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Gonzales v. Carhart: Continuing the Class Critique of the Reproductive Rights Doctrine and Movement

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GONZALES V. CARHART: CONTINUING THE CLASS CRITIQUE OF THE REPRODUCTIVE RIGHTS DOCTRINE AND MOVEMENT

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I. INTRODUCTION

I did not anticipate the ambivalence I felt after *Gonzales v. Carhart*.[1] The decision, which affirmed the constitutionality of the Federal Partial-Birth Abortion Ban Act of 2003,[2] was at once both shocking[3] and completely expected. First, I was shocked by what I saw as the Supreme Court's willingness to affirm the pro-life movement's betrayal of women who, at least in the pregnancy at issue, are pro-life.[4] As a student in my reproductive rights seminar pointed out, "These women were planning to give birth. They had the baby's room ready and decorated, but something went terribly wrong—a tragic thing that no one saw coming."[5] This reading of *Gonzales* interprets the decision as showing the willingness of pro-life

*Professor of Law, American University Washington College of Law. Thank you to the staff of the *South Carolina Law Review* and especially Kristina Cooper and James Sullivan for making this symposium one of the best discussions on constitutional jurisprudence I have attended in a long while. This Article benefited enormously from symposium participants Professors Ann Bartow, Eboni Nelson, Osamudia James, and Caitlin Borgmann. In ways too numerous to list, Kweku Toure always helps to make my work in this area and me more thoughtful.

1. 127 S. Ct. 1610, 1619 (2007) (affirming the constitutionality of the Federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. IV 2004)).

2. 18 U.S.C. § 1531.

3. I count the Court's graphic description of the procedure, *see id.* at 1620–23, and the lack of deference to the good faith and professionalism of doctors, *see id.* at 1622–23, 1631–32, chief among the ways in which the opinion was shocking.

4. These women are those (1) who do not plan on aborting their pregnancies but encounter some complication that leads to that decision; (2) whose attending physician would prescribe the use of a technique disallowed under the Act to terminate the pregnancy; and (3) who do not qualify under the Act's maternal health exception, *see* 18 U.S.C. § 1531(a) (Supp. IV 2004). While the Court's decision also affects those women who merely desire to terminate a pregnancy in the later stages of gestation in a manner disallowed under the Act, such a discussion is outside the scope of this Article.

5. D.D., a brilliant third-year law student, is also the mother of a two-year-old son.

forces to seek to limit abortion access at all costs, notwithstanding the consequences to women—even some with potentially pro-life leanings.

Certainly, this observation does not consider the circumstances of conception or that some of the women seeking to terminate their pregnancy in the late stages may have been planning to have their babies adopted, for example; the fact that these women are in the late stages of gestation suggests that the circumstances that led them to consider the late-term termination were dire and undesired. There is precious little background information explaining the pro-life movement's apparent shift in focus from abortions resulting from unintended or undesirable pregnancies, to abortions that are medically prescribed well into gestation. Even less is known as to whether the pro-life movement will experience a backlash for its position against those whose circumstances bring them under the restrictions of *Gonzales*.[6]

On the other hand, *Gonzales* represents business as usual in that it continues to show the Court's willingness to limit women's power and right to decide with their doctors the matters related to terminating their pregnancies. Many argue that the chipping away of rights established in *Roe v. Wade*[7] began almost immediately after the Court handed down that decision.[8] From such a perspective, *Gonzales* was hardly a surprise. Yet, *Gonzales* may lead to an unanticipated impact on poor women. The reproductive rights movement has continually overlooked the interests of poor women; as such, poor women continue to have particular vulnerabilities under the reproductive rights doctrine.

It is the objective of this Article to move beyond ambivalence, both in order to focus on the extent to which *Gonzales* can be understood within its appropriate juris-political context and in an effort to glean guidance as to what lies ahead in the fight for reproductive freedom. Part II of this Article analyzes the *Gonzales* decision. By exploring the specific issues taken on by the Court, one can more easily understand its doctrinal implications. Part II next places *Gonzales* within the political context of the mainstream reproductive rights movement. Part II also examines the ways in which *Gonzales* flows directly from the political context that gave rise to *Roe* and its progeny. Part III describes the potential class implications of the early reproductive rights movement. Part IV involves a shift from the mainstream reproductive rights movement and the doctrine it created to a critique of the movement's marginalization of class considerations. Specifically, Part IV examines the class critique of the reproductive rights movement in order to establish that *Gonzales* fits well within the line of cases following *Roe* that affect poor women's access to abortion in distinct and profound ways.

