2013).

law also requires that the results of the questionnaires be reported statistically on a state website.<sup>49</sup> While reproductive rights groups challenged an Oklahoma law passed the same year requiring women to undergo an ultrasound before obtaining an abortion,<sup>50</sup> to date no legal challenge has been brought against either the sex-selection ban or the questionnaire requirement.

In March of 2011, Arizona passed the Susan B. Anthony and Frederick Douglass Prenatal Discrimination Act<sup>51</sup> making it the first state to ban both sex- and race-selective abortions.<sup>52</sup> The law imposes criminal penalties on anyone who “[p]erforms an abortion knowing that the abortion sought is based on the sex or race of the child or the race of a parent of that child.”<sup>53</sup> The notes appended to the bill summary state that “[e]vidence shows that minorities are targeted for abortion and that sex-selection abortion is also occurring in our country. There is no place for such discrimination and inequality in our society.”<sup>54</sup> However, the statute does not cite specific evidence to support the assertion that these practices are taking place.<sup>55</sup>

The Arizona law takes its name from a federal bill that was introduced by Arizona Representative Trent Franks in 2009<sup>56</sup> and reintroduced by him in December 2011.<sup>57</sup> The federal bill features the same statutory language as the Arizona law but includes more congressional findings.<sup>58</sup> The findings section makes several claims

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49. Hoberock, *supra* note 46. Republican Senator Todd Lamb, the law’s author, stated that the questionnaire and reporting requirement are meant to provide more information on why women seek abortions and thereby help the state find ways to reduce the number of abortions performed. *Id.*

50. *Oklahoma Continues Assault on Reproductive Rights*, SEXUALITY INFO. & EDUC. COUNCIL U.S., <http://www.siecus.org/index.cfm?fuseaction=Feature.showFeature&featureID=1899> (last visited Apr. 7, 2013).

51. H.R. 2443, 50th Leg., 1st Reg. Sess. § 6 (Ariz. 2011) (enacted).

52. *Arizona: Abortion Banned for Race Selection*, N.Y. TIMES, Mar. 31, 2011, at A14, available at [http://www.nytimes.com/2011/03/31/us/31brfs-ABORTIONBANN\\_BRF.html](http://www.nytimes.com/2011/03/31/us/31brfs-ABORTIONBANN_BRF.html).

53. ARIZ. REV. STAT. ANN. § 13-3603.02(A)(1) (2013). The law also provides a private cause of action against the doctor who performed the procedure to the husband of the woman and, if the woman is unmarried, her parents. *Id.* § 13-3603.02(C).

54. Ariz. H.R. 2443.

55. *Id.*

56. Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act, H.R. 1822, 111th Cong. (2009); SUJATHA JESUDASON & SUSANNAH BARUCH, GENERATIONS AHEAD, RACE AND SEX SELECTION IN ABORTION DEBATES: THE LEGISLATION AND THE BILLBOARDS 3 (2011).

57. Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. (2011); Stephanie Mencimer, *Behind the GOP’s Civil Rights Crusade*, MOTHER JONES (Dec. 27, 2011), <http://motherjones.com/politics/2011/12/race-gender-selection-abortion-bills-trent-franks>.

58. *Compare* Ariz. H.B. 2443, with H.R. 3541, § 2(a).

about the practice of sex- and race-selective abortions in the United States.<sup>59</sup> It describes sex-selection abortion as “barbaric,” and asserts that while sex is ascertainable at the earliest stages of pregnancy, most sex-selective abortions occur in the second or third trimester of pregnancy.<sup>60</sup> The findings cite a 2008 study that found evidence of sex-selection in immigrant families that already had multiple daughters.<sup>61</sup> The bill also describes race-selective abortion as a “barbaric” practice, but does not cite any studies showing that race-selective abortions occur in the United States.<sup>62</sup>

Arguments in favor of restrictions on race-selective abortions are linked to larger arguments made by anti-abortion organizations regarding racial targeting by abortion providers. These arguments frame the reproductive rights movement, led in part by the work of Margaret Sanger, as part of a larger eugenics campaign.<sup>63</sup> Anti-abortion organizations also point to the larger numbers of abortions performed on minority women in the United States as evidence of providers purposefully “targeting” these populations.<sup>64</sup> Opponents of these race-selective restrictions have noted that these arguments do not seem to address the central issue of whether women are obtaining abortions *because of* the race of the fetus.<sup>65</sup> In this sense, the arguments in favor of race-selection abortion restrictions are markedly different from those in favor of restrictions on sex-selective abortions, in that they seem to largely focus on the motives of the abortion providers rather than those

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59. H.R. 3541, § 2(a)(1)(C)–(F).

60. *Id.* § 2(a)(1)(D).

61. *Id.* § 2(a)(1)(F) (referencing Douglas Almond & Lena Edlund, *Son-Based Sex Ratios in the 2000 United States Census*, 105 PROC. NAT’L ACAD. SCI. 5681 (2008), available at <http://www.pnas.org/content/105/15/5681>).

62. *Id.* § 2(a)(2)(C).

63. *The Mother of Planned Parenthood*, TOOMANYABORTED.COM, <http://www.toomanyaborted.com/plannedparenthood/sanger/> (last visited Apr. 7, 2013) (“To carry out her population control plans, [Margaret Sanger’s] organization, American Birth Control League that she founded in 1921, opened its facilities in predominantly black, immigrant and poor area [sic] of New York City.”).

64. *Hearing on H.R. 3451 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 83 (2011) (statement of Stephen H. Aden, Vice President/Senior Counsel, Alliance Defense Fund) (“[A]bortion clinics are located in disproportionately minority neighborhoods, somewhere between 70 and 80 percent. A lot of us believe that has been intentional; that has been a policy on the part of Planned Parenthood and other abortion providers.”).

65. *Id.* at 23 (statement of Rep. Mike Quigley) (“On the issue of the supposed race-based abortions, the entire premise of the bill is wrongheaded. I must assume that the writers of the bill don’t mean to imply that women of color would choose abortion as some sort of self-afflicted genocide.”).

of the women themselves.<sup>66</sup>

Before the U.S. House of Representatives voted on the bill in 2012, Representative Franks removed the provisions regarding race-selective abortion.<sup>67</sup> He claimed in an interview that opponents of the measure had “manipulated” the race issue.<sup>68</sup> The revised bill failed to pass the House.<sup>69</sup> After the vote, a member of the Senate introduced a similar bill targeting sex-selection,<sup>70</sup> which also failed to pass.<sup>71</sup>

In 2013, North Dakota and Kansas both passed motive-based abortion restrictions.<sup>72</sup> The Kansas law only prohibits sex-selective abortions,<sup>73</sup> while the North Dakota law bans abortions based on sex-selection or genetic defects.<sup>74</sup> The North Dakota law is the first in the nation to ban abortions based on genetic abnormalities,<sup>75</sup> which the statute defines as “any defect, disease, or disorder that is inherited genetically,” including “any physical disfigurement, scoliosis, dwarfism, Down syndrome, albinism, amelia, or any other type of physical or mental disability, abnormality, or disease.”<sup>76</sup> At a Senate Judiciary Committee hearing,

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66. See Dewan, *supra* note 11 (“Abortion opponents say the number is so high because abortion clinics are deliberately located in black neighborhoods and prey upon black women.”).

67. Napp Nazworth, *Rep. Trent Franks on Why Race-Based Abortion Ban Was Removed from Bill*, CHRISTIAN POST (May 31, 2012, 7:17 AM), <http://www.christianpost.com/news/rep-trent-franks-on-why-race-based-abortion-ban-was-removed-from-bill-75804/>. Representative Franks stated that he removed the race provisions because “[t]he left wing in the House wanted to make the race [issue] completely something else than it was.” *Id.*

68. *Id.*

69. Ed O’Keefe, *Bill Banning ‘Sex-Selective Abortions’ Fails in the House*, WASH. POST (May 31, 2012, 2:36 PM), [http://www.washingtonpost.com/blogs/2chambers/post/bill-banning-sex-selective-abortions-fails-in-the-house/2012/05/31/gJQAgCYn4U\\_blog.html](http://www.washingtonpost.com/blogs/2chambers/post/bill-banning-sex-selective-abortions-fails-in-the-house/2012/05/31/gJQAgCYn4U_blog.html).

70. Prenatal Nondiscrimination Act (PRENDA), S. 3290, 112th Cong. (2012); Elise Viebeck, *Sex-Selective Abortion Issue Hits Senate*, HILL (June 14, 2012, 8:41 AM), <http://thehill.com/blogs/healthwatch/abortion/232727-sex-selective-abortion-issue-hits-senate>.

71. See *S.3290 - Prenatal Nondiscrimination Act (PRENDA) of 2012*, CONGRESS.GOV, <http://beta.congress.gov/bill/112th-congress/senate-bill/3290> (last visited Apr. 7, 2013).

