

ABORTION POST-*GLUCKSBERG* AND POST-*GONZALES*: APPLYING AN ANALYSIS THAT DEMANDS EQUALITY FOR WOMEN UNDER THE LAW

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I. INTRODUCTION

[Abortions] are . . . disastrous to a woman's mental, moral, and physical wellbeing.¹

Traditionally, such discrimination [against women] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.²

While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.³

The Partial Birth Abortion Act of 2003⁴ is a sex-based classification that discriminates against women. Although the government's proclaimed interest in saving unborn life is certainly commendable,⁵ the Act's use of a sex-based classification violates the Equal Protection Clause of the Fourteenth Amendment. In place of the numerous non-discriminatory policies and programs that have proven effective in preventing the termination of unwanted pregnancies and in protecting unborn life,⁶ the government has chosen to use a sex-based classification that requires only women to sacrifice their freedom, personal autonomy, liberty, health, and economic equality.⁷ Even though

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1. HORATIO ROBINSON STORER, *WHY NOT?* 76 (1867).

2. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

3. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007) (internal citations omitted).

4. 18 U.S.C. § 1531(b)(1)(A) (2003).

5. See *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 846 (1992) (holding that "the State has legitimate interests from the outset of the pregnancy in protecting . . . the fetus that may become a child.").

6. See Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 3, 5 (Jack Balkin ed., 2005).

7. See, e.g., 18 U.S.C. § 1531(b)(1)(A) (2003) (criminalizing the abortion of a fetus contained within the body of a woman—without enacting any similar restrictions on a man's reproductive activities that give rise to the creation or preservation of unborn life).

unwanted pregnancies cannot be created without the reproductive organs of both a woman and a man, the Act does not require men to sacrifice any freedom, personal autonomy, liberty, health, or economic equality to prevent any abortions. Furthermore, extensive evidence indicates that the government's use of this sex-based classification in abortion regulation ultimately fails to achieve the government's compelling objective.⁸ Consequently, the government cannot provide an "exceedingly persuasive justification" for its decision to selectively encumber the liberty and equality of women only.⁹ Because the government cannot satisfy the exceedingly persuasive justification standard applied to all sex-based classifications,¹⁰ the Act does not pass constitutional muster under the Equal Protection Clause of the Fourteenth Amendment.

This is certainly not a new argument, as many constitutional law scholars have argued that abortion regulations violate the Fourteenth Amendment's Equal Protection Clause.¹¹ The Court's recent decision in *Gonzales v. Carhart*,¹² however, provides compelling new evidence to reinforce the argument that abortion regulations, since their inception in the first half of the nineteenth century, have always discriminated on the basis of sex in violation of the Equal Protection Clause. Further, *Gonzales* signals the beginning of the now inevitable demise of *Roe v. Wade*'s constitutional jurisprudence,¹³ and consequently, the

8. See *infra*, notes 137–147.

9. *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

10. See *id.*

11. See Jack M. Balkin, *How New Genetic Technologies Will Transform Roe v. Wade*, 56 EMORY L.J. 843, 851 (2007) (arguing that "by viewing the abortion right as part of a generalized right of privacy, the Court obscured the relationship between women's reproductive liberty and their equality with men."); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) ("[T]he Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex equality perspective."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (arguing that "the development of modern constitutional sex equality doctrine has suffered from a lack of focus on biological reproductive differences between men and women."); Eileen McDonagh, *The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-level Abortion Legislation*, 56 EMORY L.J. 1173, 1174 (2007) ("As many legal scholars have recommended for decades, the answer to the question of how to strengthen reproductive rights is to add constitutional guarantees under the Equal Protection Clause to the current foundation of abortion rights based upon the Due Process Clause."); Reva Siegel, Siegel, J., *Concurring*, in WHAT ROE V. WADE SHOULD HAVE SAID 63, 63 (Jack M. Balkin ed., 2005) ("Too often, laws that single women out for special treatment in virtue of their maternal role have excluded women from participating as equals with men in core activities of citizenship."); Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2425 (1994) (arguing for the application of Equal Protection Clause analysis where "the law takes a characteristic limited to one group of citizens and turns that characteristic into a source of social disadvantage."). Cf. Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. CHI. LEGAL F. 137, 145 (2002) (arguing "for the importance of viewing privacy and equality in tandem and examining the synergy between the two doctrines in women's rights cases.").

12. 127 S. Ct. 1610 (2007).

13. *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

need to supplant *Roe*'s substantive due process analysis with an Equal Protection Clause framework. Although the Court has successively narrowed the definition of the right *Roe* first defined,¹⁴ the *Gonzales* Court went one step further when, in defiance of the Court's prior holding in *Stenberg v. Carhart*,¹⁵ the *Gonzales* Court held that the absence of a health and safety exception for the woman did not render the Act "invalid on its face."¹⁶ To justify this decision, the *Gonzales* Court invoked "ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited" as

14. See, e.g., *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 837 (1992) (granting states the freedom to impose some restrictions on a woman's fundamental right to abortion, so long as that restriction does not constitute an "undue burden").

15. 530 U.S. 914, 921 (2000) ("[S]ubsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.") (internal quotations omitted).

16. *Gonzales*, 127 S. Ct. at 1637–38 (holding that despite the fact that "some recitations in the Act are factually incorrect[,] . . . [c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health. . . .") (emphasis added). This unquestioned deference to the Legislature is remarkable considering the Court has not granted the Legislature the same leniency under the Commerce Clause in drafting legislation to protect women from gender-based violence. See *United States v. Morrison*, 529 U.S. 598, 614 (2000) ("§ 13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.") (internal citations omitted). Thus the Court's more recent deference to the Legislature in *Gonzales* contradicts the Court's rationale in *Morrison*, and moreover, harkens back to a time in 1948 when "legislative deference" was really the Court granting the Legislature permission to enact discriminatory, sex-based classifications without fear of any encroaching judicial scrutiny. See *Goesaert v. Cleary*, 335 U.S. 464, 466–67 (1948) ("Michigan may deny to all women opportunities for bartending This Court is certainly not in a position to gainsay such belief by the Michigan legislature. . . . We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives."); See also Joshua E. Perry, *Partial Birth Biopolitics*, 11 DEPAUL J. HEALTH CARE L. 247, 251 (2007) ("Justice Kennedy's rationale signals a biopolitical power shift in decision-making away from a woman and her physician, and in combination with his deference to 'legislative competence,' an alarming willingness by the third branch of government to defer to biopolitical regulation of women's bodies by legislative bodies."). *Gonzales*, therefore, effectively illustrates how unquestioned deference to the Legislature concerning its use of sex-based classifications greatly jeopardizes the Equal Protection of women under the law.

prejudicial and harmful to women's ability to participate equally and fully in society.¹⁷

Gonzales highlights more than just the discriminatory rationale behind the government's use of abortion regulations. With its approval of an abortion ban that leaves out an exception for the health and safety of women,¹⁸ *Gonzales* exemplifies the recent collapse of the Due Process Clause's privacy framework and its ultimate failure to protect women's rights adequately. Most scholars now agree: *Roe* was both wrong and constitutionally weak the day it was decided.¹⁹ Although *Roe*'s constitutional underpinnings were frail in 1973, today in 2009, it is questionable whether they still exist.