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6. While this observation warrants further inquiry into the motivations and allegiances of the pro-life movement, doing so is beyond the scope of this Article.

7. 410 U.S. 113 (1973).

8. *See, e.g.*, Julia L. Ernst, Laura Katzive & Erica Smock, *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 753 ("[S]ince 1973, a vocal anti-choice movement within the United States has chipped away at the core of the principles espoused by *Roe*."); Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issues of Sexuality*, 33 IND. L. REV. 863, 870 (2000) ("Legal scholars immediately criticized *Roe* for its activist interpretation of the Constitution and [*Roe*] has remained under near constant attack from all levels of government as municipalities, states, and Congress have sought to enact regulations that chip away at a wom[a]n's right to procure an abortion.").

This Article concludes in Part V by suggesting that a deeper inspection into the history of class politics surrounding the reproductive rights movement portends what lies ahead following *Gonzales*. In particular, reproductive health advocates will undoubtedly witness *Gonzales*'s disproportionately negative impact on poor women in the form of further decreased access to abortion doctors, increased surveillance of doctors who receive public funding, impediments to open communication between women and their doctors, and lessening of the resources necessary to promote and preserve the health and well-being of poor women.

II. *GONZALES*'S JURIS-POLITICAL CONTEXT

A. The Case

The story of *Gonzales v. Carhart*[9] has two, interrelated legislative chapters. The first chapter begins with *Stenberg v. Carhart*,[10] in which the Court held that Nebraska's Partial Birth Abortion Ban was unconstitutional because it "lack[ed] any exception 'for the preservation of the . . . health of the mother'"[11] and "'impose[d] an undue burden on a woman's ability' to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself."[12] The second legislative chapter in the story involves the challenge to the Federal Partial-Birth Abortion Ban Act of 2003.[13] The pro-life movement essentially received two bites at the apple, with the latter being the more successful of the two. As in *Stenberg*,[14] the *Gonzales* Court grounded its decision firmly within the constitutional parameters established by *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[15] yet reached a different result.[16] Quoting *Casey*, the Court recognized that the government "has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[17] The *Gonzales* Court arguably placed more weight on the latter interest—regardless of how tenuous the fetal life may be—and all but completely abandoned the former.

Similarly, the Court in *Gonzales*—unlike the *Stenberg* Court—seemed to treat with suspicion the doctor's testimony as to the necessity of the procedure.[18] The fact that the Act arguably does not carefully describe the restricted procedures did not persuade the Court of its unconstitutionality. Specifically, the Court rejected the plaintiff's argument that the Act creates an undue burden on a woman's right to have an abortion due to lack of clarity—what conduct would make doctors performing late-term abortions culpable—and the Act's propensity to prohibit

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9. 127 S. Ct. 1610.

10. 530 U.S. 914 (2000).

11. *Id.* at 929–30 (second alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)).

12. *Id.* (quoting *Casey*, 505 U.S. at 874) (internal quotation marks omitted).

13. Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. IV 2004)).

14. *See* 530 U.S. at 929–30 (citing *Casey*, 505 U.S. at 874, 879).

15. 505 U.S. 833.

16. *See Gonzales*, 127 S. Ct. at 1626–39 (analyzing and upholding the Federal Partial-Birth Abortion Ban Act of 2003 under the *Casey* standards).

17. *Id.* at 1626 (quoting *Casey*, 505 U.S. at 846) (internal quotation marks omitted).

18. *See id.* at 1622–23, 1631–32.

lawful procedures.[19] According to the Court, the Act is not unconstitutionally vague on its face because doctors of ordinary intelligence "can understand what conduct is prohibited," and it contains safeguards against "arbitrary and discriminatory enforcement."[20]

The Court further explained that the Act is not void for vagueness because it (1) regulates and proscribes a specific procedure; (2) permits lawful procedures; (3) requires that a doctor perform an overt act upon the fetus reaching a certain "anatomical landmark"; and (4) requires deliberate and intentional commission of the act after the fetus reaches the anatomical landmark.[21] Additionally, the Court disagreed with the contention that the Act imposed an undue burden because the restrictions it placed on second trimester abortions were overly broad.[22] According to the Court, the Act was sufficiently specific in distinguishing the culpable conduct—intentionally killing a living fetus once it has reached the set anatomical landmark—from the nonculpable conduct—removing the fetus in pieces or unintentionally engaging in the proscribed conduct.[23]

