Assessing the Constitutionality of Reproductive Technologies Regulation: A Bioethical Approach

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Notes

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Current reproductive technologies have given parents the means to select against unwanted genetic characteristics by discarding or aborting genetically undesirable embryos or fetuses. Technologies such as preimplantation genetic screening and prenatal genetic testing allow parents to test embryos and previable fetuses, respectively, for genes associated with an array of nontherapeutic and therapeutic characteristics—from eye color to sex to disease. Because regulation of access to these technologies seems likely, the Supreme Court will be called upon to address the constitutionality of these regulations. The Court will face difficult questions about the balance between the procreative liberty interest in accessing information provided by these technologies and the potentially conflicting government interest in regulating such access.

This Note articulates the problems with our current procreative liberty jurisprudence and proposes an alternate framework for balancing individual and States' rights. First, I argue that precedential case law allows for the construction of a broad procreative liberty interest in accessing reproductive technological information from both preimplantation and prenatal genetic tests. Second, to balance procreative liberty and State interests, I propose the use of an analytical framework based upon Tom Beauchamp and James Childress's four principles of bioethics: autonomy, nonmaleficence, beneficence, and distributive justice. My hope is that these four principles will provide an objective language that the Court can use to articulate its ethical concerns and to create a more transparent dialogue between the liberty and State interests at issue. Lastly, I apply the four principles and speculate about the constitutionality of regulating access to information provided by reproductive technologies.

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INTRODUCTION

Abortion rights supporters—who believe that a woman has the right
to make decisions about her own body—have had to grapple with the
reality that the right to choose may well be used selectively to abort
fetuses deemed genetically undesirable. And many are finding that,
while they support a woman’s right to have an abortion if she does not
want to have a baby, they are less comfortable when abortion is used
by women who don’t want to have a particular baby.¹

Current reproductive technologies have provided parents with the
means to select against unwanted genetic characteristics by discarding or
aborting genetically undesirable embryos or fetuses. Technologies like
preimplantation genetic screening and prenatal genetic testing allow
parents to test embryos and previable fetuses, respectively, for genes

associated with characteristics like sex, hair color, eye color, skin color, and height, as well as those associated with diseases like phenylketonuria, breast cancer, Tay-Sachs disease, and cystic fibrosis.

After the Supreme Court’s recent decision to uphold the Partial-Birth Abortion Ban Act on moral grounds in Gonzales v. Carhart, it seems likely that states will respond to the moral concerns implicated by these technologies with government regulation of access to the information provided by such technologies. These regulations will leave the Court to face difficult questions about the balance between the procreative liberty and the risk of noninvasive fetal sex determination.

interest in accessing the information provided by these technologies and the potentially conflicting government interest in regulating such access.

When constitutional challenges to such regulations arise, the Court must be prepared to articulate the boundaries of the procreative liberty right at issue. Within its Fourteenth Amendment due process jurisprudence, the Supreme Court has recognized certain fundamental rights, including a woman’s limited right to have an abortion. In analyzing government regulation of these rights, the Court considers the strength of the right at stake as compared to the strength of the government’s interest in regulating that right. The Court’s assessment of these two factors within the area of reproductive rights can be divided into two prongs: (1) the procreative liberty interest prong, in which the fundamentality of the right at issue is considered; and (2) the balancing prong, in which the State’s interest is weighed against the liberty interest articulated in prong one. Under the first prong, the Court has—at least early in its jurisprudence—broadly construed the procreative liberty interest in granting women the right to obtain a previability abortion. The Court reasoned that “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”

Although the Court continues to recognize a broad procreative liberty interest, it has recently used the second “balancing” prong to constrain this broad right. In Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court first recognized that “[e]ven in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [the mother] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy.” In essence, the Court has permitted some level of governmental interference in reproductive decisionmaking and has only invalidated state regulation that placed an “undue burden” upon the exercise of a woman’s procreative liberty interest in procuring a previability abortion, or that “ha[d] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a