In *Washington v. Glucksberg*, the Court rejected the very methodology the *Roe* Court employed to justify its conclusion that a fundamental right to abortion exists.²⁰ Thus, with the combination of the Court's decisions in *Gonzales* and *Glucksberg*, the Court has effectively placed *Roe v. Wade* and the fundamental right to abortion on the endangered constitutional species list. Although the Court may never directly overrule *Roe*, in *Glucksberg* and subsequently in *Gonzales*, it has already eradicated the constitutional underpinnings upon which the *Roe* Court originally defined a woman's fundamental right to an abortion.

Therefore, in response to *Gonzales v. Carhart*, this article offers the following conclusion: *Roe v. Wade* was flawed the day it was decided. The correct constitutional query was never whether a fundamental right to an abortion could be derived from the fundamental right to marital privacy the Court

17. *Gonzales*, 127 S. Ct. at 1649 (Ginsburg, J., dissenting). See also *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) (“No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”); Jack Balkin, *Gonzales v. Carhart—Three Comments*, April 18, 2007, available at <http://balkin.blogspot.com/2007/04/gonzales-v-carhart-three-comments.html> (noting that this “new anti-abortion rhetoric attempts to demonstrate that few women in their right minds, who really understand what abortion involved, would defy their natural love for their children and consent to an abortion, much less seek to procure one. It tries to perform a rhetorical jujitsu move on the idea of choice, by suggesting—without any empirical evidence, that women don't really choose abortions, and that to have an abortion is actually a violation of their ‘true’ choices.”).

18. *Gonzales*, 127 S. Ct. at 1635–37.

19. Whereas many scholars are now criticizing the Court's reasoning in *Roe*, many others have criticized the decision for decades. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926–27 (1973) (“[*Roe*] is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.”). See also Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 291 (2008) (“Criticisms of *Roe* have generally proceeded precisely on this ground: the right to sexual privacy is not specifically mentioned in the Constitution, and there is no evidence that the framers intended the Constitution to protect a woman's right to abortion.”); Teresa Stanton Collett, *The Roberts Court and Equal Protection: Gender, Race, and Class Gender*, 59 S.C. L. REV. 701, 702 (2008) (“My conclusions compel me to join the legions of legal scholars who have sharply criticized the reasoning employed by the Court in *Roe v. Wade*.”); Ginsburg, *supra* note 11, at 376 (criticizing *Roe* because the Court “presented an incomplete justification for its action.”); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 480 (1990) (noting that the *Roe* Court did not “ground its decision, that abortion is a fundamental right, in the text of the Constitution.”).

20. 521 U.S. 702, 703 (1997) (holding that the Due Process Clause of the Fourteenth Amendment only “protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.”).

defined in *Griswold v. Connecticut*.²¹ Instead, the proper question for constitutional scrutiny has always been and continues to be: How has the government, with the goal of preventing the termination of unborn life created by the collective actions of both a woman and a man, imposed regulations that require only the woman to sacrifice her freedom, personal autonomy, liberty, health, and economic equality to save the life?

Because the government has historically enacted laws criminalizing abortion to preserve traditional stereotypes regarding a woman's domestic and subordinate position in society,²² abortion regulations necessitate an Equal Protection Clause analysis. Thus, this article will examine first how *Gonzales* and *Glucksberg* forecast *Roe's* now inevitable demise, and accordingly, why abortion regulations must now be evaluated under an Equal Protection Clause analysis—in place of the crumbling Due Process Clause framework.²³ Finally, this article will explain how and why the Partial Birth Abortion Act of 2003 violates the Equal Protection Clause of the Fourteenth Amendment.

II. WASHINGTON V. GLUCKSBERG: HOW THE COURT'S ADOPTION OF THE HISTORY AND TRADITIONS METHODOLOGY HAS ENDANGERED THE RIGHT TO ABORTION

The biggest threat to the future of a woman's fundamental right to abortion is the now inevitable demise of the rational continuum methodology. To define a fundamental right to abortion, the *Roe* Court relied on Justice Harlan's rational continuum methodology²⁴ to extend the privacy rights previously defined in *Griswold v. Connecticut*²⁵ and *Eisenstadt v. Baird*²⁶ to include a woman's right to abortion. More recently, in *Glucksberg*, the Court dismissed Harlan's rational continuum methodology, holding that the Due Process Clause of the Fourteenth Amendment only "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."²⁷ Because one cannot easily argue that a woman's right to an abortion is "deeply rooted in this Nation's history and traditions,"²⁸ the *Glucksberg* Court's implementation of a strict history and traditions methodology has undermined *Roe's* constitutional foundation—placing the continued existence of a fundamental right to abortion in great jeopardy.

21. 381 U.S. 479 (1975).

22. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265 (1992).

23. Cf. Scott A. Moss & Douglas M. Raines, *The Intriguing Federalist Future of Reproductive Rights*, 88 B.U.L. REV. 175, 178 (2008) (arguing in place of both the Due Process and Equal Protection clauses, women's rights advocates should challenge abortion regulations under the provisions found within individual states' constitutions).

24. See *infra*, note 29, at 168–70.

25. 381 U.S. 479 (1965).

26. 405 U.S. 438 (1972).

27. *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997).

28. *Id.* at 721.

A. The Birth of the Rational Continuum Methodology: How Harlan's Dissent in *Poe v. Ullman* Led to the Conception of a Woman's Fundamental Right to Abortion

Because the fundamental right to abortion is not an enumerated right, found within the text of the Constitution, the *Roe* Court had to rely on Justice Harlan's "rational continuum methodology" to conclude that the right to abortion is "embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment."²⁹ The period preceding Justice Harlan's dissent in *Poe* was one of great judicial restraint in the area of substantive due process. At that time, the Court was hesitant to define new fundamental rights that were neither explicitly listed in the Constitution's text nor commonly recognized within this Nation's traditions.³⁰ Justice Harlan's understanding of substantive due process can thus be seen as a modification of the pre-New Deal history and traditions approach, which inquired whether the right in question was "so rooted in the traditions and conscience of our people as to be ranked as fundamental."³¹ Justice Harlan challenged the Court's narrow interpretation of the Due Process Clause, arguing that the Constitution protects more rights than merely those that have been well-recognized throughout this Nation's traditions.³² Arguing that Due Process is not a simple "formula" of history and tradition analysis, Justice Harlan asserted that Due Process is instead a question of balancing, a sort of "rational continuum":

Due Process has not been reduced to any formula; its content cannot be determined by reference to any code The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.³³

Thus, the *Roe* Court adopted Justice Harlan's iteration of the rational continuum methodology and broadly interpreted the Constitution as inclusive of the fundamental right to abortion.³⁴ Although the Court could not conclude that this Nation's history and traditions directly supported a fundamental right to abortion, the *Roe* Court was able to look to applicable precedents in previous

29. *Roe v. Wade*, 410 U.S. 113, 168–70 (1973) (Stewart, J., concurring) (noting that it was the Majority's use of Justice Harlan's rational continuum methodology that permitted the Court to conclude that it "[wa]s correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.").

30. STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 170 (1996).

31. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

32. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

33. *Id.* (emphasis added).

34. *See* 410 U.S. 113, 169 (1973) (Stewart, J., concurring) (explaining that in deriving a fundamental right to abortion, the Court had adopted Justice Harlan's view that "[t]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.") (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

cases, such as *Griswold* and *Eisenstadt*, and derive its own newly defined fundamental right to abortion.³⁵

Roe was certainly not the first, nor the last, Court to rely heavily on Justice Harlan's rational continuum methodology to justify its creation of a new fundamental right. In *Griswold*, *Eisenstadt*, *Roe*, and *Casey*, the Court applied the rational continuum methodology to liberty questions dealing with sexuality, reproductive decisions, and intimate sexual relations—which the Court classified as falling under a broad category of liberty interests concerning the fundamental right to privacy.³⁶ During a period in which Harlan's rational continuum methodology controlled the constitutional jurisprudence constituting Due Process, the Court used Harlan's methodology to expand several constitutional rights in decisions such as *Griswold* (defining the right to marital privacy), *Eisenstadt* (extending the right defined in *Griswold* to unwed singles to be free from unwarranted governmental intrusion in the personal decision of whether to beget a child), and *Casey* (reaffirming the Court's decision in *Roe* to extend the right in *Eisenstadt* to the right to choose abortion before fetal viability).³⁷ During this protracted period, the Court took Justice Harlan's rational continuum methodology to its extreme, focusing almost exclusively on evaluating the intrinsic value of the liberty interest (or fundamental right) in question, while giving only cursory (if any) consideration of whether this Nation's history and traditions directly supported any of the rights in question.³⁸

From *Griswold* in 1965, to *Casey* in 1992, it was clear that the constitutional foundation of the Court's recognition of a woman's fundamental right to abortion, as derived from her right to autonomy and control over her reproductive decisions, was Harlan's rational continuum methodology.³⁹ In *Casey*, the Court once again cited its adherence to Justice Harlan's rational continuum methodology—rejecting Chief Justice Rehnquist's insistence that the proper methodology was a history and traditions analysis of the right in question.⁴⁰ In an opinion where the only reference to this Nation's history and tradition came in the dissent,⁴¹ the majority in *Casey* held that “the liberty protected by the Fourteenth Amendment [includes] the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁴²

35. *Id.* at 153.

36. See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 88 (2002); Laurence H. Tribe, *Lawrence v. Texas, the “Fundamental Right” that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1939 (2004).

37. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

38. Post, *supra* note 36, at 88.

39. *Casey*, 505 U.S. at 848–49 (re-affirming the application of Justice Harlan's “rational continuum” methodology, which the Court first adopted in *Griswold v. Connecticut*, when the Court “held that the Constitution does not permit a State to forbid a married couple to use contraceptives.”) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

40. See *Casey*, 505 U.S. at 940 (Rehnquist, J., dissenting); See also GRIFFIN, *supra* note 30, at 173.

41. See *Casey*, 505 U.S. 951 (Rehnquist, J., dissenting).

42. *Id.* at 851 (majority opinion).

B. The Untimely Demise of the Rational Continuum Methodology: How the *Glucksberg* Court's Strict Implementation of a History and Traditions Methodology Has All but Eviscerated *Roe v. Wade*

Although *Casey* may have reaffirmed the Court's adherence to Harlan's rational continuum methodology in 1992, this affirmation was retracted five years later in 1997, when the Court issued its decision in *Washington v. Glucksberg*.⁴³ In *Glucksberg*, the Court rejected Harlan's rational continuum methodology and instead adopted a strict adherence to the history and traditions methodology.⁴⁴ Through the application of this methodology, the Court declined to define a new fundamental right to end one's own life; instead, the Court concluded it could find no evidence of this Nation's historical and traditional recognition of a right to euthanasia.⁴⁵ The *Glucksberg* Court, therefore, restricted the rights the Due Process Clause protects to only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."⁴⁶

This strict implementation of the history and traditions methodology has threatened the constitutional validity of the Court's reliance on Harlan's rational continuum methodology to define a fundamental right to abortion in *Roe*. In fact, the Court's decision in *Glucksberg* calls into question not only *Roe v. Wade*, but the entire line of Supreme Court precedent built on the rational continuum methodology. *Griswold*, *Eisenstadt*, *Roe*, and *Casey* all exemplify the Court's reliance on a methodology that considers "the traditions from which [this country] developed as well as the traditions from which it broke,"⁴⁷ a methodology that is entirely antithetical to the history and traditions methodology the Court has now firmly established in *Glucksberg*.

In the eleven years since the Court's ruling in 1997, *Glucksberg's* jurisprudence has proven to be quite potent. Lower courts have overwhelmingly elected to apply *Glucksberg's* history and traditions methodology over Harlan's rational continuum when evaluating questions of substantive due process.⁴⁸ This is not surprising since *Glucksberg's* cogent language leaves no question that the history and traditions methodology is the "correct" methodology to apply.⁴⁹ Further, it is quite remarkable that, while the *Gonzales* Court cited *Glucksberg* three times, not once did the *Gonzales* Court cite to *Roe*.⁵⁰ The Court's decision in *Gonzales*, therefore, now stands as an example of how the Court can use *Glucksberg* to restrict a woman's right to abortion, since the "narrow, restrained approach to substantive due process in *Gonzales v. Carhart* [. . .] shows that [the

43. 521 U.S. 702 (1997).

44. *Id.* at 703.

45. *Id.* at 722–23.

46. *Id.* at 703.

47. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

48. See Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 419–20 (2006).

49. See *id.*

50. The Court only cited *Roe* indirectly, through citations that explained how *Casey* altered *Roe's* initial trimester framework. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1610, 1617, 1626, 1633 (2007).

Justices have recommitted themselves to the narrow, restrained approach of *Glucksberg* in substantive due process cases.”⁵¹ *Glucksberg* has erased Harlan’s rational continuum approach from the substantive due process framework, and in turn, has provided lower courts with a methodology that is now easier to apply and more predictable in its outcome—a methodology that above all, threatens the future of a right to abortion through its advocacy of a higher degree of judicial restraint.⁵²

