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Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing

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DOES THE CONSTITUTION PROTECT ABORTIONS
BASED ON FETAL ANOMALY?: EXAMINING THE
POTENTIAL FOR DISABILITY-SELECTIVE
ABORTION BANS IN THE AGE OF PRENATAL
WHOLE GENOME SEQUENCING

*Greer Donley**

This Note examines whether the state or federal government has the power to enact a law that prevents women from obtaining abortions based on their fetus's genetic abnormality. Such a ban has already been enacted in North Dakota and introduced in Indiana and Missouri. I argue below that this law presents a novel state intrusion on a woman's right to obtain a pre-viability abortion. Moreover, these pieces of legislation contain an outdated understanding of prenatal genetic testing—the landscape of which is quickly evolving as a result of a new technology: prenatal whole genome sequencing. This Note argues that the incorporation of this new technology into clinical care will both invigorate anti-choice legislatures to pursue such legislation and cause the laws' impact on women to be greater than initially anticipated. Using the undue burden standard announced in Planned Parenthood v. Casey, this Note concludes that federal and state disability-selective abortion bans are unconstitutional based on the Due Process Clause. The Note also questions whether the federal government has constitutional authority under its enumerated powers to even enact such a ban. Finally, the Note presents policy reasons for why such an abortion ban will degrade the right to a pre-viability abortion so significantly as to render it non-existent.

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INTRODUCTION

Every month, legislation is introduced at the state and federal level that attempts to chip away at a woman’s right to choose. With the emergence of a cutting-edge reproductive technology set to enter clinical care in the next few years—prenatal whole genome sequencing—anti-choice legislators will have new fodder for attacks on abortion. This technology will provide women with access to exponentially more information about their fetus than ever before. It will also become the most cost-effective prenatal testing technology to ever hit the market. The abundance of new information will undoubtedly impact women’s reproductive decision making, one likely consequence of which will be an increase in abortions based on fetal anomaly, at least when the technology is first offered in clinical care.

In this Note, I argue that the use of this new technology to inform reproductive decisions will create legislative pressure to outlaw abortions based on the disability of the fetus. This kind of legislation has already been championed in various states. In August 2013, the first state abortion ban based on the genetic abnormality of the fetus was signed into law in North Dakota. Other such state bans have been proposed in Missouri and Indiana. Moreover, four states have enacted, and nine states have introduced, sex-selective abortion bans; one state has even enacted a race-selective abortion ban. These types of laws (“reasons-based abortion bans”¹) have also made some federal traction. In 2012, the Federal House of Representatives proposed a law that would make it a criminal offense for physicians to perform abortions solely due to the sex of the fetus.

Many of these reasons-based abortion bans have been touted as civil rights bills—a way to protect vulnerable populations, including the disabled community, from discriminatory conduct. The disability² angle, as opposed to sex or race, is the most compelling given the evidence that most fetuses with genetic abnormalities are aborted when women learn that they will have one of the few disabilities traditionally tested for with prenatal genetic testing. While race- and sex-selective abortion bans are also being proposed, there is little to no evidence that such abortions are actually occurring in the United States.

This Note analyzes the constitutional issues arising from laws that attempt to limit abortions based on genetic information about the fetus.

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1. By reasons-based abortion bans, I mean laws that prevent only women who have certain reasons for choosing an abortion from actually receiving that abortion. Currently, states have enacted bans against sex-, race-, and disability-selective abortions. *See infra* Part III. Reasons-based abortion bans are different from the types of laws commonly seen regulating abortions in that they ban abortions that are procured due to certain “undesirable” reasons. Until now, the regulation of abortion has been predominately limited to the gestational age of the fetus, the information women must receive in order to receive an abortion, the types of facilities that are permitted to provide abortions, or the type of procedure performed. Regulations like these apply widely to all women meeting certain criteria in a given jurisdiction. Reasons-based bans apply to only some women who society decides have “bad” reasons for choosing abortion, despite being on the same plane as other abortion-seeking women in all other respects.
 2. In this Note, I often conflate the term “disability” with “genetic abnormality.” They are distinct concepts—many genetic abnormalities will not constitute disabilities (for instance, variants of unknown significance discussed in Table One), while some disabilities are not genetic (for instance, injuries leading to amputation). However, there is also considerable overlap between the two terms. Throughout this Note, I use the two terms interchangeably because the differences are not relevant to the argument. For clarity’s sake, however, when I refer to disability-selective abortion bans, I am generally referring to the recent legislation that bans abortion based on genetic abnormality of the fetus.

Looking at current Supreme Court jurisprudence, I discuss the many ways in which such bills are constitutionally problematic. In Part I of this Note, I provide a technological background on whole genome sequencing. I describe how quickly and inexpensively it will enter clinical care, why it might cause a rise in abortions, and ultimately, how it will spur a backlash from the anti-choice and disability rights communities. In Part II, I provide an overview of a North Dakota law that bans abortions based on the genetic abnormality of the fetus. I also describe the federal sex-selective abortion ban that was proposed in 2012. In Part III, I examine whether the Constitution empowers Congress to create a federal reasons-based abortion ban under the Commerce Clause, the Necessary and Proper Clause, or Section 5 of the Fourteenth Amendment. I conclude that it does not. Finally, in Part IV, I assess how state laws—and federal laws, if courts find that Congress possesses such authority—would raise deep due process issues and place an undue burden on women seeking an abortion after prenatal whole genome sequencing. This legal analysis is bolstered by policy concerns that judicial approval of a disability-selective abortion ban would empower legislatures to continue outlawing abortions for any “undesirable” reason, which would place the right to a pre-viability abortion in serious jeopardy.

I. THE EVOLUTION OF PRENATAL GENETIC TESTING: UNDERSTANDING HOW PRENATAL WHOLE GENOME SEQUENCING WILL DRAMATICALLY ALTER THE PRENATAL TESTING LANDSCAPE

A. *Traditional Model (1970s–2000s)*

The science of prenatal genetic testing is rapidly evolving. Until a few years ago, the archetypal model involved offering prenatal genetic testing only to women who were at an increased risk of having a child with certain conditions.³ Factors considered in this analysis included the age of the mother, family history of disease, ethnicity of the parents, and/or an abnormal ultrasound or test.⁴

Once a determination of increased risk was made, a pregnant woman had the option of fairly invasive genetic testing procedures that would require taking a sample from either the placenta or amniotic sac with a large needle inserted through either the cervix or the abdomen.⁵ These proce-

3. Wylie Burke et al., *Genetic Screening*, 33 EPIDEMIOLOGIC REVS. 148, 155–56 (2011).

4. *See id.*

5. *See* Kristine Barlow-Stewart & Mona Saleh, *Prenatal Genetic Testing—CVS and Amniocentesis*, CENTRE FOR GENETICS EDUC., <http://www.genetics.edu.au/Publications%20and%20Resources/Genetics-Fact-Sheets/FS17C.pdf> (last updated May 2012).

dures carry with them a risk of miscarriage that has historically been between 0.2% and 1%. There is additionally a range of other rare, but serious, risks attached to the procedure.⁶ The invasiveness of the test has had a negative impact on demand, causing many women who might otherwise be interested in learning genetic information about their fetus to forgo the procedure to avoid discomfort.⁷ Less than 2% of pregnant women each year choose to undergo these tests.⁸

Under the traditional model, once the genetic material had been extracted, it was tested for a finite number of serious conditions.⁹ Such conditions include Down Syndrome, Turner Syndrome, Patau's Syndrome, Edwards Syndrome, Spina Bifida, Cystic Fibrosis, Tay Sachs Disease, Thalassemia, Muscular Dystrophy, Fragile X Syndrome, and Anencephaly.¹⁰ These conditions are all very serious¹¹ and are expected to have a significant impact on the life of the child and the parents caring for him or her. This assumes that the child survives the first few years of life, which—for many of these conditions—is not common.¹² Moreover, the genes marking these conditions are all genetically highly penetrant (“diagnostic”), meaning that if the genetic marker is present, it will almost certainly produce the manifestation of the trait in the individual who possesses it.¹³

Due to the invasive nature of the procedure, coupled with the limited number, and rare occurrence, of the tested diseases, it was relatively uncommon for women to undergo prenatal genetic testing.¹⁴ When they did, the conditions tested for were rare enough that the test did not frequently produce any medically relevant information.¹⁵ However, if parents received pos-

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6. *Id.* Additional risks include needle injury, leaking amniotic fluid, Rh sensitization, infection, and infection transmission. *Amniocentesis*, THE MAYO CLINIC, (Oct. 10, 2012), <http://www.mayoclinic.com/health/amniocentesis/MY00155/DSECTION=Risks>.
 7. Henry T. Greely, *Get Ready for the Flood of Fetal Gene Screening*, 469 NATURE 289, 289 (2011).
 8. *Id.*
 9. Greer Donley, Sarah Chandros Hull & Benjamin E. Berkman, *Prenatal Whole Genome Sequencing: Just Because We Can, Should We?*, 42 HASTINGS CENTER REP. 28, 29–30 (2012).
 10. *Fetal Screening, Diagnostic and Screening Tests*, FETALSCREENING.COM, http://www.fetalscreening.com/conditions_tests.php (last visited Aug. 15, 2013).
 11. Donley et al., *supra* note 9, at 29.
 12. U.S. Nat'l Library of Med., *Anencephaly, Expectations (Prognosis)*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002547/> (last updated May 1, 2011); U.S. Nat'l Library of Med., *Tay Sachs, Expectations (Prognosis)*, PUBMED HEALTH, <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002390/> (last updated Nov. 2, 2012).
 13. Donley et al., *supra* note 9.
 14. Greely, *supra* note 7.
 15. Donley et al., *supra* note 9, at 33.

itive test results indicating that their child had one of these conditions, the result would be diagnostic¹⁶ and carry with it the dramatic information that the child will suffer from a serious disease. Given that this information is both diagnostic and severe, the presence of these conditions was assumed to be relevant to parents' reproductive decision making. Indeed, one primary purpose of these prenatal tests has always been to afford parents the option to terminate the pregnancy in case of a positive test result.¹⁷ Data from United States and Europe suggest that between 92–93% of parents who learn through prenatal genetic testing that their child will have Down Syndrome choose to terminate the pregnancy.¹⁸ The presence of other conditions for which the traditional model tested also correlates to abortion. For example, 61–67% of parents choose to terminate for Spina Bifida, 82–86% for Anencephaly, and 69–75% for Turner Syndrome.¹⁹

However, given the rarity of the conditions and the infrequency with which women are tested, abortions based on this information have been relatively uncommon—only about 13–14% of women who have received an abortion reported that their reason for doing so was a potential health problem with the child.²⁰ And when such abortions have occurred, they have been surprisingly uncontroversial. In 2007, 70% of Americans polled indicated that they believed women should be permitted to obtain an abortion “if there is a strong chance of a serious defect in the baby.”²¹ That is compared with the 49% of Americans who self-identified as pro-choice in 2007.²² Moreover, Virginia²³ and Mississippi have permitted Medicaid

16. By diagnostic, I mean highly penetrant genetic conditions whose presence almost certainly means the manifestation of the condition. This will later be contrasted to susceptibility genes, whose presence indicates an increased likelihood, but not certainty, of developing a condition. Donley et al., *supra* note 9.

17. AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION NO. 410, ETHICAL ISSUES IN GENETIC TESTING 3 (2008), available at <http://www.acog.org/-/media/Committee%20Opinions/Committee%20on%20Ethics/co410.pdf?dmc=1&ts=20130922T1415295393>.

18. Caroline Mansfield, Suellen Hopfer & Theresa M. Marteau, European Concerted Action, *Termination Rates After Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, 19 *PRENATAL DIAGNOSIS* 808, 810 (1999).

19. *Id.*

20. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *PERSP. ON SEXUAL AND REPROD. HEALTH* 110, 113 (2005), available at <http://www.guttmacher.org/pubs/journals/3711005.pdf>.

21. Amy Harmon, *Genetic Testing + Abortion = ???*, *N.Y. TIMES* (May 13, 2007), <http://www.nytimes.com/2007/05/13/weekinreview/13harm.html>.

22. Abortion, *GALLUP* (Sept. 22, 2013, 6:00 AM), <http://www.gallup.com/poll/1576/abortion.aspx>.

23. In 2012, a bill was introduced in Virginia to repeal this coverage. Laura Bassett, *Virginia Abortion, Contraception Bills Proposed In New Legislative Session*, *HUF-*

funds to be used for abortions in cases of severe fetal defect (where funds are otherwise restricted to only cover abortions after rape, incest, or when the life of the mother is threatened).²⁴ Some states like Maryland and Utah, which ban abortions after viability, provide exceptions to this ban for fetal anomaly.²⁵

This is not to say that termination decisions based on traditional prenatal tests have ever been, or are now, wholly uncontroversial. There has been a significant backlash from the disability rights community regarding termination decisions based on this information—most notably in the Down Syndrome community.²⁶ Due to the limited scope of traditional prenatal genetic testing and the severity of the conditions tested for, prenatal genetic testing has remained an instrumental part of prenatal care despite its implications for abortion.²⁷

B. The Current Reality: Recent Shifts Resulting from Various New Prenatal Genetic Testing Technologies (2010–Present)

A major change in prenatal genetic testing occurred in 2010, when two independent research groups were able to isolate the fetal genotype from a simple maternal blood sample.²⁸ This means that recently, women receiving care in certain prenatal centers have been able to obtain prenatal genetic testing with a non-invasive blood draw as early as ten weeks into their pregnancy.²⁹ This not only removes the invasive aspect of the test, but also opens up the potential for more widespread testing: “Checking for hundreds or thousands of traits with one blood test, early in pregnancy, could move prenatal genetic testing from uncommon to routine.”³⁰ With this test,

FINGTON POST (Jan. 4, 2013), http://www.huffingtonpost.com/2013/01/04/virginia-abortion-contraception_n_2410445.html.

24. GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS (2013), available at http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

25. *Id.*

26. See, e.g., *Bristol Palin: Don't Abort Down Syndrome Babies*, HUFFINGTON POST (May 15, 2012), http://www.huffingtonpost.com/2012/05/15/bristol-palin-abortion-down-syndrome_n_1518154.html; Stephanie Pappas, *Fetal Testing Could Intensify Abortion Wars*, LIVESCIENCE (Nov. 1, 2012, 3:22 PM), <http://www.livescience.com/24472-fetal-genetic-testing-abortion-wars.html>.

27. See Mary M. Murry, *Prenatal Genetic Screening: Is it Right for You?*, Posting in *Pregnancy and You Blog*, MAYO CLINIC (Jan. 7, 2012), <http://www.mayoclinic.com/health/prenatal-genetic-screening/MY01966>.

28. Greely, *supra* note 7.

29. *FAQ: Cell-Free Fetal DNA Testing*, UCSF MED. CENTER, http://www.ucsfhealth.org/education/cell-free_fetal_dna_testing/ (last visited Aug 15, 2013).

30. Greely, *supra* note 7.

a simple blood draw from the pregnant woman could be tested for any known genetic marker.³¹

This new technology is emerging in a unique context. Although just beginning, the understanding of human genomics is growing quickly. In the past few decades, due to the increase of whole genome sequencing research, the genetic markers for a rapidly increasing number of conditions have been discovered—as of October 2012, over 20,000 individual human genes have been identified.³² At the same time, the functions of more than 90% of the genes in the human genome remain unknown.³³ Thus, the world is changing from one of prenatal genetic testing where only a small number of severe, diagnostic conditions could be detected to one in which thousands of conditions (soon to be hundreds of thousands) can be ascertained, many of which are neither diagnostic nor severe.³⁴ For example, scientists have already expressed concern regarding the implications of prenatal genetic testing for the genes associated with breast cancer, which is on the horizon.³⁵ It may go without saying that reproductive decisions based on the fetus' chance of developing breast cancer are more controversial than decisions based on more traditional information regarding conditions like Down Syndrome or Tay Sachs.

Though these non-traditional tests have become more available in recent years, at this point, parents have to be proactive to get them. They are not the standard of care,³⁶ and thus are offered by only a limited number of facilities. Doctors do not frequently offer testing for diseases outside of the conventional list, so parents who utilize this new technology must seek it out themselves, often as a result of their own medical histories of the condition.³⁷ For example, a woman who knows she carries the breast cancer gene might look for facilities that can provide fetal testing for this marker. This

31. Greely, *supra* note 7, at 290.

32. PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES, PRIVACY AND PROGRESS IN WHOLE GENOME SEQUENCING 18, 19 (2012).

33. Data is current as of 2010. Amy L. McGuire & James R. Lupski, *Personal Genome Research: What Should the Participant Be Told?*, 26 TRENDS IN GENETICS 199, 200 (2010); see also Kelly E. Ormond et al., *Challenges in the Clinical Application of Whole-Genome Sequencing*, 375 THE LANCET 1749, 1749–51 (2010).

34. Donley et al., *supra* note 9, at 28–30; PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES, *supra* note 32, at 19–22.

35. Claire Julian-Reynier et al., *BRCA1/2 Carriers: Their Childbearing Plans and Theoretical Intentions About Having Preimplantation Genetic Diagnosis and Prenatal Diagnosis*, 14 GENETICS IN MED. 527, 527–528 (2012).

36. AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, U.S. DEP'T OF HEALTH & HUMAN SERVICES, GUIDELINE SUMMARY: SCREENING FOR FETAL CHROMOSOMAL ABNORMALITIES (2011), available at <http://www.guidelines.gov/content.aspx?id=10921>.

37. Julian-Reynier, *supra* note 35, at 527.

new technology is still in its nascent form so its impact on the prenatal setting has not yet been fully realized and remains confined to a small subset of women.³⁸

C. *The New Frontier: Prenatal Whole Genome Sequencing*

In July of 2012, *Nature* published the first account of fetal whole genome sequencing through a maternal blood sample.³⁹ This technology is currently only being used in the research setting, but it will likely be clinically available in the near future. Prenatal whole genome sequencing will reveal not only severe, diagnostic information, but also an array of new genetic information for which the traditional model never tested. This new information has been grouped into five categories: variants of unknown significance, non-medical genetic information, genes indicating carrier status, susceptibility genes, and late-onset genetic markers.⁴⁰ When compared to the prenatal information tested for under the traditional model (diagnostic information about severe diseases), these categories yield information that is less dramatic and less determinative of the quality of life that the parents and the child will have.⁴¹ This is both because the presence of a genetic marker might be less certain to manifest in the child and because the conditions tested might be less physically symptomatic and painful. Not only will this deluge of information raise new ethical issues,⁴² it will also make termination decisions based on this information more common and controversial, especially as the technology is first introduced into clinical care.

Currently, due to the relative scarcity of prenatal genetic testing—and the rareness of the genetic conditions that traditional genetic tests diagnose—few parents must face the profoundly difficult and complicated deci-

38. However, the fact that the technology is available has nevertheless caused controversy in the past five years. Harmon, *supra* note 21.

39. H. Christina Fan et al., *Non-invasive Prenatal Measurement of the Fetal Genome*, 487 *NATURE* 320 (2012); Krista Conger, *New Method Enables Sequencing of Fetal Genomes Using Only Maternal Blood Sample*, *STANFORD SCH. OF MED.* (July 4, 2012), <http://med.stanford.edu/ism/2012/july/genome.html>.

40. For definitions, see *infra* Table One. These categories are not absolute and can bleed into one another, but are a good way to conceptualize the new information this technology will generate. Donley et al., *supra* note 9, at 30; PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES, *supra* note 32, at 19.

41. Donley et al., *supra* note 9, at 30; PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES, *supra* note 32, at 19.

42. Some ethical concerns that have been raised are (1) an interference in the future autonomy of the child—i.e. taking away the child's right not to know their genetic information later in life; (2) an increase in the role that genetic determinism plays in child-rearing, and (3) a change the concept of a normal, healthy pregnancy. Donley et al., *supra* note 9, at 28–40.

sions that result from learning that their child will have a genetic abnormality. This will no longer be the case with prenatal whole genome sequencing, which will reveal some unfortunate medical information for every fetus. For example, after sequencing the exomes⁴³ of healthy twin children in 2012, thirty-two variants associated with disease were revealed.⁴⁴ This underscores the reality that within every person's genome are numerous genetic markers implicating one's health. As described in Table One, most of this fetal genetic information will be neither severe nor diagnostic (in contrast to the conditions tested for in the traditional model), but rather non-diagnostic genetic information regarding less serious conditions. Some information will even be completely unrelated to the health of the child. However, while most of the generated information will be less serious, the volume of data produced will be exponentially greater.⁴⁵

43. Exomes constitute only 1% of the genome but are believed to contain 85% of all disease-causing mutations. European Soc'y of Human Genetics, *Exome Sequencing Gives Cheaper, Faster Diagnosis in Heterogeneous Disease, Study Shows*, SCIENCE DAILY (June 25, 2012), <http://www.sciencedaily.com/releases/2012/06/120625064746.htm>.

