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Roe, Casey, and Sex-Selection Abortion Bans

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Roe, Casey, and Sex-Selection Abortion Bans

Thomas J. Molony*

Abstract

Forty years after Roe v. Wade, state legislatures continue to try to chip away at a woman's right to choose. In a flurry of recent activity, lawmakers across the country have considered and, in some cases, adopted sweeping measures that range from expanded clinic-safety regulations to outright bans on abortion early in pregnancy if a fetal heartbeat can be detected. Several states have banned sex-selection abortions—abortions sought based on the sex of the fetus. These narrow bans advance society's interest in eradicating sex discrimination, an interest the Supreme Court has not considered in the abortion context but elsewhere has described as compelling. Sex-selection abortion bans, therefore, test in a new way the limits of state regulation.

To survive constitutional challenge, a sex-selection abortion ban must satisfy the requirements established in Planned Parenthood of Southeastern Pennsylvania v. Casey. Casey, while retaining Roe's "central holding" that a woman has the right to choose abortion before the fetus is viable, fundamentally changed the constitutional landscape by granting states greater latitude to regulate abortion pre-viability. Under Casey, states may adopt reasonable pre-viability regulations that do not impose an undue burden on the woman's right and may restrict abortion post-viability so long as exceptions apply when the procedure is necessary to protect the life or health of the woman.

Recent federal court decisions suggest that Casey leaves no room for a pre-viability ban of any sort. Under these precedents, sex-selection abortion bans, which typically apply throughout

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pregnancy, would seem destined to fail. A careful reading of Roe and Casey, however, reveals a less certain destiny. While recognizing the barriers Casey presents for sex-selection abortion bans, this Article offers an argument as to how a narrowly drafted ban might survive a challenge under Casey. The Article also evaluates the bans currently in place or that have been proposed and offers suggestions for improvement, including recommendations as to how the bans might be modified to fit more safely within the parameters the Court has established.

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I. Introduction

Forty years have passed since the United States Supreme Court decided *Roe v. Wade*,¹ and lawmakers across the country continue to adopt legislation to rein in a woman's right to choose. Legislative efforts have accelerated recently,² with states such as Texas, North Dakota, Kansas, and North Carolina adopting new abortion laws in the face of strong opposition by pro-choice advocates.³ The measures adopted in North Dakota, Kansas, and North Carolina include bans on sex-selection abortions—abortions sought because of the sex of the fetus.⁴ Because these

1. 410 U.S. 113 (1973).

2. See Chris Good, *Starting This Week, It's Harder to Get an Abortion in 5 States*, ABC NEWS (July 2, 2013, 7:00 AM), <http://abcnews.go.com/blogs/politics/2013/07/starting-this-week-its-harder-to-get-an-abortion-in-5-states/> (last visited Feb. 5, 2014) (“Abortion restrictions are popping up everywhere, it seems.”) (on file with the Washington and Lee Law Review).

3. See Juliet Eilperin, *N.C. Gov. McCrory Signs Anti-Abortion Bill into Law Monday Night*, WASH. POST (July 29, 2013, 10:38 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/29/nc-gov-mccrory-signs-anti-abortion-bill-into-law-monday-night/> (last visited Dec. 29, 2013) (indicating that North Carolina's governor signed a 2013 abortion law, “as abortion rights protestors waged a 12-hour vigil across the street from his executive mansion”) (on file with the Washington and Lee Law Review); John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. TIMES (Mar. 26, 2013), <http://www.nytimes.com/2013/03/27/us/north-dakota-governor-signs-strict-abortion-limits.html?pagewanted=all> (last visited Dec. 29, 2013) (indicating that pro-choice advocates “quickly condemned” a 2013 North Dakota abortion law) (on file with the Washington and Lee Law Review); Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES (July 18, 2013), http://www.nytimes.com/2013/07/19/us/perry-signs-texas-abortion-restrictions-into-law.html?_r=0 (last visited Dec. 29, 2013) (noting substantial opposition to a 2013 Texas law banning abortions after twenty weeks gestation and modifying standards for abortion clinics) (on file with the Washington and Lee Law Review); John Hanna, *Sweeping Anti-Abortion Bill Passes Kansas Legislature, Awaits Governor's Signature*, KAN. CITY STAR (Apr. 6, 2013), <http://www.kansascity.com/2013/04/06/4165019/sweeping-anti-abortion-bill-passes.html> (last visited Dec. 29, 2013) (noting the positions taken by abortion foes and abortion rights advocates with respect to a 2013 Kansas abortion law) (on file with the Washington and Lee Law Review).

4. See H.B. 2253, 2013 Leg., 2013–14 Sess. § 10(a) (Kan. 2013) (“No person shall perform or induce an abortion . . . with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the [fetus].”); S.B. 353, 2013 Gen. Assemb., 1st Sess. § 90-21.121(a) (N.C. 2013) (“[No] person shall perform or attempt to perform an abortion upon a woman in this State with knowledge . . . that a significant factor in the woman seeking the abortion is related to the sex of the [fetus].”); H.B. 1305, 63d Leg. Assemb., Reg.

narrow bans attempt to control access to abortion based on a woman's reasons for having the procedure, they challenge the constitutional limits of abortion regulation in a new way.

The Court in *Roe* rejected the notion that a woman has the right to choose to have an abortion "at whatever time, in whatever way, and for whatever reason that she alone chooses."⁵ In *Roe* and later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁶ the Court addressed limitations on timing,⁷ and in *Gonzales v. Carhart*,⁸ the Court dealt with constraints on manner.⁹ The Court, however, never has squarely faced the question of a state's ability to limit abortion based on the *reasons* for which it is sought. Sex-selection abortion bans present this very question.

It is common to think of *Roe* as the constitutional norm for abortion regulations and restrictions, but *Casey* sets the current standard. Therefore, it is *Casey* that a sex-selection abortion ban must satisfy to be constitutional. While the Court in *Casey* retained the "most central principle of *Roe*" that a woman has the "right to terminate her pregnancy before viability,"¹⁰ it gave

Sess. § 2(1) (N.D. 2013) ("[A] physician may not intentionally perform or attempt to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the [fetus] . . ."). The bans adopted in North Dakota, Kansas, and North Carolina, as well as some of those that have been adopted or proposed in other states, apply to any "unborn child," a term that would include not only a fetus but also a human in an earlier stage of development. See H.B. 2253, 2013 Leg., 2013-14 Sess. §§ 1, 10 (Kan. 2013) (defining and using the term "unborn child"); H.B. 1305, 63d Leg. Assemb., Reg. Sess. §§ 1, 2 (N.D. 2013) (same); S.B. 353, Gen. Assemb., 2013-14 Reg. Sess. § 3(a) (N.C. 2013) (using the term "unborn child"); H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. § A (Mo. 2013) (defining and using the term "unborn child"). Nevertheless, the term "fetus" is used throughout this Article when describing sex-selection abortion bans.

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

6. 505 U.S. 833 (1992).

7. See *Roe*, 410 U.S. at 160, 165 (setting viability as the time at which a state may prohibit abortion entirely so long as exceptions are made for protection of the life or health of the woman); *Casey*, 505 U.S. at 871, 879 (stating that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade* . . . and [is] a component of liberty").

8. 550 U.S. 124 (2007).

9. See *id.* at 132, 156 (holding that a federal ban on partial-birth abortion did not violate the Constitution).

10. *Casey*, 505 U.S. at 871.

states substantially more latitude to adopt abortion laws than they had under *Roe*. In *Casey*, the Court preserved the ability of states under *Roe* to “regulate, and even proscribe, abortion [after viability] except where it is necessary . . . for the preservation of the life or health of the mother”¹¹ and opened a new door to pre-viability measures that do not pose an “undue burden” on a woman’s right to abort a non-viable fetus.¹²

Despite the door that *Casey* opened, the prospects for sex-selection abortion bans seem rather grim. Though otherwise narrow, sex-selection abortion bans typically apply throughout pregnancy,¹³ and recent federal court decisions call into question whether *Casey* permits a pre-viability ban of any kind.¹⁴ Unlike the bans considered in these recent cases, however, sex-selection abortion bans serve a state interest that was not considered in *Roe* or *Casey*—that of eliminating sex discrimination and its harmful effects. The presence of this interest, which the Court has described as “compelling” in cases involving freedom of association for expressive purposes,¹⁵ makes the answer to the question of the constitutionality of sex-selection abortion bans less clear than it might first appear.

This Article considers whether a sex-selection abortion ban can, and how it might, be upheld under *Casey*. Part II begins by describing the various forms of sex-selection bans that have been adopted or considered by various state legislatures and in the U.S. Congress. Part III follows with a general discussion of *Roe* and how *Casey*, through its undue burden standard, altered the

11. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973); *Casey*, 505 U.S. at 879 (quoting *Roe*).

12. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–77 (1992) (describing the undue burden test).

13. See *infra* note 49 and accompanying text (noting that only the ban proposed in Oregon does not apply throughout pregnancy).

14. See *infra* notes 57–99 and accompanying text (discussing recent federal cases striking down abortion bans).

15. See *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (citing a state’s “compelling interest in eliminating discrimination against women” to uphold a state public accommodation law against the argument that it unconstitutionally infringed Rotary members’ right of expressive association); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (finding the State’s compelling interest in eliminating discrimination against women justified an infringement on an organization’s freedom of association).

framework *Roe* had established for evaluating abortion laws. In Part IV, the Article examines whether the most narrowly drawn sex-selection abortion ban can survive *Casey*. It explains that such a ban is constitutional post-viability even without an explicit life or health exception. After acknowledging the difficulty in arguing that such a ban is constitutional pre-viability, Part IV attempts to lay out a reasonable argument in support of a very narrow pre-viability sex-selection abortion ban. To make the argument, the Article examines the Court's treatment of the parental consent provisions of the Pennsylvania statute at issue in *Casey* and draws on Court decisions recognizing that a state's compelling interest in eliminating sex-discrimination justifies a slight infringement on the constitutional guarantee of freedom of expressive association. This same interest, Part IV posits, also may be sufficient to sanction the slight infringement that a narrow sex-selection abortion ban may impose on a woman's right to choose. Part V considers the future of sex-selection abortion bans, how states might make their bans more effective, and what states might do to improve their prospects of surviving *Casey*. The Article concludes that sex-selection abortion bans primarily serve not as a practical barrier to abortion, but as a vehicle—and an important one—for a state to emphasize the equal dignity that women and men share, and in light of that reality, states should draft their bans carefully so that they can deliver this important message as powerfully as possible.

II. Sex-Selection Abortion Bans

Although sex-selection abortion bans have received quite a bit of attention lately, they are not new. For over twenty years, Illinois and Pennsylvania have prohibited abortion when it is sought solely based on the sex of the fetus.¹⁶ New bans, however, have started to appear in greater numbers in the past few years. Since 2010, five additional states—Arizona, Kansas, North

16. See 720 ILL. COMP. STAT. § 510/6(8) (1984) (“No person shall intentionally perform an abortion with the knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.”); 18 PA. CONS. STAT. ANN. § 3204(c) (West 1989) (“No abortion which is sought solely because of the sex of the [fetus] shall be deemed a necessary abortion.”).

Carolina, North Dakota, and Oklahoma—have enacted sex-selection abortion bans.¹⁷ In addition, bills proposing sex-selection abortion bans have been introduced recently in eleven other state legislatures and in Congress.¹⁸

17. See H.B. 2253, 2013 Leg., 2013–14 Sess. § 10(a) (Kan. 2013) (prohibiting a person from “perform[ing] or induc[ing] an abortion . . . with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the [fetus]”); S.B. 353, 2013 Gen. Assemb., 1st Reg. Sess. § 90-21.121(a) (N.C. 2013) (providing that no one shall perform an abortion “with knowledge, or an objective reason to know, that a significant factor in the woman seeking the abortion is related to the sex of the [fetus]”); H.B. 1305, 63d Leg. Assemb., Reg. Sess. § 1(a) (N.D. 2013) (barring any physician from “intentionally perform[ing] or attempt[ing] to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the [fetus]”); H.B. 2443, 50th Leg., 1st Reg. Sess. § 13-3603.02(A)(1) (Ariz. 2011) (proscribing the act of “perform[ing] an abortion knowing that the abortion is sought based on the sex or race of the child”); OKLA. STAT. ANN. tit. 63 § 1-731.2(B) (West 2010) (“No person shall knowingly or recklessly perform or attempt to perform an abortion with knowledge that the pregnant female is seeking the abortion solely on account of the sex of the [fetus].”).