72. H.R. 2253, 2013 Leg., Reg. Sess. (Kan. 2013) (enacted), available at [http://www.kslegislature.org/li/b2013\\_14/measures/documents/hb2253\\_enrolled.pdf](http://www.kslegislature.org/li/b2013_14/measures/documents/hb2253_enrolled.pdf); (last visited May 12, 2013); H.R. 1305, 63d Leg. Assemb., Reg. Sess. (N.D. 2013) (enacted), available at <http://www.legis.nd.gov/assembly/63-2013/documents/13-0351-02000.pdf?20130417194356>; *HB 2253*, KANSAS LEGISLATURE, [http://www.kslegislature.org/li/b2013\\_14/measures/hb2253/](http://www.kslegislature.org/li/b2013_14/measures/hb2253/) (last visited May 23, 2013); *Bill Actions for HB 1305*, NORTH DAKOTA LEGIS. BRANCH, <http://www.legis.nd.gov/assembly/63-2013/bill-actions/ba1305.html> (last visited Apr. 17, 2013).

73. Kan. H.R. 2253.

74. *N.D. Governor Approves 6-Week Abortion Ban, Says Constitutionality is ‘Open Question,’* CBSNEWS.COM (Mar. 26, 2013, 1:10 PM), [http://www.cbsnews.com/8301-201\\_162-57576359/n.d.governor-approves-6-week-abortion-ban-says-constitutionality-is-open-question/](http://www.cbsnews.com/8301-201_162-57576359/n.d.governor-approves-6-week-abortion-ban-says-constitutionality-is-open-question/).

75. Eligon & Eckholm, *supra* note 10.

76. N.D. H.R. 1305.

one speaker characterized the abortion rates for children with Down syndrome as “simply a modern version of eugenics.”<sup>77</sup> Opponents of the bill noted that many of the genetic defects listed in the bill result in the child dying in the womb or shortly after birth.<sup>78</sup>

Currently, only a small minority of states have motive-based restrictions on abortion,<sup>79</sup> but this number may increase in the future. During 2011, eight other states attempted to pass similar legislation, though none of the bills passed.<sup>80</sup> Anti-abortion organizations are also lobbying on the broader issue of selective abortions.<sup>81</sup> No legal challenge has been brought against a race- or sex-selective abortion restriction, and any future challenge may require courts to reexamine the nature of the constitutional right to terminate a pregnancy.<sup>82</sup>

## II. THE DEVELOPMENT OF THE RIGHT TO PRIVACY WAS FOUNDED ON PRINCIPLES OF REPRODUCTIVE AUTONOMY

*Roe v. Wade*, the landmark case recognizing the right to terminate a pregnancy, framed the right as an extension of the “right to privacy.”<sup>83</sup> The Court first used this term in the context of reproductive autonomy in *Griswold v. Connecticut*,<sup>84</sup> a case declaring that married couples had the

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77. Nick Smith, *Abortion Bills Kick Up Debate*, BISMARCK TRIB. (March 12, 2013, 11:14 PM), [http://bismarcktribune.com/news/local/govt-and-politics/abortion-bills-kick-up-debate/article\\_706928b8-8b94-11e2-9ae8-0019bb2963f4.html](http://bismarcktribune.com/news/local/govt-and-politics/abortion-bills-kick-up-debate/article_706928b8-8b94-11e2-9ae8-0019bb2963f4.html).

78. *Id.*

79. ARIZ. REV. STAT. ANN. § 13-3603.02 (20132) (effective July 20, 2011); 720 ILL. COMP. STAT. 510/6(8) (2012) (effective Nov. 20, 1975); OKLA. STAT. tit. 63, § 1-731.2 (2012) (effective Apr. 2, 2010); 18 PA. CONS. STAT. ANN. § 3204 (West 2012) (effective as amended Nov. 17, 1989); H.R. 2253, 2013 Leg., Reg. Sess. (Kan. 2013), *available at* [http://www.kslegislature.org/li/b2013\\_14/measures/documents/hb2253\\_enrolled.pdf](http://www.kslegislature.org/li/b2013_14/measures/documents/hb2253_enrolled.pdf); H.R. 1305, 63d Leg. Assemb., Reg. Sess. (N.D. 2013), *available at* <http://www.legis.nd.gov/assembly/63-2013/documents/13-0351-02000.pdf?20130417194356>.

80. *See* O’Keefe, *supra* note 69; *see also* King, *supra* note 8, at 27 n.131.

81. *See, e.g.*, AM. UNITED FOR LIFE, BAN ON ABORTIONS FOR SEX SELECTION AND GENETIC ABNORMALITIES: MODEL LEGISLATION & POLICE GUIDE FOR THE 2013 LEGISLATIVE YEAR 9 (2013), *available at* <http://www.aul.org/wp-content/uploads/2012/11/Sex-Selective-and-Genetic-Abnormality-Ban-2013-LG.pdf>.

82. Representative Franks has not been discreet about these larger motives behind the bill. *See Rep. Trent Franks: ‘Predna’ [sic] Would ‘Blow a Fatal Hole in Roe v. Wade,’* WASH. INDEP. (Mar. 18, 2011, 1:20 PM), <http://washingtonindependent.com/106651/rep-trent-franks-predna-would-blow-a-fatal-hole-in-roe-v-wade>.

83. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

84. 381 U.S. 479 (1965).

right to use contraception.<sup>85</sup> By the time *Roe* was decided, the concept of the “right to privacy” was firmly rooted in the Court’s substantive due process jurisprudence.<sup>86</sup> The right protected a wide range of individual rights in the areas of procreation,<sup>87</sup> contraception,<sup>88</sup> marriage,<sup>89</sup> and family upbringing.<sup>90</sup> These precedents established a foundation to support the development of the right to privacy in the abortion context.<sup>91</sup> This section outlines the origins of the right to privacy as it pertains to reproductive rights and intimate relationships prior to *Roe*.

A. *Early Cases Protecting Familial Autonomy and Procreation Relied on General Notions of Liberty*

Before dealing with issues such as abortion or contraception, the Court in the late nineteenth and early twentieth centuries was already taking part in the “nascent constitutionalization” of liberty rights in both the economic and social realms.<sup>92</sup> During the “*Lochner* era,”<sup>93</sup> the Court read the “liberty” of the Fourteenth Amendment’s Due Process Clause as protecting numerous economic rights.<sup>94</sup> Meanwhile, the Court

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85. *Id.* at 484–85.

86. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846–49 (1992). The doctrine of substantive due process provides that legislation that intrudes on “fundamental rights” must be subject to strict scrutiny. *See id.* (distinguishing the procedural and substantive components of the Due Process Clause); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 812–13 (4th ed. 2011). Over the years, the Court has devised different methods for identifying fundamental rights, and has recognized rights protected under the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the Equal Protection Clause of the Fourteenth Amendment. CHEMERINSKY, *supra*, at 812–13.

87. *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942).

88. *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (1972); *Griswold*, 381 U.S. at 485–86.

89. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

90. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

91. *Casey*, 505 U.S. at 851 (noting that “[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”); *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (noting that the right to privacy extends to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education).

92. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2236 (2002).

93. “*Lochner*” refers to the Court’s decision in *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court declared unconstitutional a New York law that limited the number of hours bakers could work based on the principles of freedom of contract. *Id.* at 61. The term “*Lochner* era” refers to a period in which the Court closely scrutinized and often struck down economic legislation on the grounds that the Fourteenth Amendment protected a right to contract. CHEMERINSKY, *supra* note 86, at 630–31.

94. *See Lochner*, 198 U.S. at 53 (“right to contract,” “right to purchase and sell labor”); Allgeyer

interpreted this same “liberty” to protect non-economic rights, such as the right to bodily integrity<sup>95</sup> and the right to familial control.<sup>96</sup> Although the Court later extinguished many of the economic liberty rights,<sup>97</sup> it continued to recognize liberty interests in non-economic forms.

Prior to its decision in *Griswold*, the Court recognized a right to marry,<sup>98</sup> a right to procreate,<sup>99</sup> and a right to control the education of one’s children.<sup>100</sup> The Court relied on notions of “natural dut[ies]” and commonly shared values and practices when expounding these new rights,<sup>101</sup> and occasionally acknowledged the inchoate nature of this area of law.<sup>102</sup> In *Meyer v. Nebraska*,<sup>103</sup> the majority noted that “[w]hile this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated.”<sup>104</sup> Although the exact scope of these liberty rights was not fully defined, the Court’s decisions established a “private realm of family life which the state cannot enter.”<sup>105</sup> When the Supreme Court announced a “right to privacy” in *Griswold*, the Court fashioned a right to privacy by combining “well-respected constitutional privacy notions—primarily drawing from Fourth and First Amendment cases—with forgotten turn-of-the-century ‘liberty’ cases under the Fourteenth Amendment,” involving marriage, procreation, and family governance.<sup>106</sup>

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v. Louisiana, 165 U.S. 578, 591 (1897) (“liberty to contract”).

95. See *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”). The liberty interest in bodily integrity has been discussed in more recent cases as well. See *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part) (“One aspect of this liberty is a right to bodily integrity, a right to control one’s person.”); *Washington v. Harper*, 494 U.S. 210, 221–22, 229 (1990).

96. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

97. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1397 (1992).

98. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

99. *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942).

100. *Pierce*, 268 U.S. at 535 (invalidating a state law requiring children to attend public schools); *Meyer*, 262 U.S. at 399 (invalidating a state law that prohibited non-English teaching in schools).

101. *Meyer*, 262 U.S. at 400 (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance . . . [I]t is the natural duty of the parent to give his children education suitable to their station in life.”).

102. *Id.* at 399.

103. 262 U.S. 390.

104. *Id.*

105. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

106. Gormley, *supra* note 97, at 1396.

B. *Contraception Became a Component of Liberty in Griswold and Eisenstadt v. Baird*

The Court's decision in *Griswold* established the right to privacy as a constitutional doctrine, and broadened the right to include the use of contraception. The Court struck down a law that prohibited the distribution and sale of contraceptives on grounds that it violated the right to privacy.<sup>107</sup> The Court's initial articulation of the right was framed in spatial terms, as it was limited to the confines of the marital bedroom.<sup>108</sup> The Court later expanded the scope of the right to privacy in *Eisenstadt v. Baird*,<sup>109</sup> by striking down a Massachusetts law that prohibited the distribution of contraceptives to unmarried individuals.<sup>110</sup> The Court held that "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."<sup>111</sup>

Unlike the previous cases recognizing fundamental rights in familial autonomy, which the Court held to be an aspect of "liberty" protected by the Fourteenth Amendment, the right to privacy was not originally based on a specific constitutional provision.<sup>112</sup> Justice Douglas, writing for the majority in *Griswold*, explained that the right was instead found within the "penumbras" of several constitutional provisions.<sup>113</sup> The *Eisenstadt* Court ruled that the state law violated the Equal Protection Clause, rather than the Due Process Clause, by invidiously discriminating on the basis of marital status.<sup>114</sup> However, these cases did provide a doctrinal foundation for the Court's decision in *Roe*, as the *Roe* Court viewed the right to terminate a pregnancy as a logical extension of the earlier right to privacy cases.<sup>115</sup>

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107. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

108. *See id.* at 485–86 (holding that these disparate constitutional amendments created a "zone of privacy" that protected the "privacy surrounding the marriage relationship").

109. 405 U.S. 438 (1972).

110. *Id.* at 453.

111. *Id.*

112. *Griswold*, 381 U.S. at 484–85 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy." (citations omitted)). Justice Douglas described the right as emanating from several constitutional amendments, including the First, Fourth, Fifth, and Ninth Amendments. *Id.*

113. *Id.*

114. *Eisenstadt*, 405 U.S. at 454–55.

115. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973) (noting that "the right [of personal privacy] has some extension to activities relating to marriage, procreation, contraception, family relationships,

### III. SINCE *ROE*, THE SUPREME COURT HAS ALLOWED INCREASINGLY RESTRICTIVE ABORTION LAWS

The Court first recognized the right to an abortion in *Roe*, but even in its original form, the right was qualified by State interests.<sup>116</sup> The Court's abortion jurisprudence is marked by the Court's evolving ideas about the nature of several competing interests, including the woman's interest in reproductive autonomy, and the State interest in protecting fetal life.<sup>117</sup> *Roe* provided a trimester framework for analyzing the constitutionality of abortion restrictions, and posited that the State interest in fetal life is greater during later stages of pregnancy.<sup>118</sup> Over time, however, the Court has revised its jurisprudence and provided more open-textured standards for analyzing abortion laws which allow for greater State involvement at earlier stages of a woman's pregnancy.<sup>119</sup>

#### A. *The Court Established the Right to Terminate a Pregnancy in Roe v. Wade*

The *Roe* Court announced that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>120</sup> The Court described the right as an extension of earlier cases finding a right to privacy in familial and reproductive matters.<sup>121</sup> Because the liberty interests protected by the Fourteenth Amendment already covered a right to use contraception and to raise children according to one's views, the Court concluded that even more fundamental reproductive rights, such as the decision of whether to carry a pregnancy to term, were also included under the Due Process Clause.<sup>122</sup> However, the Court stipulated that the right "is not unqualified and must be considered against important State interests in

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and child rearing and education" (internal citations omitted).

116. *Id.* at 153–54.

117. *See* *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007) (woman's mental and physical health); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (reproductive autonomy); *Roe*, 410 U.S. at 163 (fetal life).

118. *Roe*, 410 U.S. at 163.

119. *See Casey*, 505 U.S. at 876 (replacing the *Roe* trimester framework with the undue burden test).

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

121. *Id.* at 152–53.

122. *Id.*

regulation.”<sup>123</sup>

The trimester framework created in *Roe* was based on the Court’s belief that the State interest in regulating fetal life increased as the fetus developed.<sup>124</sup> Therefore, the State could not regulate abortions until after the first trimester.<sup>125</sup> After this point, the State could only regulate “to the extent that the regulation reasonably relate[d] to the preservation and protection of maternal health.”<sup>126</sup> The Court went on to hold that after the second trimester, when the fetus would reach “viability,” a State could regulate to protect fetal life.<sup>127</sup> The Court explained that a fetus becomes viable when it is “potentially able to live outside the mother’s womb, albeit with artificial aid.”<sup>128</sup> After viability, a State could go so far as to prohibit abortion, as long as it left an exception for cases in which the procedure was required to preserve the life or health of the mother.<sup>129</sup>

### B. *Casey’s “Undue Burden” Standard Permits Previability Abortion Regulations*

The Court disposed of the trimester framework in *Planned Parenthood v. Casey*, concluding that the *Roe* approach did not sufficiently articulate the State interest in fetal life.<sup>130</sup> Under *Casey*, a State still could not prohibit abortions prior to viability;<sup>131</sup> however, it could regulate abortions prior to viability in ways that would not constitute an “undue burden” for the woman seeking an abortion.<sup>132</sup> The Court defined “undue burden” as any regulation that “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>133</sup> Regulations that instead serve “to

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123. *Id.* at 154.

124. *Id.* at 162–63.

125. *Id.* at 163 (“With respect to the State’s important and legitimate interest in the health of the mother, the ‘compelling’ point, in the light of present medical knowledge, is at approximately the end of the first trimester.”).

126. *Id.*

127. *Id.*

128. *Id.* at 160. The Court stated that this point is usually around seven months (twenty-eight weeks) into a pregnancy, but can occur earlier. *Id.*

129. *Id.* at 163–64.

130. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870–71 (1992).

131. *Id.* at 860. The *Casey* Court also acknowledged that what constituted “viability” in the 1990s was different from its meaning in 1973 (the year *Roe* was decided), and that viability now occurred usually at twenty-three to twenty-four weeks. *Id.*

132. *Id.* at 876.

133. *Id.* at 877.

inform the woman's free choice" or to "persuade her to choose childbirth over abortion" are permissible under *Casey* as long as the measures do not present a substantial obstacle.<sup>134</sup> While only a plurality of the Court reached this holding, it was re-affirmed by a majority of the Court several years later.<sup>135</sup>

The Court has upheld several state abortion laws based on the undue burden test provided in *Casey*. For example, the Court upheld state laws that require doctors to inform the woman of the availability of materials regarding the physical characteristics of the fetus,<sup>136</sup> require women to wait twenty-four hours before undergoing the procedure,<sup>137</sup> and require minors to obtain parental consent and notification.<sup>138</sup> Nevertheless, the Court has also struck down several regulations under this standard, such as the spousal notification requirement in *Casey*.<sup>139</sup>

While the *Casey* plurality revised the standards by which courts would analyze abortion laws and abandoned *Roe*'s trimester framework, it also upheld many of *Roe*'s basic principles. First, the Court emphasized that women still have the right to reproductive autonomy prior to fetal viability.<sup>140</sup> In fact, the plurality provided a more extensive discussion on the importance of this right than did the *Roe* majority.<sup>141</sup> Second, the *Casey* Court reaffirmed viability as the proper point in which the State could enact restrictions on available abortion

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134. *Id.* at 877–78.

135. *See* *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (affirming the holding of *Casey* with respect to viability and the undue burden standard).

136. *Casey*, 505 U.S. at 885–86. The "informed consent" provision in *Casey* also required that women be provided with information regarding childbirth and a list of adoption providers. *Id.* at 881.

137. *Id.* at 885–86 ("The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable . . .").

138. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 326–27 (2006).

139. *Casey*, 505 U.S. at 887–98. Justice O'Connor reasoned that spouses in "well-functioning marriages" would discuss the abortion procedure. *Id.* at 892–93. However, the fact that millions of women who are victims of domestic violence would likely fear notifying an abusive husband supported the conclusion that the requirement would "operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895. Chief Justice Rehnquist, writing in a partial dissent, disagreed with this conclusion, and reasoned that the spousal notification requirement "is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking." *Id.* at 975 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

140. *Id.* at 848–53.

141. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1770 (2008) (noting that *Casey* "presents itself as respecting women's decisional autonomy even as to the procedures the Partial-Birth Abortion Ban Act regulates").

procedures,<sup>142</sup> meaning the State cannot ban abortions before the fetus reaches viability.<sup>143</sup> *Casey* also upheld the necessity of a health exception in laws that restrict access to abortion after viability.<sup>144</sup>

C. *The Court Approved Prohibitions on Specific Abortion Procedures Based on Moral Grounds in Gonzales*

In 2007, the Supreme Court challenged many of the central principles of its abortion jurisprudence in *Gonzales v. Carhart*,<sup>145</sup> in which the Court upheld the Partial-Birth Abortion Ban Act of 2003.<sup>146</sup> The federal law prohibited abortion methods which involve the extraction of the intact fetus, known as intact dilation and extraction (intact D&E) (or “partial-birth”<sup>147</sup> abortion).<sup>148</sup> The *Gonzales* Court upheld the law, concluding that the regulation furthered a legitimate State interest in protecting the life of the fetus as well as the mental health of the woman.<sup>149</sup> The Court reasoned that Congress had a sufficient basis to conclude that the procedure was highly similar to infanticide, an act that is criminally actionable.<sup>150</sup> The Court held that Congress has the ability to “draw[] boundaries to prevent certain practices that extinguish life and are close to actions that are condemned.”<sup>151</sup> Also, by prohibiting a “gruesome and inhumane” abortion procedure,<sup>152</sup> the Court concluded that the State was protecting the pregnant woman from potential emotional harm.<sup>153</sup>

Both Justices and scholars have criticized the *Gonzales* majority’s

142. *Casey*, 505 U.S. at 860, 870.

143. *Id.* at 870.

144. *Id.* at 846 (holding that a State can restrict abortions after fetal viability “if the law contains exceptions for pregnancies which endanger the woman’s life or health”).

145. 550 U.S. 124 (2007).

146. *Id.* at 168.

147. “The term ‘partial-birth abortion’ was invented for purposes of writing legislation. There is no textbook reference to any operative procedure or medical state called ‘partial birth.’” Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, HARPER’S MAGAZINE, Nov. 2004, at 33, available at <http://www.harpers.org/archive/2004/11/0080278>.

148. *Id.* at 137–38. Justice Kennedy, writing for the majority, provides a lengthy and detailed description of the procedure in his opinion. *Id.*

149. *Id.* at 157–61. For a discussion of the State interest in women’s mental health, see *supra* Part II.B.

150. 550 U.S. at 158.

151. *Id.*

152. *Id.* at 141 (quoting Partial-Birth Abortion Act, Pub. L. No. 108-105, 117 Stat. 1201, 1201 (2003)).

153. *Id.* at 159–61.

reasoning. Justice Ginsburg in dissent, joined by three other Justices, accused the Court of breaking with precedent by allowing moral concerns to effectively decide the case.<sup>154</sup> Additionally, she argued that the majority's decision in *Gonzales* did not comport with precedent because the intact D&E law did not provide a medical exception for the woman.<sup>155</sup> Justice Ginsburg also noted that the *Casey* decision "blurs the line . . . between previability and postviability abortions."<sup>156</sup>

The plurality dismissed this argument by finding that Congress could conclude that, in light of medical uncertainty, the practice was never medically necessary.<sup>157</sup> Therefore, the plurality found that the ban on this particular procedure did not infringe on a woman's constitutional right to terminate a pregnancy previability, as she would theoretically have access to other procedures and would not be entirely unable to receive an abortion.<sup>158</sup> The majority did leave open the possibility, however, that the law's lack of a health exception could be subject to an as-applied challenge in the future.<sup>159</sup> The dissent sharply criticized the majority's analysis regarding the health exception issue, pointing out that the physicians who testified that intact D&E was never medically necessary had little authority for their opinions, and that there was "significant medical authority" to support the conclusion that the procedure was medically necessary in certain cases.<sup>160</sup>

#### IV. THE COURT'S JURISPRUDENCE RECOGNIZES COMPETING INDIVIDUAL AND STATE INTERESTS

The Supreme Court's abortion jurisprudence is characterized by the balancing of competing interests: the woman's interest in reproductive autonomy, and the State interest in fetal life and in the woman's health. Over time, the Court has refined its understanding of these interests. In order to analyze whether motive-based abortion restrictions pass constitutional muster, a closer look at the nature and scope of these interests is required.

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154. *Id.* at 182 (Ginsburg, J., dissenting).

155. *Id.* at 161–67; *id.* at 179 (Ginsburg, J., dissenting) (criticizing the majority for "defy[ing] the Court's longstanding precedent affirming the necessity of a health exception").

156. *Id.* at 171; *id.* at 186–87 (Ginsburg, J., dissenting).

157. *Id.* at 166–67 (plurality opinion).

158. *Id.* at 164 ("Alternatives are available to the prohibited procedure.").

159. *Id.* at 167.

160. *Id.* at 180 (Ginsburg, J., dissenting).

A. *Women's Constitutional Right to Reproductive Autonomy Is Related to Liberty and Privacy*

The Court's inconsistent terminology regarding the constitutional right to reproductive autonomy precludes a concise definition of the right. From *Roe* to *Gonzales*, the Court has discussed a woman's right as stemming from both privacy and liberty rights.<sup>161</sup> Additionally, the Court has provided numerous iterations of the right, describing it as the right to exercise "control over [one's] destiny,"<sup>162</sup> "the right to choose,"<sup>163</sup> and "the freedom to decide matters of the highest privacy and the most personal nature."<sup>164</sup> This lack of definitional consistency has also been subject to criticism.<sup>165</sup> A close look at the Court's articulation of the woman's right to terminate a pregnancy shows that principles of liberty and privacy undergird the constitutional right.

1. *Current Abortion Jurisprudence Focuses Primarily on the Woman's Liberty Rather Than Privacy*

Earlier cases involving reproductive decisionmaking framed the constitutional right as one of privacy.<sup>166</sup> Although the *Griswold* majority located the right to privacy in numerous constitutional amendments,<sup>167</sup> the Court later changed course in *Roe* and located the right within the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment.<sup>168</sup> In this sense, once *Roe* was decided, the right to privacy became a component of a larger liberty guarantee. But framing women's reproductive rights primarily in terms of privacy rather than liberty

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161. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 846 (1992); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

162. *Casey*, 505 U.S. at 869.

163. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

164. *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part).

165. Some Justices have criticized the Court's approach to substantive due process and reproductive rights on these very grounds. Justice Scalia's scathing dissent in *Casey* reflects this judgment:

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court . . . the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.

*Casey*, 505 U.S. 883, 983 (Scalia, J., dissenting in part and concurring in part).

166. *See, e.g., Griswold*, 381 U.S. at 484.

167. *Id.* at 484–85.

168. *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

created a certain degree of doctrinal confusion.<sup>169</sup> Many scholars and commentators criticized *Roe* for applying the right to privacy to actions that had little to do with common understandings of the term.<sup>170</sup> Justice Stevens, as both a federal appeals judge and a Supreme Court Justice, stated that liberty, rather than privacy, was a more appropriate term in discussing substantive due process rights.<sup>171</sup>

Since *Roe*, the Court has frequently discussed women's reproductive rights in terms of liberty interests rather than the right to privacy.<sup>172</sup> Professor Jamal Greene of Columbia Law School points out that the Court shifted away from referring to the right to privacy in several non-abortion cases leading up to *Casey*.<sup>173</sup> In *Cruzan v. Director, Missouri Department of Health*,<sup>174</sup> Chief Justice Rehnquist noted that although many state courts analyzed a right to refuse medical treatment under a "generalized constitutional right of privacy," the right would be analyzed by the Court "in terms of a Fourteenth Amendment liberty interest."<sup>175</sup> The *Casey* plurality finalized this change in terminology, stating that "[t]he controlling word in the cases before us is 'liberty.'"<sup>176</sup> As Professor Greene notes, the Court only uses the term "privacy" twice in *Casey*.<sup>177</sup> Even Justices frequently sympathetic to protecting *Roe* shifted away from using privacy as the primary justification for a woman's constitutional right to terminate a pregnancy.<sup>178</sup> Justice Ginsburg's dissent in *Gonzales* emphasized that "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course."<sup>179</sup>

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169. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302 (2d ed. 1998) ("Much judicial and scholarly ink has been spilt in the task of expounding this paradoxical right."); Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 461 (1987).

170. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929 (1973).

171. See, e.g., *Fitzgerald v. Porter Mem'l Hosp.*, 523 F.2d 716, 719 (7th Cir. 1975).

172. Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 725 (2010).

173. *Id.* at 724–25. The Court conspicuously failed to mention the right to privacy in cases involving maternity leave and family organization. *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (striking down public housing eligibility requirement); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating school board's maternity leave policy).

174. 497 U.S. 261 (1990).

175. *Id.* at 279 n.7.

176. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 846 (1992).