44. Benjamin D. Solomon et al., *Incidental Medical Information in Whole-Exome Sequencing*, 129 PEDIATRICS e1605, e1607 (2012).

45. PRESIDENTIAL COMMISSION FOR THE STUDY OF BIOETHICAL ISSUES, *supra* note 32, at 20–21.

TABLE ONE: NEW INFORMATION GENERATED BY PRENATAL WHOLE GENOME SEQUENCING⁴⁶

Categories of Information	Definition	Example(s)
Variants of Unknown Significance (new)	VUS are variations in a genetic sequence whose association with disease risk is, by definition, unknown; however, because they are often found in regions associated with important health functions, they are thought to potentially be associated with health conditions.	N/A
Non-medical Genetic Information (new)	Non-medical genetic information can predict characteristics that are unrelated to the health of the fetus, and rather related to physical or emotional traits.	Athletic ability, loyalty, hair color, sex ⁴⁷
Genes Indicating Carrier Status (new)	If a child is a carrier of a genetic condition, then once s/he reaches reproductive age and decides to have children, his/her offspring would be at risk of having that condition only if his/her partner is also a carrier for the same condition.	Ability to pass on Cystic Fibrosis or Tay Sachs to one's offspring
Susceptibility Genes (new)	Susceptibility genes are genetic markers of low or variable penetrance that suggest a genetic predisposition, or increased statistical likelihood, for developing a disease	Breast cancer, heart disease, diabetes
Late-Onset Genetic Conditions (new)	Genetic conditions that generally do not have any impact on a person's health until later in life.	Alzheimer's Disease, Huntington's Disease
Severe, Diagnostic Genetic Information (traditional model)	Severe, diagnostic medical information reveals highly penetrant genetic markers (genes whose presence is almost certain to lead to a given condition) for conditions that will have a highly significant impact on the life of the child.	Down Syndrome, Tay Sachs

Given this complicated landscape of new genetic information, parents may struggle to figure out how a result revealing twelve variants of unknown significance, five susceptibility genes, one carrier status, various undesirable non-medical indicators, and a condition of late-onset ought to weigh into their reproductive decisions. While most of these conditions on their own might not alter one's reproductive decision making, the barrage of information might have a cumulative impact, despite the fact that similar test results are present in the genomes of many healthy adults. Results from traditional prenatal tests may have been more devastating given the severity and certainty of the condition, but presented comparatively straightforward choices for women and couples to make. In contrast, the decisions faced by parents after receiving prenatal whole genome sequencing information will involve

46. Donley, *supra* note 9, at 30-32.

47. Even though this Note concerns the difficulties in abortion bans based on the genetic abnormality of the fetus ascertained through this new technology, prenatal whole genome sequencing will also reveal the sex of the child at an earlier date than currently available and could have an impact on the demand for sex-selective abortion. Thus, even though sex-selective abortion is not specifically addressed in this Note, the concept is implicated within this technology.

highly complicated formulations of risk and severity across many potential conditions. Given the contentiousness surrounding any abortion decision (even ones based on severe, diagnostic genetic information), termination decisions based on this less significant information are likely to be highly controversial. The 70% approval rate for abortions based on severe genetic abnormality may plummet once suspicions surface that women are receiving abortions based on much less serious medical information. This will engender a severe backlash from the anti-choice community.

Moreover, whereas the traditional model offered prenatal genetic testing only to individuals whom physicians believe are more likely to have certain highly penetrant and serious conditions, whole genome sequencing will be applicable to a broader population. Because every fetus will be at risk for something for which prenatal whole genome sequencing can test, every woman will suddenly become a good candidate for the procedure. Further, this increased information will not be financially prohibitive in the near future—most believe the \$1,000 genomic sequence is in sight.⁴⁸ This is not only less expensive than traditional prenatal testing, but produces substantially more information for the cost.⁴⁹ These two factors, combined with the ability to get genomic testing with a non-invasive blood sample, will immediately increase the demand for prenatal testing services. In other words, not only will the test reveal significantly more information, but will also be offered to, and sought out by, significantly more women.

The increased mass of information generated by whole genome sequencing, broader population of women to obtain it, and greater controversy over abortion decisions that result from it, create the perfect climate for anti-choice legislatures to enact disability-selective abortion bans. These bans will prevent certain women from receiving a pre-viability abortion; for that group of women, such laws are the most restrictive abortion regulations enacted since *Roe*. Below I analyze whether the federal government has the constitutional authority to create a federal ban. After concluding it does not, I argue that states are also prohibited from enacting these bans under the Due Process Clause.

48. Ivan Karabaliev, *The \$1,000 Genome Is Almost Here—Are We Ready?*, SCI. AM. (Oct. 15, 2012), <http://blogs.scientificamerican.com/guest-blog/2012/10/15/the-1000-genome-is-here-are-we-ready/>.

49. Donley et al., *supra* note 9, at 31.

II. AN EXAMINATION OF THE NORTH DAKOTA GENETIC ABNORMALITY
ABORTION BAN AND OTHER PROPOSED REASONS-BASED
ABORTION BANS

A. State Level

In March of 2013, North Dakota became the first state to sign into law a ban on abortions performed solely based on the disability or sex of the fetus.⁵⁰ Indiana and Missouri have introduced nearly identical bills that would also ban abortion based on the sex or genetic abnormality of the fetus.⁵¹ Four states—Arizona, Illinois, Oklahoma, and Pennsylvania—have enacted sex-selective abortion bans;⁵² nine others have introduced such bans.⁵³ Arizona is the only state to have also enacted a race-selective abortion ban.⁵⁴ While the Center for Reproductive Rights is challenging the North Dakota law, it remains in effect as of November 2013.⁵⁵

The anti-choice group Americans United for Life (“AUL”) supported the North Dakota bill.⁵⁶ The organization made it their objective in 2012 to encourage legislation banning abortions based on the sex or genetic abnormality of the fetus.⁵⁷ AUL’s 2012 policy guide (entitled “Bans on Abortions for Sex Selection and Genetic Abnormality”) created model language for state and federal governments to use in enacting such legislation.⁵⁸ The AUL document cites the Americans with Disabilities Act (“ADA”) as its

50. N.D. CENT. CODE ANN. § 14-02.1–04.1 (Westlaw through 2013 Reg. Sess.); *North Dakota Becomes First State to Limit Abortions Based on Sex-Selection and Genetic Abnormalities Using AUL Model Legislation*, AMS. UNITED FOR LIFE (Mar. 26, 2013), <http://www.aul.org/2013/03/north-dakota-becomes-first-state-to-limit-abortions-based-on-sex-selection-and-genetic-abnormalities-using-aul-model-legislation/> [hereinafter *North Dakota Becomes First*].

51. S. 183, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); H.R. 386, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

52. *North Dakota Becomes First*, *supra* note 50.

53. Dayna Lovelady, *At Least 9 States Considering Bills to Ban Sex-Selective Abortions*, CHRISTIAN POST (Mar. 6, 2013, 1:27 PM), <http://www.christianpost.com/news/at-least-9-states-considering-bills-to-ban-sex-selective-abortions-91318/>.

54. Bob Christie, *Arizona Race And Sex-Selective Abortion Ban Draws ACLU Lawsuit*, HUFFINGTON POST (May 29, 2013, 5:51 PM), http://www.huffingtonpost.com/2013/05/29/arizona-abortion-ban-race-sex_n_3355493.html.

55. Two of North Dakota’s Four New Laws To Restrict Abortions Will Take Effect Today, INFORUM (July 31, 2013), https://secure.forumcomm.com/?publisher_ID=1&article_id=407776.

56. *North Dakota Becomes First*, *supra* note 50.

57. AMS. UNITED FOR LIFE, BAN ON ABORTIONS FOR SEX-SELECTION AND GENETIC ABNORMALITIES: MODEL LEGISLATION AND POLICY GUIDE (2011), *available at* <http://www.aul.org/wp-content/uploads/2012/01/Sex-Selective-and-Genetic-Abnormality-Ban-2012-LG.pdf>.

58. *Id.*

legal authority.⁵⁹ Given that the ADA prohibits discrimination based on disability,⁶⁰ proponents of disability-selective abortion bans might use the ADA as a framework to demonstrate that these abortions are illegally discriminatory.⁶¹

Under the North Dakota law, the following conduct is a class A misdemeanor (punishable by up to a year in prison):⁶²

Notwithstanding any other provision of law, a physician may not intentionally perform or attempt to perform an abortion with knowledge that the pregnant woman is seeking the abortion solely: (a) on account of the sex of the unborn child; or (b) because the unborn child has been diagnosed with either a genetic abnormality or a potential for a genetic abnormality.⁶³

The statute defines genetic abnormality as “any defect, disease, or disorder that is inherited genetically. The term includes any physical abnormality, scoliosis, dwarfism, Down Syndrome, albinism, Amelia, or any other type of physical or mental disability, abnormality, or disease.”⁶⁴ Due to this broad definition of abnormality, the law would likely cover most, if not all, information generated by prenatal whole genome sequencing.

This recent trend toward enacting abortion bans, coupled with the explicit encouragement of various anti-choice groups to continue down this path, signals the willingness of legislatures to push forward with such reasons-based abortion legislation. The upcoming controversy surrounding prenatal whole genome sequencing will likely rejuvenate that legislative predisposition, creating a unique environment in which the target may change from sex-based abortion bans to abortion bans based on the genetic abnormality of the fetus.

59. *Id.*

60. Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101–12213 (Westlaw through 2013 P.L. 113-31).

61. This Note does not analyze whether the ADA actually supports abortion bans based on fetal anomaly. Because I conclude that these bans are unconstitutional, the ADA analysis becomes moot. I mention it above only to note that proponents of these bans use the ADA as a justification for their enactment. Whether or not this is true, it becomes irrelevant in light of their unconstitutionality.