18. See Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. § 3(a)(1) (2013) (establishing criminal and civil liability for “knowingly perform[ing] an abortion knowing that such abortion is sought based on the sex, gender, color or race of the [fetus]”); H.B. 1131, 69th Gen. Assemb., 1st Reg. Sess. § 18-3.5-203(1) (Colo. 2013) (prohibiting a person from knowingly performing a sex-selection abortion, using force to coerce a sex-selection abortion, soliciting or accepting money to perform such abortion, or transporting a woman to obtain such a procedure); S.B. 56, 69th Gen. Assemb., 1st Reg. Sess. § 18-3.5-203(1) (Colo. 2013) (same); H.B. 845, 115th Leg., Reg. Sess. § 3(6)(a) (Fla. 2013) (“A person may not knowingly . . . perform, induce, or actively participate in a termination of a pregnancy knowing that it is sought based on the sex or race of the [fetus]”); S.B. 1072, 115th Leg., Reg. Sess. § 3(6)(a) (Fla. 2013) (same); H.B. 1430, 118th Gen. Assemb., 1st Reg. Sess. § 3 (Ind. 2013) (prohibiting the intentional performance of an abortion before and after viability “if the person knows that the pregnant woman is seeking a sex-selective abortion”); S.B. 183, 118th Gen. Assemb., 1st Reg. Sess. § 4 (Ind. 2013) (same); H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. § 188.281(1) (Mo. 2013) (“No person shall intentionally perform . . . an abortion with the knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the [fetus].”); S.B. 2286, 236th Leg. Sess., 2013–14 Reg. Sess. § 230-e(2) (N.Y. 2013) (“No person shall knowingly or recklessly perform or attempt to perform an abortion with knowledge that the pregnant female is seeking the abortion solely on account of the sex of the [fetus].”); H.B. 3515, 77th Leg. Assemb., 2013 Reg. Sess. § 1(2) (Or. 2013) (barring the performance of “late-term sex-selection abortion[s],” defined as sex-selection abortions performed during the third trimester of the pregnancy); H.B. 17, 83d Leg., 2d Sess. § 170.003(a) (Tex. 2013) (prohibiting a person from “knowingly perform[ing] or attempt[ing] to perform . . . an abortion that is based on the sex of the pregnant woman’s [fetus]” as well as the use or threat of force to intentionally coerce such a

By and large, the sex-selection abortion bans that have been adopted or proposed are very narrowly drawn. Many only prohibit a person from performing an abortion when he or she *knows* that the procedure is being sought *solely* based on the sex of the fetus.¹⁹ The scope of others, however, is less clear. The Arizona statute, for example, does not state explicitly that it is limited to cases in which an abortion is sought *solely* for the purposes of sex selection.²⁰ As a result, the law might be interpreted to apply

procedure); H.B. 1316, 2013 Gen. Assemb., Reg. Sess. § 1 (Va. 2013) (“Any person who intentionally performs an abortion with knowledge that the abortion is sought solely and exclusively on account of the sex of the [fetus] is guilty of a class 4 felony.”); Assemb. B. 217, 101st Leg., 2013–14 Reg. Sess. § 253.103 (Wis. 2013) (“No person may perform an abortion knowing that it is a sex-selective abortion.”); Assemb. B. 2157, 215th Leg., 1st Ann. Sess. § 2 (N.J. 2012) (prohibiting a person from “knowingly perform[ing] a sex-selection or race-selection abortion”); H.B. 570, 129th Gen. Assemb., 2011–12 Sess. § 2919.20 (Ohio 2012) (proscribing the purposeful performance of sex-selection abortions, including using force or funds to induce such procedures, and providing a civil action for pregnant woman upon whom such an abortion is performed).

19. See 720 ILL. COMP. STAT § 510/6(8) (1985) (prohibiting abortions performed “with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus”); H.B. 2253, 2013 Leg., 2013–14 Sess. § 10(a) (Kan. 2013) (same); H.B. 1305, 63d Leg. Assemb., Reg. Sess. § 2 (N.D. 2013) (same); OKLA. STAT. ANN. tit. 63 § 1-731.2(B) (West 2010) (same); H.B. 1430, 118th Gen. Assemb., 1st Reg. Sess. § 3 (Ind. 2013) (proscribing abortions performed by a person who “knows that the pregnant woman is seeking a sex-selective abortion”); S.B. 183, 118th Gen. Assemb., 1st Reg. Sess. § 4 (Ind. 2013) (same); H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. § 188.281(1) (Mo. 2013) (prohibiting abortions performed “with the knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the [fetus]”); S.B. 2286, 236th Leg. Sess., 2013–14 Reg. Sess. § 230-e(2) (N.Y. 2013) (same); H.B. 1316, 2013 Gen. Assemb., Reg. Sess. § 1 (Va. 2013) (banning abortions “sought solely and exclusively on account of” the fetus’s sex); Assemb. B. 217, 101st Leg., 2013–14 Reg. Sess. § 253.103 (Wis. 2013) (prohibiting a person from performing an abortion “knowing that it is a sex-selective abortion”). The Pennsylvania statute appears to impose liability even when a person is merely reckless in performing a sex-selection abortion. 18 PA. CONS. STAT. ANN. § 3204(a), (c), (d) (West 1989). The proposed Oregon bill seems to provide for liability for performing an abortion solely based on the sex of the fetus, even if the person performing the sex-selection abortion does so neither knowingly nor recklessly. H.B. 3515, 77th Leg. Assemb., 2013 Reg. Sess. (Or. 2013).

20. ARIZ. REV. STAT. ANN. § 13-3603.02(A) (2013). The proposed federal Prenatal Nondiscrimination Act (PRENDA) of 2013 and bills introduced in Colorado, Florida, and Ohio similarly omit the word “solely.” Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. (2013); H.B. 13-1131, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); S.B. 13-056, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013); H.B. 845, 2013 Leg., Leg. Sess. 2013. (Fla. 2013); S.B. 1072, 2013 Leg., Leg. Sess. 2013. (Fla. 2013); H.B. 570, 129th Gen.

when sex selection is one, but not the only, reason an abortion is sought. North Carolina's sex-selection abortion ban is perhaps the broadest of those adopted or proposed. The 2013 law extends to any case in which a person performing an abortion has "knowledge, or an *objective reason to know*, that a *significant factor* in the woman seeking the abortion is *related to* the sex of the [fetus]."²¹ Therefore, it clearly bans abortions when reasons other than sex selection are present.

The scope of some sex-selection abortion bans is narrowed by exceptions. The Illinois and Oklahoma bans, for instance, do not bar sex-selection abortions that are sought when the fetus has, or is suspected to have, a genetic abnormality.²² Virginia's proposed ban excludes abortions necessary to protect the life of the woman.²³ And the bans enacted in Arizona and Kansas, and those

Assemb., Reg. Sess. 2011-12 (Ohio 2012). Similar to the Pennsylvania statute, the bill introduced in Texas seems to allow for liability when the person performing the abortion does not know that it is being sought based solely on the sex of the fetus. See H.B. 17, 83d Leg., 2d Reg. Session (Tex. 2013) (prohibiting only knowingly performing a sex-selection abortion, not knowingly performing an abortion that is known to be sought for purposes of sex selection).

21. S.B. 353, 2013 Gen. Assemb., 1st Reg. Sess. § 90-21.121 (N.C. 2013) (emphasis added).

22. See 720 ILL. COMP. STAT. § 510/6(8) (1985) ("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."); OKLA. STAT. ANN. tit. 63, § 1-731.2(B) (West 2010) ("Nothing in this section shall be construed to proscribe the performance of an abortion because the [fetus] has a genetic disorder that is sex-linked."). The ban proposed in New York likewise excludes abortions sought because of a genetic abnormality. See S.B. 2286, 236th Leg. Sess., 2013-14 Reg. Sess. § 230-e(2) (N.Y. 2013) ("Nothing in this section shall be construed to proscribe the performance of an abortion because the [fetus] has a genetic disorder that is sex-linked."). North Dakota, on the other hand, specifically prohibits abortions sought based on a genetic abnormality. See H.B. 1305, 63d Leg. Assemb., Reg. Sess. § 2(1) (N.D. 2013) ("[A] physician may not intentionally perform . . . an abortion with knowledge that the pregnant woman is seeking the abortion solely because the [fetus] has been diagnosed with . . . a genetic abnormality."). Proposed bans in Indiana and Missouri would do likewise. See S.B. 183, 118th Gen. Assemb., 1st Reg. Sess. § 6 (Ind. 2013) (prohibiting an individual from intentionally performing an abortion before and after viability "if the person knows that the pregnant woman is seeking the abortion solely because the fetus has been diagnosed with a genetic abnormality"); H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. § 188.287(1) (Mo. 2013) ("No person shall intentionally perform . . . an abortion with knowledge that the pregnant woman is seeking the abortion solely because the [fetus] has been diagnosed with . . . a genetic abnormality . . .").

23. See H.B. 1316, 2013 Gen. Assemb., Reg. Sess. § 1 (Va. 2013) ("This

proposed in Congress and in the Missouri, New Jersey, Ohio, Texas, and Virginia legislatures, explicitly exempt from liability a woman seeking a sex-selection abortion.²⁴

III. *Roe and Casey Generally*

No matter its scope, a sex-selection abortion ban must pass through *Casey* to survive a constitutional challenge, and to understand *Casey*, it is important to begin with *Roe*. Although the Court in *Roe* found a woman's right to choose abortion within the now long-recognized right to privacy under the Fourteenth Amendment,²⁵ the Court cautioned that the abortion right is not absolute²⁶ and is "inherently different" from other privacy rights.²⁷ According to the Court, a woman's right to choose must

section shall not prohibit the use by a physician of any procedure that, in reasonable medical judgment, is necessary to prevent the death of the mother . . .").

24. See ARIZ. REV. STAT. ANN. § 13-3603.02(E) (1978) (West) ("A woman on whom a sex-selection or race-selection abortion is performed is not subject to criminal prosecution or civil liability . . ."); Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. § 3(a) (2013) ("A woman upon whom a sex-selection or race-selection abortion is performed may not be prosecuted or held civilly liable . . ."); H.B. 2253, 2013 Leg., 2013–14 Sess. § 10(c) (Kan. 2013) ("A woman upon whom an abortion is performed shall not be prosecuted . . ."); H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. § 188.296(2) (Mo. 2013) (establishing that any woman upon whom a prohibited abortion is performed shall not be prosecuted or held civilly or criminally liable); H.B. 17, 83d Leg., 2d Sess. § 170.003(e) (Tex. 2013) (exempting a woman on whom a prohibited abortion is performed from criminal liability); H.B. 1316, 2013 Gen. Assemb., Reg. Sess. § 1 (Va. 2013) ("The mother may not be prosecuted for any criminal offense based on the performance of any [prohibited] act . . ."); Assemb. B. 2157, 215th Leg., 1st Ann. Sess. § 4 (N.J. 2012) (same); H.B. 570, 129th Gen. Assemb., 2011–12 Sess. § 2919.20(D) (Ohio 2012) (same). The bans proposed in Florida only would exempt minor women from liability. See H.B. 845, 115th Leg., Reg. Sess. § 3(6)(e) (Fla. 2013) ("A mother of a [fetus] on whom a sex-selection or race-selection termination of pregnancy is performed who as not attained 18 years of age . . . is not subject to criminal prosecution or civil liability . . ."); S.B. 1072, 115th Leg., Reg. Sess. § 3(6)(e) (Fla. 2013) (same).

25. See *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (finding that the right to privacy includes the right to have an abortion).