Glucksberg’s reinstatement of the history and traditions methodology is so strict that some scholars have concluded that *Glucksberg* fundamentally changed the course of Due Process altogether.⁵³ Some scholars even questioned whether *Glucksberg* directly overruled the prior Due Process precedents of *Griswold*, *Roe*, *Eisenstadt*, and *Casey*.⁵⁴ Yet instead of directly overruling cases like *Casey* and *Griswold*, the *Glucksberg* Court simply reshaped them to fit within the *Glucksberg* mold.⁵⁵ While the Court in *Casey* made no mention of the history and traditions methodology (and instead directly quoted Justice Harlan’s dissent in *Poe*),⁵⁶ the *Glucksberg* Court practically rewrote *Casey*, rejecting the notion that *Casey* was based on Harlan’s rational continuum methodology and instead, proclaiming that the “Court’s opinion in *Casey* [. . .] in a general way and in light of [its] prior cases[.]” described rights “that [the] Court identified as so deeply rooted in our history and traditions.”⁵⁷ Similarly, the *Glucksberg* Court took a case like *Griswold*, where the Court held that there was a fundamental right to the use of contraceptives based on Justice Harlan’s rational continuum methodology, and reframed it as a case that defined a fundamental right to contraceptives based on the longstanding history and tradition of rights older “than the Bill of Rights.”⁵⁸ Thus, although *Glucksberg* embodies the antithesis of Justice Harlan’s rational continuum methodology as applied in *Griswold*, *Eisenstadt*, *Roe*, and *Casey*, *Glucksberg* did not directly overrule that specific line of Court precedent. Instead, *Glucksberg* merely rewrote the history of substantive due process law—writing a new history that tells a story of an almost exclusive reliance on the history and traditions methodology—and effectively excludes the story of the Court’s earlier adoption of the rational continuum from Justice Harlan’s dissent in *Poe*.⁵⁹

51. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1518 (2008).

52. See *id.* at 1520 (“Gonzales is a pro-judicial restraint, anti-substantive due process decision.”); Post, *supra* note 36, at 92.

53. Post, *supra* note 36, at 93 (“By collapsing substantive due process into a question of historical fact, *Glucksberg* transformed the Court from an institution engaged in cultural judgments into an institution that enforced the cultural judgments of others.”).

54. See Tribe, *supra* note 36, at 1894. See also Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 39 (2003) (arguing that *Glucksberg*’s strict adherence to the history and traditions methodology does not support many of the rights defined in the Court’s line of privacy cases).

55. See *Washington v. Glucksberg*, 521 U.S. 702, 727 & n.19 (1997).

56. *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 848–49 (1992) (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961)).

57. *Id.*

58. *Id.*

59. See Post, *supra* note 36, at 92.

In a post-*Glucksberg*, post-*Gonzales* world, a woman's right to abortion is no longer secure under the Due Process Clause. Instead, women's rights advocates need to move their legal discourse out from under the collapsing substantive due process framework, and begin to argue what has been true all along: current abortion regulations are sex-based classifications that violate the Equal Protection Clause of the Fourteenth Amendment.

III. GONZALES V. CARHART: HOW THE PARTIAL BIRTH ABORTION ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Man is, or should be, woman's protector and defender. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.⁶⁰

The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.⁶¹

Respect for human life finds an ultimate expression in the bond of love the mother has for her child.⁶²

The Partial Birth Abortion Act of 2003 violates the Fourteenth Amendment's Equal Protection Clause. The Act constitutes a sex-based classification, and the government has failed to put forth an "exceedingly persuasive justification" that "show[s] at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."⁶³ Although the Court has yet to scrutinize abortion laws within the Equal Protection Clause framework, the *Gonzales* Court's consideration of the "bond of love the mother has for her child"⁶⁴ as a legitimate rationale for constitutional analysis provides compelling evidence that current abortion regulations should be analyzed under the Equal Protection Clause—not the Due Process Clause. The *Gonzales* Court's own justification for its ruling would not pass constitutional muster under *United States v. Virginia's* "exceedingly persuasive justification" test for sex-based classifications.⁶⁵

A. The Partial Birth Abortion Act of 2003 Constitutes a Sex-Based Classification

The Partial Birth Abortion Act of 2003 is a sex-based classification because it singles out women for special governmental treatment⁶⁶ that "closes a door or

60. *Bradwell v. State of Illinois*, 83 U.S. 130, 141 (1872)(Bradley, J., concurring).

61. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 835 (1992) (emphasis added).

62. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

63. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (internal quotations omitted).

64. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

65. See *infra* notes 109–148.

66. See *supra* note 7.

denies opportunity to women.”⁶⁷ Accepting the argument that life begins immediately at conception (or even fertilization), the government is forcing women to sacrifice their freedom, personal autonomy, liberty, health, and economic equality to save the life of another. At no other time, and in no other analogous circumstances, does the government ever require men to sacrifice their freedom, personal autonomy, liberty, health, or economic equality to save the life of another.

Both the body of a man and a woman are required to create the new life the government seeks to protect. The government, however, has elected to regulate the life and liberty of only one of the two sexes that are required for the creation of the new life. Although it is true that only women are equipped with the necessary organs that create a state of pregnancy,⁶⁸ this physical reality does not grant the government the constitutional privilege of “tak[ing] a characteristic limited to one group of citizens and turn[ing] that characteristic into a source of social disadvantage.”⁶⁹ The Fourteenth Amendment is not blind to the government’s manipulation of a suspect class’s physical anomaly from the norm as a basis for discriminating against that class. Instead, this is just the sort of discrimination the Fourteenth Amendment subjects to constitutional scrutiny.⁷⁰

Similarly, it is true that no unwanted pregnancy could ever be created without the sperm of a man. The government, however, could not justify the equality of a law that regulates only the extra-marital intimate sexual relations of men on the basis that only men are physically capable of producing the sperm that are necessary to create unwanted pregnancies.⁷¹ It is quite conceivable that if the government could regulate men’s extra-marital sexual relations, there would be fewer abortions in the United States. Like the government’s regulation of abortion, this sort of discretionary discrimination amounts to a sex-based

67. *Virginia*, 518 U.S. at 532. See also *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 323 (1993) (Stevens, J., dissenting) (“A classification is sex based if it classifies on the basis of sex. As the capacity to become pregnant is a characteristic necessarily associated with one sex, a classification based on the capacity to become pregnant is a classification based on sex.”); Balkin, *supra* note 19, at 324 (“Laws that force women to become mothers against their will help maintain the unequal and subordinate status of women in society because they help commit women, against their will, to lives of domestic labor and economic dependency.”).

68. Reva Siegel has acknowledged that the reasoning that abortion regulations do not constitute sex-based classifications because only women can become pregnant is a flawed application of race discrimination doctrine to sex discrimination doctrine. See Reva Siegel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1025 (2002) (“Fashioned in the image of race discrimination doctrine, the law of sex discrimination . . . [fails] to understand how the state enforces status relations through the regulation of practices that are primarily or exclusively performed by members of one group.”).

69. Sunstein, *supra* note 11, at 24–25.

70. The Court’s decision in *Casey*, while based on substantive due process grounds, contains language that provides strong support for this interpretation of the Equal Protection Clause. See *Casey v. Planned Parenthood of Southeastern Pa.*, 505 U.S. 833, 852 (1992) (“That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice.”).

71. See Cass Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1, 31–32 (1992) (Arguing that abortion regulations “selectively turn women’s reproductive capacities into something for the use and control of others. No parallel disability is imposed on men.”).

classification that warrants constitutional review under the Fourteenth Amendment.