62. N.D. CENT. CODE ANN. § 12.1-32-01 (Westlaw through 2013 Legis. Sess.).

63. N.D. CENT. CODE ANN. § 14-02.1-04.1 (Westlaw through 2013 Legis. Sess.).

64. *Id.*

B. Federal Level

The Prenatal Non-Discrimination Act (“PRENDA”) was proposed in the federal House of Representatives in 2012.⁶⁵ It was first introduced as “the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011,” and imposed civil and criminal penalties for performing abortions based on either the race or sex of the fetus.⁶⁶ By the time the House voted on the bill in 2012, however, the bill no longer contained the race-based provision.⁶⁷

While PRENDA did not ban abortions based on the disability of the fetus, it was a reasons-based ban that was also crafted as an anti-discrimination statute.⁶⁸ Congress purported to rely on many powers in proposing PRENDA, including the Commerce Clause, the Necessary and Proper Clause, and Section 5 of the Fourteenth Amendment (“Section 5”).⁶⁹ Because an appropriate use of Section 5 powers requires a demonstration of state action involving a “widespread and persisting deprivation of constitutional rights,”⁷⁰ PRENDA contained a section purporting to uncover a widespread practice of sex- and race-selective abortions.⁷¹ However, the bill’s findings were exceptionally inadequate when measured against the Supreme Court’s Section 5 jurisprudence.⁷² For instance, the legislators did not point to any discriminatory *state action*, nor did they present data describing the rate of sex-selective abortions in the *United States*.⁷³ This lack of relevant data was one factor contributing to the perception that PRENDA was not a bill aimed at improving sex-equality, but rather a bill attempting to prevent abortion in any way possible.⁷⁴ Despite all of PRENDA’s problems, it still managed to get a majority of votes in the

65. Prenatal Nondiscrimination Act of 2012, H.R. 3541, 112th Cong. (2012).

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

67. H.R. 3541 (2012).

68. H.R. 3541 § 2a(1)B (2012) (“United States law prohibits the dissimilar treatment of males and females who are similarly situated and prohibits sex discrimination in various contexts, including the provision of employment, education, housing, health insurance coverage, and athletics.”).

69. H.R. 3541 § 2b (2012).

70. *See City of Boerne v. Flores*, 521 U.S. 507, 526 (1997).

71. H.R. 3541 § 2a(1)C-H (2012).

72. *See, e.g., City of Boerne*, 521 U.S. 507; *see infra* Part III(C).

73. H.R. 3541 § 2a(1)I (2012).

74. *Sex Selection Abortion Bans Are Harmful to Women*, NAT’L WOMEN’S L. CENTER (May 29, 2012), <http://www.nwlc.org/resource/sex-selection-abortion-bans-are-harmful-women>.

House (246-168).⁷⁵ However, because the bill was brought up for vote during a suspension of the rules, it required a two-thirds majority and fell short of the 276 votes it needed to pass.⁷⁶

The data demonstrating that disability-based abortions are occurring in the United States is much more robust.⁷⁷ Whereas the findings in PRENDA present no data of sex-selective abortion in the United States, the fact section in AUL's model legislation for abortions based on genetic abnormalities⁷⁸ is comparatively damning: "Various studies have found that between 70 percent and 100 percent of unborn children diagnosed with genetic abnormalities are aborted."⁷⁹ While this is certainly not dispositive, this data does make the Section 5 analysis appear more persuasive at first glance, and might encourage federal legislators to attempt to create a disability-selective abortion ban in the near future.

III. ENUMERATED POWERS: CONGRESS LACKS THE AUTHORITY TO ENACT A FEDERAL DISABILITY-SELECTIVE ABORTION BAN

The power to enact federal laws banning abortions based on the genetic abnormality of the fetus could come from three distinct sources of power, each of which PRENDA purported to rely on: the Commerce Clause, the Necessary and Proper Clause, and Section 5 of the Fourteenth Amendment. I argue that each of these sources of power is inadequate and, therefore, that any federal reasons-based abortion ban would be unconstitutional.

Under modern Commerce Clause jurisprudence, Congress must show that there is a substantial *economic* effect on interstate commerce in order to regulate an activity.⁸⁰ Because an abortion ban cannot be justified as economic legislation, but is rather a congressional attempt to regulate areas typically reserved to the states, the Court should invoke federalism principles to determine that Congress lacks the power to pass such legislation. This is consistent with the Court's holdings in *United States v. Morrison*⁸¹

75. *H.R. 3541 (112th): Prenatal Nondiscrimination Act (PRENDA) of 2012 (On Motion to Suspend the Rules and Pass, as Amended)*, GOVTRACK.US (May 31, 2012), <http://www.govtrack.us/congress/votes/112-2012/h299>.

76. Kate Sheppard, *House GOP's 'Prenatal Nondiscrimination' Bill Fails*, MOTHER JONES (May 31, 2012, 12:36 PM) <http://www.motherjones.com/mojo/2012/05/house-gop-abortion-sex-selection>.

77. Mansfield et al., *supra* note 18.

78. See *supra* note 2 for a discussion comparing the terms "disability" and "genetic abnormality."

79. A.M.S. UNITED FOR LIFE, *supra* note 57.

80. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

81. *United States v. Morrison*, 529 U.S. 598 (2000).

and *United States v. Lopez*.⁸² If the Court is persuaded that protecting certain state spheres of regulation renders the Commerce Clause invalid, the Court will be unlikely to uphold a federal abortion ban under the Necessary and Proper Clause. Recent precedent in *National Federation of Independent Business (“NFIB”) v. Sebelius*⁸³ demonstrates that the Court will be hostile towards arguments that the Necessary and Proper Clause independently grants the government authority, in light of the established federalism concerns, to legislate when lacking other constitutional authority. Finally, Section 5 certainly does not provide Congress with the power to pass this legislation, as the Constitution does not accord personhood to a fetus; consequently a fetus is not subject to equal protection of the laws and the federal government has no unconstitutional discrimination to remedy.⁸⁴ I give a detailed discussion of each source of power in turn below.

A. Commerce Clause

In 1995, Commerce Clause jurisprudence changed dramatically with the holding in *United States v. Lopez*.⁸⁵ Before that decision, the Court’s interpretation of the Commerce Clause permitted Congress to enact legislation that had *any* effect on interstate commerce, even in areas typically reserved to the states.⁸⁶ After *Lopez*, an appropriate use of Commerce Clause powers required Congress to show that it was regulating one of three things: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or (3) conduct that has a significant *economic* effect on interstate commerce.⁸⁷ As with the majority of modern Commerce Clause legislation, an abortion ban based on the genetic abnormality of the fetus would be analyzed through the third category of *Lopez* (as was the statute in *Lopez* itself).⁸⁸ I therefore restrict my analysis to that category.

The Court held in *Lopez* that the link between national productivity and the possession of a firearm in a school zone was too attenuated for the law to qualify as a significant economic impact on interstate commerce.⁸⁹ This was later affirmed in *United States v. Morrison*, where the Court struck down a portion of the Violence Against Women Act after concluding that violence against women does not have a substantial economic effect on in-

82. *Lopez*, 514 U.S. 549.

83. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

84. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

85. *Lopez*, 514 U.S. 549.

86. *Wickard v. Filburn*, 317 U.S. 111 (1942).

87. *Lopez*, 514 U.S. at 558–59 (emphasis added).

88. *See generally, Lopez*, 514 U.S. at 559.

89. *Lopez*, 514 U.S. at 600–02.

terstate commerce.⁹⁰ In doing so, the Court observed four problems with the statute in *Lopez* that helped it to analyze the relevant provision of the Violence Against Women Act and ultimately conclude that it was also unconstitutional.⁹¹ Because the Court used its opinion to reflect on and succinctly state its past holding in *Lopez*, *Morrison* presents a useful lens through which to view the Court's current Commerce Clause jurisprudence.

First, in reviewing the relevant provision of the Gun-Free School Zones Act, the Court highlighted that the “noneconomic, criminal nature of the conduct at issue was central to our decision.”⁹² This was because the provision was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”⁹³ Thus, the activity in question must be “some sort of economic endeavor.”⁹⁴

Second, the Court noted that in *Lopez*, the statute at issue lacked any reference to an impact on interstate commerce in its legislative history.⁹⁵ Such a legislative footprint allows the Court to defer to Congress' judgment on whether a regulation would have an impact on interstate commerce that was not clearly apparent.⁹⁶ It also bolsters an argument that the ultimate aim of the law is economic in nature.

Third, the Court explained that the Gun-Free School Zones Act lacked a “jurisdictional” element that would ground the prohibited conduct in interstate commerce.⁹⁷ For instance, after *Lopez* struck down the Gun-Free School Zones Act, Congress reenacted the law with added legislative history mentioning the economic impact of guns in schools, as well as a jurisdictional element that restricted the regulation to guns that had traveled *through interstate commerce*.⁹⁸ While the amended Gun-Free School Zones Act has yet to be addressed by the Supreme Court, the Ninth Circuit found that the changes adequately addressed the Commerce Clause issues and that the amended Act was thus constitutional.⁹⁹ There remains doubt, however,

90. *United States v. Morrison*, 529 U.S. 598 (2000).

91. *Morrison*, 529 U.S. at 610–13.

92. *Morrison*, 529 U.S. at 610.

93. *Morrison*, 529 U.S. at 610.

94. *Morrison*, 529 U.S. at 611.

95. *Morrison*, 529 U.S. at 612.

96. *Morrison*, 529 U.S. at 612.

97. *Morrison*, 529 U.S. at 612.

98. Seth J. Safra, *The Amended Gun-Free School Zones Act: Doubt As to Its Constitutionality Remains*, 50 DUKE L.J. 637, 638–39 (2000).

99. *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005).

as to whether the amended Act is actually constitutional given that the changes were largely superficial.¹⁰⁰

Finally, the Court noted that the statute in *Lopez* had an effect on interstate commerce that lacked proximity and was too attenuated.¹⁰¹ In other words, because restricting guns in school zones was not closely related to the purported economic effect, the *Lopez* Court was hesitant to permit the enactment of the law under a constitutional provision that dealt with commerce.¹⁰² Moreover, a highly attenuated connection to interstate commerce will make the Court suspicious of whether or not a law was really passed for an economic reason, or whether the justification is being retroactively attached to the law in attempt to survive judicial review.