26. See *id.* (explaining that the right to choose abortion is not free from all government interference).

27. See *id.* at 159 (stating that the existence of potential human life differentiates this privacy right from those such as marital intimacy, procreation, or education of one's children).

be balanced against three important state interests: “safeguarding health, . . . maintaining medical standards, and . . . protecting potential life.”²⁸ “At some point in pregnancy,” the Court explained, “these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.”²⁹

The Court’s assessment of the state’s interests in protecting women’s health and in guarding potential life resulted in *Roe*’s famous trimester framework.³⁰ Under this framework, until the end of the first trimester, neither interest is compelling³¹ and therefore “the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.”³² At about the end of the first trimester, however, the state’s interest in the pregnant woman’s health becomes compelling, allowing the state to “regulate the abortion procedure in ways that are reasonably related to maternal health.”³³ It is not until the fetus attains viability—when it is “potentially able to live outside the mother’s womb, albeit with artificial aid”³⁴—that the state’s interest in protecting potential life becomes compelling and justifies measures that “regulate, [or] even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”³⁵

The *Roe* Court’s trimester framework proved unkind to many abortion regulations. Under this framework, the Court struck down the Texas statute at issue in *Roe*, which had outlawed abortion except when necessary to save the life of the woman.³⁶

28. *Id.* at 154.

29. *Id.*

30. *See id.* at 162–63 (describing a balance of the state’s interests against those of the woman).

31. *See id.* at 163 (establishing that neither interest becomes compelling until “approximately the end of the first trimester”).

32. *Id.* at 164.

33. *Id.*

34. *Id.* at 160.

35. *Id.* at 165.

36. *See id.* at 164 (concluding that Texas’s failure to distinguish between different stages in the pregnancy and its limiting the procedure only to circumstances in which a woman’s life is at risk rendered its statute unconstitutional).

The Court dealt likewise with other lesser abortion regulations that later came before it,³⁷ finding these regulations incapable of satisfying the Court's most exacting standard of review—strict scrutiny—under which a measure may “be sustained only if drawn in narrow terms to further a compelling state interest.”³⁸

In *Casey*, the Court determined that the cases subsequent to *Roe* went too far and failed to recognize the weight of the state's interests.³⁹ Presented with the opportunity to overrule *Roe*, however, it declined and instead retained *Roe*'s “essential holding,” which the Court described as consisting of three parts:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the 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.⁴⁰

The Court in *Casey* determined that the third principle had been neglected in later cases that applied *Roe*'s trimester framework.⁴¹ Consequently, it abandoned this “elaborate, but rigid construct”⁴² in favor of an “undue burden” standard, which the Court asserted

37. See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759, 771 (1986) (endorsing “the general principles laid down in *Roe*” and finding unconstitutional a Pennsylvania statute that required a woman to be provided with certain information before having an abortion); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 428–30, 452 (1983) (applying *Roe*'s trimester framework to strike down an ordinance requiring informed consent, a waiting period, and parental consent).

38. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992).

39. See *id.* at 872 (noting that the Court's later application of the trimester framework “sometimes contradicted the State's permissible exercise of its powers”).

40. *Id.* at 846.

41. See *id.* at 871 (“*Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's ‘important and legitimate interest in potential life.’ That portion of the decision . . . has been given too little acknowledgment and implementation . . .”).

42. *Id.* at 872.

was “the appropriate means of reconciling the State’s interest [in potential life] with the woman’s constitutionally protected liberty.”⁴³

The Court in *Casey* “reaffirm[ed] *Roe*’s holding” that, after viability, a state has the power to prohibit abortion so long as exceptions are made for circumstances in which the life or health of the woman are at stake.⁴⁴ It was as to pre-viability measures that *Casey* made a change, opting for its undue burden standard over *Roe*’s trimester framework.⁴⁵ Under this new standard, the Court explained, “[a]n undue burden exists, and therefore a provision of a law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”⁴⁶ Absent such purpose or effect, a regulation designed to encourage a woman to give birth or to protect the woman’s health will be sustained so long as it has a rational basis.⁴⁷ The Pennsylvania statute at issue in *Casey*—which included an informed consent provision, a twenty-four-hour waiting period, and a parental consent requirement—largely passed the test.⁴⁸

43. *Id.* at 876.

44. *See id.* at 879 (stating that the adoption of the undue burden test does not disturb *Roe*’s holding that a state may restrict a woman’s right to choose abortion after viability).

45. *See id.* at 872 (explaining that under *Roe*’s trimester framework “almost no regulation at all is permitted during the first trimester of pregnancy,” which “sometimes contradict[s] the State’s permissible exercise of its power”).

46. *Id.* at 878.

47. *See id.* (“[A] state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.”).

48. *See id.* at 887, 895, 899 (finding that the twenty-four-hour waiting period, informed consent, and parental consent requirements do not unconstitutionally impose an undue burden, but concluding that the spousal notification provision unconstitutionally burdens a woman’s right to choose abortion).

IV. *Surviving Casey*

All of the sex-selection abortion bans that have been enacted or proposed, with the exception of the one in Oregon,⁴⁹ are effective throughout pregnancy. Therefore, most of the bans must satisfy both the pre-viability and post-viability standards outlined in *Casey*.⁵⁰

What *Casey* states generally about a woman's right to choose abortion and the way the opinion explains the undue burden standard raise significant doubts as to whether any pre-viability sex-selection abortion ban is permissible. It seems appropriate, then, to begin considering this question by examining the constitutionality of a sex-selection abortion ban in its narrowest form—one that, like those adopted in Kansas, Illinois, North Dakota, and Oklahoma, prohibits a person from performing an abortion knowing that it is being sought *solely* based on the sex of

49. Compare H.B. 3515, 77th Leg. Assemb., 2013 Reg. Sess. § 1 (Or. 2013) (prohibiting only “late-term sex-selection abortion,” defined as “an abortion performed during the third trimester of pregnancy”), with OKLA. STAT. ANN. tit. 63 § 1-731.2(B) (West 2010) (applying the ban throughout pregnancy); Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. § 3(a)(1) (2013) (same); H.B. 2253, 2013 Leg., 2013–14 Sess. § 10(a) (Kan. 2013) (same); S.B. 353, 2013 Gen. Assemb., 1st Reg. Sess. § 90-21.121(a) (N.C. 2013) (same); H.B. 1305, 63d Leg. Assemb., Reg. Sess. § 1(a) (N.D. 2013) (same); H.B. 1131, 69th Gen. Assemb., 1st Reg. Sess. § 18-3.5-203(1) (Colo. 2013) (same); S.B. 56, 69th Gen. Assemb., 1st Reg. Sess. § 18-3.5-203(1) (Colo. 2013) (same); H.B. 845, 115th Leg., Reg. Sess. § 3(6)(a) (Fla. 2013) (same); S.B. 1072, 115th Leg., Reg. Sess. § 3(6)(a) (Fla. 2013) (same); H.B. 1430, 118th Gen. Assemb., 1st Reg. Sess. § 3 (Ind. 2013) (specifying that the prohibition on sex-selection abortions applies to those performed both pre-viability and post-viability); S.B. 183, 118th Gen. Assemb., 1st Reg. Sess. § 4 (Ind. 2013) (same); H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. § 188.281(1) (Mo. 2013) (prohibiting sex-selection abortions performed at any point in the pregnancy); S.B. 2286, 236th Leg. Sess., 2013–14 Reg. Sess. § 230-e(2) (N.Y. 2013) (same); H.B. 570, 129th Gen. Assemb., 2011–12 Sess. § 2919.20 (Ohio 2012) (same); H.B. 17, 83d Leg., 2d Sess. § 170.003(a) (Tex. 2013) (same); H.B. 1316, 2013 Gen. Assemb., Reg. Sess. § 1 (Va. 2013) (same); Assemb. B. 217, 101st Leg., 2013–14 Reg. Sess. § 253.103 (Wis. 2013) (same); Assemb. B. 2157, 215th Leg., 1st Ann. Sess. § 2 (N.J. 2012) (same); and H.B. 2443, 50th Leg., 1st Reg. Sess. § 13-3603.02(A)(1) (Ariz. 2011) (banning the performance of sex-selection abortions without regard to the point in the pregnancy).

50. See *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007) (“The abortions affected by the Act’s regulations take place both previability and postviability; so . . . the undue burden analysis . . . [is] applicable.”).

the fetus.⁵¹ This Part evaluates such a narrow ban and offers an argument in support of its constitutionality. Part V discusses how broader bans might fare.

A. *An Easy Case Post-Viability*

Casey’s treatment of post-viability abortion regulations is consistent with *Roe* and relatively clear: “[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.”⁵² A post-viability sex-selection abortion ban that contains explicit health and life exceptions, therefore, easily satisfies *Casey*. None of the enacted or proposed sex-selection abortion bans, however, specify a health exception, and only the ban proposed in Virginia expressly excludes abortions that are necessary to protect a woman’s life.⁵³ Nevertheless, based on the Court’s decision in *Gonzales*, a narrow sex-selection abortion ban without specific life or health exceptions is constitutional.⁵⁴

In *Gonzales*, the Court upheld the 2003 federal partial-birth abortion ban notwithstanding the fact that the law did not

51. See 720 ILL. COMP. STAT. § 510/6(8) (1985) (proscribing sex-selection abortions intentionally performed by any person “with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus”); OKLA. STAT. ANN. tit. 63 § 1-731.2(B) (West 2010) (prohibiting any person from “knowingly or recklessly perform[ing] . . . an abortion with knowledge that the pregnant female is seeking the abortion solely on account of the sex of the [fetus]”); H.B. 2253, 2013 Leg., 2013–14 Sess. § 10(a) (Kan. 2013) (barring any “person” from performing or inducing an abortion “with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the [fetus]”); H.B. 1305, 63d Leg. Assemb., Reg. Sess. § 1(a) (N.D. 2013) (prohibiting a physician from “intentionally performing . . . an abortion with knowledge that the pregnant woman is seeking an abortion solely” because of the fetus’s sex).

52. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (quoting *Roe v. Wade*, 410 U.S. 113, 164–65 (1973)).

53. See H.B. 1316, 2013 Gen. Assemb., Reg. Sess. § 1 (Va. 2013) (“This section shall not prohibit the use by a physician of any procedure that, in reasonable medical judgment, is necessary to prevent the death of the mother . . .”).

54. See *Gonzales*, 550 U.S. at 166–67 (upholding a federal prohibition on partial-birth abortion despite the absence of a health exception).

include a health exception, and the Court did so even though there was significant disagreement as to whether the use of the partial-birth abortion procedure might be medically necessary in some circumstances.⁵⁵ A narrow sex-selection abortion ban presents a stronger case than the ban on partial-birth abortion at issue in *Gonzales* because no serious argument can be made that an abortion sought *solely* based on the sex of the fetus ever is medically necessary. If a woman seeks an abortion when her life or health is at stake, she is not seeking the procedure *solely* based on the sex of the fetus, and the procedure would not be barred even if the sex of the fetus were a consideration. For example, a narrow ban would not prohibit abortion of a female fetus if having a girl somehow would be detrimental to a woman's physical, mental, or emotional health. In such a case, the woman would be seeking the abortion not *solely* based on the sex of the fetus, but because of the sex of the fetus *and* the associated effect on her health. Thus, a sex-selection abortion ban in its narrowest form should satisfy *Casey's* post-viability requirements even without explicit life and health exceptions.

B. An Uphill Climb Pre-Viability

"Liberty finds no refuge in a jurisprudence of doubt,"⁵⁶ the Court began in *Casey*. Yet, in contrast to the standard for post-viability restrictions, the Court's explanation of the conditions under which pre-viability measures are permitted has left much in doubt. The extent of the uncertainty becomes particularly evident when one tries to assess the constitutionality of a sex-selection abortion ban that applies prior to viability.

Casey is unclear as to whether or how its undue burden standard applies to a pre-viability abortion ban. One view, which the United States Court of Appeals for the Ninth Circuit articulated in *Isaacson v. Horne*,⁵⁷ is that *Casey* categorically bars any type of pre-viability ban without regard to the undue burden

55. See *id.* at 162–65 (reasoning that the Court has previously "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty").