15. See Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (quoting Casey, 505 U.S. at 879 (plurality opinion), for the proposition that the State “may not prohibit any woman from making the ultimate decision to terminate her pregnancy”).
16. 505 U.S. at 872 (plurality opinion).
17. Id. at 874 (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision [to have an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”). Impliedly, state-enacted obstacles to the exercise of this right are constitutional so long as they do not unduly burden the exercise of a woman’s right to obtain an abortion.
nonviable fetus.'" Applying this undue burden test, the Gonzales Court held that the Partial-Birth Abortion Ban Act did not constitute an undue burden on a woman's ability to procure a previability abortion because "the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition." Notably, while the Court invalidated one previability abortion procedure, other such procedures remain legal.

The "balancing" prong has allowed the Court to pay lip service to the fundamental right at issue, while simultaneously giving effect to the moral concerns implicit in abortion regulation. Specifically, the Gonzales decision gave credence to what Professor Sonia Suter terms the "'repugnance' approach," meaning that the Court recognized moral repugnance not only as a valid State interest, but also as a State interest sufficient to overcome a woman's exercise of her procreative liberty interest in obtaining a particular type of previability abortion. This decision seemingly contradicted the Court's previous representation that morality would not control its decisions and that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." As it now stands, the undue burden test represents an overly malleable

18. Id. at 877.

(K) Thus, by aborting a child in the manner that purposefully seeks to kill the child after he or she has begun the process of birth, partial-birth abortion undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world, in order to destroy a partially-born child.

(L) The gruesome and inhumane nature of the partial-birth abortion procedure and its disturbing similarity to the killing of a newborn infant promotes a complete disregard for infant human life that can only be countered by a prohibition of the procedure.

Id. § 2(14)(K)–(L), 117 Stat. at 1205–06.
21. Id. at 158.
22. See id. at 181–82 (Ginsburg, J., dissenting) (discussing other procedures).
24. See Gonzales, 550 U.S. at 157–58 (discussing the State's interest in protecting society against moral "coarsen[ing]"); see also infra note 27.
25. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision."); Roe v. Wade, 410 U.S. 113, 116 (1972) ("Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.").
balancing test, which can be manipulated by the Court to swing with the pendulum of the majority's moral vision. It is not the second prong balancing test itself that is offensive to the liberty interest at stake, it is the jurisprudential shroud surrounding such a test and the resulting ambiguity within the Court's decisions.

As the dawn of reproductive technological regulation approaches, the Court must prepare to articulate a clear balancing standard that accounts for both a woman's procreative liberty interest and the State's interest in preserving and promoting potential life. This Note articulates the problems with our current jurisprudence and proposes an alternate framework for balancing individual and states' rights.

First, I argue that the precedential case law discussed in Part IV of the Casey opinion allows for the construction of a broad procreative liberty interest in accessing reproductive technological information from both preimplantation and prenatal genetic tests. Second, as to the balancing of the procreative liberty interest and the State's interests, I propose the use of an analytical framework based upon Tom Beauchamp and James Childress's four principles of bioethics. As with the current balancing test, these four principles provide a means for the Court to protect the liberty interest at stake, while acknowledging and promoting governmental interests. However, my hope is that these four principles

27. See Suter, supra note 23, at 1519, 1580–83. Suter explains,
What Kennedy wants to legitimate as a justification for abortion regulations has more to do with “moral concerns” and protecting the sensibilities of the community.

Kennedy fails to acknowledge he has introduced an entirely new justification for prohibiting certain abortion procedures, one that Casey and Roe neither discussed nor legitimized.

... Indeed, given the ultimately unpersuasive grounds for upholding an abortion ban with no health exception, Gonzales suggests that such repugnance can be sufficient justification for limiting abortion rights.

Id. at 1580–81, 1583 (footnote omitted).