Using this four-factor test, the *Morrison* Court held that the federal government also lacked authority under the Commerce Clause to enact federal legislation that allowed victims of gender-based violence to sue their attackers in federal court.¹⁰³ As justification for rejecting the government's argument that permitting these federal suits would significantly affect interstate commerce, the Court pointed to principles of federalism: "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."¹⁰⁴ This federalism concern was also fundamental in the *Lopez* opinion, where the Court held that an expansive interpretation of the Commerce Clause would destroy the purpose of enumerated powers.¹⁰⁵ For this reason, the government's national productivity argument, which attempted to demonstrate that a firearm possession law would substantially affect interstate commerce, was deemed insufficient to permit federal legislation:

Under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (in-

100. Safera, *supra* note 98, at 661–62.

101. *Morrison*, 529 U.S. at 612.

102. *Morrison*, 529 U.S. at 615–17. The Court reiterates this point in *Gonzales v. Raich*, 545 U.S. 1, 3–4 (2005), where it held that the personal growth of medical marijuana could still be regulated under the Commerce Clause because it was ultimately an economic endeavor: "The laws at issue in *Lopez* and *Morrison* had nothing to do with "commerce" or any sort of economic enterprise In contrast, the CSA regulates quintessentially economic activities: the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market."

103. *Morrison*, 529 U.S. at 612.

104. *Morrison*, 529 U.S. at 617–19.

105. *United States v. Lopez*, 514 U.S. 549, 564 (1995).

cluding marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.¹⁰⁶

In both cases, the Court was concerned about federal encroachment into spheres of regulation that state police powers had generally governed. By narrowing the kinds of activities that the government can regulate to matters that are economic in nature and have a significant effect on interstate commerce, the Court has reserved certain areas of the law to the states.

If a federal abortion ban based on the genetic abnormality of the fetus were enacted, it would not meet the "substantial economic impact" test enumerated in *Lopez* and confirmed in *Morrison*. The logic underlying the Supreme Court's holding in both cases applies with equal force over a federal abortion regulation. A federal disability-selective abortion ban is not intended to regulate economic activity, but rather to assert the government's moral disapproval of these abortions. Such legislative action from the federal government, which lacks general police powers, infringes on protected rights of states to regulate the health and safety of its citizens:

Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, . . . matter[s] of local concern," the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."¹⁰⁷

Given that "by long tradition, the health and safety of the people is left to the States as matters of local concern,"¹⁰⁸ states have generally governed the regulation of medical practice and been protected from unreasonable federal encroachment in this area. For instance, in 2006, the Supreme Court held that the federal Controlled Substances Act could not be used to prosecute physicians who assist in the suicide of terminally ill patients in Oregon,

106. *Lopez*, 514 U.S. at 564.

107. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citations omitted).

108. *United States v. Regenerative Sciences, LLC*, 878 F. Supp. 2d 248, 255 (D.D.C. 2012).

where physician-assisted suicide is legal.¹⁰⁹ This holding was based in part on a recognition that the medical profession is generally regulated under a state's police powers and that the federal government should not invalidate a reasonable state position on medical practice just because it is at odds with the federal government's views.¹¹⁰

If the Court was concerned in *Morrison* and *Lopez* about federal encroachment into state police powers, a federal disability-selective abortion ban should be equally troubling to the Court. Such a ban would grant the federal government power to regulate medical practice, an area historically reserved for the states. This is only more apparent for the regulation of abortion, which involves vastly different, and regionally correlated, public opinions. In this case, states would be in the best position to legislate regional values—so long as states do not violate the undue burden analysis discussed *infra*, their unique position to legislate in this area should be protected as part of their established police power to regulate areas involving public health and safety. “The Constitution requires a distinction between what is truly national and what is truly local;” if this holding is to have force, then courts should prevent the federal government from regulating the truly local issue of reproductive decision making.¹¹¹

The effect of disability-selective abortion on interstate commerce is highly attenuated at best, just as in both *Lopez* and *Morrison*. For instance, the economic impact analysis provided for PRENDA, contained in a report issued by the Committee on the Judiciary, was weak. It first estimates the amount spent on abortions each year: “approaching one billion annually.”¹¹² The report then highlights that some women travel across state lines to obtain an abortion; however, there is no data provided on how frequently this occurs. Rather, the reader is left to infer from information on the lack of availability of abortion facilities in different counties that that women in counties without abortion facilities must travel to obtain an abortion.¹¹³ The critical question left unaddressed, however, is how many women actually travel *out of state* to obtain an abortion as a result of not having an abortion provider nearby. Regardless of this logical hole, the bill concludes that “abortion impacts interstate commerce.”¹¹⁴

This argument is flawed for the following reason: the relevant question is not whether abortions generally have a significant impact on commerce,

109. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006).

110. *Gonzales*, 546 U.S. at 269–74.

111. *Lopez*, 514 U.S. at 617–18.

112. H.R. REP. NO. 112-496, at 29 (2012), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt496/pdf/CRPT-112hrpt496.pdf>.

113. *Id.*

114. *Id.*

but whether *disability-selective* abortions significantly impact *interstate* commerce. In other words, Congress must restrict their economic analysis to the specific conduct their legislation regulates.¹¹⁵ As this law was not a general abortion regulation, but a disability-selective abortion regulation, the economic impact analysis should be limited. The figures citing the annual cost of abortion are not specific to disability-selective abortion, which only accounts for 13–14% of abortions generally,¹¹⁶ and are not limited to abortions performed across state lines. Therefore, the numbers are misleading. In reality, the amount spent on disability-selective abortions procured across state lines is likely quite small and the report provides no figures to estimate it.

Any legislative history that attempts to demonstrate a link between disability-selective abortion and interstate commerce will be a mere pretext—the goal of this legislation is moral, not economic. If the Court suspects that Congress might have doctored the legislative history to satisfy the third category of *Morrison*, it will not be given much weight. In fact, this was the case in *Morrison*, where the Court overturned the law despite legislative findings that domestic abuse has an impact on interstate commerce due to the Court's perception that it was written in anticipation of potential litigation.¹¹⁷ A compelling legislative footprint, therefore, must not only be present in the documents, but also be genuine.

Finally, even if the law was to include a jurisdictional hook—for instance, if the law criminalized the practice of disability-selective abortions on women who have traveled through interstate commerce—it would still fail three of the four elements enumerated in *Morrison*. While the Amended Gun-Free School Zones Act never reached the Supreme Court, which would ultimately answer whether such a superficial jurisdictional hook would also protect a disability-selective abortion ban, one could imagine the Court would have similar problems with a jurisdictional fix as they have with hollow additions to legislative history. Ultimately, it would not address the substance of the law, which is the heart of the issue. If the ultimate concern is federalism, the Court should be unreceptive to legislation that fails to limit federal encroachment into protected state powers even if it meets one or two elements of the four-factor *Morrison* test.

Moreover, Congress would never pursue such a jurisdictional hook in this context. Unlike *Lopez* where nearly every gun will have traveled through interstate commerce, many women seeking these abortions will be able to

115. See *United States v. Morrison*, 529 U.S. 598, 612–13 (2000).

116. Lawrence B. Finer, *supra* note 20.

117. *Morrison*, 529 U.S. at 614 (“[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”).

obtain them without leaving their home state. Thus, adding this hook would greatly reduce the law's impact and Congress may be reluctant to expend political energy in enacting such a weak law.

The Supreme Court has considered one challenge to a federal abortion law in the aftermath of *Lopez*—a federal ban to abortions performed using the Dilation and Extraction (“D&X”) procedure.¹¹⁸ While the ban was enacted using Commerce Clause powers, it was not challenged on Commerce Clause grounds, and it was thus not an issue in that case.¹¹⁹ This is despite the fact that the Act used the jurisdictional hook described in *Lopez*.¹²⁰ Though the Court upheld the Act in the face of a Substantive Due Process challenge, Justice Thomas notes in the first paragraph of his concurrence, joined by Scalia, that “whether the Partial-Birth Abortion Ban Act of 2013 constitutes a permissible exercise of Congress’ power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.”¹²¹ While the Court has yet to face such a question, the fact that two Justices wrote a paragraph-long concurrence simply to note that the Commerce Clause issue was not raised might indicate that at least some members of the Court would be receptive to an argument that federal abortion bans are an inappropriate use of Commerce Clause powers.¹²²

Based on the factors outlined in *Morrison*, the Court ought to hold that the federal government lacks authority to enact federal abortion legislation under the Commerce Clause. First, Congress is not attempting to regulate an economic activity, but rather to regulate the medical profession according to their moral judgments. Because this is an area typically reserved to the states,¹²³ the Court should reject an understanding of this law as economic regulation. Second, given that this legislation is truly about the morality of abortion, any legislative history regarding the law's economic impact would appear doctored for litigation. As was determined in *Morrison*, legislative history that appears insincere will be rejected.¹²⁴ Third, while Congress could attach a jurisdictional hook to increase the likelihood of surviving judicial review, it might be hesitant to do so if the hook would reduce the law's impact. Furthermore, the Supreme Court has yet to rule on

118. *Gonzales v. Carhart*, 550 U.S. 124, 146–47 (2007).

119. *Gonzales*, 550 U.S. at 169 (Thomas, J., concurring).

120. The Act provides that “any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.” 18 U.S.C.A. § 1531 (Westlaw through 2013 P.L. 113-31).

121. *Gonzales*, 550 U.S. at 169.

122. *Gonzales*, 550 U.S. at 169.

123. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

124. *United States v. Morrison*, 529 U.S. 598, 614 (2000).

whether the superficial addition of a jurisdictional hook could repair a law that raised fundamental federalism issues. Finally, the highly attenuated link between disability-selective abortion and interstate commerce will make the Court question whether the regulation was really intended for an economic purpose. If not, the federalism concerns resurface.

B. Necessary and Proper Clause

The most recent Supreme Court analysis of the Necessary and Proper Clause occurred in *National Federation of Independent Business v. Sebelius* (“*NFIB*”), where the Court ruled on the constitutionality of the Affordable Care Act. In that decision, the Court departed from its traditionally broad interpretation of the Necessary and Proper Clause. First, the Court noted the history of the Clause, which has traditionally been “very deferential to Congress’s determination that a regulation is ‘necessary.’ [The Court has] thus upheld laws that are ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’”¹²⁵ While the Clause has historically been used to further expand the powers of the federal government, the Court in *NFIB* retreated from that position and declared that the Necessary and Proper Clause is not without limits.¹²⁶

The Court noted that the Necessary and Proper Clause is confined by the fundamental structure of our government, which balances state and federal power. In *NFIB*, the Court held that the individual mandate portion of the Affordable Care Act could not be enacted according to Commerce Clause powers—this holding was a result of federalism-based concerns similar to those articulated in *Lopez* and *Morrison*.¹²⁷ This reasoning was also used in the Necessary and Proper Clause analysis. If federalism principles require the Court to place limits on Congress’ power to legislate, those limits should extend to authority under both the Commerce Clause and the Necessary and Proper Clause:

But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not “consist[ent] with the letter and spirit of the constitution,” are not “proper [means] for carrying into Execution” Congress’s enumerated powers. Rather, they are, “in the words of The Fed-

125. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591–92 (2012) (citations omitted).