56. *Casey*, 505 U.S. at 844.

57. 716 F.3d 1213 (9th Cir. 2013).

standard.⁵⁸ Another is that *Casey*'s undue burden test applies, but the only consideration under the test is the effect of a ban on a woman's ability to make the "ultimate decision."⁵⁹ If either of these two interpretations is correct, any sex-selection abortion ban—no matter how narrow—is bound to fail.

Casey, however, leaves open the possibility of a third interpretation. The Court's treatment of the parental consent provisions at issue in the case suggests that the undue burden test applies to a pre-viability ban and that relevant to the test are government interests that are different from those considered in *Roe* and *Casey*.⁶⁰ If that is so, there is hope for a narrow sex-selection abortion ban, which advances a state's interest in eliminating sex discrimination, an interest the Court has recognized as compelling in its jurisprudence regarding the First Amendment's guarantee of freedom of association for expressive purposes.

1. Pre-Viability Bans Unconstitutional Per Se?

Before delving into the third possible interpretation of *Casey*, due attention must be given to the first two, for there certainly is ample support for them. The Ninth Circuit employed the first interpretation in *Isaacson*; United States District Courts in Idaho, Arkansas, and North Dakota applied the second in other cases.

In *Isaacson*, the Ninth Circuit struck down an Arizona law—commonly referred to as a "fetal pain statute"—that prohibited abortion beginning at twenty weeks' gestation,⁶¹ the time at

58. See *id.* at 1225 (striking down an Arizona ban on abortion after twenty weeks because it "prohibits pre-viability abortions").

59. See *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1144, 1150–51 (D. Idaho 2013) (applying the undue burden test to find that a fetal pain statute unconstitutionally placed an "insurmountable obstacle" in the path of a woman seeking to abort a nonviable fetus (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992))).

60. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (reaffirming that "a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure").

61. See *Isaacson v. Horne*, 716 F. 3d 1213, 1217 (9th Cir. 2013) (noting that the challenged provision "extends the abortion ban earlier in pregnancy, to the

which the State contended a fetus can begin to feel pain,⁶² though before viability.⁶³ In declaring Arizona's fetal pain statute unconstitutional, the court claimed that the Supreme Court's precedent is clear:

[A] woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable. A prohibition on the exercise of that right is *per se* unconstitutional. While the state may *regulate* the mode and manner of abortion prior to fetal viability, it may not *proscribe* a woman from electing abortion, nor may it impose an undue burden on her choice through regulation.⁶⁴

According to the Ninth Circuit, there was no need to evaluate whether the statute imposed an undue burden, and the lower court was wrong to do so: “[T]his ‘undue burden’/‘substantial obstacle’ mode of analysis has no place where, as here, the state is *forbidding* certain women from choosing pre-viability abortions rather than specifying the conditions under which such abortions are to be allowed.”⁶⁵

The Ninth Circuit's interpretation of *Casey* undoubtedly is a reasonable one. The Court in *Casey* stated that, “[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”⁶⁶ Moreover, in preserving this “essential holding” of *Roe*, the Court indicated that, “[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the

period between twenty weeks gestation and fetal viability”). The prohibition included an exception for medical emergencies. *Id.*

62. *See id.* at 1218 (quoting ARIZ. REV. STAT. § 36-2151(6) (2012) to explain that the prohibition is “based on . . . strong medical evidence that unborn children feel pain during an abortion at that gestational age”).

63. *See id.* at 1225 (stating that because the parties agree “that no fetus is viable at twenty weeks gestational age,” as supported by the district court findings, the challenged statute “necessarily prohibits pre-viability abortions”).

64. *Id.* at 1217.

65. *Id.* at 1225.

66. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992). The Ninth Circuit pointed out that the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), did not disturb this principal. *Isaacson*, 716 F.3d at 1223–24.

procedure.”⁶⁷ By speaking separately of a prohibition and the imposition of a substantial obstacle, the Court seemed to indicate that a pre-viability ban is an absolute obstacle and therefore unconstitutional *per se*. In addition, that *Casey*, like *Roe*, permits a state to prohibit abortion after viability suggests that a state may not do so before viability.⁶⁸

Not all courts considering pre-viability bans have taken the same approach as the Ninth Circuit. Other courts considering pre-viability bans have applied the undue burden test, but they have done so in a way that suggests a similar *per se* bar. In *McCormack v. Hiedeman*,⁶⁹ the U.S. District Court for the District of Idaho decided that Idaho’s fetal pain statute “unconstitutionally burden[ed] the abortion right.”⁷⁰ According to the Idaho district court, *Casey* permits only two types of regulation: (1) regulations designed to inform a woman’s choice and (2) those aimed at protecting a woman’s health.⁷¹ Because Idaho’s fetal pain statute did neither, it was unconstitutional.⁷² According to the court, the statute was not intended to inform a woman’s choice, but instead “to narrow the universe of previously allowable pre-viability abortions,”⁷³ and the state had not even attempted to justify the law as an effort to protect a woman’s health or safety.⁷⁴ Its purpose and effect, the court asserted, was not just to place a substantial obstacle in the path of a woman

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

68. *See id.* at 879 (“We also reaffirm *Roe*’s holding that ‘subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion’”).

69. 900 F. Supp. 2d 1128 (D. Idaho 2013).

70. *Id.* at 1149–50.

71. *See id.* (noting that prior to viability “the State may not rely on its interest in the potential life of the fetus to place a substantial obstacle to abortion . . . in women’s paths”).

72. *See id.* at 1150 (explaining further that the statute neither seeks to persuade a woman to choose childbirth over abortion nor mentions the mother’s health or safety as a purpose).

73. *Id.*

74. *See id.* (finding that the stated purpose of the statute “is to protect a fetus ‘from the state at which substantial medical evidence indicates that they are capable of feeling pain’”).

who wants to abort a nonviable fetus, but an “insurmountable” or “absolute” one.⁷⁵

The United States District Court for the Eastern District of Arkansas in *Edwards v. Beck*⁷⁶ and the United States District Court for the District of North Dakota in *MKB Management Corp. v. Burdick*⁷⁷ likewise applied *Casey*'s undue burden test to Arkansas and North Dakota “fetal heartbeat statutes,” which prohibit abortions at or after twelve or six weeks’ gestation when a fetal heartbeat is detected.⁷⁸ Unlike the court in *Heideman*, however, neither the Arkansas district court nor the North Dakota district court engaged the undue burden test in a meaningful way, doing little more than indicating that the test applies, describing what it requires, and concluding that the fetal heartbeat statutes imposed an unconstitutional burden on a woman’s right to choose.⁷⁹

It is just as easy to find support in *Casey* for the interpretation utilized in *Heideman*, *Beck*, and *MKB Management* as it is for the view the Ninth Circuit expressed in *Isaacson*. The Court in *Casey* indicates that “[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” and that “[a] statute with this purpose [or effect] is invalid.”⁸⁰ The test, then, appears to focus only on the interests of the woman. If a law

75. *Id.* at 1151.

76. 946 F. Supp. 2d 843 (E.D. Ark. 2013).

77. No. 1:13-cv-071, 2013 WL 3779740 (D.N.D. July 22, 2013) (granting the plaintiffs’ motion for preliminary injunction).

78. *See Edwards*, 946 F. Supp. at 845, 848 (considering the Arkansas fetal heartbeat statute and noting that “[t]he Eighth Circuit has adopted the ‘undue-burden test’ for facial challenges to abortion laws”); *Burdick*, 2013 WL 3779740, at *9 (considering the North Dakota heartbeat statute and finding that it imposes an undue burden on a woman’s right to choose).

79. *See Edwards*, 946 F. Supp. 2d at 850 (noting that the Eighth Circuit applies the undue burden test in evaluating abortion laws and concluding that the Arkansas fetal heartbeat statute “impermissibly infringes a woman’s Fourteenth Amendment right to cho[ose]” to have an abortion before viability); *Burdick*, 2013 WL 3779740, at *1, *10 (“The plaintiffs have clearly shown that H.B. 1456 more than likely prohibits pre-viability abortions in a large percentage of cases in North Dakota, thereby imposing an undue burden on women seeking to obtain an abortion.”).

80. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

hinders her ability to have an abortion, it is unconstitutional, and a ban does not just hinder her ability, it eliminates it.

2. Avoiding a Rush to Judgment: An Alternative Interpretation

Of course, the decisions in *Heideman*, *Beck*, *MKB Management*, and *Isaacson* do not necessarily foretell the unconstitutionality of sex-selection abortion bans because sex-selection abortion bans are different from fetal pain and heartbeat statutes in at least three significant ways. First, sex-selection abortion bans are narrow and do not seek to replace viability as the time at which the state begins to have a broad right to restrict abortion.⁸¹ Second, while states largely rely on their interests in potential life and maternal health to justify fetal pain and heartbeat statutes,⁸² sex-selection abortion bans introduce other interests, including that of eradicating sex discrimination from society. Third, fetal pain and heartbeat statutes focus on the fetus—when it can feel pain or has a heartbeat; sex-selection abortion bans focus on the woman—the reasons for her decision and the possible impact of her decision on society at large.

81. See *Isaacson v. Horne*, 716 F.3d 1213, 1229 (9th Cir. 2013) (“Section 7 effectively shifts from viability to twenty weeks gestation the point at which the state’s asserted interests override a woman’s right to choose”); *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1150 (D. Idaho 2013) (“In essence, the PUCPA embodies a legislative judgment equating viability with twenty weeks’ gestational age, which the Supreme Court expressly forbids.”); *Edwards*, 946 F. Supp. 2d at 850 (“Act 301 equates fetal viability with a 12-week gestational age and a fetal heartbeat”); *Burdick*, 2013 WL 3779740, at *9 (“[T]he new law seems to suggest that a fetus is viable at the point a heartbeat is detected.”).

82. See *Isaacson*, 716 F.3d at 1219 (noting that the district court had determined that the State’s interest in potential life and maternal health justified Arizona’s fetal pain statute); *McCormack*, 900 F. Supp. 2d at 1149–50 (noting that the Idaho fetal heartbeat law could not be justified by the State’s interest in potential life or women’s health); *Edwards v. Beck*, 946 F. Supp. 2d 843, 847 (E.D. Ark. 2013) (observing a woman’s right to choose abortion is balanced against state interests in potential life and maternal health and that *Casey* concludes that the state’s interests are not sufficient to justify prohibition prior to viability). North Dakota, in support of its fetal heartbeat statute, relied on “preserving the integrity of the medical profession [and] preventing the coarsening of society’s moral sense” as additional justifications. *Burdick*, 2013 WL 3779740, at *4.

a. Casey May Only Bar Blanket or Comprehensive Abortion Bans

The courts striking down the fetal pain and heartbeat statutes emphasize a problem with the breadth of those statutes.⁸³ According to the Ninth Circuit in *Isaacson*, when adopting its fetal pain statute, Arizona had “fail[ed] to follow the Supreme Court’s clear rule that no woman may be *entirely* precluded from choosing to terminate her pregnancy at any time prior to viability.”⁸⁴ Perhaps, then, *Casey* only bars blanket or comprehensive bans—those outlawing abortion with or without exceptions—that apply for some period of time prior to viability. There is evidence in *Casey* to support this conclusion.

The Court in *Casey* indicated that it was reaffirming *Roe*’s essential holding, but it described that holding in various ways throughout the opinion. Some of the Court’s statements suggest that any pre-viability ban is unconstitutional;⁸⁵ others indicate that only blanket bans are.⁸⁶ If the Court’s claim that it was reaffirming what was essential in *Roe* is to be taken seriously, it would seem appropriate to give more weight to the statements that are more faithful to *Roe* itself and to consider the less faithful ones merely as attempts to paraphrase. By interpreting the opinion in this way, one reasonably can argue that *Casey* only prohibits blanket bans.