28. Although preimplantation genetic screening provides information about in vitro embryos while prenatal genetic testing provides information about in utero fetuses, I deal with these technologies largely in the same manner. Selective discard of an embryo and selective abortion of a fetus differ procedurally and ethically; however, they remain similar in terms of the ultimate decision each involves. Both procedures implicate a parental choice of whether to have a particular child, and both preimplantation genetic screening and prenatal genetic testing provide the information necessary to make that decision. See Garrison, supra note 12, at 1639 ("[T]he regulatory issues posed by sex selection are not unique to ART [assisted reproductive technology, such as preimplantation genetic diagnosis]; regulation that restricts trait determination in ART thus should logically apply to the abortion context as well... [S]ex selection through abortion and sex selection through [preimplantation genetic diagnosis] pose the same public concerns... . ."). Thus, the broad procreative liberty right discussed in this Note encompasses access to genetic information about both embryos and fetuses.

BIOETHICAL APPROACH will provide an objective language that the Court can use to articulate its ethical concerns and to create a more transparent dialogue between the liberty and State interests at issue.

The four principles are autonomy, nonmaleficence, beneficence, and distributive justice. Consideration of these factors will allow the Court to weigh the procreative liberty interest (autonomy) against the State’s interest in preserving potential life (nonmaleficence), and promoting potential life (beneficence). In addition, the Court could consider the burden posed by the inaccessibility of such procedures (distributive justice). By weighing these four factors, I argue that the Court would be more likely to find that the State’s interests outweigh a liberty interest in obtaining nontherapeutic genetic information—information about purely cosmetic genetic characteristics. On the other hand, the proposed balancing test would likely protect the liberty interest in obtaining therapeutic genetic information about an embryo or fetus and its potential medical health. Of course, it is important to recognize that therapeutic and nontherapeutic genetic characteristics represent the poles of a broader continuum of genetic characteristics which may present more difficult questions for the Court.

I. THE TECHNOLOGIES AT ISSUE

Before exploring the nature of the procreative liberty and State interests at stake, I provide a brief synopsis of the reproductive technologies at issue. In section A, I discuss preimplantation genetic screening, which involves in vitro genetic testing of embryonic cells. Section B explains prenatal genetic testing, a procedure used to test for genetic characteristics of in utero fetuses.

A. PREIMPLANTATION GENETIC SCREENING

Preimplantation genetic screening evolved from a process known as preimplantation genetic diagnosis (PGD), a procedure “developed to identify and avoid specific disease-causing mutations before pregnancy.” PGD involves the in vitro fertilization (IVF) process, by which a woman’s ovaries are stimulated and her eggs extracted. After removal and fertilization of the eggs, a cell biopsy is performed, at which time doctors analyze the genetic content of the embryo. Certain embryos are then selected for transfer based upon these genetic tests.

30. See id.
32. Id.
33. Id.
34. Id.
PGD allows women who have undergone IVF to screen the fertilized embryos for genetic abnormalities, diseases, and chromosomal defects. In essence, PGD provides a means for IVF participants to avoid genetic conditions like Tay-Sachs disease, cystic fibrosis, sickle cell anemia, Huntington's disease, and others. Preimplantation genetic screening involves the same technological procedures as PGD; however, rather than focusing on diagnosis of genetic disease, preimplantation genetic screening involves genetic testing for a broader spectrum of genetic characteristics, including non-disease-related characteristics, and can currently provide information about an array of traits, including sex, hair color, eye color, skin color, height, and breast cancer predisposition.

Parents can utilize preimplantation genetic screening procedures in various ways. First, parents may wish to use preimplantation genetic screening to identify and select for a child who will have a particular disability common to the parent, such as deafness or dwarfism. Three percent of IVF-preimplantation genetic screening clinics have used the technology in this manner. Second, if the parents have an existing seriously ill child, they may wish to select an embryo that presents as an immunological match for their sick child. Twenty-four percent of IVF clinics have used the technology in this manner.