Furthermore, while saving unborn life and preventing the abortion of unwanted pregnancies are certainly laudable goals (and arguably qualify as compelling governmental objectives), that does not excuse the government's use of discriminatory means from the requisite constitutional scrutiny that must be applied to all sex-based classifications.⁷² When a government's law or regulation utilizes one of the Fourteenth Amendment's enumerated suspect classifications, the Court must apply the appropriate level of constitutional scrutiny—even if the government contends that its intentions are benign.⁷³ Because legislatures have historically disguised harmful, sex-based discriminatory laws with proclaimed "benign" intentions,⁷⁴ the Court has adopted "a strong presumption that gender classifications are invalid."⁷⁵ If a government wishes to classify based on sex or gender, its use of discriminatory means must pass "the test for determining the validity of a gender-based classification."⁷⁶ This constitutional scrutiny "is straightforward [and] must be applied free of fixed notions concerning the roles and abilities of males and females."⁷⁷

B. *Virginia's* Exceedingly Persuasive Justification Standard

Because the Partial Birth Abortion Act of 2003 is a sex-based classification,⁷⁸ the government has the burden of demonstrating that the regulation passes the constitutional scrutiny of *Virginia's* heightened exceedingly persuasive justification standard. Accordingly, the government must show that its use of a sex-based "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."⁷⁹ This "burden of justification is demanding and it rests entirely on the State."⁸⁰

This standard is, in effect, more demanding than the ordinary standard of review corresponding with the Court's application of an intermediate level of scrutiny. In *Virginia*, the Court took the exceedingly persuasive justification

72. See *Regents of the Univ. of Cal. v. Bakke*, 485 U.S. 265, 299 (1978) ("Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant.") (citations omitted).

73. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, n.9 (1982) ("Our past decisions establish, however, that when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.").

74. Reva Siegel, *supra* note 22, at 265.

75. See *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (explaining that the Court's "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.").

76. *Hogan*, 458 U.S. at 724–25.

77. *Id.*

78. See *supra*, note 8.

79. *United States v. Virginia*, 518 U.S. 515, 524 (1996).

80. *Id.* at 533.

standard the Court first expounded in *Personnel Administrator of Massachusetts v. Feeney*⁸¹ and greatly expanded its scope—resulting in an intermediate scrutiny standard that more closely resembles the “strict” level of scrutiny the Court reserves for race classifications.⁸² The *Virginia* Court strengthened the standard of review for sex-based classifications by incorporating into its analysis an examination of the authenticity of the government’s asserted objective—successfully rooting out those proclaimed governmental interests that only serve as a pretext for other, more discriminatory objectives.⁸³ Furthermore, the *Virginia* Court modified the sex-based classification standard of review to also evaluate the efficacy of the government’s selective use of the sex-classification as its means to achieve the compelling governmental interest.⁸⁴

Thus by writing a standard of review that analyzes both the authenticity of the government’s asserted interest as well as the efficacy of the government’s selected means, the Court effectively engendered a new species in the heightened standard of review category for sex-based classifications: the *Virginia* exceedingly persuasive justification standard.⁸⁵

Under this stricter standard of heightened scrutiny, the *Virginia* Court first analyzed the government’s proffered interest in maintaining the Virginia Military Institute (VMI) as a male-sex only institution of higher education, scrutinizing the governmental action for a “close resemblance between ‘the alleged objective’ and ‘the actual purpose underlying the discriminatory classification.’”⁸⁶ Although *Virginia* claimed its governmental objective was diversity in higher education, the Court was quick to note that “[n]either recent nor distant history bears out *Virginia*’s alleged pursuit of diversity through single-sex educational options.”⁸⁷

In dispensing with the government’s alleged objective, the Court reviewed the evidence before it and concluded that diversity in higher education was not the original reason *Virginia* created VMI as a male-sex only institution in 1839.⁸⁸ The Court noted that in 1839, *Virginia* created VMI out of a governmental concern that “[h]igher education at the time was considered dangerous for women[,] reflecting widely held views about women’s proper place” in society—views the Court now considers to be unconstitutional as a rationale for

81. 442 U.S. 256, 273 (1979) (holding that past “precedents dictate that any state law overtly or covertly designed to prefer males over females . . . would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.”) (emphasis added).

82. *Virginia*, 518 U.S. at 545 (“The Commonwealth’s justification for excluding all women from ‘citizen-soldier’ training for which some are qualified, in any event, cannot rank as ‘exceedingly persuasive,’ as we have explained and applied that standard.”).

83. *Id.* at 536.

84. *Id.* at 546.

85. See Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819, 821 (2002) (“Ginsburg’s surprisingly uncelebrated opinion in the VMI case is splendid. It carries, I believe, the seeds of radical and very important doctrinal change.”).

86. *Virginia*, 518 U.S. at 536 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982)).

87. *Id.*

88. *Id.*

the government's use of a sex-based classification.⁸⁹ The Court concluded that "[t]he [government's] justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."⁹⁰

In comparison to the Due Process framework of *Glucksberg* and *Gonzales*—which merely inquires whether the government has a compelling interest—the *Virginia* Court's application of the Equal Protection framework provides more sound constitutional protection to women as a suspect class, since it examines the authenticity of the government's proclaimed interest for any disguised discriminatory intent.⁹¹ The *Virginia* Court justified this more demanding review of the government's objective, reasoning that the Equal Protection Clause must prevent "state actors [from] rely[ing] on 'overbroad' generalizations to make 'judgments about people that are likely to . . . perpetuate historical patterns of discrimination.'"⁹² As the Court explained, "justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in facts differently grounded."⁹³ Consequently, for women who have historically been subjected to discriminatory laws predicated upon "overbroad generalizations . . . about people,"⁹⁴ the Equal Protection Clause offers a more secure constitutional shelter than the Due Process Clause.

Furthermore, the *Virginia* Court's elucidation of its exceedingly persuasive justification standard further heightened the Court's "intermediate" scrutiny of sex-based classifications through an evaluation of the efficacy of the means the government had selected to achieve its interest.⁹⁵ This evaluation requires the government's use of a sex-based classification to "substantially advance" the government's stated compelling interest.⁹⁶ After examining the means the government had selected to achieve its goal of achieving diversity in higher education, the Court determined that "[a] purpose genuinely to advance an array of educational options is not served by VMI's historic and constant plan."⁹⁷ The fact that *Virginia's* use of a sex-based classification did not "substantially advance" the government's alleged compelling interest further justified the Court's dismissal of the government's use of its sex-based classification. As a result of this analysis, the *Virginia* Court successfully

89. *Id.* at 536–37.

90. *Id.* at 532.

91. *See Sager, supra* note 85, at 822 (noting that *Virginia's* "requirement of an exceedingly persuasive justification calls for a hard judicial look of a special sort: it demands an explanation of why a particular law does not implicate those deep constitutional vices normally associated with such laws.").

92. *Virginia*, 518 U.S. at 541–42.

93. *Id.* at 535–36.

94. *Id.* at 541–42.

95. *Id.* at 545–46 ("Just as surely, the Commonwealth's great goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the Commonwealth's premier 'citizen-soldier' corps.").

96. *Id.* at 546.

97. *Id.* at 539–40.

incorporated the efficacy of the government's use of a sex-based classification into the constitutional analysis under the Court's heightened standard of review.