As to pre-viability measures, *Casey* is most faithful to *Roe* in two places. At the outset of its opinion, the Court notes the

83. See *Isaacson*, 716 F.3d at 1227 (noting that Arizona’s twenty-week law deprives women of the right to choose abortion *at all* after twenty weeks gestation); *McCormack*, 900 F. Supp. 2d at 1151 (indicating that Idaho’s fetal pain statute represented “an outright ban on abortions at or after twenty weeks’ gestation”); *Edwards*, 946 F. Supp. 2d at 849 (observing that the Arkansas law “prohibits all abortions, . . . where the pregnancy has progressed to twelve weeks and a fetal heartbeat is detected”); *MKB Mgmt. Corp. v. Burdick*, No. 1:13-cv-071, 2013 WL 3779740 at *2 (D.N.D. July 22, 2013), (indicating that the North Dakota fetal heartbeat statute “would essentially ban abortions in the State of North Dakota”).

84. *Isaacson*, 716 F.3d at 1228 (emphasis added).

85. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992) (indicating that a state may not prevent “any woman from making the ultimate decision to terminate her pregnancy prior to viability”).

86. See *infra* text accompanying notes 87–88 and 90 (identifying statements that support the conclusion that *Casey* bars only blanket or comprehensive bans).

importance of describing *Roe*'s essential holding "with clarity" and, attempting to do that, states: "Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."⁸⁷ Later, consistent with the first statement, the Court asserts that *Roe* had determined that the "weight [of the State's interest in protecting potential life] is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions" and that "the essential holding of *Roe* should be reaffirmed."⁸⁸ These statements reflect the particular decision the Court had to make in *Roe*—the constitutionality of a Texas statute that outlawed abortion except when necessary to save the life of the woman.⁸⁹ When considered in light of that statute, the statements in *Casey* suggest that the Constitution bars only a comprehensive ban prior to viability, not a narrow ban when justified by a state interest that neither *Roe* nor *Casey* considered.

The statement in *Casey* that is most consistent with *Roe* regarding what a state may do post-viability also supports this conclusion. In summarizing the implications of its adoption of the undue burden standard, the Court quotes *Roe*: "We . . . reaffirm *Roe*'s holding that 'subsequent 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."⁹⁰ Again, the Court hearkens back to the statute at issue in *Roe*, which unconstitutionally attempted to do pre-viability what is permissible only post-viability. By looking to the statute at issue in *Roe*, then, one can see an appealing symmetry: pre-viability, a state may not adopt a blanket ban even with exceptions; post-viability, it may, so long as there are exceptions that permit abortion when the life or health of the woman is at risk. Narrow pre-viability bans, therefore, are not necessarily prohibited.

87. *Id.* at 846.

88. *Id.* at 871.

89. *See Roe v. Wade*, 410 U.S. 113, 117–18 (1973) (describing the Texas statute at issue in the case).

90. *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 164–65) (emphasis added).

Still, it is hard to reconcile this interpretation with *Roe*'s holding that, "[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician"⁹¹ and with *Casey*'s assertion that "a State may not prohibit *any* woman from making the *ultimate decision* to terminate her pregnancy before viability."⁹² The Court's treatment of the parental consent requirement at issue in *Casey*, however, indicates that these statements cannot be taken too far.

The subject of *Casey* was the Pennsylvania Abortion Control Act of 1982, which among other things provided that an unemancipated woman under the age of eighteen could not, without the consent of one of her parents, a guardian or a person "standing in loco parentis," choose to have an abortion, except in the case of a medical emergency.⁹³ As a safety mechanism, the statute included a judicial bypass provision that allowed a court to override the parental consent requirement if the court were to determine that the woman is "mature and capable of giving informed consent" or that an abortion is in the best interests of the woman.⁹⁴ *Casey* characterized Pennsylvania's parental consent requirement as a "structural mechanism by which . . . the parent or guardian of a minor[] may express profound respect for the life of the unborn,"⁹⁵ but in substance the requirement—at least theoretically—"banned" pre-viability abortions in a narrow set of circumstances. The Pennsylvania statute did not leave all women with the right to make the "ultimate decision."⁹⁶ To the contrary, the law took the decision entirely out of a woman's hands when (i) she is a minor, (ii) one of her parents does not consent, (iii) she is not mature and capable of making the decision for herself, and (iv) an abortion is not in her best interests.

91. *Roe*, 410 U.S. at 164.

92. *Casey*, 505 at 879 (emphasis added).

93. *See id.* at 899, 904–05 (quoting 18 PA. CONS. STAT. § 3206(b) (1990)).

94. *See id.* at 899, 905 (allowing the court to authorize an abortion if it would be within the minor woman's best interests, without specifying how the court should determine the woman's best interests).

95. *Id.* at 877.

96. *Id.* at 879 (applying *Roe*'s "central holding" that "a State may not prohibit any woman from making the ultimate decision" to the Pennsylvania statute).

Nevertheless, the Court—as it had done previously when applying *Roe* to similar parental consent requirements⁹⁷—determined that such a ban is constitutional.⁹⁸ Thus, when the Court in *Casey* stated that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability,”⁹⁹ it could not have meant, literally, *any* woman.

To claim that the Court, when referring to the rights of “any woman,” meant any *adult* woman would contradict what the Court pointed out in *Planned Parenthood of Central Missouri v. Danforth*.¹⁰⁰ “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. . . .”¹⁰¹ The question, then, is why certain women may be prohibited from making “the ultimate decision.” The answer is the presence of an interest that is different from the three specifically identified in *Roe* and *Casey*, an interest related to the woman and not the fetus.

b. Casey May Permit Narrow Bans When Supported by Other Interests

Casey's treatment of Pennsylvania's parental-consent requirement not only confirms that a state may adopt a limited ban, it also indicates that a state may do so if it has an interest of sufficient strength that is different from those considered in *Roe* and *Casey*. In reaching the conclusion that viability creates the appropriate balance for the rights of the woman and the rights of the state, *Roe* and *Casey* considered only two state interests—

97. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 519–20 (1990) (upholding a parental consent requirement with judicial bypass provision); *Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 490–94 (1983) (same).

98. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (“Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.”).

99. *Id.* at 879.

100. 428 U.S. 52 (1976).

101. *Id.* at 74–75.

safeguarding women's health and protecting potential life.¹⁰² Although it does not say so explicitly, the Court in *Casey* must have allowed the limited "ban" under the Pennsylvania parental consent requirement because of another state interest—that of protecting minors.¹⁰³ Therefore, when *Casey* states that, "before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure,"¹⁰⁴ the interests the Court was referring to were those it had weighed in settling on viability as the dividing line for abortion regulation.¹⁰⁵ Indeed, when *Casey* describes *Roe's* holding with respect to when a legislative ban is justified, it focuses on the state's interest in potential life: "[V]iability marks the earliest point at which the State's *interest in fetal life* is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."¹⁰⁶

Yet, language in *Casey* does suggest that, even when other interests are present, a law is invalid if it places a substantial obstacle in the path of a woman seeking an abortion: "[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."¹⁰⁷ Again, the Court's treatment of the Pennsylvania parental consent requirement indicates that the Court should not be taken literally and that state interests other than those considered in *Roe* and *Casey* are relevant to the undue burden test. The Court in *Casey* applied the undue burden standard to the parental consent

102. See *supra* notes 33–35 and accompanying text (identifying the interests considered in *Roe* and *Casey*).

103. See *Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 922 (9th Cir. 2004) ("With regard to minors, . . . the state has additional interests that may justify regulation of the manner in which they determine to undergo the procedure." (citing *Danforth*, 482 U.S. at 74)).

104. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

105. See *Isaacson v. Horne*, 716 F.3d 1213, 1222 (2013) (listing the interests the Court considered in *Roe* and stating, "*those* interests could not justify any regulation of abortion during the first trimester of pregnancy" (emphasis added) (citing *Roe v. Wade*, 410 U.S. 113, 164 (1973))).

106. *Casey*, 505 U.S. at 860 (emphasis added).

107. *Id.* at 877.

provisions¹⁰⁸ and determined that they did not impose an undue burden, notwithstanding the fact that they took the decision entirely out of certain women's hands and placed it in those of either her parent or the court.¹⁰⁹ In reaching that conclusion, then, the Court must have considered an interest other than those of safeguarding a woman's health, protecting potential life, and regulating the medical profession.

The Court in *Casey* actually paid very little attention to the parental consent provisions, stating instead that “[w]e have been over most of this ground before.”¹¹⁰ Notably, when it did so before, the Court considered other interests. For example, in *City of Akron v. Akron Center for Reproductive Health*,¹¹¹ the Court observed that a “majority of the Court [in *Bellotti v. Baird*¹¹² had] indicated that a State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial.”¹¹³ Moreover, the Court in *Akron* identified the two interests in *Roe* that had justified abortion regulations—

108. *Id.* at 877–78 (referring to the Pennsylvania parental consent provisions in discussing “guiding principles” for the undue burden test).

109. Interestingly, the Court does not even mention its undue burden test when it evaluates the parental consent provision. Instead it cites prior cases and merely concludes that the Pennsylvania statute is constitutional. *Id.* at 899. Some of the opinions in prior cases that *Casey* cites (one of which is a concurrence by Justice O'Connor), however, employed an undue burden standard in reviewing parental consent provisions. See *Ohio v. Akron Center for Reprod. Health*, 497 U.S. 502, 519–20 (1990) (“The Ohio statute, in sum does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion. We believe, in addition, that the legislature acted in a rational manner in enacting H.B. 319.”); *Hodgson v. Minnesota*, 497 U.S. 417, 461 (1990) (O'Connor, J., concurring) (“It has been my understanding in this area that ‘[i]f the particular regulation does not ‘unduly burde[n]’ the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose.” (citing *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 453 (1983))); *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (finding that a Massachusetts parental consent statute “impose[d] an undue burden upon the exercise by minors of the right to seek an abortion”). Moreover, in *Casey*'s discussion of “guiding principles” for its undue burden test, the Court cites its consideration of the Pennsylvania parental consent statute as an example of a regulation that does not constitute an undue burden. *Casey*, 505 U.S. at 877.

110. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992).

111. 462 U.S. 416 (1983).

112. 443 U.S. 622 (1979).

113. *Akron*, 462 U.S. at 439.

protection of potential life and protection of a woman's health—but noted that “the Court repeatedly has recognized that, in view of the unique status of children under the law, the States have a ‘significant’ interest in certain abortion regulations aimed at protecting children ‘that is not present in the case of an adult.’”¹¹⁴ This “significant” interest sustained the parental consent limitations at issue in *Casey* even though the limitations applied from the outset of pregnancy.¹¹⁵

Following *Casey*, the Court has continued to consider pre-*Casey* precedent with respect to parental consent provisions, notwithstanding the Court's adoption of the undue burden standard.¹¹⁶ These prior cases were decided under strict scrutiny, a standard of review that always gives the state an opportunity to explain itself,¹¹⁷ suggesting that a state is permitted to justify itself under *Casey*'s undue burden test.

Gonzales also indicates that additional state interests are relevant to the undue burden test. Indeed, Justice Ginsburg in her dissent in *Gonzales* accused the majority of taking into account other interests when it upheld the federal partial-birth abortion ban.¹¹⁸ The majority purports to ground its decision in

114. *Id.* at 427 n.10 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976)); *see also* *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990) (“The State has a strong and legitimate interest in the welfare of its young citizens . . .”); *Ashcroft*, 462 U.S. at 490–91 (“A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial.”).

115. *See Casey*, 505 U.S. at 899 (concluding that Pennsylvania's parental consent provisions were constitutional); *Ashcroft*, 462 U.S. at 493 (determining that Missouri's parental consent requirement was constitutional).

116. *See Planned Parenthood of Idaho v. Wasden*, 376 F.3d 908, 922 n.12 (2004) (“[T]he Supreme Court chastised (and reversed) this court for failing to apply *Bellotti II* and *Akron II* faithfully.” (citing *Lambert v. Wicklund*, 520 U.S. 292, 295–97 (1997))); *Isaacson v. Horne*, 716 F.3d 1213, 1222 (9th Cir. 2013) (“*Casey* jettisoned . . . the strict scrutiny standard applied in *Roe*.”).