Finally, the Court rejected the claim that the Act is unconstitutional because it does not contain an exception for the health of the mother.[24] The Court stated that this facial challenge was inappropriate because the challenge concerned the lack of an exception to the proscribed conduct.[25] Accordingly, the Court stated,

> In these circumstances the proper means to consider exceptions is by as-applied challenge[s]. The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used.[26]

Additionally, the Court held that "[n]o as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception."[27]

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19. *See id.* at 1627–39.

20. *See id.* at 1628 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)) (internal quotation marks omitted).

21. *See id.* at 1627–28.

22. *See id.* at 1629–32.

23. *See id.* at 1629–31.

24. *See id.* at 1635–37.

25. *See id.* at 1638.

26. *Id.* (internal citation omitted).

27. *Id.* at 1639 (citing 18 U.S.C. § 1531(a) (Supp. IV 2004)). The Court's reasoning here is arguably circular. According to the Court, when dealing with exceptions, an as-applied challenge is proper unless the exception is explicit. However, an explicit exception requires a facial challenge, which would in turn lose because the exception exists in the Act.

B. The Doctrine

Abortion rights proponents and opponents alike would likely contend that *Gonzales* represents the first major decision on abortion since *Casey*,[28] where the Court created the "undue burden" standard for pre-viability restrictions on abortion.[29] In many ways, this assessment of the import of *Gonzales* is accurate in that it is the modern version of *Casey*—it creates new law by placing the state's interest in protecting fetal life on par with, if not higher than, the state's interest in protecting the health of women. It also builds upon—or remedies—what the *Casey* Court saw as *Roe*'s undervaluing of the state's interest in protecting potential lives of fetuses by arguably lessening the state's obligation to protect a woman's health.

Yet, *Gonzales* began long before *Casey*. According to Eileen Kaufman, *Gonzales*'s roots can be traced back to *Roe*, where the Court established that a woman has a fundamental right to be free from governmental infringement prior to viability and that a state's interest in protecting potential life becomes compelling upon viability.[30] However, *Casey*'s essential principles become the organizing framework for the *Gonzales* decision.[31] Without *Casey*, it is difficult to see, particularly at first glance, how the Court could have struck the ostensible balance between the state's interest in protecting the life of a fetus and protecting a woman's health.

C. The Political Background

Notwithstanding the fact that *Gonzales* arises out of a political context that in many ways predates *Roe*, the issue of abortion is the cause célèbre of the modern reproductive rights movement and has *Roe* as its hallmark case. Reproductive rights in the mainstream movement's political discourse equals abortion and abortion equals reproductive rights. With its highly-charged constitutional, moral, religious, and political implications, the abortion debate generates political unrest reminiscent of that surrounding slavery in the nineteenth century.[32] As with the slavery debate,

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28. *See* Planned Parenthood of Se. Pa v. Casey, 505 U.S. 833, 846 (1992) (affirming *Roe*'s recognition of a woman's right to choose to terminate a fetus prior to viability and obtain an abortion without undue influence from the state; the state's legitimate interest in restricting termination of pregnancies involving viable fetuses; and that at all times the state has an interest in protecting the health of a pregnant woman and "the life of a fetus that may become a child").

29. *See id.* I actually disagree with this proposition, believing instead that the Court established the undue burden standard in *Maher v. Roe*. *See* 432 U.S. 464, 473–74 (1977) ("[T]he right [to abortion] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.").

30. *See* Eileen Kaufman, *Civil Rights and Related Decisions*, 23 TOURO L. REV. 855, 870 (2008) (discussing *Gonzales*'s relationship to *Casey* as well as its future implications for abortion rights).

31. *See Gonzales*, 127 S. Ct. at 1626–39.