126. *NFIB*, 132 S. Ct. at 2592.

127. *NFIB*, 132 S. Ct. at 2591.

eralist, ‘merely acts of usurpation’ which ‘deserve to be treated as such.’¹²⁸

To ensure that the Necessary and Proper Clause is not invoked to create new federal powers, the Court makes the distinction that “our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power.”¹²⁹ Once the Court held that the mandate could not be upheld under the Commerce Clause, the Court concluded that upholding it under the Necessary and Proper Clause would in essence confer Congress with a new power.¹³⁰

The Court will be especially unlikely to find independent authority under the Necessary and Proper Clause after holding that principles of federalism prevent enactment of a federal law under the Commerce Clause. This is made clear by the Court’s citation to Justice Kennedy’s concurrence in *United States v. Comstock*, which noted that “it is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause.”¹³¹ Thus, if the Court adopted my view that the Commerce Clause is insufficient to grant the federal government power to enact a disability-selective abortion ban, and that such a ban would raise serious federalism concerns, it would dramatically alter the Necessary and Proper Clause analysis. If the Commerce Clause was insufficient, the Court would likely find that upholding the law under the Necessary and Proper Clause would confer Congress with a new power, rather than facilitate the use of an enumerated power.

Understanding where to draw this line can be tricky. The Court in *NFIB* clearly struggled to demarcate what additional power the Necessary and Proper Clause provides Congress. However, *NFIB* makes clear that when Congress lacks constitutional authority to legislate under the Commerce Clause because of federalism concerns, the Court will be suspicious of the government’s attempt to invoke the Necessary and Proper Clause as independent authority to wash away these federalism worries. This is understandable given that concerns regarding federal intrusion into states’ police power will persist regardless of which constitutional provision is considered by the Court—if upholding the law based on the Commerce Clause implicates principles of federalism, so would upholding the law based on the Necessary and Proper Clause. Given that a disability-selective abortion ban

128. *NFIB*, 132 S. Ct. at 2592 (citations omitted).

129. *NFIB*, 132 S. Ct. at 2592.

130. *NFIB*, 132 S. Ct. at 2592–93.

131. *United States v. Comstock*, 130 S. Ct. 1949, 1967–68 (2010) (Kennedy, J., concurring).

implicates federalism concerns because it attempts to legislate health and safety issues traditionally reserved for the states, then it is irrelevant how Congress attempts to justify this expansive intrusion into state action.

Ultimately, the Court will either find the act constitutional under the Commerce Clause and uphold the law on those grounds, or maintain its federalism argument throughout both the Commerce Clause and Necessary and Proper Clause analysis.

C. Section 5 of the Fourteenth Amendment

Just as Congress purportedly sought to enact PRENDA pursuant to an appropriate use of Section 5 powers, a similar law penalizing state actors who perform abortions based on the genetic abnormality of the fetus might be justified by reference to this clause. Section 5 of the Fourteenth Amendment allows the federal government to proactively legislate to prevent unconstitutional discrimination in a narrow set of circumstances.¹³² Proper use of Section 5 powers requires Congress first demonstrate that a sufficient number of equal protection violations exist to justify the creation of the act.¹³³ Even then, the act is only constitutional if there is congruence and proportionality between the injury to be prevented (as measured by real constitutional violations of the Equal Protection Clause) and the means adopted to meet that end.¹³⁴

Because the Equal Protection Clause only applies to persons,¹³⁵ the first hurdle to overcome in this analysis would be the claim that fetuses are persons protected by the United States Constitution. If the Court were to accept this premise, it would have profound implications for other areas of law. Not only would it jeopardize the substantive due process right to abortion,¹³⁶ but it could also potentially justify prosecuting women who have had abortions under various homicide statutes. For this reason, the Supreme Court held affirmatively that a fetus is not a person within the meaning of the Fourteenth Amendment in *Roe v. Wade*.¹³⁷ Without recognition as persons, the Equal Protection Clause does not extend its protections to fetuses, and Section 5 powers cannot be appropriately invoked.

132. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

133. *City of Boerne*, 521 U.S. at 530.

134. *City of Boerne*, 521 U.S. at 508.

135. U.S. CONST. amend. XIV, § 1.

136. *Roe v. Wade*, 410 U.S. 113, 164 (1973); see *infra* Part IV.

137. *Roe*, 410 U.S. at 158 (“All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

However, even if the Court were to overrule longstanding precedent and endow fetuses with constitutional rights, a federal ban on disability-selective abortions would still be unconstitutional. As mentioned above, the Fourteenth Amendment only applies to discriminatory state action, and consequently, Section 5 can only be invoked to correct state behavior.¹³⁸ While there may be some state complicity in disability-selective abortions—for instance, those abortions performed at state hospitals or using state funds—it could never meet the standard pronounced in *Boerne*, which requires the remedy to be congruent and proportional to the injury.¹³⁹ If the injury involves state actors, a proportional remedy would be aimed at such state action. A law like PRENDA, which criminalizes the actions of all physicians performing these kinds of abortions and not just the state actors, extends the remedy far beyond the injury. This, of course, assumes an injury exists at all under the Equal Protection Clause, which is unlikely given that the disabled community is not a protected class and, even if it was, fetuses are not people under the law.¹⁴⁰

Ultimately, it is unclear whether Congress has the power to enact federal abortion legislation under any power, given that a Commerce Clause challenge to federal abortion regulation has yet to go to the Supreme Court since *Lopez*. Based on the Court's holding in *Morrison*, such a federal law triggers federalism issues by encroaching on the states' police power to regulate the health of its citizens and the medical profession, and certain members of the Court might find such arguments persuasive.¹⁴¹ Based on the analysis in *NFIB*, it seems equally unlikely that the Supreme Court would permit the federal government to regulate based on the Necessary and Proper Clause if it finds that Congress lacked the authority based on other enumerated powers.¹⁴² Finally, Section 5 powers present the weakest argument upon which the federal government could rely. Given that fetuses have never been defined as persons,¹⁴³ and moreover, that disability has not been granted heightened scrutiny for Equal Protection Clause analysis,¹⁴⁴ Congress will be unable to find any unconstitutional state action upon which to justify such a remedy.

138. *City of Boerne*, 521 U.S. at 522–24.

139. *City of Boerne*, 521 U.S. at 508.

140. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (“[W]e conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.”).

141. *United States v. Morrison*, 529 U.S. 598, 617–19 (2000).

142. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591–92 (2012).

143. U.S. CONST. amend. XIV, § 5; *Roe v. Wade*, 410 U.S. 113, 158 (1973).

144. *City of Cleburne*, 473 U.S. at 442.

IV. SUBSTANTIVE DUE PROCESS: DISABILITY-SELECTIVE ABORTION BANS ARE UNCONSTITUTIONAL UNDER THE UNDUE BURDEN ANALYSIS

Unlike the federal government, state legislative powers are not restricted to those enumerated in the Constitution.¹⁴⁵ Regulating abortion and other medical procedures has long been considered within the purview of the states.¹⁴⁶ The one notable exception to this rule is the Federal Partial Birth Abortion Act, discussed *supra* and *infra*.¹⁴⁷ Neither states nor the federal government can enact laws that violate the constitution. Since *Roe v. Wade*, nearly all abortion challenges have been based on Substantive Due Process grounds.¹⁴⁸ There have been some attempts to more firmly place the right to abortion within the Equal Protection Clause by arguing that women are denied access to an important medical procedure for which there is no comparable procedure denied to men.¹⁴⁹ Because women are a semi-protected class, framing the issue in this way would make any abortion regulation suspect and thus would have protected the right more firmly.¹⁵⁰

However, this is not how the Court's abortion jurisprudence has developed. Instead, the right to an abortion has been vested in the Due Process Clause and the right to privacy.¹⁵¹ Despite this constitutional protection, the Supreme Court has upheld a great deal of regulation of abortion procedures.¹⁵² In the following section, I analyze how the undue burden framework enumerated in *Casey* might illuminate concepts underlying the constitutionality of abortion bans based on the genetic abnormality of the fetus. I also examine policy concerns that contravene judicial approval of such bans.

A. *Casey's Undue Burden Analysis*

In 1973, the Supreme Court held in *Roe v. Wade* that women have a constitutional right (embedded within the Due Process Clause of the Fourteenth Amendment) to receive an abortion.¹⁵³ *Roe* created the trimester framework, whereby a woman had complete freedom to obtain an abortion

145. Compare U.S. CONST. art. IV. with U.S. CONST. art. I § 8.

146. *Roe v. Wade*, 410 U.S. 113, 149–50 (1973).

147. 18 U.S.C.A. § 1531 (Westlaw through 2013 P.L. 113–31).

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

149. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 379–83 (1985).

150. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

151. *Roe*, 410 U.S. at 154, 164.

152. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 839 (1992).

153. *Roe*, 410 U.S. at 164–65.

within the first trimester of her pregnancy.¹⁵⁴ In the second trimester, the state was allowed to regulate certain aspects of abortions if they related to legitimate interests, such as protecting potential life and maternal health.¹⁵⁵ It was only in the third trimester that states were allowed to outlaw abortions, and only then if they left exceptions for the life or health of the mother.¹⁵⁶ Perhaps the greatest protection provided by the Court in *Roe* was the strict scrutiny analysis that is guaranteed for all fundamental rights.¹⁵⁷ Under a strict scrutiny test, any law that inappropriately restrains the right to access an abortion (depending on which trimester the regulation affects) is presumed unconstitutional unless it is narrowly tailored to serve a compelling governmental interest.¹⁵⁸

For close to twenty years after *Roe*, the Court struggled to define the outer limits of the right to terminate a pregnancy, and their decisions produced some variability in the doctrine. The jurisprudence shifted dramatically in 1992, when the Court altered its analysis from trimesters to viability through its decision in *Planned Parenthood v. Casey*.¹⁵⁹ The Court allowed state interference of the right to abortion before viability (whereas, under *Roe*, the state could not interfere in the first trimester) so long as the state's regulation was not an "undue burden" on the pregnant woman and furthered a legitimate state interest.¹⁶⁰ After viability, the Court found it constitutionally permissible to regulate without limits, which includes completely banning abortions, so long as there was an exception for the life of the mother.¹⁶¹ While this change on its own may have not altered the substance of the law dramatically had the undue burden analysis been strong, the Court in *Casey* made clear in application that the new standard was weak.