117. *See Wasden*, 376 F.3d at 922 n.12 (noting that the pre-*Casey* cases addressing parental consent statutes applied strict scrutiny, and not the undue burden standard); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (noting the cases involving *Roe* “decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest.”).

118. *Gonzales v. Carhart*, 550 U.S. 124, 182 (2007) (Ginsburg, J., dissenting) (“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

the state's interests in protecting potential life and regulating the medical profession,¹¹⁹ but it is evident that other interests were at work, for the Court states: "There can be no doubt the government has an interest in protecting the integrity and ethics of the medical profession."¹²⁰ Likewise, by noting an important purpose of the federal partial-birth abortion ban, the Court indicated the relevance of the state's interest in protecting life outside the womb: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life."¹²¹

Finally, if the undue burden test does not allow for consideration of additional state interests, then a woman effectively has an absolute right to have an abortion pre-viability, a consequence that is anathema to the principle that no fundamental right is absolute and the state always has the opportunity to justify itself.¹²² Consistent with this idea, *Casey* indicates that the woman's right is "to be free from *unwarranted* governmental intrusion,"¹²³ and that "[n]ot all government

preserving life.").

119. *See id.* at 157 (noting that "the State has a significant role to play in regulating the medical profession" and that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman").

120. *Id.* Interestingly, this interest may have been identified in *Roe*, but it disappeared when the Court established viability as the line at which the state's power to restrict abortion increases.

121. *Id.* (quoting the congressional findings in support of the Act).

122. *See* *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3056 (2010) (Scalia, J., concurring) ("No fundamental right—not even the First Amendment—is absolute."); *id.* at 3101 (Stevens, J., dissenting) ("[T]he strength of the individual's liberty interests and the State's regulatory interests must always be assessed and compared. No right is absolute."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 873–75 (1992) (noting that the Court in *Roe* "was not recognizing an absolute right" "[a]s our jurisprudence relating to all liberties save perhaps abortion have recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right"); *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) ("The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate."); *Kovacs v. Cooper*, 336 U.S. 77, 85 (1949) ("[E]ven the fundamental rights of the Bill of Rights are not absolute.").

123. *Casey*, 505 U.S. at 875 (emphasis added) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

intrusion is of necessity unwarranted.”¹²⁴ As the Court observes, “*Roe* did not declare an unqualified constitutional right to an abortion Rather, the right protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy.”¹²⁵ Indeed, the very name of *Casey*’s test—the “undue” burden test—suggests that the state has the opportunity to explain why its restrictions are “due” or “warranted.”

*c. A State’s Compelling Interest in Eliminating Sex
Discrimination May Allow a Sex-Selection Abortion Ban to
Survive the Undue Burden Test*

Though there are a number of reasons for concluding that additional state interests are relevant to the undue burden test, the Court’s summary dismissal of the challenge to the parental consent requirement in *Casey*¹²⁶ leaves one to wonder *how* the additional interests supporting a narrow sex-selection abortion would be weighed under the test. The answer may come from an unlikely place—the Court’s opinions with respect to the constitutionally protected freedom to associate for expressive purposes and, specifically, the opinions in *Roberts v. United States Jaycees*,¹²⁷ *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹²⁸ and *Boy Scouts of America v. Dale*.¹²⁹ In those cases, the Court considered whether public accommodation statutes—those that prohibit discrimination based on, among other attributes, race, religion, sex, and, in the case of the statute as issue in *Dale*, sexual orientation—unconstitutionally infringed on a group’s associational rights.¹³⁰ The Court in all of the cases

124. *Id.*

125. *Id.* at 874–75 (emphasis added) (quoting *Maher v. Roe*, 432 U.S. 464, 473–74 (1977)).

126. *See id.* at 899 (disposing of the challenge to the parental consent provisions in two paragraphs and with almost no analysis).

127. 468 U.S. 609 (1984).

128. 481 U.S. 537 (1987).

129. 530 U.S. 640 (2000).

130. *See Dale*, 530 U.S. at 644, 645–47 (explaining that the plaintiff filed suit, alleging the Boy Scouts violated New Jersey’s public accommodation statute by revoking his membership because he was homosexual and that the

abandoned strict scrutiny in favor of an undue burden-like balancing test¹³¹ and, in two, determined that the state's interest in eliminating sex discrimination tipped the balance in favor of the statute.¹³²

In *Roberts*, the Court determined that a Minnesota public accommodation statute did not violate the constitutional rights of the United States Jaycees by requiring the group to admit women as full voting members.¹³³ Just as it had in *Roe* with respect to a woman's constitutional right to choose abortion, the Court in *Roberts* indicated that "[t]he right to associate for expressive purposes is not . . . absolute."¹³⁴ Accordingly, the Court stated, "[i]nfringements on that right may be justified by regulations

Court granted certiorari to decide whether the law violated the First Amendment); *Duarte*, 481 U.S. at 539 (stating the question to be decided was "whether a California [public accommodation] statute that requires California Rotary Clubs to admit women members violates the First Amendment"); *Roberts*, 468 U.S. at 612, 615 (introducing the plaintiff's argument that the public accommodation statute infringed on male Jaycees members' rights of free speech and expressive association).

131. See *Dale*, 539 U.S. at 640–41 (describing the balancing test needed to weigh the potential burden on the Boy Scouts' freedom of expressive association against the state's interest in combating discrimination against a segment of society); *Duarte*, 481 U.S. at 549 (stating the law does not infringe on Rotary members' expressive freedoms and that any infringement would be justified because it serves a compelling state interest); *Roberts*, 468 U.S. at 626 (finding that the plaintiffs had "failed to demonstrate that the Act impose[d] any serious burdens" on their associational rights).

132. See *Duarte*, 481 U.S. at 549

In *Roberts* we recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services. *Id.*, at 626, 104 S.Ct., at 3254. The Unruh Act plainly serves this interest. We therefore hold that application of the Unruh Act to California Rotary Clubs does not violate the right of expressive association afforded by the First Amendment.

(citations omitted); *Roberts*, 468 U.S. at 628 ("[Absent] a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech.").

133. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612, 627 (1984) (holding that there is "no basis . . . for concluding that admission of women as full voting members will impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views" because the Act requires no change in stating or promoting the group's beliefs).

134. *Id.* at 623.

adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”¹³⁵

Upholding the Minnesota statute, the Court in *Roberts* observed that a state has a compelling interest “of the highest order” in “eradicating” discrimination against women,¹³⁶ that the statute was not designed to suppress speech, but aimed at “eliminating discrimination and assuring citizens equal access to publicly available goods and services,”¹³⁷ and that the statute did not impose “any serious burdens on the male members’ freedom of expressive association.”¹³⁸ As to the relative burden, the Court noted that the Jaycees already allowed women to participate as nonvoting members and that admitting women as full members did not affect policy positions the Jaycees had taken over the years.¹³⁹ According to the Court, the statute “impose[d] no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members, [and] even if enforcement of the Act cause[d] some incidental abridgment of the Jaycees’ protected speech, that effect is no greater than is necessary to accomplish the State’s legitimate purposes.”¹⁴⁰

The Court in *Duarte* reached a similar conclusion with respect to a California public accommodation statute’s burden on the associational rights of Rotary International, whose constitution limited Rotary Club membership to men.¹⁴¹ In finding in favor of the state, the Court in *Duarte* considered most of the same factors that it had in *Roberts*.¹⁴² As to the extent of the burden on their freedom of expressive association, the Court

135. *Id.* at 623–24.

136. *Id.* at 623.

137. *Id.* at 623–24.

138. *Id.* at 626.

139. *Id.* at 626–27.

140. *Id.* at 627–28.

141. *See* Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (analogizing the holding in this case to the holding in *Roberts*).

142. *Compare* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627–29 (1984) (considering the state’s purpose, the means chosen, the necessity of the means to achieve the purpose, and the burden on the organization), *with Duarte*, 481 U.S. at 548–49 (considering the state’s interest in eliminating discrimination against women and incidental or other burdens on the club).

noted that Rotary Clubs had a practice of not engaging in “public questions” and that the California statute did not preclude or limit the ability of the clubs to pursue “their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace.”¹⁴³ In addition, just as it had in *Roberts*, the Court indicated that, “[e]ven if the [California statute did] work some slight infringement on Rotary members’ right of expressive association, that infringement [was] justified because it serves the State’s compelling interest in eliminating discrimination against women.”¹⁴⁴ Unlike in *Roberts*, however, the Court in *Duarte* did not evaluate whether the effect of the “slight infringement” was greater than necessary to serve the state’s purposes in eradicating sex discrimination. Instead, the Court in *Duarte* seemed to find that a public accommodation statute prohibiting sex discrimination, by its very nature, imposes no infringement that is greater than is necessary. Said another way, if a public accommodation statute’s infringement on a party’s expressive associational rights is only slight, the state’s interest in eradicating sex discrimination always tips the balance in favor of the statute.

The issue in *Dale* was whether a New Jersey public accommodation statute that prohibited discrimination based on sexual orientation unconstitutionally infringed upon the freedom of expressive association enjoyed by the Boy Scouts of America, which had revoked the adult membership of homosexual activist James Dale.¹⁴⁵ Finding in favor of the Boy Scouts,¹⁴⁶ the Court noted the balancing test it had applied in *Roberts* and *Duarte*:

[A]fter finding a compelling state interest, the Court [in *Roberts* and *Duarte*] went on to examine whether or not the application of the state law would impose any “serious burden” on the organization’s rights of expressive association. So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State’s interest on the other.¹⁴⁷

143. *Duarte*, 481 U.S. at 548.

144. *Roberts*, 481 U.S. at 549.

145. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644–45 (2000).

146. *See id.* at 644 (holding New Jersey’s public accommodation law violated the Boy Scouts’ First Amendment right to expressive association).

147. *Id.* at 658–59.

The Court in *Dale* then purported to apply the balancing test, though it did so without explaining why the scale tipped in favor of the Boy Scouts. Largely deferring to the assessment made by the Boy Scouts as to the burden involved, the Court merely concluded that requiring the Boy Scouts to include Dale imposed a significant burden on the organization's freedom of association for expressive purposes and that "[t]he state interests embodied in New Jersey's public accommodation law [did] not justify such a severe intrusion."¹⁴⁸

The most cautious reading of *Dale*, and perhaps the best, is that an infringement on a group's freedom of association for expressive purposes only is constitutional if the infringement is slight and advances a compelling government interest. According to the Court,

We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express.¹⁴⁹

Moreover, the Court in *Dale* indicated that its analysis was similar to that in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,¹⁵⁰ a case in which the Court had applied its "traditional First Amendment analysis"¹⁵¹ and found that a public accommodation law preventing discrimination based on sexual orientation violated the First Amendment free speech rights of private parade organizers who did not wish to have a homosexual group march in their parade.¹⁵² In reaching this decision, the Court observed that no legitimate interest had been identified to support the statute, but that, if the state was trying to "produce a society free of . . . biases," applying the statute to

148. *Id.* at 653, 659.

149. *Id.* at 657.

150. 515 U.S. 557 (1995).

151. *Hurley*, 515 U.S. at 566; see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000) (stating its First Amendment analysis was similar to that in *Hurley*).