32. Interestingly, the abortion rights campaign grew out of the civil rights movement of the 1950s and 1960s. *See* EVA R. RUBIN, ABORTION, POLITICS, AND THE COURTS: *ROE V. WADE* AND ITS AFTERMATH 30 (1982) ("The dramatic victory in *Brown* made it apparent to . . . special-interest groups with good causes that litigation might offer benefits and a chance of success denied them by the legislative process.").

the issues have become solidified into a dichotomous framework summed up by the question, "Which side are you on?"[33]

However, the traditional story of abortion in the United States has a more extensive narrative than the modern debate represents. In fact, the twentieth century abortion issue was initially constructed after World War II.[34] At that time, more American women than ever before—16.5 million—worked outside of the home; "that number was increasing by approximately one million each year, despite postwar reconversion policies that aimed to eliminate huge numbers of women from the workplace."[35] In an effort to reentrench the standard of the "model-woman"—the stay-at-home wife and mother—public discussions and popular-cultural representations that defined "acceptable" behavior for the "fairer sex" were common.[36] Women who had experienced paid employment during the war responded to this push for redomestication by taking a more aggressive stance toward reproductive rights.[37] Their position in turn provoked mainstream disapproval of the growing number of women seeking abortions, as reflected in state enforcement of stringent anti-abortion statutes.[38]

As early as the 1960s, it was clear that the fight against anti-abortion statutes and the fight for access to sterilization would greatly influence the political agenda for women who wanted to work in paid labor and not become mothers.[39] Indeed, positioning abortion alongside women's interest in increasing their options in the labor force facilitated strong alliances within the fledgling, second-wave women's movement.[40] Under this broader construction, the abortion rights movement gained relevance to lesbians in the sexual liberation movement and to blacks and Latinos in the civil rights movement.[41] While many embraced this expanded vision of reproductive rights,[42] abortion became the single issue for much of the mainstream

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33. *See* BEVERLY WILDUNG HARRISON, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION 185–86 (1983). Specifically, Harrison noted,

> To oppose legal abortion is to define women as child-bearers rather than autonomous human beings, and to endorse a sexually repressive morality enforced by the state. Often at a particular historical moment an issue emerges that illuminates the nature of the larger struggle. It is the sort of issue that precludes neutrality, that despite its ambiguities and complexities (and there always are some), poses that most basic of political questions—which side are you on?

Id. (quoting Ellen Willis, *Commentary*, VILLAGE VOICE, Dec. 31–Jan. 6, 1981, at 28).

34. *See* Rickie Solinger, *Introduction* to ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, at 1, 5 (Rickie Solinger ed., 1998).

35. *Id.* at 5–6.

36. *See* Rickie Solinger, *Pregnancy and Power Before* Roe v. Wade, *1950–1970*, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, *supra* note 34, at 15, 17.

37. *See* Solinger, *supra* note 34, at 6.

38. *See* Solinger, *supra* note 36, at 18–19.

39. *See id.* at 17.

40. *See id.* at 19.

41. *See generally* JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT (2003) (exploring the relationship between the movement for increased abortion rights and other feminist movements that focused on an array of agendas).

42. For example, organizations such as the Boston Women's Health Book Collective, a group of women from Boston and Cambridge, Massachusetts, published *Women and Their Bodies: A Course*—later called *Our Bodies, Ourselves*. *See* BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, OUR BODIES, OURSELVES: A BOOK BY AND FOR WOMEN (2d ed. 1976). The Boston Women's Health Book Collective has been quite successful in disseminating information regarding various aspects of women's

reproductive health movement.[43] Despite consistent pleas for a broader focus in the movement—one that urged stressing self-help and attempting to raise awareness about other aspects of women's health[44]—the mainstream movement made the political and strategic decision to focus on abortion.[45]

Consequently, the concentration of resources and energy paid off when, in 1973, the Supreme Court granted constitutional protection to a woman's decision to terminate a pregnancy.[46] This decision appeared to have successfully validated the fight for reproductive autonomy for women. According to Sarah Weddington, the attorney who represented "Jane Roe," the *Roe* decision was supposed to be the floor upon which other rights could logically be supported.[47]

As events unfolded, however, the reproductive rights movement had little opportunity to explore or establish those *other* rights. Instead, the movement has become largely preoccupied with reacting to the so-called right-to-life movement,[48] including mainstream politicians, Christian fundamentalist organizations, and extremist groups such as Operation Rescue.[49] The right-to-life movement's primary objectives entail recriminalizing abortion, making it inaccessible, or both.[50] To accomplish their objectives, these organizations employ a range of techniques from court battles to what is essentially terrorism.[51] Facing such obstacles and aggressive attacks on the right to abortion—including the murder of abortion providers[52]—the reproductive rights movement has had a difficult time moving on to a broader spectrum of reproductive issues. Therefore, despite the debates within the ranks as to whether abortion should continue to be a single-focus issue,[53] mainstream reproductive rights advocates largely view defending the gains of *Roe* as the primary purpose of the movement.[54]

In addition to the Court's articulation of the rights and interests established in *Roe*,[55] pro-choice feminist activists and theorists maintained a complex relationship

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health including aging, self image, economic development, and political involvement. *See id.*

43. *See* SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 51–54 (1991).