177. Greene, *supra* note 172, at 728.

178. *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

179. *Id.*

However, while the Court speaks largely in the argot of liberty and autonomy when discussing the right to choose an abortion, the discourse of privacy still remains within the Court's decisions.<sup>180</sup> Supreme Court Justices have frequently highlighted the connection between these two values.<sup>181</sup> In *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>182</sup> Justice Blackmun wrote that there are few decisions "more personal and intimate, more *properly private*" than the right to determine whether to end a pregnancy.<sup>183</sup> Justice Stevens, writing a partial concurrence and dissent in *Casey*, emphasized that the "[t]he woman's constitutional liberty interest also involves her freedom to decide matters of the *highest privacy* and the most personal nature."<sup>184</sup> These passages suggest that the right to autonomous decisionmaking, while primarily an issue of liberty, still stems in part from the private nature of the subject matter at issue.

## 2. *The Liberty Interest Encompasses the Right to Decisional Autonomy in Reproductive Matters*

In *Roe* and *Casey*, the Court enshrined the principle that women have the constitutional right to *choose* whether or not to continue a pregnancy.<sup>185</sup> The *Roe* Court reasoned that the fundamental nature of this right stemmed in part from the drastic consequences that may flow from the inability to exercise the right: forcing a woman to keep an unwanted pregnancy can take a serious toll on the her physical and psychological health.<sup>186</sup> Justice O'Connor noted in *Casey* that the cases involving the right to privacy and contraception were directly linked to the abortion cases, as all of the cases affirmed women's liberty to make "personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it."<sup>187</sup>

The *Casey* plurality's emphasis on the philosophical aspects of liberty comports with the concept of decisional autonomy. Given that the choice

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180. See *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

181. See *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part); *Thornburgh*, 476 U.S. at 772.

182. 476 U.S. 747.

183. *Id.* at 772 (emphasis added).

184. *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part) (emphasis added).

185. *Id.* at 870 (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

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

187. *Casey*, 505 U.S. at 853.

to terminate a pregnancy frequently involves the personal values and beliefs of the woman, the Court stressed that liberty includes the right to have independent and personal views on larger philosophical matters.<sup>188</sup> The Court explained that the “destiny of the woman must be shaped to a large extent on her *own conception of her spiritual imperatives* and her place in society.”<sup>189</sup> Justice O’Connor, writing for the *Casey* plurality, characterized the decision to terminate a pregnancy as a highly personal decision that is directly tied to subjective beliefs of the individual:

These matters, involving the most intimate and personal choices a person may make in a lifetime, . . . are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.<sup>190</sup>

In sum, the *Casey* Court suggested that women’s liberty interest extends to a woman’s beliefs on matters relevant to her decisionmaking on whether to terminate her pregnancy through an abortion.<sup>191</sup>

The Court’s conception of liberty works in conjunction with ideas about the allocation of decision-making power between the State and the individual.<sup>192</sup> The Court has described right to privacy in terms of a “private sphere of individual liberty” that is kept “beyond the reach of government.”<sup>193</sup> *Casey* affirmed that when it comes to reproductive rights, the State cannot insist on “its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture.”<sup>194</sup>

### *B. The Supreme Court Has Identified a State Interest in Protecting Fetal Life*

Over the past several decades, the Court has developed the contours of the State interest in regulating abortion. Through this development,

188. *Id.* at 851–52.

189. *Id.* at 852 (emphasis added).

190. *Id.* at 851.

191. *Id.*

192. See *TRIBE*, *supra* note 169, at 1352 (“[T]he issue of individual autonomy—of control over one’s body and reproductive destiny—is in turn a question of power, pure and simple.”); Allen, *supra* note 169, at 465–66; Greene, *supra* note 172, at 724 (“In a liberal society, an individual decision either to risk or to invite pregnancy is simply not the community’s to make . . .”).

193. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

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

two interrelated interests have emerged: the State interest in protecting fetal life, and the State interest in preserving the woman's health.<sup>195</sup> The Court has allowed increased regulation of abortions based on both of these interests.<sup>196</sup>

*Casey* marked a major expansion of the State interest in fetal life, as the Court recognized that this interest exists even during the first trimester of a pregnancy.<sup>197</sup> *Roe* established that the State had a recognized interest in promoting and protecting fetal life but limited the interest to the second and third trimesters, with a stronger interest in later stages of pregnancy.<sup>198</sup> It was not until the third trimester, when the fetus reached viability, that the State could go so far as to outlaw abortion as long as there was an exception that would allow abortions for medical emergencies.<sup>199</sup> The Court reasoned that it is not until the fetus "has the capability of meaningful life outside the mother's womb" that the State interest in fetal life outweighs the woman's interest in reproductive autonomy.<sup>200</sup> Hence, under *Roe*, the State interest in fetal life was directly correlated with the fetus's biological development.<sup>201</sup>

The Court expanded this interest in *Casey* by recognizing that the State interest in promoting respect for human life exists at "the earliest stages of pregnancy,"<sup>202</sup> and that the *Roe* trimester framework was too "rigid" to fully account for the State interest.<sup>203</sup> Because the State now had an interest in fetal life at earlier stages of pregnancy, the plurality held that the State could create "structural mechanisms" by which to "express profound respect for the life of the unborn."<sup>204</sup>

*Gonzales* further expanded the State interest in fetal life by recognizing that the interest allows the State to prohibit abortion procedures that are deemed "brutal and inhumane" and that can have a harmful effect on societal values.<sup>205</sup> The Court afforded considerable

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195. *Id.* at 846 (O'Connor, J., writing for the Court) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting *the health of the woman* and *the life of the fetus* that may become a child." (emphasis added)).

196. *See* *Gonzales v. Carhart*, 550 U.S. 124, 157, 159 (2007).

197. *Casey*, 505 U.S. at 872.

198. *Roe v. Wade*, 410 U.S. 113, 163 (1972).

199. *Id.* at 163.

200. *Id.*

201. *Id.* (noting that "[s]tate regulation protective of fetal life after viability thus has both logical and biological justifications").

202. *Casey*, 505 U.S. at 872.

203. *Id.* at 872-73.

204. *Id.* at 877-78.

205. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

deference to Congress to determine what kinds of medical procedures would fall into this category of morally actionable practices warranting State prohibition.<sup>206</sup> In *Gonzales*, the Court approved of Congress's decision to ban procedures that were similar to infanticide and compared the intact D&E procedure to state prohibition of assisted suicide.<sup>207</sup> Justice Kennedy posited that by allowing procedures that so closely resembled infanticide to be performed, those procedures will "further coarsen society to the humanity of . . . all vulnerable and innocent human life."<sup>208</sup>

Although some scholars have praised the reasoning in *Gonzales* as reflecting commonly held moral beliefs,<sup>209</sup> many scholars have criticized this morality-based reasoning for being too subjective and for contradicting Court precedent.<sup>210</sup> Professor Sonia Suter of George Washington University Law School argued that this morality-based standard "offers no clear boundaries or analytical framework for assessing when something is morally problematic" and that it "raises the problems of moral relativism."<sup>211</sup> Others critique the reasoning in *Gonzales* because it purportedly conflicts with Court precedent on the imposition of moral codes through legislation.<sup>212</sup> Justice Ginsburg, in her dissent, rebuked the *Gonzales* majority on this point:

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding

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206. *Id.* at 163.

207. *Id.* at 158 (citing *Washington v. Glucksberg*, 521 U.S. 702, 732–735 (1997)). The Court did not mention one crucial difference between intact D&E and assisted suicide, which is that the former "is concerned with the life of an entity recognized as a person by law." Rebecca E. Ivey, Note, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in Gonzales v. Carhart*, 94 VA. L. REV. 1451, 1459 (2008).

208. *Gonzales*, 550 U.S. at 157.

209. See, e.g., Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 519, 569–70 (2008) ("Justice Kennedy's . . . political instincts seem sound. . . . [H]e has roughly articulated the mainstream American view: allow women to choose abortion in the early period of pregnancy, but recognize the government's interest in expressing its citizens' moral condemnation of partial-birth abortion.").

210. E.g., Sonia M. Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514, 1583–84 (2008).

211. *Id.*

212. *Id.*; see also *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting).

fundamental rights, the Court dishonors our precedent.<sup>213</sup>

Ginsburg cites to *Casey*, which rejected an approach that would allow “principles of morality” and “moral code[s]” to dictate abortion regulation,<sup>214</sup> and *Lawrence v. Texas*,<sup>215</sup> which rejected State action that used criminal law to enforce “ethical and moral principles.”<sup>216</sup>

### C. *The State Has an Interest in Women’s Physical and Mental Health*

In addition to recognizing the State interest in protecting fetal life, the Court has recognized a State interest in protecting the health, both physical and mental, of the woman seeking an abortion.<sup>217</sup> Initially, this interest focused primarily on the physical health of the woman.<sup>218</sup> The *Roe* Court found that the State has an interest in ensuring the safety of all medical procedures, including abortions.<sup>219</sup> Therefore, during the first trimester, the State could regulate abortions in the same ways that it could regulate other medical procedures, limiting this power to measures that “reasonably relate[] to the preservation and protection of maternal health.”<sup>220</sup>

The Court further expanded the State interest in women’s health in *Casey*, in which the plurality recognized that the State had an interest not only in the physical health of the woman seeking an abortion, but also in her decisionmaking.<sup>221</sup> The joint opinion stated that measures that serve to better inform the woman seeking an abortion about the procedure and options other than abortion are constitutional.<sup>222</sup> Therefore, the plurality found that a waiting period requirement, while ostensibly burdensome for some women,<sup>223</sup> was an appropriate means to ensure informed

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213. *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting) (citations omitted).

214. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 850 (1992)).

215. 539 U.S. 558 (2003).

216. *Gonzales*, 550 U.S. at 183 (Ginsburg, J., dissenting) (quoting *Lawrence*, 539 U.S. at 571).

217. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 327 (2006) (“[O]ur precedents hold . . . that a State may not restrict access to abortions that are ‘necessary . . . for the preservation of the life or health of the [woman].’”) (quoting *Casey*, 505 U.S. at 879).

218. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

219. *Id.* at 150.

220. *Id.* at 163.

221. *Casey*, 505 U.S. at 877–78.

222. *Id.*

223. The *Casey* joint opinion dismissed findings by the District Court that the waiting period would be “particularly burdensome” on low-income women and those who had to travel long distances to receive an abortion. *Id.* at 885–87. The plurality found that “[a] particular burden is not of necessity a substantial obstacle.” *Id.* at 887.

consent.<sup>224</sup> While the State could not create a “substantial obstacle” that would hinder the woman’s ability to make the ultimate decision, the State could still “persuade her to choose childbirth over abortion.”<sup>225</sup>

The Court expanded the scope of the State interest in the mental health of the woman in *Gonzales*, in which the Court concluded that the banning of barbaric and cruel abortion procedures also aimed to protect the woman’s mental health.<sup>226</sup> The Court reasoned that one effect of the ban on “partial-birth” abortions was to prevent the woman from experiencing profound anguish after undergoing the procedure:

The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed the doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.<sup>227</sup>

While earlier abortion cases emphasized the State interest in protecting the fetus, the Court increasingly approved of measures that focused on the State interest in the physical and mental health of the woman.<sup>228</sup>

#### V. SEX- AND RACE-SELECTIVE ABORTION LAWS INFRINGE ON WOMEN’S CONSTITUTIONAL RIGHTS

No legal challenge has yet been brought against a motive-based abortion restriction, and therefore no court has ruled on the constitutionality of these laws. If a court were to review a motive-based restriction, it should strike down the law as facially unconstitutional on two separate grounds. First, the law violates a woman’s liberty interest in her autonomous decisionmaking, which protects her personal motives and beliefs in seeking the procedure. Therefore, a law that targets her personal motives violates her constitutional rights. Second, a woman seeking an abortion on the basis of sex or race will be prohibited from obtaining the procedure prior to fetal viability, which violates *Casey*’s previability rule. Although motive-based restrictions do find limited precedential support in *Gonzales*, which upheld the prohibition of a

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224. *Id.*

225. *Id.* at 878.

226. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

227. *Id.*

228. *Id.*

“gruesome and inhumane” abortion procedure,<sup>229</sup> the motive-based restrictions are distinguishable from the Partial-Birth Abortion Act in several key respects.

A. *The Right to an Abortion Encompasses the Subjective Motives and Intent of the Individual*

The Supreme Court has repeatedly stated that the decision to obtain an abortion is an intensely personal one.<sup>230</sup> The liberty interest under the Due Process Clause protects not only the right to obtain an abortion, but also the reasons and motivations behind such a decision.<sup>231</sup> Considering this dual nature of the liberty interest, laws that restrict access to abortion based on the personal motives of the individual woman infringe on the woman’s constitutional rights.

The Court has recognized a woman’s liberty interest in reproductive autonomy to incorporate the woman’s personal beliefs. In *Casey*, the plurality characterizes the right to choose or forego contraception as a decision that reflects one’s personal views.<sup>232</sup> Justice O’Connor’s description of the liberty interest in *Casey* as “the right to define one’s own concept of existence, of meaning . . . and of the mystery of human life”<sup>233</sup> highlights the liberty interest’s dual nature: it creates affirmative rights regarding actions (the right to obtain an abortion) while simultaneously protecting the beliefs and thoughts of the individual (“the right to define one’s own concept of existence”<sup>234</sup>).

While the Court now frames abortion rights primarily in terms of “liberty,”<sup>235</sup> the discourse of privacy still remains an important principle in the Court’s jurisprudence.<sup>236</sup> If the liberty right is understood to incorporate notions of privacy that protect people from “unwarranted governmental intrusion” in the realm of reproductive decisionmaking,<sup>237</sup> a law that monitors one’s beliefs and imposes the State’s values onto that decisionmaking violates that right. In this sense, the Oklahoma law that

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229. *Id.* at 141 (quoting Partial-Birth Abortion Act, Pub. L. No. 108-105, 117 Stat. 1201, 1201 (2003)).

230. *Casey*, 505 U.S. at 851; *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

231. *Casey*, 505 U.S. at 853.

232. *Id.* at 851.

233. *Id.*

234. *Id.*

235. *See id.* at 846 (“[T]he controlling word in the cases before us is ‘liberty.’”).

236. *See supra* Part IV.A.1.

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

requires women seeking an abortion to complete a lengthy questionnaire<sup>238</sup> violates women's constitutional rights, as it allows the government to intrude upon the realm of private decisionmaking.

The Court has also noted the diversity of views on abortion and the beginning of life, and concluded that women's liberty interest must reflect this diversity of opinion. The purported State interest in reducing discriminatory abortions conflicts with this expansive conception of women's liberty interest.<sup>239</sup> In *Casey*, the Court stressed that the abortion debate touches on "intimate views with infinite variations,"<sup>240</sup> and that "[a]t the heart of liberty is the right to define one's own concept of existence . . . and of the mystery of human life."<sup>241</sup> The *Casey* plurality concluded that the State therefore does not have the power to compel people to adopt certain views.<sup>242</sup> While "[m]en and women of good conscience can disagree" on abortion, the fact that some people "find abortion offensive" could not "control [the Court's] decision."<sup>243</sup> The racist or sexist views of women covered by these motive-based abortion restrictions may be subject to mainstream society's disapproval, but it does not follow that the State can then limit the reproductive liberty of these individuals. These views, while offensive to many, are still included as one "variation" of the "intimate views" referenced in *Casey*.

The Court's discussion of the liberty interest that protects intimate conduct also demonstrates how liberty encompasses both personal autonomy and autonomy of belief. In *Lawrence v. Texas*, a case where the Court struck down a ban against sodomy, Justice Kennedy wrote in his majority opinion: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."<sup>244</sup> Similarly, in *Stanley v. Georgia*,<sup>245</sup> in which the Court recognized a right to possess pornography in the home, the Court declared: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."<sup>246</sup> These cases

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238. See *supra* note 47 and accompanying text.

239. *Casey*, 503 U.S. at 853.

240. *Id.*

241. *Id.* at 851.

242. See *id.* at 850 (answering in the negative as to the "underlying constitutional issue [of] whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter").

243. *Id.* at 850.

244. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

245. 394 U.S. 557 (1969).

246. *Id.* at 565.

demonstrate that an individual's thoughts and beliefs fall within the purview of his or her liberty rights.

An opposing interpretation of liberty, one that grants the right to engage in a physical act but fails to protect the thoughts and beliefs that inform that act, results in an incomplete right. In this sense, the issue of motive-based restrictions highlights the ways in which ideas of autonomy and privacy intersect within the liberty right. Because the right is largely a right to autonomous decisionmaking, the right cannot exist without protecting, that is, keeping private and free from government regulation, the individual thoughts behind that decisionmaking. The premise that an individual's subjective intent can be the basis for limiting the constitutional right fails to recognize the Court's more expansive articulations of the liberty right.

Admittedly, the Supreme Court has affirmed a certain degree of legislative encroachment on women's mental autonomy in the context of abortion laws. For example, many of the regulations approved by the Court, such as informed consent requirements and waiting periods, seem directly tied to affecting or influencing the woman's state of mind.<sup>247</sup> In *Casey*, the Court recognized that the State has a right to "enact rules and regulations designed to encourage [the woman] to know that there are philosophical and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy."<sup>248</sup> The Court has shown itself to be increasingly receptive to measures that protect a woman's mental health.<sup>249</sup> For example, in *Gonzales* the Court upheld the abortion restriction in part because doing so may prevent the woman from feeling deep sadness and regret.<sup>250</sup>

However, the motive-based abortion restrictions take this concept of influence a step further. As opposed to merely influencing a woman's state of mind, these regulations deem certain abortions to be unlawful based on motive and intent. These laws do not aim to influence women's thoughts and understandings of abortion but instead aim to prevent women with certain thoughts and views from accessing abortion procedures. Therefore, this type of regulation exceeds the State's ability to persuade women in their decisionmaking. By attempting to regulate and restrict access to abortions based on a woman's personal beliefs, motive-based restrictions infringe on the woman's liberty interests.