152. See *Hurley*, 515 U.S. at 561, 566 (1995) (holding the law requiring parade organizers to admit groups expressing messaging inconsistent with the organizers' views to be an unconstitutional violation of free speech).

the parade organizers would strike at the very heart of their free speech rights because “[o]ur tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says.”¹⁵³ In other words, if the object of the public accommodation statute in *Hurley* was to control the content of a person’s speech, its impact would be severe and impermissible. Similarly, the Court in *Dale* found that the New Jersey law “directly and immediately affect[ed] associational rights . . . that enjoy First Amendment protection.”¹⁵⁴ The severity of the impact, therefore, seems to have been critical to the Court’s decision in *Dale*, leaving one to conclude that *Roberts*, *Duarte*, and *Dale* only permit infringement on expressive associational rights when the infringement is slight *and* the state has a compelling interest “unrelated to the suppression of ideas.”¹⁵⁵

The nature of a woman’s right to choose abortion and the nature of the right to freedom of expressive association are surprisingly similar. *Roe* recognized that, because of the presence of a potential life, the right to privacy associated with a woman’s right to choose is “inherently different [from the right to privacy as it relates to] marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education.”¹⁵⁶ Likewise, the Court in *Duarte* and *Roberts* recognized that the relationships among the members of the Jaycees and Rotary Clubs were unlike the intimate relationships involved in marriage, procreation, and family relationships, which warranted more robust associational protection.¹⁵⁷ Thus, one might reasonably argue that, just as a state’s compelling interest in eradicating sex discrimination justifies a slight infringement on expressive associational rights, the same compelling interest—

153. *Id.* at 578–79.

154. *Dale*, 530 U.S. at 659.

155. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

156. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

157. *See Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545–47 (1987) (distinguishing the relationship among Rotary Club members from the relationships that have enjoyed greater associational protection); *Roberts*, 468 U.S. at 620–21 (distinguishing the relationships involved in the Jaycees from more “intimate relationships”).

one “of the highest order”¹⁵⁸—justifies a sex-selection abortion ban that imposes only a slight infringement on a woman’s right to choose.

Moreover, interests like those present in *Gonzales*, a case in which the Court employed the undue burden standard,¹⁵⁹ apply equally to sex-selection abortion bans. In *Gonzales*, the Court noted that, in adopting the federal partial-birth abortion ban, Congress was concerned that allowing partial-birth abortion would “coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.”¹⁶⁰ Permitting sex-selection abortion similarly could “coarsen society” to the equal dignity of women and men and could impede the progress society has made in that regard.¹⁶¹ As the American Society of Reproductive Medicine (ASRM) asserted in discussing pre-implantation genetic diagnosis (PGD), if individual or family desires with respect to the sex of offspring are:

fulfilled on a large scale through PGD for sex selection, they may contribute to a society’s gender stereotyping and overall gender discrimination. On the other hand, if they are expressed and fulfilled only on a small scale and sporadically (as is presently the case), their social implications will be correspondingly limited. Still, they remain vulnerable to the judgment that no matter what their basis, they identify gender as a reason to value one person over another, and they support socially constructed stereotypes of what gender means. In doing so, they not only reinforce possibilities of unfair discrimination, but they may trivialize human reproduction by

158. *Duarte*, 481 U.S. at 549 (quoting *Roberts*); *Roberts*, 468 U.S. at 623.

159. *See Gonzales v. Carhart*, 550 U.S. 124, 168 (2008) (upholding the challenged law because it did not impose an undue burden).

160. *See id.* at 157 (quoting congressional findings on the effects of allowing partial-birth abortions).

161. Legislative findings included in several bills proposing sex-selection bans indicate that the bans are justified as a measure to protect against “coarsening society.” Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. § 2(a)(3)(B) (2013); H.B. 13-1131, 69th Gen. Assemb., 1st Reg. Sess. § 1 (Colo. 2013); S.B. 13-056, 69th Gen. Assemb., 1st Reg. Sess. § 1 (Colo. 2013); H.B. 845, 2013 Leg., Leg. Sess. 2013 (Fla. 2013); S.B. 1072, 2013 Leg., Leg. Sess. 2013 (Fla. 2013); A. 2157, 215th Leg., 2d Ann. Sess. § 1(p) (N.J. 2013).

making it depend on the selection of nonessential features of offspring.¹⁶²

In addition, the Court noted in *Gonzales* that it “has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned.”¹⁶³ Because sex-selection abortion bears a striking similarity to the historical practice of female infanticide in societies that have valued boys over girls,¹⁶⁴ banning the procedure sets a necessary and appropriate boundary.

A state that adopts a sex-selection abortion ban also has a strong argument that it is “protecting the integrity and ethics of the medical profession,”¹⁶⁵ an interest the Court in *Gonzales* found important. In upholding the federal partial-birth abortion ban, the Court observed that “Congress was concerned . . . with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion.”¹⁶⁶ The same ethical issues exist with respect to sex-selection abortion. In fact, the case for a narrow sex-selection abortion ban might be more compelling than that for the federal partial birth abortion ban because the American College of Obstetricians and Gynecologists (ACOG), which vehemently opposed the partial-birth abortion ban,¹⁶⁷ generally considers performing an abortion based on the sex of the fetus to be unethical:

162. Am. Soc’y for Reprod. Med., *Sex Selection and Preimplantation Genetic Diagnosis*, 72 FERTILITY & STERILITY 595, 597 (1999), http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/Sex_Selection.pdf.

163. *Gonzales v. Carhart*, 550 U.S. 124, 158 (2008).

164. See E.G. Austin, *Looking Out for Baby Girls*, ECONOMIST (June 28, 2011, 4:42 PM), <http://www.economist.com/blogs/democracyinamerica/2011/06/sex-selective-abortion> (last visited Feb. 6, 2014) (noting that “widespread access to abortion . . . is not the only cause of . . . gendercide—many baby girls are simply killed”) (on file with the Washington and Lee Law Review); Jason C. Greaves, *Sex-Selective Abortion in the U.S.: Does Roe v. Wade Protect Arbitrary Gender Discrimination?*, 24 GEO. MASON U. CIV. RTS. L.J. 333, 335 (2013) (“Before the widespread availability of prenatal screening, [son preference] was accomplished through infanticide . . .”).

165. *Gonzales*, 550 U.S. at 157 (quoting *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

166. *Id.*

167. See ACOG Statement on the U.S. Supreme Court Decision Upholding the Partial-Birth Abortion Ban Act of 2003, AM. COLL. OBSTETRICIANS &

The committee accepts, as ethically permissible, the practice of sex selection to prevent sex-linked genetic disorders. The committee opposes meeting other requests for sex selection, such as the belief that offspring of a certain sex are inherently more valuable. The committee opposes meeting requests for sex selection for personal and family reasons, including family balancing, because of the concern that such requests may ultimately support sexist practices.¹⁶⁸

In addition, though not favoring legal prohibition of sex-selection through PGD, ASRM states that “the cumulative weight of the arguments against nonmedically motivated sex-selection gives cause for serious ethical caution.”¹⁶⁹

Moreover, a sex-selection abortion ban arguably advances a state’s interest in the safety and well-being of its citizens. Bills both in Congress and in the Colorado and New Jersey legislatures assert that

[s]ex selection abortion results in an unnatural sex ratio imbalance, which is undesirable due to the inability of the numerically predominant sex to find mates; and such imbalance gives rise to the commoditization of humans, in the form of human trafficking and a consequent increase in kidnapping and other violent crimes.¹⁷⁰

These claims are not unfounded. Mara Hvistendahl postulates in a 2011 book that similar effects have occurred in China because of a skewed sex-ratio that resulted from the abortion of female fetuses just because they are female.¹⁷¹ These effects have not

GYNECOLOGISTS (Apr. 18, 2007), http://www.acog.org/About_ACOG/News_Room/News_Releases/2007/ACOG_Statement_on_the_US_Supreme_Court_Decision (last visited Mar. 16, 2014) (quoting the ACOG president as saying “[t]oday’s decision to uphold the Partial-Birth Abortion Ban Act of 2003 is shameful and incomprehensible to those of us who have dedicated our lives to caring for women”) (on file with the Washington and Lee Law Review).

168. *Sex Selection*, COMM. OPINION NO. 360 (Comm. on Ethics), Feb. 2007, reaffirmed 2011, at 4, <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co360.pdf?dmc=1&ts=20140207T1106472847>.

169. Am. Soc’y for Reprod. Med., *supra* note 162, at 598.

170. H.R. 447, 113th Cong. § 2N (2013); *see also* H.B. 13-1131, 69th Gen. Assemb., 1st Reg. Sess. § 2(a)(XII) (Colo. 2013); A. 2157, 215th Leg., 2d Ann. Sess. (N.J. 2013).

171. *See* MARA HVISTENDAHL, UNNATURAL SELECTION: CHOOSING BOYS OVER GIRLS, AND THE CONSEQUENCES OF A WORLD FULL OF MEN 217–25 (2011) (describing the consequences of an imbalanced sex ratio); Jonathan V. Last, *The War Against Girls*, WALL ST. J. (June 24, 2011), <http://online.wsj.com/>

been seen in the United States on a large scale, but there is reason to be concerned about them. Researchers have found that, in particular communities, after having a girl, the sex ratio for some children becomes unnaturally high.¹⁷² As more and more Americans try to design the “perfect family,”¹⁷³ the risks associated with sex selection could become more real.

Despite the state’s compelling interest in eliminating sex discrimination and the other substantial interests that support sex-selection abortion bans, if *Casey*’s undue burden test applies in the same way as the Court seems to have applied the balancing test in its freedom of expressive association cases, a sex-selection abortion ban will survive only if it infringes on a woman’s right to choose no more than slightly.¹⁷⁴ Reaching such a

article/SB10001424052702303657404576361691165631366.html (last visited Feb. 7, 2014) (reviewing Hvistendahl’s book) (on file with the Washington and Lee Law Review).

172. See Sujatha Jesudason & Anat Shenker-Osorio, *Sex Selection in America: Why It Persists and How We Can Change It*, ATLANTIC (May 21, 2012), <http://www.theatlantic.com/politics/archive/2012/05/sex-selection-in-america-why-it-persists-and-how-we-can-change-it/257864/> (last visited Jan. 14, 2014) (noting that a normal sex ratio is between 1.02 and 1.06 boys per girl and that, in “Korean, Chinese, and Indian communities . . . after having one girl, parents have as many as 1.17 boys per girl,” and after having two girls, “the ratio goes up to 1.51”) (on file with the Washington and Lee Law Review).

173. See *id.* (noting that fertility clinics advertise services to facilitate “family balancing”). A number of companies now provide services to facilitate sex selection. See, e.g., GENDER SELECT, LLC, <http://choosegender.com/Default.aspx?gclid=CKTevcqMjrYCFcWPPAodQVIANw> (last visited Mar. 16, 2014) (offering its services to help people “bring[] the number of children of each gender in one family closer to equal”) (on file with the Washington and Lee Law Review). These companies may not provide sex-selection abortion services, but their existence indicates a demand for sex selection. It is not hard to imagine a case in which a couple chooses a sex-selection abortion after their preconception efforts fail.

174. The *Dale* opinion, however, could be interpreted as allowing a greater infringement. In *Dale*, the Court did not describe the state interests supporting the New Jersey publication accommodation statute at issue in the case or assess the weight of those interests, but only decided that the interests were insufficient to justify a substantial infringement on the associational rights of the Boy Scouts. *Boy Scouts of Am. v. Dale*, 540 U.S. 640, 659 (2000). Early in its opinion, the Court noted that the New Jersey Supreme Court had found that the state’s “compelling interest in eliminating the destructive consequences of discrimination from society” justified the New Jersey public accommodation law, but the *Dale* opinion nowhere identifies this broad interest as compelling. *Id.* at 640. Moreover, the *Dale* Court indicated that its analysis was similar to that in *Hurley*, and in *Hurley*, the Court noted that no legitimate interest had been

conclusion is difficult at best because an abortion ban of any type would appear to strike at the very heart of the abortion right. Yet, a close look at the foundations of a woman's right to choose abortion reveals its essence, which a narrow sex-selection abortion ban does not "directly" or "immediately"¹⁷⁵ affect.

When it recognized a woman's right to abort a nonviable fetus, the Court in *Roe* was driven by a number of detriments associated with pregnancy and parenthood:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.¹⁷⁶

The Court in *Casey* drew on *Roe*'s concerns when it described a concept of liberty that includes a woman's right to choose.¹⁷⁷ According to *Casey*, the Court's previous decisions regarding contraception

support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation, but also human responsibility and respect for it. . . . One view is based on such reverence for the

identified to support the infringement of the speech rights of parade organizers imposed by a Massachusetts public accommodation law that barred discrimination based on sexual orientation. *Id.* at 659; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578 (1995). One might argue then that the Court in *Dale* found no compelling interest in preventing discrimination based on sexual orientation and therefore left open the possibility that a significant infringement (though perhaps not one that is severe) might be constitutional when justified by a compelling interest.