44. *See id.* at 44.

45. *See id.* at 51–54. The women's movement was in full swing during the late 1960s and its influence on the focus and strategies during the prelegalization period is undeniable. In fact, leaders of the women's movement were also heading the most powerful abortion rights organizations. *Id.*

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

47. Interview with Sarah Weddington, Attorney for "Jane Roe," in Long Beach, Cal. (Feb. 27, 1997).

48. For an example of this kind of reaction to the right-to-life movement, see Marcy J. Wilder, *The Rule of Law, the Rise of Violence, and the Role of Morality: Reframing America's Abortion Debate*, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, *supra* note 34, at 73.

49. *See id.* at 82–84.

50. *See id.* at 82–85.

51. *See id.*

52. *See id.* at 81–86.

53. For an argument in support of a broader focus, see Marlene Gerber Fried, *Transforming the Reproductive Rights Movement: The Post-*Webster *Agenda*, *in* FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 1, 12–14 (Marlene Gerber Fried ed., 1990).

54. JANET HADLEY, ABORTION: BETWEEN FREEDOM AND NECESSITY, at xiv (1996). Their attention is not altogether misplaced as *Roe* has undergone several limitations since its pronouncement of a woman's right to terminate a pregnancy. *See* cases cited *infra* note 57.

55. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

with the decision. On one hand, most pro-choice feminists interested in sexual freedom, civil and economic rights, and reproductive healthcare undoubtedly recognized the enormity and importance of abortion decriminalization. On the other hand, they must have also experienced *Roe* as somewhat of a hollow victory in that it only spoke to the narrow issue of abortion.[56] Further, pro-choice critics of *Roe* have argued that the case—and the political movement that gave rise to the case—reflected the priorities of (1) middle and upper class women, many of whom could already afford legal abortions in this country or abroad, and (2) women, the majority of whom were privileged and white, who had not been subjected to sterilization abuse. On both fronts, race and class figured prominently in the critique.[57]

Of particular relevance to this discussion of the implications of *Gonzales* is the fact that the modern reproductive rights movement and its doctrine have consistently garnered substantial class critiques.[58] One such area of critique surrounds the post-*Roe* abortion-funding cases.[59] Certainly, these cases are of profound importance due to their impact on the reproductive realities of women who require government funding in order to make their right to an abortion meaningful. However, the negative class implications of the efforts to decriminalize abortion actually predate *Roe*.[60] Given the reproductive and sterilization abuses of poor women dating back to slavery,[61] the decision to focus substantial resources on

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56. Marlene Gerber Fried, *Abortion in the United States—Legal but Inaccessible*, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, *supra* note 34, at 219 (discussing the continued implications of the post-*Roe* narrowing of the feminist agenda).

57. *See, e.g.*, Angela Hooten, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER SOC. POL'Y & L. 59, 65 (2005) (discussing the critique of *Roe* on race and class grounds); Melanie M. Lee, Comment, *Defining the Agenda: A New Struggle for African-American Women in the Fight for Reproductive Self-Determination*, 6 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 87 (2000) (discussing the reproductive rights agenda for African-American women).

58. *See, e.g.*, Kenneth L. Karst, *Poverty and Rights: A Pre-Millennial Triptych*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 404 (2002) (questioning the application of the reproductive rights doctrine to the needs of poor women); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 120, 136–37 (1992) (recognizing the negative experiences of poor women under *Roe* created by courts' and advocates' failure to take privacy seriously); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies*, 104 HARV. L. REV. 1419, 1460–62 (discussing at length the ways in which the reproductive rights movement and doctrine overlook poor women).

59. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 509 (1989) ("[T]he State's decision here to use public facilities and staff to encourage childbirth over abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.'" (quoting Harris v. McRae, 448 U.S. 297, 315 (1980)); Poelker v. Doe, 432 U.S. 519, 521 (1977) ("[W]e find no constitutional violation by the city of St. Louis in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions."); Maher v. Roe, 432 U.S. 464, 473–74 (1977) ("[T]he right [created by *Roe*] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.").

60. *See, e.g.*, Mark A. Graber, *The Ghost of Abortion Past: Pre-*Roe *Abortion Law in Action*, 1 VA. J. SOC. POL'Y & L. 309, 311–12 (1994) (noting that prior to *Roe*, poor women found it difficult to get their issues addressed in the abortion rights movement).

61. *See generally* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 22–103 (1997) (providing a historical discussion of the regulation of black women's reproductive autonomy since slavery).

abortion decriminalization betrayed not only the history of slavery but also the history of the eugenics movement where thousands of women—mainly poor women—were forcibly sterilized.[62] As the following Part of this Article discusses, the impact of not fully integrating class into the forefront of the reproductive rights movement not only makes the consequences of *Gonzales* inevitable, but also forever limits the potential for a broadly-construed, inclusive notion of reproductive rights.

III. *GONZALES*'S CONTRIBUTION TO THE DOCTRINE'S CLASS CONFLICT

A comprehensive assessment of *Gonzales*'s class implications in the reproductive rights context must begin with *Skinner v. Oklahoma*.[63] In *Skinner*, the Court struck down the Oklahoma Habitual Criminal Sterilization Act, which permitted the sterilization of criminals convicted of more than one felony involving moral turpitude.[64] The lower court had ordered Skinner to undergo a vasectomy after he was twice convicted for robbery with a firearm, following an earlier conviction of stealing chickens.[65] The Court held that the sterilization order offended the Constitution because the statute unequally treated offenders who had committed crimes of the same ilk.[66] For example, a person convicted of grand larceny three times would be subject to sterilization under the Act, while a person convicted of embezzling three times would not.[67] There was nothing to distinguish embezzlement from larceny beyond the class of the offender; it was this distinction that the Court found unacceptable.[68]

The Court both accepted and elaborated on the Fourteenth Amendment challenge to the statute, finding that the Act violated the Equal Protection Clause.[69] The Court noted that the Act "la[id] an unequal hand on those who have committed intrinsically the same quality of offense and sterilize[d] one and not the other."[70] The Court articulated the importance of reproduction in continuing "the race," and announced the breakthrough conclusion that infringement on reproductive capacities violates the Fourteenth Amendment.[71] It is unclear exactly what Justice Douglas was referring to when he wrote "the race." What is clear is that Justice Douglas's reference would have been clear had he not changed his original draft, which stated the following: "The classification hardly has firmer constitutional basis than if in dealing with particular offenses it drew a line between rich and poor or between Nordic and other racial types."[72] Notwithstanding the race question, given the historical context within which *Skinner* was decided, Douglas makes clear

62. *See id.* at 89–98.
63. 316 U.S. 535 (1942).
64. *Id.* at 536, 538.
65. *Id.* at 537.
66. *See id.* at 541.
67. *Id.* at 538–39.
68. *See id.*
69. *Id.* at 538.
70. *See id.* at 541.
71. *See id.*
72. *See* Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1441 n.180 (1997) (quoting William O. Douglas, Draft of Opinion in *Skinner* (n.d.) (unpublished draft, on file with Manuscript Division, Library of Congress)) (internal quotation marks omitted).

his meaning when he writes, "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."[73]

Skinner remains the foundational decision of reproductive rights legal doctrine,[74] although its more progressive insights are no longer referenced when its holding is cited.[75] In *Skinner*, the Court made clear that reproduction raises important issues of human rights and went on, in effect, to launch a reproductive rights legal doctrine that focused on matters so fundamental to personhood that the government should not interfere with people's choices in those areas.[76] In conclusion, the Court grounded its decision on the disparate impact the Oklahoma Act would have on disfavored groups by arguing that it was as if Oklahoma, by enacting the statute, had purposefully selected a particular class of persons for oppressive treatment.[77] While *Skinner* is still cited in support of the reproductive rights of women, it does not stand for the proposition that one's status as a racial minority in general, and as a descendent of slaves in particular, bears any historical or doctrinal relevance in the application of constitutional protection in reproductive matters.[78]