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247. *Casey*, 505 U.S. at 885–86.

248. *Id.* at 872.

249. *See supra* Part III.B.3.

250. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

*B. The Motive-Based Restrictions Violate Women's Constitutional Rights by Posing an Absolute Bar to Abortion Previability*

The effect of these motive-based restrictions is to create an absolute bar to receiving an abortion for women who are obtaining the procedure for specific reasons. While the Court has allowed certain regulations previability, the Court has also firmly held that a woman must still have access to abortion during that stage of pregnancy.<sup>251</sup> The absolute prohibition before viability constitutes an undue burden and conflicts with the Court's holdings in *Casey* and *Gonzales*.

In *Casey*, the Court held that a woman has “the right . . . to choose to have an abortion before viability and to obtain it without undue interference from the State.”<sup>252</sup> Before a fetus reaches viability, the State is substantially limited in the types of regulations it can enact.<sup>253</sup> Even though the Court has upheld increasingly restrictive and invasive regulations,<sup>254</sup> it has continued to maintain that the undue burden standard precludes the total prohibition on abortions previability.<sup>255</sup> Although the Court upheld the prohibition of all “partial-birth” abortions in *Gonzales*, this was not viewed as an undue burden as the Court concluded that the procedure was never medically necessary and that other constitutional procedures were available.<sup>256</sup>

The federal bill, PRENDA, attempts to circumvent this issue by asserting that the majority of sex-selective abortions occur during the second and third trimester, stages in which the State does have the power to provide absolute bans on abortion as long as there is a health exception.<sup>257</sup> However, the statutory text does not limit its prohibition to later trimesters.<sup>258</sup> This begs the question of whether the State interest in combating gender and racial discrimination outweighs women's constitutional right to first trimester autonomous decisionmaking.

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251. *Casey*, 505 U.S. at 846.

252. *Id.* at 846.

253. *Id.* at 870.

254. *Id.* at 880–87 (upholding informed consent and twenty-four-hour waiting period requirements).

255. *Id.* at 870.

256. *Gonzales v. Carhart*, 550 U.S. 124, 162–64 (2007); see Siegel, *supra* note 141, at 1770 (“Justice Kennedy understands *Casey* to require protection for ordinary second-trimester abortions, and *Carhart* construes the Partial-Birth Abortion Act to protect these standard second-trimester procedures . . .”).

257. Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. § 2(a)(1)(D) (2011).

258. *Id.* § 3(a)(1).

Some have argued that the sex- and race-based discrimination that is the motivating force behind these abortions is serious enough to warrant legislative solutions.<sup>259</sup> It is true that in many contexts, the federal government has an interest in prohibiting discrimination. Through its Fourteenth Amendment and Commerce Clause powers, Congress has the ability to pass many forms of antidiscrimination legislation,<sup>260</sup> which can regulate private action in areas such as employment,<sup>261</sup> public accommodations,<sup>262</sup> and housing.<sup>263</sup> States have a similarly strong interest in combating discrimination, as evidenced by the fact that a majority of states have antidiscrimination statutes.<sup>264</sup> Hate crime legislation demonstrates that racial animus and other forms of bias can be the basis for heightened criminal sanctions when accompanied with criminal acts.<sup>265</sup> Some anti-abortion advocates have claimed that these abortions sought on the basis of the sex or race of the fetus are heinous enough to constitute hate crimes.<sup>266</sup>

While the State interest in prohibiting discrimination is valid, the interest must be viewed through a different lens when a fundamental interest is implicated.<sup>267</sup> For example, Congress can enact valid antidiscrimination legislation, but the need to protect religious freedom requires exemptions for religious employers.<sup>268</sup> The same holds true for state laws: in *United States v. Dale*,<sup>269</sup> the Court applied strict scrutiny to a state antidiscrimination law when it infringed on an organization's First Amendment rights.<sup>270</sup> The existence of a fundamental right does not necessarily render the State interest moot, as certain government

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259. See, e.g., Paulsen, *supra* note 11.

260. David B. Oppenheimer, *The Supreme Court's Conflict Over Antidiscrimination Law*, 37 HUM. RTS. 18, 18–19 (2010).

261. 42 U.S.C. § 2000e (2012).

262. *Id.* § 2000a.

263. *Id.* § 3601.

264. Jarod S. Gonzales, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 116–17 (2007).

265. See 18 U.S.C. § 249 (2012).

266. E.g., *Ultimate Hate Crime: Gender Selection Abortions*, YOUTUBE, <http://www.youtube.com/watch?v=X-PlpCeCyN8> (last visited June 5, 2012).

267. Courts must apply strict scrutiny to legislation that infringes on a fundamental right. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

268. See Julie Manning Magid & Jamie Darin Prenekert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMPL. L. 191, 194–95 (2005).

269. 530 U.S. 640 (2000).

270. *Id.* at 644.

interests are compelling enough to justify the infringement.<sup>271</sup> However, a law that directly infringes a woman's constitutional right to *decide* whether to terminate a pregnancy is another matter. Considering that antidiscrimination laws generally target behavior that is not deemed fundamental for constitutional purposes,<sup>272</sup> arguments in favor of motive-based restrictions that make analogies to these laws are fundamentally flawed. Because the Court has maintained that viability is still the proper standard to determine the extent to which States can prohibit abortions, rather than State interests in preventing discrimination, motive-based restrictions conflict with *Casey's* holding.

C. *The State Interests Recognized in Gonzales Are Distinguishable from Those Asserted in Motive-Based Abortion Restrictions*

One argument that could be made in defense of the constitutionality of motive-based abortion laws is that these laws prohibit conduct that is considered “barbaric” and “inhumane,” and therefore abortions that are motivated by certain prejudices are in the same vein as the prohibition on “partial-birth” abortion in *Gonzales*.<sup>273</sup> In that case, the Court upheld a federal ban on intact D&E based partly on Congress's finding that the procedure was “gruesome and inhumane.”<sup>274</sup> The federal bill banning sex- and race-selective abortions contains findings that seem to echo the moral outrage in the Partial-Birth Abortion Act.<sup>275</sup> For example, the Prenatal Nondiscrimination Act stated that sex-selection abortion is a “barbaric” practice of “sex-based or gender-based violence,” and often occurs in later stages of pregnancy when the fetus “has developed sufficiently to feel pain.”<sup>276</sup>

Due to the fact that the moral justifications that were approved by the Court in *Gonzales* have few limiting principles—“gruesome” is a subjective standard, especially when it comes to medical procedures—a

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271. *Zablocki*, 434 U.S. at 386–87. Professor Jaime Staples King of UC Hastings argues that the State interest in “societal integrity” may allow courts to regulate certain aspects of reproductive decisionmaking, such as access to reproductive technology. King, *supra* note 8, at 56.

272. See, e.g., *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (“There is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union.”); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

273. See generally *Suter*, *supra* note 210, at 1587–92.

274. *Gonzales v. Carhart*, 550 U.S. 124, 141 (2007).

275. Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. § 2(a)(1)(D) (2011).

276. *Id.*

State defending motive-based restrictions could argue that the laws are driven by similar moral concerns. It is also reasonable to assume that there are many who would find the practice of aborting fetuses solely on the basis of the sex or race of the fetus to be morally repugnant.<sup>277</sup> In the House Judiciary Committee hearing for PRENDA, Representative Franks framed the issue in purely moral terms:

I truly hope that the debate and passage of this bill will call all Americans . . . to an inward and heartfelt reflection upon the humanity of unborn children and the inhumanity of what is being done to them . . . . But, until then, can we not, at the very least, agree that it is wrong to knowingly kill unborn children because they are the wrong color or because they are baby girls instead of baby boys?<sup>278</sup>

The moral opposition to discrimination on the basis of race or sex is only heightened when targeted at those who are deemed innocent and defenseless, and when the discrimination results in the end of potential life.

The “gruesome and inhumane” standard provided in *Gonzales* fails to provide clear guidance on how to adjudicate future abortion laws that implicate similar State interests. However, a close reading of *Gonzales* provides certain guiding principles that should factor into the analysis of whether motive-based restrictions promote a lawful government purpose. While the motive-based restrictions may further the State interest in preventing the moral coarsening of society, other State interests recognized in *Gonzales* are markedly absent, making the motive-based laws distinguishable on several grounds. First, the motive-based abortion laws do not target actions that are analogous to criminal acts. Second, the laws do not promote the mental and physical health of the woman. Third, the law at issue in *Gonzales* focused on abortion procedures, while motive-based laws restrict women’s liberty rights based on their personal beliefs.