35. See id.
37. Finning & Chitty, supra note 2, at 69–70.
39. Id. at 164.
40. Id. at 165.
41. Sovio et al., supra note 6, at 2.
42. Sagi et al., supra note 8, at 510–12.
46. Baruch et al., supra note 31, at 1055.
preimplantation genetic-screening clinics used the procedure for this purpose. Finally, parents can use the results of preimplantation genetic screening to select for cosmetic (nontherapeutic) genetic characteristics, the most common of which is currently sex. Forty-two percent of IVF-preimplantation genetic screening clinics have already used preimplantation genetic screening to allow couples to choose the sex of their baby.

Although the technology does not yet allow selection for a broad array of nontherapeutic traits, with the advance of DNA microarray (a testing device that can screen for thousands of gene variants at one time), the ability to select such traits remains only a matter of time. The large percentage of IVF-preimplantation genetic screening clinics that currently permit nontherapeutic sex selection suggests that these clinics might similarly permit parents to select for other nontherapeutic characteristics once access to such genetic information becomes more technologically feasible. Such feasibility raises concerns about selective discard of genetically undesirable embryos.

B. PRENATAL GENETIC TESTING

Like preimplantation genetic screening, prenatal testing features comparable technological capabilities, though testing is performed on an in utero fetus rather than an in vitro embryo. Prenatal genetic testing currently includes both first and second trimester screening and testing procedures. Within the first trimester, women can obtain two procedures: a chorionic villus sampling (CVS) or a first trimester screen. CVS involves the removal of chorionic villi cells from the placenta through transcervical or transabdominal sampling. Performed between ten to thirteen weeks after the woman’s last menstrual period, CVS detects certain chromosomal abnormalities, like Down syndrome, and genetic disorders, like cystic fibrosis. A new prenatal screen, known as the “first trimester screen,” involves a noninvasive blood sampling in combination with an ultrasound evaluation of the fetus. Currently, this screen allows mothers to identify the risk of certain chromosomal abnormalities, like Down syndrome and Trisomy-18. Both CVS and the first trimester

49. Id. at 1056.
50. Id.
51. King, supra note 12, at 286.
53. Id.
55. Id. Trisomy-18 is a chromosomal disorder characterized by physical birth defects and medical problems, which include, most notably, congenital heart defects. See SOFT: Nonprofit Volunteer
screen detect potential risks for disease or chromosomal abnormality; however, these technologies do not test for disease and chromosomal aberration. Likewise, in the second trimester, the quad screen and the triple screen detect risks similar to their first trimester counterparts.

If risk factors appear on these screens, women can then test for the actual presence of a disease-causing gene or a chromosomal defect. The most common tests are amniocentesis and cordocentesis. Just as PGD technologies evolved into more expansive preimplantation genetic screening technologies, prenatal testing could experience a similar expansion and be used to test for nontherapeutic genetic characteristics. Amniocentesis can presently be used to determine fetal sex. Moreover, a new first-trimester blood test would allow parents access to genetic information at a much earlier stage of pregnancy. With parents able to test for an array of genetic characteristics, reproductive technologies effectively provide them with the information necessary to selectively discard and abort genetically undesirable embryos and fetuses.


56. American Pregnancy Association, Chorionic Villus Sampling, supra note 52; American Pregnancy Association, First Trimester Screen, supra note 54.


60. See, e.g., King, supra note 12, at 300 (discussing, within the context of preimplantation genetic screening, the probability that improvements in understanding gene function will “provide information on non-disease-related genetic traits, such as height, hair color, skin color, eye color, and possibly some behavioral characteristics”).