IV. *GONZALES* AND THE CLASS CRITIQUE CONTINUUM

Skinner can arguably be read as evidence of the Court's recognition that the constitutional implications of reproductive rights—including abortion—are inextricably bound to class implications.[79] Yet, the relationship between class and reproductive rights is without specific or explicit reference in *Griswold v. Connecticut*[80] or *Eisenstadt v. Baird*.[81] However, the class implications are certainly implicit in the holdings of these cases. First, the focus on abortion as the central thrust of litigation is a direct result of the splits between middle- and upper-class women who sought abortions and working-class and poor women whose reproductive interests were more closely tied to a broader construction of

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73. *Skinner*, 316 U.S. at 541.

74. A. Felecia Epps, *The Right Responsibility: Does the Right to Procreate Include the Responsibility to Parent?*, 34 OHIO N.U. L. REV. 85, 113 (2008) ("*Skinner v. Oklahoma* was the first case to recognize the existence of a right to freedom in procreation decisions." (internal footnote omitted)).

75. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992) (citing *Skinner* but failing to discuss the potential race-related aspects of the decision); Webster v. Reprod. Health Servs., 492 U.S. 490, 547 (1989) (same); Roe v. Wade, 410 U.S. 113, 152 (1973) (same); Eisenstadt v. Baird, 405 U.S. 438, 453–54 (1972) (same); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (same).

76. *See Skinner*, 316 U.S. at 541.

77. *See id.*

78. For a more detailed discussion of *Skinner*, see ROBERTS, *supra* note 61, at 307–08.

79. For examples of commentary finding class implications in the *Skinner* decision, see Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 HARV. C.R.-C.L. L. REV. 299, 361 (1993) ("In language that carried an accusation of class bias, the Court asserted that '[s]terilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination.'" (quoting *Skinner*, 361 U.S. at 541)); and Nourse, *supra* note 72, at 1439 ("*Skinner* is about class distinctions in criminal law . . . .").

80. *See* 381 U.S. 479 (1965).

81. *See* 405 U.S. 438 (1972).

reproductive healthcare. One can fairly assume that had poor women and women of color had more political influence and resources within the mainstream movement their issues would have taken center stage. Second, as Professor Darren Lenard Hutchinson points out in his analysis of Supreme Court decisions, many of the Court's decisions dealing with controversial topics are essentially a stamp approval on how the majority of Americans have already resolved the issue.[82] Under Hutchinson's theory, *Roe* and its progeny can be understood as reifying the prioritization of abortion in the realm of reproductive interests facing women. It would follow, therefore, that the decisions help to push the interests more likely to impact poor women and women of color to the margins, not only in the political sphere but in the jurisprudential sphere as well. When class and race do arise in cases, the Court appears justifiably obtuse or hostile to arguments that would sensitize the doctrine to such matters.

Interestingly, when the issue of class reappeared in the jurisprudential landscape of the modern reproductive rights doctrine, it did so in *Maher v. Roe*[83] and *Harris v. McRae*[84]—two cases that limited public funding of abortions for women on public assistance. Therefore, *Skinner*'s class consciousness within the reproductive rights context is relegated to the margin—albeit an important margin. *Skinner* is cited for the proposition that procreative matters are well within the zone of privacy that the Constitution protects from governmental intrusion.[85] *Maher* and *Harris*, however, establish that denying public funding for abortions sought by poor women is not an intrusion or undue burden on women seeking to exercise their right to an abortion.[86]

Not only does *Gonzales* continue a history of political and jurisprudential limitations on the interests set forth in *Roe*, but it also further implicates class in reproductive rights. In that respect, *Gonzales* extends the reach of the so-called "Hyde Amendment," which sets the parameters for using federal Medicaid resources for abortion procedures.[87] Like *Gonzales*, the Hyde Amendment restricts funding to situations where the life of the mother is at stake.[88] Also like *Gonzales*, the Hyde Amendment evolved from *Roe*'s initial articulation of maternal health as an important trigger for abortion funding.[89] As of 1991, several states had similarly

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82. Darren Lenard Hutchinson, *The* Majoritarian *Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 4 (2005).

83. 432 U.S. 464, 480 (1977) (upholding a state prohibition on the use of public funding for abortions not necessary to protect the health or life of the mother).