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277. Live Action, an anti-abortion non-profit organization that has produced “sting” videos involving Planned Parenthood, has advocated forcefully on the issue of sex-selective abortions. See Laura Bassett, *Planned Parenthood Sting Caught on Video, Released by Anti-Abortion Activists*, HUFFINGTON POST (May 29, 2012, 11:16 AM), [http://www.huffingtonpost.com/2012/05/29/planned-parenthood-video\\_n\\_1552672.html](http://www.huffingtonpost.com/2012/05/29/planned-parenthood-video_n_1552672.html); PROTECTOURGIRLS.COM: A PROJECT OF LIVE ACTION, <http://protectourgirls.com> (last visited Feb. 7, 2013).

278. *Hearing on H.R. 3451 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 1 (2011) (statement of Rep. Trent Franks).

1. *Motive-Based Restrictions Do Not Target Actions that Are Analogous to Criminal Acts*

The *Gonzales* Court concluded that the State can prohibit uniquely brutal or inhumane abortion procedures when the prohibited actions are analogous to criminal actions.<sup>279</sup> The Court offered assisted suicide as another example of this line-drawing principle, reasoning that its similarity to euthanasia warranted government prohibition.<sup>280</sup> If the similarity to criminal actions is an integral part of the Court's reasoning, then *Gonzales* does not support motive-based restrictions. While discrimination on the basis of race and sex is unlawful in many contexts,<sup>281</sup> it does not rise to the level of being criminally actionable on its own. If the court's reasoning applies to any abortion procedure that is brutal or inhumane, then the application of *Gonzales* to motive-based restrictions is similarly problematic. The abortion of a fetus of a certain race or sex is not any more "brutal" or "inhumane" than any other abortion procedure, as both procedures extinguish fetal life through the same mechanisms.

2. *Motive-Based Restrictions Do Not Protect Women's Mental or Physical Health*

Motive-based restrictions cannot be justified based on concerns for the woman's mental health. The *Gonzales* Court supported its decision by identifying the ban as a measure that will ultimately protect women's mental health,<sup>282</sup> and by recognizing that the State can impose measures that protect women from the perceived savagery of specific abortion methods.<sup>283</sup> These arguments are predicated on an idea of the woman as a passive and uninformed patient, at risk of experiencing "[s]evere depression and loss of esteem" and "regret[ting] [her] choice to abort the infant life [she] once created and sustained."<sup>284</sup>

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279. *Gonzales*, 550 U.S. at 158.

280. *Id.*

281. *See supra* notes 260–264 and accompanying text.

282. *Gonzales*, 550 U.S. at 159–60.

283. *Id.* at 157.

284. *Id.* at 159. Justice Kennedy, writing for the majority, conceded that there is no "reliable data to measure the phenomenon" of female post-abortion regret, but cited to an amicus brief detailing stories of this phenomenon. *Id.* Professor Reva Siegel points out that Kennedy failed to mention an opposing brief containing the testimonies of over 150 women who elected second-trimester abortions. Siegel, *supra* note 141, at 1732 n.110. Many scholars have critiqued the Court's reasoning in this area and claimed that these measures are not in fact protective of women's well being. Suter, *supra* note 210, at 1579 ("Clearly, a statute cannot promote informed consent by

The hypothetical woman targeted by these laws, one who is prohibited from obtaining an abortion due to her sexist or racist views, stands in stark contrast to the emotionally fragile woman imagined by the *Gonzales* Court. The hypothetical sexist or racist abortion-seeker does not suffer from a lack of information, but rather has too much of it, as she knows certain information about her fetus that is motivating her to obtain an abortion. The nature of the motive-based restriction implies a degree of knowledge and intentionality on the part of the woman—she is choosing an abortion because she consciously does not want a specific child. While this woman may come to “regret her choice,” she is not necessarily more susceptible to this regret than a woman who chooses the procedure for reasons relating to her income, career, health, or family size.

The State may have a sufficient interest in preventing these types of abortions that it can pass legislation that requires women to learn about the alleged harmfulness of or moral opposition to these discriminatory actions. Many states have passed “informed consent” laws that require doctors to impart certain information to a woman before performing an abortion, including detailed descriptions of the fetus<sup>285</sup> and information about potential side effects of the procedure.<sup>286</sup> One can imagine that a State could pass a law that requires the woman to hear about sex and race equality, or the State interest in preventing a gender gap in the population, and a court would analyze these types of laws under *Casey*’s undue burden test. Preventing a woman from obtaining an abortion based on her personal beliefs, however, does not flow from the State’s informative powers.

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eliminating any possibility of consent.”); Ronald Dworkin, *The Court & Abortion: Worse Than You Think*, N.Y. REV. BOOKS, May 31, 2007, at 21 (noting that if the goal is to prevent a woman’s “possible ‘severe depression and loss of self esteem,’ . . . by not permitting her to choose how her fetus will be killed, why may it not protect her more securely by not permitting her an abortion at all?”).

285. *E.g.*, KY. REV. STAT. ANN. § 311.725 (West 2006) (“The materials shall include . . . a pictorial or photographic depiction of the zygote, blastocyte, embryo, or fetus.”); MICH. COMP. LAWS ANN. § 333.17015 (West 2001) (requiring a “medically accurate depiction, illustration, or photograph and description” of the fetus); TEX. HEALTH & SAFETY CODE ANN. § 171.016 (West 2012) (“The informational materials must . . . inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments”); UTAH CODE ANN. § 76-7-305.5 (West 2008).

286. *E.g.*, TEX. HEALTH & SAFETY CODE ANN. § 171.012 (requiring doctors to inform women of the possibility of hemorrhaging and increased risk of breast cancer due to an abortion).

3. *Motive-Based Restrictions Directly Target Women's Liberty, While Gonzales Dealt with Medical Procedures*

Another major difference between the Partial-Birth Abortion Act and motive-based abortion restrictions is that the former targets abortion procedures, while the latter targets the purpose behind the woman's decision. Because the law at issue in *Gonzales* focused on one abortion procedure, the Court concluded that the law did not hinder women's ability to exercise their reproductive rights. The *Gonzales* majority held that Congress had the authority to conclude that the procedure is never medically necessary.<sup>287</sup> A corollary of this reasoning is that a woman who seeks an abortion, as long as she is seeking the abortion prior to viability, still has access to an abortion.<sup>288</sup> All that is restricted is her access to one specific type of procedure.

The "gruesome" aspect of intact D&E derives from the physical components of the procedure,<sup>289</sup> not from the purpose or motivation behind the procedure. This is a useful distinction, as the motivation, of either the woman or the doctor, behind an intact D&E is the same for all other abortions: the termination of the pregnancy. *Gonzales* does not address whether the *purpose* behind obtaining an abortion can be "inhumane" enough to warrant restriction.

Due to these important differences, a court should not uphold a motive-based restriction based on *Gonzales*. The precedential weight of the Court's decision in *Gonzales*, as it pertains to legislation prohibiting other abortion procedures deemed gruesome or immoral, is still unclear.<sup>290</sup> However, motive-based restrictions do not share several of the primary characteristics of the partial-birth abortion procedure that supported the Court's reasoning.

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287. *Gonzales*, 550 U.S. at 163–64.

288. *Id.* at 164 ("Alternatives are available to the prohibited procedure.").

289. *Id.* at 141 (quoting Partial-Birth Abortion Act, Pub. L. No. 108-105, 117 Stat. 1201, 1201 (2003)).

290. This does not mean that courts have not considered *Gonzales* in other contexts. In *Isaacson v. Horne*, 884 F. Supp. 2d 961 (D. Ariz. 2012), a United States District Court interpreted *Gonzales* as allowing states to prohibit previability abortions generally. *See id.* at 967–68. Based on this interpretation of the case, the court upheld Arizona's law banning abortions after twenty weeks because there was a health exception and abortions before twenty weeks were still available. *Id.* at 967–71. The trial court's decision is currently on appeal before the Ninth Circuit. Julia Zebley, *Ninth Circuit Hears Arguments on Arizona 20-Week Abortion Ban*, JURIST (Nov. 6, 2012, 8:13 AM), <http://jurist.org/paperchase/2012/11/ninth-circuit-hears-arguments-on-arizona-20-week-abortion-ban.php>.

## CONCLUSION

Only six states currently have laws that restrict women's access to abortion based on their personal motivations, but based on recent state legislative patterns, this number may grow in the future. The fact that advances in reproductive technologies will provide greater opportunities to learn more information about the genetic characteristics of the fetus means that support for these measures may also increase. While many people may have strong moral opposition to sex- and race-selective abortions, these motive-based restrictions conflict with many of the central principles of the Court's reproductive liberty jurisprudence. Numerous cases demonstrate that the liberty protected by the Due Process Clause encompasses the personal beliefs and values that inform one's reproductive decisionmaking. Also, the State cannot pass measures that unduly restrict women from obtaining abortions during the first trimester. Lastly, while *Gonzales* may support other abortion restrictions based on moral grounds, many of the justifications supporting Congress's ban on partial-birth abortions do not apply to motive-based abortions, thereby minimizing the applicability of *Gonzales* as precedent. While motive-based restrictions target practices that many people find morally offensive, these laws infringe women's constitutional rights. Therefore, a court that reviews a motive-based abortion restriction in the future should hold the law to be unconstitutional.