In *Casey*, Planned Parenthood challenged five provisions of a state law: (1) a requirement that a woman give informed consent twenty-four hours before the procedure; (2) a requirement, if the patient was a minor, that at least one parent give consent (or that the minor undergo a judicial bypass procedure); (3) a requirement that if the patient was married, she inform her husband; (4) a provision to exempt women in medical emergencies from these requirements (challenged for not being broad enough); and (5) a provision that imposed reporting requirements on facilities that perform abor-

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

155. *Roe*, 410 U.S. at 164–65.

156. *Roe*, 410 U.S. at 164–65.

157. *Roe*, 410 U.S. at 155.

158. *Roe*, 410 U.S. at 155.

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

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

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

tions.¹⁶² Of these five provisions, only the spousal notification requirement was struck down as unconstitutional.¹⁶³

Most notably, the Supreme Court upheld the state's mandatory twenty-four hour waiting requirement, which it had previously deemed unconstitutional.¹⁶⁴ Though the Court acknowledged the burden this would impose on women, they held that it was not an undue burden under the new test.¹⁶⁵ This was despite the fact that the waiting period could result in the inability of some women to reasonably get an abortion—especially women living in rural communities, low-income women, or women who generally lack a social support system.¹⁶⁶ In describing the doctrine, the Court gave the following guidance—a state can attempt to persuade women to avoid abortions through regulation, but cannot remove their right to choose or place a substantial obstacle in her way:

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. *Unless it has that effect on her right of choice*, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.¹⁶⁷

Since *Casey*, the Supreme Court has only decided two abortion cases. For this reason, there is little Supreme Court jurisprudence interpreting the undue burden standard. Both cases reviewed by the Court in the aftermath of *Casey* address bans on the use of the dilation and extraction (“D&X”) abortion procedure (colloquially, and controversially, known as partial-birth abortion).¹⁶⁸ The D&X procedure is one of two common procedures doc-

162. *Casey*, 505 U.S. at 838.

163. *Casey*, 505 U.S. at 838.

164. *Casey*, 505 U.S. at 838; *see also* *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), *overruled by Casey*, 505 U.S. 833.

165. *Casey*, 505 U.S. at 838–39 (“Although § 3205’s 24-hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid on the present record and in the context of this facial challenge.”).

166. *Casey*, 505 U.S. at 937.

167. *Casey*, 505 U.S. at 877 (emphasis added).

168. *Gonzales v. Carhart*, 550 U.S. 124, 128 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000). While the term “partial birth abortion” is used colloquially, it was developed by the anti-choice community to incite extreme reactions. It also inadequately de-

tors use for abortions performed after twenty weeks of pregnancy; the dilation and evacuation (“D&E”) procedure is the other technique and is considered by some to be more humane to the fetus.¹⁶⁹ The first D&X abortion ban to be considered by the Court was in *Stenberg*, which involved a Nebraska statute that outlawed any abortion performed with the D&X method.¹⁷⁰ Using the *Casey* undue burden analysis, the Court held that the Nebraska statute was unconstitutional.¹⁷¹ The District Court in this case had concluded that the D&X procedure was “superior to, and safer than, the D&E and other abortion procedures used during the relevant gestational period.”¹⁷²

Given these findings, the Court first held that it was an undue burden to outlaw this procedure without a health exception. Second, the Court held that the statute was unconstitutionally vague.¹⁷³ Because the statutory language was broad enough to be potentially read to also cover D&E procedures, doctors would struggle to determine what conduct was prohibited and might therefore cease to perform both types of procedures.¹⁷⁴ Finally, the Court noted that if the law was to be interpreted as a ban of both the D&E and D&X procedures, it would certainly violate the undue burden standard of *Casey* given that certain women would be unable to receive a pre-viability abortion. Thus, this ambiguous language could lead to an unconstitutional result.¹⁷⁵

In spite of this decision, the federal government passed a federal ban (the Partial-Birth Abortion Ban Act)¹⁷⁶ that was substantially similar to the one deemed unconstitutional by the Court in *Stenberg*. This bill also reached the Supreme Court in *Gonzales v. Carhart*, in which the Court—despite addressing the same challenges raised under *Stenberg*—found the bill constitutional.¹⁷⁷ In *Gonzales*, the Court held the bill was not unconstitutionally vague because it included a distinction between the D&X and D&E procedures.¹⁷⁸ This convinced the Court that the D&E procedure would not be covered by the ban. For this reason, it held that the law did

scribes the actual procedure. Julie Rovner, ‘*Partial-Birth Abortion: Separating Fact from Spin*,’ NPR (Feb. 21, 2006), <http://www.npr.org/2006/02/21/5168163/partial-birth-abortion-separating-fact-from-spin>.

169. Rovner, *supra* note 168.

170. *Stenberg*, 530 U.S. at 914.

171. *Stenberg*, 530 U.S. at 914.

172. *Stenberg*, 530 U.S. at 915.

173. *Stenberg*, 530 U.S. at 938, 945–46.

174. *Stenberg*, 530 U.S. at 945–46.

175. *Stenberg*, 530 U.S. at 938–39.

176. 18 U.S.C.A. § 1531 (Westlaw through 2013 P.L. 113-31).

177. *Gonzales v. Carhart*, 550 U.S. 124, 128 (2007).

178. *Gonzales*, 550 U.S. at 149.

not place an undue burden on women desiring second trimester, pre-viability abortions, who could always obtain a D&E procedure even if the D&X procedure was outlawed.¹⁷⁹

The totality of Supreme Court jurisprudence interpreting the undue burden standard in *Casey* has only established two types of abortion regulations that are known to constitute an undue burden: (1) a spousal consent requirement,¹⁸⁰ and (2) a ban on both D&E and D&X abortions.¹⁸¹ This jurisprudence has also demonstrated three types of abortion regulations that do not constitute an undue burden: (1) a twenty-four hour mandatory waiting period,¹⁸² (2) a ban on the D&X procedure (even without an exception for the health of the mother),¹⁸³ and (3) a parental consent requirement for minors (with a judicial bypass option).¹⁸⁴ Finally, we know that a state's attempt to prohibit a woman from terminating her pregnancy before viability is unconstitutional.¹⁸⁵ The tricky part lies in demarcating the line between state conduct that persuades women to avoid abortion and state conduct that creates a substantial obstacle for women to exercise their right to choose. Some have argued that the relative dearth of guidance from the Supreme Court has caused lower courts to apply the undue burden standard unpredictably.¹⁸⁶ I propose below that while this jurisprudence might be ambiguously applied in the judicial review of most abortion regulations, the legal analysis should be direct and clear when applied to a disability-selective abortion bans.

B. *Undue Burden for Disability-Selective Abortions*

Nearly all pre-viability abortion laws¹⁸⁷ attempt to regulate the way in which an abortion is procured—for instance, by mandating that a certain waiting period elapses prior to an abortion, by requiring that certain information (or “persuasion techniques”) is offered beforehand, or by regulating

179. *Gonzales*, 550 U.S. at 154–56.

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

181. *Gonzales*, 550 U.S. at 124.

182. *Casey*, 505 U.S. at 833.

183. *Gonzales*, 550 U.S. at 124.

184. *Casey*, 505 U.S. at 833.

185. *Casey*, 505 U.S. at 877–88. (“What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”).

186. Ruth Burdick, *The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split over the Salerno Test*, 23 HASTINGS CONST. L.Q. 825, 869 (1996).

187. Because *Casey* allowed for abortion bans after viability, many states have banned post-viability abortion altogether, with exceptions for the life and health of the mother. GUTTMACHER INST., *supra* note 24; *Casey*, 505 U.S. at 846.

the type of physician or facility that can offer an abortion.¹⁸⁸ Disability-selective abortion bans, on the other hand, explicitly outlaw pre-viability abortions for certain women. The women singled out for this disparate treatment are those for whom the state legislature has perceived to have less legitimate reasons for obtaining an abortion. Because the Court in *Roe*, as interpreted by *Casey*, held that a state cannot prohibit any women from receiving a pre-viability abortion, I argue that reasons-based abortion bans are a novel and aggressive intrusion on a women's right to choose.

Despite the difficulty in predicting with certainty how courts applying an undue burden standard will rule, a ban on abortion for genetic abnormality of the fetus (or any reasons-based ban for that matter) ought to be comparatively straightforward. The analysis would be different if a law were to discourage women from aborting a fetus with a genetic abnormality through various regulations. For instance, "informed-consent" provisions that require women to be educated about the productive life that a disabled person could lead, mandated counseling with parents of disabled children, or extensive waiting periods before obtaining the abortion, would all likely be found constitutional given the current state of the law. However, a disability-based abortion ban, like the one in North Dakota, goes beyond an attempt at persuasion and instead prohibits the abortion altogether for certain women—women seeking an abortion based on the genetic abnormality of the fetus.

A simplistic reading of *Gonzales* might lead one to believe that not all abortion bans are automatically unconstitutional.¹⁸⁹ However, the Partial-Birth Abortion Ban Act is not a ban on abortions, but rather a ban on a certain abortion procedure. It is thus better viewed as a regulation on the type of procedure available to women seeking abortion rather than an abortion ban. This is evidenced by the Court's holding in *Stenberg* that a ban of both D&E and D&X procedures would be unconstitutional as it would prevent certain women from obtaining a pre-viability abortion.¹⁹⁰ Because the Nebraska statute was unclear and could be interpreted to include both a ban of the D&E and D&X procedures, the Court found it unconstitutional under *Roe* and *Casey*.¹⁹¹ The Court in *Gonzales* did not overrule this central holding in *Stenberg*; it distinguished the cases based on language used in the

188. See generally Tracy Conner, *40 Years After Roe v. Wade, More States Restricting Abortion*, NBC NEWS (Jan. 21, 2013, 8:20 PM), http://usnews.nbcnews.com/_news/2013/01/21/16624980-40-years-after-roe-v-wade-more-states-restricting-abortion?lite.

189. *Gonzales*, 550 U.S. 124.