The *Virginia* Court reasoned that this strengthening of the review for sex-based classifications was warranted, given this Nation's "long and unfortunate history of sex discrimination"—a history of governmental action that has consistently prevented women from entering the political sphere by limiting their role in society to the domestic sphere.⁹⁸ Justice Ginsburg, writing for the *Virginia* Court, noted that historically sex-based classifications have operated to disenfranchise women from the democratic process, highlighting the fact that women were not considered a part of "We the People" until the passage of the Nineteenth Amendment in 1920.⁹⁹

The *Virginia* Court's historical analysis reveals the true necessity of a stricter standard of heightened review for sex-based classifications.¹⁰⁰ Whereas sex-based classifications have historically operated to prohibit women from participating in the political process, their proponents have predicated the advocacy of such classifications on moral or domestic-based arguments concerning a woman's role in the family and the need to preserve the family as an institution.¹⁰¹ As Justice Ginsburg noted in *Virginia*, revered constitutional Founders such as Thomas Jefferson argued for the government's use of sex-based classifications based on the "moral" argument that to "prevent deprivation of morals and ambiguity of issue, [women] could not [be permitted to] mix promiscuously in the public meetings of men."¹⁰² In 1872, Justice Bradley acknowledged and adopted the prevailing acceptance of this "moral" reasoning to support the government's use of sex-based classifications, reasoning that "the harmony, not to say identity, of interest and views which belong, or should

98. *Id.* at 529–32 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)).

99. *Id.* at 531–32. See Siegel, *supra* note 68, at 975–76 (quoting CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS* 107 (1923)) ("To get the word male . . . out of the constitution cost the women of the country fifty-two years of pauseless campaign . . . During that time they were forced to conduct fifty-six campaigns of referenda to male voters; 490 campaigns to urge Legislatures to submit suffrage amendments to voters; 47 campaigns to induce State constitutional conventions to write woman suffrage into State constitutions; 277 campaigns to persuade State party conventions to include woman suffrage planks; 30 campaigns to urge presidential party conventions to adopt woman suffrage planks in party platforms, and 19 campaigns with 19 successive Congresses.") (internal quotations omitted).

100. See *United States v. Carolene Products*, 304 U.S. 144, 152–53, n. 4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); J. ELY, *DEMOCRACY AND DISTRUST* 75–77 (1980).

101. Reva Siegel argues for a higher degree of scrutiny for sex-based classifications based on a "synthetic interpretation" of both the Fourteenth and Nineteenth Amendments. Siegel, *supra* note 68, at 1044 (quoting *United States v. Virginia*, 518 U.S. 515, 534 (1996)) ("Specifically, sex discrimination doctrine grounded in a synthetic interpretation of the Fourteenth and Nineteenth Amendments, and in an understanding of the history of the woman suffrage campaign, might accord heightened scrutiny to state action regulating the family that denies women 'full citizenship stature' or that perpetuates the 'legal, social, and economic inferiority of women.'").

102. *Virginia*, 518 U.S. at 532 (quoting Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816), in 10 *WRITINGS OF THOMAS JEFFERSON* 45–46, n. 1 (P. Ford ed. 1899)).

belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."¹⁰³ Furthermore, many who opposed the Nineteenth Amendment argued that women did not need the right to vote since they could rely on their husbands for virtual representation.¹⁰⁴ Extending the vote to women, opponents argued, would disrupt the sacred institution of the family by introducing politics into the home—creating a significant potential for domestic discord should the woman ever decide to use her newfound political independence to disagree with her husband.¹⁰⁵ For the opponents of women's suffrage, the preservation of the "institution of marriage lay at [the] heart" of their opposition.¹⁰⁶

Thus, the government's use of a sex-based classification to preserve women's societal role as Mother and to preserve the integrity of the family as an institution is not a new development. Instead, for centuries lawmakers have utilized sex-based classifications to perpetuate gender inequality in this country, and consequently, government actions that utilize sex-based classifications, such as abortion regulations, necessitate the application of the Equal Protection Clause—not the indiscriminate Due Process Clause. In this Nation, laws and regulations predicated on prejudicial views concerning a woman's proper place in society have so thwarted women's ability to participate in the democratic process that those "who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."¹⁰⁷ Under this exceedingly persuasive justification standard, the government's use of a sex-based classification will be analyzed for pretext, and the government will be required to demonstrate that its use of the classification actually achieves its alleged purpose.

1. The Partial Birth Abortion Act of 2003 Does Not Pass Constitutional Muster Under the Exceedingly Persuasive Justification Standard's Analysis for Pretext

The government's use of a sex-based classification in the Act fails the exceedingly persuasive justification standard's examination for pretext. The government's use of a sex-based classification fails because "[n]either recent nor distant history bears out [the government's] alleged pursuit of [preventing the termination of unwanted pregnancies] through"¹⁰⁸ its use of discriminatory abortion regulations. Like *Virginia's* asserted interest in diversity for higher

103. *Bradwell v. State of Illinois*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring)).

104. Siegel, *supra* note 68, at 980.

105. *See id.* at 986 ("Such objections notwithstanding, the virtual representation argument remained the core of the antisuffrage case Unmarried women were assumed to depend on male relatives for representation.").

106. *Id.*

107. *Virginia*, 518 U.S. at 531.

108. *See id.* at 536.

education,¹⁰⁹ the government's asserted interest in protecting unborn life operates as a pretext that masks the original, discriminatory purpose behind the government's creation of abortion regulations. The government's alleged benign interest in protecting unborn life¹¹⁰ is marred by the fact that "[t]hose who advocated restricting women's access to abortion in the nineteenth century were interested in enforcing women's roles, an objective they justified with arguments concerning women's bodies."¹¹¹

Closer scrutiny reveals that the government's proffered justification is not genuine, but rather, displays an unconstitutional "rel[iance] on overbroad generalizations about the different talents, capacities, or preferences of males and females."¹¹² When the government first began regulating women's reproductive rights in the nineteenth century, the criminalization of abortion and birth control "functioned as a method of enforcing marital roles" of women as wives and mothers—at a time when women were using abortion as a means to achieve greater political and economic independence from their domestic roles in the home.¹¹³ Before 1820, no government in this country (state or federal) had criminalized any act of abortion.¹¹⁴ From 1821 to 1841, ten states and one federal territory enacted various laws criminalizing abortion.¹¹⁵ Between 1860 and 1880 more than "[forty] anti-abortion statutes of various kinds were placed upon state and territorial lawbooks."¹¹⁶

This surge in anti-abortion legislation, however, did not take place in a vacuum. Instead, this legislation was the result of a successful national anti-abortion campaign whose advocates viewed abortion as "a wife's rejection of her traditional role as housekeeper and child raiser."¹¹⁷ As women began to acquire political independence and a measure of equality in society, women realized that having fewer children in the home allowed them more opportunities to participate in society outside of the home.¹¹⁸ Because the majority of husbands did not support their wives' efforts to become politically independent actors outside of the home, abortion became an effective tool women could use to liberate themselves from their historical confinement to the household—a tool that could "be practiced without the man's knowledge."¹¹⁹

109. *Virginia* argued unsuccessfully that its sex-based classification achieved diversity in higher education. *Id.* at 535 ("Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.").

110. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626 (2007) (considering "the legitimate interest of the Government in protecting the life of the fetus that may become a child.").

111. Reva Siegel, *supra* note 22, at 265.

112. *Virginia*, 515 U.S. at 532; JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 103 (1978).

113. Siegel, *supra* note 23, at 318; MOHR, *supra* note 112, at 105.

114. MOHR, *supra* note 112, at 20.

115. *Id.*

116. *Id.* at 200.

117. *Id.* at 108.

118. *Id.* at 107–08.

119. *Id.* at 103 ("A number of physicians . . . certainly believed that one of the keys to the upsurge of abortion was the fact that it was uniquely a female practice, which men could neither control nor prevent.").

For the first time in this Nation's history, birthrates dropped dramatically.¹²⁰ "The steepest decennial drop in this long decline . . . occurred between 1840 and 1850, exactly when abortion information, abortion services, and abortion itself came out into the open."¹²¹ At a time when other forms of birth control required the unobtainable consent of an unwilling husband,¹²² women in the mid-nineteenth century turned to abortion as their gateway out of the home and into political society.

Men, however, did not sit idly by as birthrates dropped and middle-class, white Protestant women began to enter political society in mass numbers.¹²³ Instead, they organized an effective national anti-abortion campaign that resulted in scores of anti-abortion statutes in several states.¹²⁴ The most vocal and active members of this campaign were "regular physicians [who] were among the most defensive groups in the country on the subject of changing traditional sex roles."¹²⁵ In addition to seeking to prevent women from divorcing their traditional societal roles as mothers, physicians in the nineteenth century medical community sought to abdicate "the birthing process from midwives, and [. . .] prevent women from entering the medical profession."¹²⁶ By asking state legislatures to criminalize abortion across the country, physicians were literally asking the government to "deploy its sanctions against their competitors."¹²⁷ To win this male monopoly over the medical profession, physicians in the American Medical Association spread propaganda across the country averring that abortion was "'decimating the human family."¹²⁸

Thus, the original objective behind the creation of abortion regulations was not to protect unborn life, but rather, to prevent women's entry into the medical profession and ensure the perpetuation of stereotyped gender norms, such as the wife's "duty to bear children which she owed, not to her husband, but to the community."¹²⁹ The Partial Birth Abortion Act, therefore, fails to pass constitutional muster as there is no "close resemblance between 'the alleged objective' and 'the actual purpose underlying the discriminatory classification.'"¹³⁰

120. *Id.* at 102 ("In 1810 there were 1358 children under the age of 5 for every 1000 white women of childbearing age in the United States. . . . By 1895 that figure had fallen to a moderate 685 children per 1000 women. Put differently, the average American woman bore 7.04 children in 1800; 3.65 by 1900.").

121. *Id.* at 83.

122. *Id.* at 107–08.

123. *See id.* at 102 (noting that for the first time, "abortion became highly visible, much more frequently practiced, and quite common as a means of family limitation among white, Protestant, native-born wives of middle- and upper-class standing,").

124. *See supra* notes 114–116 and accompanying text.

125. MOHR, *supra* note 112, at 168.

126. Siegel, *supra* note 22, at 300.

127. MOHR, *supra* note 112, at 160.

128. *Id.* at 75 (quoting D.A. O'Donnell and W. L. Atlee, "Report of the Committee on Criminal Abortion," *Transactions of the American Medical Association*, XXII (1871), 250–51).

129. Siegel, *supra* note 22, at 296–97 (internal citations omitted).

130. *United States v. Virginia*, 518 U.S. 515, 536 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982)).

The *Gonzales* Court's most recent scrutiny of the constitutionality of an abortion regulation under the Due Process Clause only further supports this conclusion. Although the government today claims its compelling interest is the protection of unborn life,¹³¹ the *Gonzales* Court's own rhetoric effectively reveals that the use of abortion regulations to perpetuate traditional sex-stereotypes has hardly changed in the last 150 years.¹³² Notably, the *Gonzales* Court justified its decision to uphold the constitutionality of the Act's abortion regulation based on the Court's view that "[re]spect for human life finds an ultimate expression in the bond of love the mother has for her child."¹³³ The *Gonzales* Court further justified its decision by reasoning that "[i]t is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound."¹³⁴ Thus, the *Gonzales* Court has effectively held that a woman who obtains an abortion suffers profound anguish because she has failed her ultimate societal role as a mother.

The Court, however, has rejected the idea that any biological difference exists between a man and a woman to justify the government's disparate treatment of the two sexes' roles, duties, or benefits involved in parenting. In *Caban v. Mohammed*, the Court rejected "the claim that [a] broad, gender-based distinction . . . is required by any universal difference between maternal and paternal relations."¹³⁵ The Court's rejection of "any universal difference between maternal and paternal relations" reveals the unconstitutional stature of the government's "rel[iance] on overbroad generalizations about the different talents, capacities, or preferences of males and females"¹³⁶ in their capacity as parents. Consequently, the *Gonzales* Court's preoccupation with preserving a woman's traditional role as "mother" as the "ultimate expression" of "respect for human life" reflects nothing more than the true discriminatory and unconstitutional objective that persists and pervades lawmakers' contemporary regulation of abortion.¹³⁷ The Partial Birth Abortion Act of 2003, therefore, does not survive the constitutional scrutiny of the exceedingly persuasive justification standard.

2. The Partial Birth Abortion Act of 2003 Does Not Pass Constitutional Muster Under the Exceedingly Persuasive Justification Standard's Efficacy Analysis

131. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626–27 (2007).

132. See Siegel, *supra* note 22, at 265 (discussing the discriminatory reasons concerning why legislatures enacted abortion regulations). *C.f.* *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007) (internal citations omitted) ("While we find no reliable data to measure the phenomenon, it *Seems* unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.").

133. *Gonzales*, 127 S. Ct. at 1634.

134. *Id.* Notably, the American Psychology Association conducted a thorough examination of the various studies that have examined the psychological effects of abortion on women's health and concluded that abortion does not adversely affect women's mental health. See APA Task Force on Mental Health and Abortion, *Report of the APA Task Force on Mental Health and Abortion*, Aug. 13, 2008, available at <http://www.apa.org/releases/abortion-report.html>.

135. *Caban v. Mohammed*, 441 U.S. 380, 388–89 (1979) (internal citations omitted).

136. *United States v. Virginia*, 518 U.S. 515, 532 (1996).

137. *Gonzales*, 127 S. Ct. at 1617.