175. *Dale*, 530 U.S. at 659.

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

177. Justin Gillette, Comment, *Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 664 (2013) (noting that, since *Roe*, the Court often has referred to "women's reproductive rights in terms of liberty interests rather than the right to privacy").

wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. . . . [These] concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant. It was this dimension of personal liberty that *Roe* sought to protect.¹⁷⁸

The detriments described in *Roe* and the confines of the liberty interest explained in *Casey* arguably form the core of a woman's right to choose.¹⁷⁹

A narrow ban on sex-selection abortion does not implicate any of these concerns in a meaningful way. A woman who chooses to have an abortion based solely on the sex of the fetus is not concerned with her health, the burdens of maternity, additional offspring or child care, the distress in having a child, the inability to care for a child, or the stigma of unwed motherhood. Nor can one genuinely claim that a narrow sex-selection abortion ban inhibits a woman's liberty "to define [her] own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁸⁰ The sex of a child alone has little, if any, bearing on any of these things. Therefore, any infringement that a narrow sex-selection ban might impose on a woman's right to choose reasonably can be characterized as slight or insubstantial and, in light of the state's compelling interest in eliminating sex discrimination and the other important interests described above, justified.

178. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992).

179. Gillette, *supra* note 177, at 666 ("The *Roe* Court reasoned that the fundamental nature of [the abortion] 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 . . . her physical and psychological health.").

180. *Casey*, 505 U.S. at 851.

V. *The Future of Sex-Selection Abortion Bans*

As should now be clear, the case for the constitutionality pre-viability of the most narrow sex-selection abortion ban is a difficult one. Not surprisingly, broader bans are harder to justify.

Even post-viability, a broader ban may run afoul of *Casey*. As discussed above, bans that prohibit an abortion sought *solely* based on the sex of the fetus do not need life or health exceptions because an abortion that is necessary to protect the life or health of the woman is not based *solely* on the sex of the fetus.¹⁸¹ A broader ban that proscribes abortions when sought based on (but not *solely* based on) the sex of the fetus, on the other hand, raises questions about how a woman who has other reasons for choosing abortion might be affected. If the sex of the fetus is one among other reasons, does the ban apply? If so, it almost certainly is unconstitutional post-viability—because it does not allow for abortion when a woman’s life or health is at risk—and pre-viability—because it would preclude a woman from choosing an abortion when she has any other permissible reason.

Of course, bans that merely fail to use the word “solely” are susceptible to a narrow interpretation. North Carolina’s broadly written ban, however, is not. It clearly captures cases in which sex selection is one among other reasons and contains neither a life nor a health exception.¹⁸² As a result, North Carolina’s ban very likely is unconstitutional both pre- and post-viability.¹⁸³

181. See *supra* notes 52–55 and accompanying text (considering the constitutionality post-viability of narrow sex-selection abortion bans).

182. S.B. 353, Gen. Assemb., 2013-14 Reg. Sess. § 3(a) (N.C. 2013) (emphasis added).

183. See S.B. 353, Gen. Assemb., 2013-14 Reg. Sess. § 3(a) (N.C. 2013) (banning abortion when “a *significant factor* . . . is related to the sex of the [fetus].” (emphasis added)). In fact, the language used in North Carolina’s ban is reminiscent of language that proved problematic in the Supreme Court’s consideration in *Stenberg v. Carhart*, 530 U.S. 914 (2000), of Nebraska’s partial birth abortion ban. In *Stenberg*, the Court determined that the statute posed an undue burden because it could be interpreted to encompass a [dilation and extraction procedure (“D&E”)], which is commonly used. See *Stenberg*, 530 U.S. at 939, 945–46 (describing the overbreadth of Nebraska’s partial-birth abortion ban and finding an undue burden). The statute that the Court found problematic “forb[ade] ‘deliberately and intentionally delivering into the vagina a living unborn child, or a *substantial portion* thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child.’” *Id.* at 938 (emphasis added). The Court in *Gonzales*, in

The sex-selection abortion bans that have been enacted or proposed tend to have a uniform scope throughout pregnancy and therefore fail to account for the different standards that apply to pre-viability and post-viability measures under *Casey*.¹⁸⁴ As a result, the narrowest bans sacrifice strength post-viability in favor of maximizing the likelihood of surviving constitutional scrutiny pre-viability. Broader bans, in contrast, find themselves on very shaky ground pre-viability, but attempt to take better advantage of the more robust power states have with respect to post-viability measures.

States could achieve better balance by drafting their statutes to reflect more closely the differing standards that apply pre- and post-viability under *Casey*. Pre-viability, a state should do no more than prohibit abortions sought *solely* for sex-selection. As indicated above, even such a narrow sex-selection abortion ban faces significant challenges pre-viability, and leaving any ambiguity as to a ban's breadth only increases the chances of its being found unconstitutional.¹⁸⁵ Post-viability, a state might use language similar to that in the North Carolina ban—prohibiting a person from performing an abortion when he or she has “knowledge, or an objective reason to know, that a significant factor in the woman seeking the abortion is related to the sex of the [fetus]”¹⁸⁶—but with specific life and health exceptions. In addition, a state should be sure to include specific severability provisions so that a ban can survive post-viability even if struck down pre-viability.¹⁸⁷ By taking these simple steps, a state can

upholding the federal partial-birth abortion ban, found the omission of the language covering delivery of a “substantial portion” of an unborn child to be significant. *See* *Gonzales v. Carhart*, 550 U.S. 124, 152 (“The Act . . . thus displaces the interpretation of ‘delivering’ dictated by the Nebraska statute’s reference to a ‘substantial portion’ of the fetus.”).

184. *See supra* notes 16–24 and accompanying text (discussing proposed and passed legislation).

185. *See supra* notes 54–55 (discussing the uphill battle a pre-viability ban faces).

186. S.B. 353, Gen. Assemb., 2013–14 Reg. Sess. § 3(a) (N.C. 2013).

187. Only the Illinois law and the bills proposed in Indiana, Missouri, and Virginia include severability clauses. 720 ILL. COMP. STAT. § 510/6(8) (1985); H.B. 1430, 118th Gen. Assemb., 2013 Leg. Sess. § 4(a)–(b) (Ind. 2013); S.B. 183, 118th Gen. Assemb., 2013 Leg. Sess. § 4(c) (Ind. 2013); H.B. 386, 97th Gen. Assemb., 1st Reg. Sess. § 188.281(2) (Mo. 2013); H.B. 1316, Gen. Assemb., 2013 Sess. § 18.2-71.2(D) (Va. 2012).

maximize the effect of a ban, while improving its chances of withstanding a constitutional challenge.

Regardless of whether a sex-selection abortion ban applies or is constitutional pre-viability, states should strengthen their bans by requiring that a woman be given a disclosure regarding the ban before she has an abortion. In *Casey*, the Court indicated that “a State [may] further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion,”¹⁸⁸ and that a state law requiring a woman to be given information that is “truthful and not misleading” does not impose an undue burden.¹⁸⁹ Consequently, a state might seek to curb sex-selection abortion by requiring a disclosure such as the following:

The American College of Obstetricians and Gynecologists considers performing an abortion based on the sex of the fetus to be unethical, except when aimed at preventing sex-linked genetic disorders. The State of _____ likewise considers choosing to have an abortion based [solely] on the sex of the unborn child to be unethical, and performing a sex-selection abortion [after an unborn child has reached the point at which he or she can live outside the womb] is prohibited by _____ law.¹⁹⁰

A state speaks strongly when it adopts a sex-selection abortion ban, but it needs to make sure that its message is heard. Only the legislation proposed in Virginia requires disclosure of the ban to a woman seeking to have an abortion.¹⁹¹ Other states would benefit from doing the same.

188. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992).

189. *Id.* at 882.

190. A state might even be able to require a physician to make this statement orally before a woman has an abortion without violating the physician’s First Amendment right to be free from being compelled to speak. See Scott W. Gaylord & Thomas J. Molony, *Casey and a Woman’s Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 597–601, 646 (2012) (concluding that compelling physicians to display ultrasound images to a woman seeking an abortion and to explain those images does not violate the physician’s First Amendment right to be free from compelled speech).

191. H.B. 1316, Gen. Assemb., 2013 Sess. § 18.2-76(A)-(C) (Va.).

Finally, states would do well to include sex-selection abortion bans within broader legislation aimed at eliminating sex discrimination against potential life. One report indicates that, “as of 2006, half of American fertility clinics that offer embryo screening allow would-be parents some form or sex-selective add-ons . . . and the market is growing.”¹⁹² Legislators who are concerned about potential life inside the womb should be equally concerned with practices such as these that affect potential life outside the womb, and by adopting bans on sex selection that extend beyond sex-selection abortions, legislators can avoid a charge that they are singling out abortion and acquiescing to an activity that has the similar effect.

VI. Conclusion

In light of all of the potential pitfalls associated with sex-selection abortion bans, one reasonably might ask whether the bans are worthwhile. After all, any abortion restriction that a state adopts must allow the procedure when it is necessary to preserve a woman’s health,¹⁹³ and as Clarke Forsythe points out in a recent book, the broad definition the Court in *Doe v. Bolton*¹⁹⁴ gave to the “health’ exception . . . swallowed the supposed ability of the states to prohibit abortion.”¹⁹⁵ Moreover, a woman seeking an abortion based on the sex of the fetus need not tell anyone of her reason. Justice Ginsberg might say then, as she did in

192. Jesudason & Shenker-Osorio, *supra* note 172; *see also* Annie Moskovian, *Bans on Sex-Selective Abortions: How Far Is Too Far?*, 40 HASTINGS CONST. L.Q. 423, 444–45 (2013) (indicating that some couples use PGD “through in vitro fertilization . . . for sex selection”).

193. *See* *Gonzales v. Carhart*, 550 U.S. 124, 161 (2007) (considering in applying the undue burden test whether the federal partial birth abortion ban “creates significant health risks for women”); *Casey*, 505 U.S. at 879 (noting that, after viability, any prohibition on abortion must permit the procedure “where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother” (quoting *Roe v. Wade*, 410 U.S. 113, 165 (1973))).

194. 410 U.S. 179 (1973).

195. CLARKE D. FORSYTHE, ABUSE OF DISCRETION 8 (2013); *see also* *Doe*, 410 U.S. at 192 (“[M]edical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.”).

Gonzales, that a sex-selection abortion ban “saves not a single fetus from destruction.”¹⁹⁶

Yet, sex-selection abortion bans matter. The very act of banning sex-selection abortions may discourage a woman from seeking such an abortion,¹⁹⁷ and by enacting a ban, a state expresses its view about potential life and the equal dignity of women and men. As suggested by *Roberts* and *Duarte*, a state has a compelling interest in delivering this message,¹⁹⁸ and a state speaks with particular strength when it adopts a ban. A sex-selection abortion ban that applies after a fetus becomes viable can deliver this message and certainly is more easily defensible under *Casey*, but only a ban that applies throughout pregnancy can affirm that women and men *always* share equal dignity.

Nevertheless, as this Article demonstrates, it is difficult to argue that a pre-viability ban of any type is constitutional under *Casey*. With that in mind, states need to be realistic about what they can achieve through their sex-selection abortion bans and must be smart about how they draft them. Wise lawmakers will adopt bans that, pre-viability, are as narrow as those enacted in Kansas, Illinois, North Dakota, and Oklahoma and, post-viability, are as broad as the ban adopted in North Carolina, but with life and health exceptions. If states do otherwise, their efforts may be for naught and their simple but important message could be lost.

196. *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting).

197. *See id.* at 160 (majority opinion) (“It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions.”).

198. *See supra* note 141 and accompanying text (discussing recognition by the Court in *Roberts* and *Duarte* that a state has a compelling interest in eliminating sex discrimination).