190. *Stenberg v. Carhart*, 530 U.S. 945–46 (2000).

191. *Stenberg*, 530 U.S. at 945–46.

federal statute that clearly excluded the D&E procedure from the ban.¹⁹² This clearer language, the Court reasoned, would ensure that all women seeking second-trimester, pre-viability abortions would be able to receive them through the D&E technique. As the Court in *Gonzales* was clear that its holding depended on the D&E procedure remaining available to women, the *Stenberg* and *Gonzales* opinions should be read to prevent any true pre-viability abortion ban.¹⁹³

The North Dakota abortion ban goes way beyond the Nebraska statute at issue in *Stenberg* and actually outlaws certain pre-viability abortions. It is therefore an explicit rejection of the Court's holding in *Roe*, as interpreted by *Casey*, that the government cannot prevent women from obtaining a pre-viability abortion. This clearly violates the undue burden standard, which protects a "woman's right to make the ultimate choice."¹⁹⁴ Under this law, women seeking abortions due to genetic abnormality are denied any choice. It is thus clearly an undue burden and facially unconstitutional.

Some might argue that because a disability-based abortion ban would only affect a small number of women, the burden placed on women generally is reasonable. An undue burden analysis, however, does not look to women generally. In holding that the spousal consent portion of the Pennsylvania abortion law was unconstitutional, the Court in *Casey* found that "the fact that [the provision] may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant."¹⁹⁵ Thus, the analysis ought to focus on the women who might seek these reasons-based abortions, not on the potential undue burden on women seeking abortions as a whole. For this narrower set of women, the state is not attempting to persuade—it is denying them a constitutionally protected right, which violates the central holding of *Casey*.¹⁹⁶

Casey makes clear that garden-variety state interests—for instance, protecting the health of the mother or the fetus' potential life—are not enough to entitle the state to prohibit any woman access to a pre-viability abortion.¹⁹⁷ However, proponents of these laws might argue that in the case

192. *Gonzales*, 550 U.S. at 150–55.

193. *Stenberg*, 530 U.S. at 938–39.

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

195. *Casey*, 505 U.S. at 837–38.

196. *Casey*, 505 U.S. at 877–88 ("What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.").

197. *Casey*, 505 U.S. at 871–73 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe* . . . It is a rule of law and a component

of disability-selective abortions, the state's interest is unique. In this case, the state claims to protect the fetus' constitutional right to equal protection under the law.¹⁹⁸ Under this argument, two constitutionally protected rights would be in conflict, and there might be a reason to find an exception to the Court's past holding that states cannot prevent women from receiving pre-viability abortions. This would first require proving that disability-selective abortions are unconstitutionally discriminatory under the Equal Protection Clause.

For many of the reasons discussed above, this argument would fail. First, the Supreme Court does not consider fetuses to be persons entitled to equal protection under the Constitution.¹⁹⁹ Second, disability is not a protected class according to the Supreme Court and thus any state participation in disability-selective abortion would be analyzed through rational basis review.²⁰⁰ Because there are many rational reasons why a state might permit, or a state hospital might perform, these abortions—the most important of which is to protect the constitutional rights of its citizens—no court would find this state action unconstitutional. Finally, private actors commit the vast majority of this discriminatory conduct and their actions are not covered by the Equal Protection Clause.²⁰¹

It is worth noting that while North Dakota lacks a constitutional basis to justify its disability-selective abortion ban, its interest in preventing discrimination might justify harsher abortion regulations so long as they fail to outlaw the procedure. For instance, states can impose greater regulations on the abortions of minors by requiring parental consent or a longer waiting period.²⁰² In this context, the state interest in protecting the minor is very strong and justifies more intensive regulations. Nevertheless, the Supreme Court has held that an outright ban on abortions for adolescent women is unconstitutional; therefore, parental consent requirements must contain a judicial bypass mechanism to ensure that young women who lack parental consent are not denied access.²⁰³ The heightened state interest in the case of disability-selective abortions would justify greater state regulation, but the

of liberty we cannot renounce. On the other side of the equation is the interest of the State in the protection of potential life. . . . Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed.”).

198. U.S. CONST. amend. XIV, § 1.

199. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

200. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

201. U.S. CONST. amend. XIV, § 1.

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

203. *Casey*, 505 U.S. at 899.

state cannot go so far as to prevent a pre-viability abortion as North Dakota has done.

This legal analysis is bolstered by substantial policy concerns. If the Court were to uphold a reasons-based abortion ban as constitutional, there is a legitimate concern that such a holding would, over time, degrade the right to abortion so significantly as to render it useless. Given that there is no constitutional reason to view the state interest in preventing disability discrimination of fetuses as distinct from other state interests, courts would have no constitutional reason to invalidate other reasons-based abortion bans once they have already approved of a disability-selective ban. Thus, because courts would have no *legal* reason to invalidate other reasons-based bans after upholding a disability-selective abortion ban, judicial approval would enable legislatures to evaluate and legislate which reasons for obtaining an abortion are “legitimate.” Those deemed unreasonable would become illegal. This slippery slope, which would continue to degrade the constitutional right to a pre-viability abortion, should be an intolerable result that courts are unwilling to entertain.

It is uncontroversial to acknowledge that many people judge the legitimacy of a woman’s decision to obtain an abortion based on her reasons for the procedure. Thus, once legislatures are allowed require doctors to inquire into a woman’s reasons (and then refuse to perform the abortion if certain reasons are given), public opinion will begin to define and limit the right. Some may think that the decision to pursue an abortion based on the fetus’s genetic abnormality is fundamentally immoral or selfish given the perception that the parents may have determined that they are not willing to handle the complications that raising a child with a disability might cause them. However, the right to a pre-viability abortion allows a woman to decide, regardless of the reason, whether or not she wants to carry her child to term.²⁰⁴ She may be too young, she may dream of going to college; she may lack financial stability and refuse to subject herself or her child to further financial stress. Her health may be in jeopardy or the child may be a result of rape, in which case the last thing she may want is to have a reminder of that experience. She might be focused on her career and not want to disrupt her job advancement. She might not want children at all. She may learn that her child is a girl and decide that she would prefer a son, or that her child will have Down Syndrome, breast cancer, Attention Deficit Disorder, asthma, acne, or brown eyes and decide to try again for a more “perfect” child. She may not want her body to undergo the physical transformations attendant to pregnancy. Any of these decisions—despite one’s personal views on whether or not they are acceptable—boil down to the same ulti-

204. *Roe*, 410 U.S. 113; *Casey*, 505 U.S. 833.

mate decision: whether a woman's vision of the life she wants involves this child.

Regardless of whether these judgments of other women's decisions are legitimate, legislatures should not be allowed to turn these subjective judgments into law. Period. The constituents in some states will find that nearly all reasons for having an abortion are unacceptable, including lack of maturity, social network, and financial stability. However, once courts allow legislatures to enact any reasons-based abortion bans, they will have no constitutional reason to deny other such bans. As demonstrated above, the state's interest in banning these abortions—preventing fetal discrimination—is constitutionally indistinguishable from its potential interest in preventing abortions to defend potential life. Thus legitimizing a state ban against disability-selective abortion would bring about an onslaught of these bans. I maintain that the Constitution does not give room for this public scrutiny. It restricts states from preventing *any* woman from obtaining a pre-viability abortion for *any* reason.²⁰⁵ The Supreme Court has never strayed from that holding and to do so now would be a grievous error.

Finally, if these bans are deemed constitutional, they will raise serious implications for the doctor-patient relationship. Such bans would chip away at the trust in one's physician that everyone should expect. After receiving the results of prenatal whole genome sequencing, women would not feel as if they could discuss their options openly with their doctor out of fear that doing so would limit their options later. Moreover, as prenatal whole genome sequencing does become the standard of care, any woman who engages in the test and later decides to have an abortion—whether or not that decision is based on the test results—would be immediately suspected of doing so for genetic reasons. If physicians could be criminalized for performing an abortion due to the disability of the fetus, then they might not be comfortable performing an abortion on any women who has had prenatal whole genome sequencing. Once the technology is incorporated into clinical care, every pregnant woman will be offered this test ten weeks into her pregnancy; this could cause a huge problem for doctors trying to protect themselves from liability while also caring for the needs of their patients.

Roe as interpreted by *Casey* forbids legislatures from prohibiting any woman from getting an abortion before viability.²⁰⁶ While there have been bans on procedures used to perform an abortion, such bans ultimately did not prohibit any woman from exercising her right to obtain a pre-viability abortion (even if accessing that right became more difficult). However, if the holding in *Casey* is to have any bite, the Court must continue to hold

205. *Roe*, 410 U.S. 113; *Casey*, 505 U.S. 833.

206. *Casey*, 505 U.S. at 871–72.

that such a prohibition—regardless of the size of the affected population—is unconstitutional. While the strength of a state’s interest can impact the intensity with which it attempts to persuade a woman to avoid such an abortion, it cannot override the central right to a pre-viability abortion.²⁰⁷ Finally, if a disability-selective abortion ban is upheld, it implicates serious policy interests—once legislatures are allowed to decide for women whether their reason for seeking an abortion is good enough, the foundation upon which the right rests will disappear. Moreover, courts will lack any constitutional reason with which to distinguish a ban on disability-selective abortions from a ban on abortions due to financial hardship. They will therefore have little power to police legislatures from enacting such bans.

CONCLUSION

Prenatal whole genome sequencing will radically change the status quo for prenatal care in the United States. This change will likely increase the demand for abortions based on genetic abnormality in addition to increasing the controversy accompanying them. Since these bans are already in fashion among anti-choice state legislatures, this increased controversy will spur the introduction of more bills that ban such abortions in states that lack sufficient political support at the moment. Any federal disability-selective abortion ban would be enacted based on an inappropriate use of enumerated federal powers. It will raise serious implications for the principles of federalism guaranteed by our Constitution and the Court should therefore find it unconstitutional. Furthermore, such bans by either the state or federal governments will violate the central holding in *Casey* that a state cannot prohibit any woman from getting a pre-viability abortion. Disability-selective abortion bans are thus unconstitutional under the Due Process Clause. This is the right outcome from a policy perspective as well—if courts fail to forbid legislatures from determining when a woman’s reason for obtaining an abortion are appropriate, certain legislatures will effectively remove the right to an abortion by outlawing a series of “illegitimate” reasons. ❀

207. *Casey*, 505 U.S. at 871–72.