Furthermore, the Act does not survive the judicial scrutiny of the exceedingly persuasive justification standard because the government's regulation of abortion fails to "substantially advance" the government's "great goal" of preventing the termination of unwanted pregnancies.¹³⁸ In *Virginia*, the Court concluded that "the Commonwealth's great goal is not substantially advanced by women's categorical exclusion," and consequently, the Court held that "*Virginia*, in sum, has fallen far short of establishing the exceedingly persuasive justification that must be the solid base for any gender-defined classification."¹³⁹ Likewise, the efficacy of the government's use of abortion regulations is questionable, at best. However, when it comes to the government's use of a prohibited sex-based classification, questionable efficacy does not satisfy the constitutional requirements of the exceedingly persuasive justification standard. Instead, the government bears the burden of proving that its prohibited use of a sex-based classification substantially advances the government's objective to protect unborn life.¹⁴⁰ This "burden of justification is demanding and it rests entirely on the State."¹⁴¹

No conclusive evidence exists to substantiate the success of abortion regulations in reducing the number of abortions and protecting unborn life.¹⁴² This is likely because the government's use of a sex-based classification in its regulation of abortion completely fails to address the underlying causes of unwanted pregnancies and resulting abortions. Abortions do not occur in a vacuum, as the Court's deficient reasoning in *Gonzales* seems to suggest. Instead, most contemporary abortions are the result of this Nation's failed economic and social policies that have left many women in such a precarious socio-economic state that the decision to terminate their pregnancy becomes one of economic survival.¹⁴³ "In 2000, women with resources below the federal poverty level

138. *Virginia*, 518 U.S. at 546.

139. *Id.* at 546.

140. *Id.* at 531-32.

141. *Id.*

142. See John M. Breen, *Modesty and Moralism: Justice, Prudence, and Abortion—A Reply to Skeel & Stuntz*, 31 HARV. J. L. & PUB. POL. 219, 295 (2008).

143. See APA Task Force on Mental Health and Abortion, *supra* note 134, at 293 ("Among women who have had abortions, the available data has consistently shown that financial considerations do indeed play a role in the decision to abort. In 2004, researchers at the Guttmacher Institute conducted a structured survey of over 1,100 women who had recently obtained abortions. Significantly, 73 percent of respondents listed '[c]an't afford a baby now' as one of their reasons for choosing the procedure. A similar study conducted in 1987 revealed similar financial concerns. In this earlier survey, 68 percent of the 1,900 participating women indicated that their inability to afford a child was a factor in their decision to abort. In addition, both of these studies reveal that the inability to afford a child was of great importance relative to other factors. The 2004 study reported that 23 percent of participating women listed financial constraints as the most important reason for Seeking an abortion, and the 1987 study indicated that 21 percent listed this factor as the most important. Indeed, in the 2004 study, only one reason to abort ranked ahead of financial concern. That is, 25 percent of the women surveyed responded they were 'not ready' for a child, or another child, or that the timing of the pregnancy was 'wrong.'").

constituted 57% of all abortions.”¹⁴⁴ Clearly one effective way to reduce the number of abortions in this country would be to combat the poverty many pregnant women face. In fact, studies show that countries that implement public assistance programs to reduce poverty have lower rates of abortion than countries that merely criminalize abortion.¹⁴⁵ Further, studies have shown that better access to contraceptives and more effective sex education programs serve to lower the number of unwanted pregnancies, thereby lowering the number of abortions.¹⁴⁶ But the government has chosen not to pursue any of these alternative means—despite the fact that they would provide for a more effective reduction in the number of abortions in this country.

The fact that the government’s use of a sex-based classification constitutes one of the least effective means to prevent the termination of unborn life only further serves to discredit the government’s claim that protection of unborn life is its true, original purpose. The available evidence indicates that the root causes of abortion are the lack of reproductive health care for women, the poverty pregnant women face, the sexual and physical abuse of women, and the rampant abandonment of pregnant women by the unborn child’s male father.¹⁴⁷ Instead of implementing a policy that resolves any of these underlying causes, the government has elected to use a discriminatory sex-based classification. The fact that the government’s use of a sex-based classification fails to substantially advance its own compelling objective renders its regulation of abortion unconstitutional.

IV. CONCLUSION

Gonzales stands as an example of how certain discriminatory laws can pass constitutional muster when they are incorrectly analyzed under the Due Process

144. *Id.* at 20–21 (citations omitted). *See also id.* at 15 (“According to the 2000 Census data, African American women are more than three times as likely as White women to have an abortion (Dugger, 1998). Latinas are approximately two times as likely as White women to have an abortion, although there are important subgroup differences. . . . The overrepresentation of ethnic minority women among those who obtain abortions in the United States may represent the general problem of greater poverty and reduced access to health care, including reproductive health services, among women of color.”).

145. *See id.* at 295 (“The incidence of abortion in countries that provide greater public assistance to women facing unwanted pregnancies than the United States appears to confirm the inability of non-coercive methods to significantly reduce the number of abortions. For example, a 1999 study, also sponsored by the Guttmacher Institute, reported the frequency of abortion in fifty-nine countries with populations of at least one million where abortion is legal and generally available. For each country, the study included three important statistics: the actual number of reported abortions within a given year; the ‘abortion rate,’ that is, the number of abortions per 1,000 women ages 15 to 44; and the ‘abortion ratio,’ that is, the number of abortions per 100 known pregnancies. Thus, for 1996, the study reported that 1,365,700 abortions were performed in the United States. This means in that year, for every 1,000 women of childbearing age, 22.9 had an abortion, and a staggering 25.9 percent of all known pregnancies were terminated by abortion.”).

146. Jack M. Balkin, *supra* note 6, at 5.

147. *See* APA Task Force on Mental Health and Abortion, *supra* note 134, at 293.

Clause—in place of the Equal Protection Clause.¹⁴⁸ Because abortion regulations were initially created to “ensure that women perfor[m] their obligations as wives and mothers[,]”¹⁴⁹ abortion regulations require a more scrutinizing judicial review than that which Due Process jurisprudence provides. When properly analyzed under *Virginia*’s exceedingly persuasive justification standard, the constitutional defects in the government’s use of this harmful and prejudiced sex-based classification are effectively exposed. Thorough scrutiny of the Equal Protection Clause reveals that abortion regulations have not only thwarted women’s economic and political equality in society—but they have ultimately failed to prevent the termination of unwanted pregnancies.

The true success of the *Virginia* Court’s Equal Protection Clause analysis, therefore, is its ability to root out the true, discriminatory purposes behind the government’s use of sex-based classifications. As the Court’s analysis in *Virginia* demonstrates, the government’s continued adherence to traditional sex stereotypes not only unconstitutionally burdens one sex, but more importantly, precludes the government from implementing innovative and effective policies that would actually achieve the government’s stated compelling interest.

Women—and the unborn lives they collectively create with men—would benefit greatly if the government focused on policies and programs that work to resolve the true causes of unwanted pregnancies and abortion, rather than merely relying on policies that blindly perpetuate prejudicial sex stereotypes. When “the State’s . . . purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.”¹⁵⁰

148. Thus, where the Substantive Due Process Clause fails, the Equal Protection Clause succeeds. See Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) (contrasting the Equal Protection Clause with the Substantive Due Process Clause, by noting that “the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses therefore operate along different tracks . . . [the Equal Protection Clause] does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted.”).

149. Ronald Turner, *Gonzales v. Carhart and the Court’s “Regret Rationale,”* 43 WAKE FOREST L. REV. 1, 266 (2008).

150. *Orr v. Orr*, 440 U.S. 268, 283 (1979).