84. 448 U.S. 297, 326 (1980) (holding that states that participate in Medicaid are not required to fund medically necessary abortions even though the Hyde Amendment makes reimbursement impossible).

85. *E.g.*, *id.* at 312 n.18; *Maher*, 432 U.S. at 471–72, 472 n.7.

86. *See Harris*, 448 U.S. at 326; *Maher*, 432 U.S. at 480.

87. The original Hyde Amendment was passed by Congress in 1976 as part of an appropriations bill for the U.S. Department of Labor and Health, Education, and Welfare. *See* Department of Labor Appropriation Act of 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976). However, subsequent Congresses appended similar provisions to other appropriations bills. *See, e.g.*, Department of Labor Appropriation Act of 1983, Pub. L. No. 97-377, § 204, 96 Stat. 1830, 1894 (1982) (prohibiting the use of federal funds "to perform abortions except where the life of the mother would be endangered if the fetus were carried to term"). The term *Hyde Amendment* has come to refer to any such funding amendment. *See Harris*, 448 U.S. at 302.

88. Department of Labor Appropriation Act of 1977, § 209, 90 Stat. at 1434.

89. *See* Roe v. Wade, 410 U.S. 113, 162 (1973).

restricted public funds for women seeking abortions.[90] At present, seventeen states provide public funding for abortions when a treating physician deems the procedure medically necessary.[91] While "medical necessity" can be construed narrowly to exclude psychiatric or other mental health justifications, there is room to argue that it is broad enough to include maternal health and by extension, nonmedical health issues, in addition to situations where the life of the woman is at stake.

Gonzales, however, all but forecloses this possible extension by failing to require that state restrictions on abortion include an explicit maternal health exception.[92] *Gonzales* goes further by casting doubt on the success of an as-applied challenge to the lack of a maternal health exception because the Act contains an exception for situations where the life of the mother is at stake.[93] This aspect of the Court's holding takes its cue directly from the shift from a focus on maternal health exceptions to life exceptions found in the funding context. One cannot help but hold up the success of the shift in the funding context as an essential factor in the Court's holding in *Gonzales*. The intriguing proposition is that the mainstream abortion rights movement is arguably as responsible for this aspect of *Gonzales* as much as the pro-life movement and the new composition of the Court. While little is gained by pointing fingers, there is much to be gained by not only examining the correlation between the dynamics and the development of the doctrine but also examining the potential cross-purposes of those dynamics.

V. CONCLUSION

While I agree that *Carhart* will be "oceanic" in its significance[94] within the juris-political landscape of the modern reproductive rights doctrine, I believe poor women will most heavily feel its impact. Poor women, who are disproportionately women of color, are already struggling with issues of access to abortion due to the funding restrictions established after *Roe* and the funding realities that predated *Roe*.[95] *Gonzales* will likely exacerbate the already dire conditions facing poor women who need or want abortions, because fewer doctors will be willing to offer the procedures for fear of criminal indictment. Additionally, doctors who provide reproductive services in public facilities are inherently subject to greater surveillance, and are therefore more likely than private doctors to be found in

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90. Specifically, thirty states—Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Utah—and the District of Columbia—restrict the use of state Medicaid funds for abortion to only cases of life-threatening pregnancy. *See* Rachel Benson Gold & Daniel Daley, *Public Funding of Contraceptive, Sterilization and Abortion Services, Fiscal Year 1990*, 23 FAM. PLAN. PERSP. 204, 209, 210 tbl.3 (1991).

91. *See* GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF AS OF APRIL 1, 2008: STATE FUNDING OF ABORTION UNDER MEDICAID (2008), *available at* http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

92. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1637 (2007).

93. *See id.* at 1639 (citing 18 U.S.C. § 1531(a) (Supp. IV 2004)).

94. Edward Lazarus, *The Supreme Court's Split Decision to Uphold the Federal "Partial Birth Abortion" Ban: Why, Despite the Court's Disclaimers, It Will Be Hugely Influential*, FINDLAW, Apr. 26, 2007, http://writ.news.findlaw.com/lazarus/20070426.html.

95. For a discussion of the impact of funding restrictions on legal abortions, see Graber, *supra* note 60, at 368–70.

violation of the Act. It will only take a few public prosecutions or indictments of public doctors under the Act before doctors cease performing the procedures disallowed under the Act. Perhaps those doctors will move to the private sector, but, undoubtedly, the indictments will follow them.

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