II. THE MOVEMENT TOWARD REGULATION OF REPRODUCTIVE TECHNOLOGIES

As discussed in Part I, preimplantation genetic screening and prenatal testing have the capacity to provide parents with a broad array of nontherapeutic genetic information about an embryo or fetus. Thus, these technologies implicate the parental decision of whether to have a particular child, a decision which remains distinct from the broader question of whether to have a child. Because of the ethical implications of selective discard and abortion, scholars predict that some form of legislation will emerge to harness the broad informational capabilities of these technologies. For example, a recent study among IVF clinics confirmed not only a need, but also a desire for regulation. Forty-three percent of IVF clinics that performed preimplantation genetic screening procedures reported receiving screening requests that they felt "raised ethical questions." Furthermore, seventy-seven percent of clinics believed that technological advances would permit screening of the entire embryonic genome. As technology continues to offer greater genetic information to parents, the potential need arises for regulatory limits on the use of these technologies to furnish genetic information.

The need for regulation stems from ethical and societal implications of allowing parents to choose—or not choose—a particular child based upon that potential child's genetic characteristics. In a recent New York Times article, Amy Harmon commented,

Abortion rights supporters . . . have had to grapple with the reality that the right to choose may well be used selectively to abort fetuses deemed genetically undesirable. And many are finding that, while they support a woman's right to have an abortion if she does not want to have a baby, they are less comfortable when abortion is used by women who don't want to have a particular baby.

In fact, only twenty-eight percent of Americans surveyed approved of using preimplantation genetic screening to select a child's sex, compared to sixty-eight percent who disapproved. Furthermore, twenty-two percent approved of using preimplantation genetic screening
to select for desirable traits, while seventy-two percent disapproved of this form of nontherapeutic genetic screening. However, in another poll, seventy percent of Americans believed women should be able to obtain an abortion if a strong possibility existed that the particular child would possess some serious defect. Arthur Caplan, chairman of the department of medical ethics at the University of Pennsylvania School of Medicine, summarized the legal and ethical issues prenatal genetic testing presents: "How much choice do you really want to give?" All of these difficult questions recognize the underlying truth that technology will continue to evolve and that government regulation will likely be seen as the answer to these problems.

From a broad viewpoint, regulation will likely attempt to limit some forms of selective discard and abortion. Professor Suter hypothesizes that as it becomes possible to test for traits other than just sex, states may ban abortions on the basis of this information or perhaps restrict the ability to get information about fetal traits. States might protect excess embryos created through IVF by prohibiting [PGD] or the discard of embryos with unwanted characteristics.

Sujatha Jesudason, associate director for the Center for Genetics and Society, summarized the current concern about such legislation: "The fear is that this [legislation] will be used as an excuse to limit women's access to abortion.... But as these selective technologies are getting popularized we need to try to agree on a set of principles without giving up the fight for reproductive rights."

Because of the constitutional implications of controlling access to reproductive services and information, the Court will likely be called upon to perform a Fourteenth Amendment due process analysis by balancing the procreative liberty interest in accessing reproductive technological information and the State's interest in preserving and promoting potential life. Any regulation that affects the accessibility of these technological procedures might be "construed as an undue burden on a woman's right to make procreative choices and challenged as such."

III. THE CURRENT STATE OF PROCREATIVE LIBERTY INTERESTS

Although reproductive technologies implicate concerns about discard and abortion, some scholars have questioned "whether reproductive rights encompass the right to any method of obtaining

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70. Id.
71. Harmon, supra note 1.
72. Id. (quoting Caplan).
73. Suter, supra note 23, at 1516–17 (footnote omitted).
74. Harmon, supra note 1.
75. Malinowski, supra note 63, at 187 (quoting Jesudason).
information that influences such decisions, and if so, whether it encompasses the right to any and all information, including information about fetal traits. Professor Suter summarizes, "If the state prohibits prenatal tests for non-medical traits with the goal of preventing trait-selective abortions, then the legitimacy of such state action depends on the strength of one's procreative liberty interest in being able to undergo such abortions." The Court's assessment of the procreative liberty interest at stake is essential to its due process analysis. If the Court does not recognize such an interest, regulation of reproductive technologies will be treated as presumptively valid. However, if the Court recognizes a liberty interest in undergoing a trait-selective abortion, then it will apply a less deferential analysis in scrutinizing the state regulation at issue. Thus, construction of the liberty interest represents the first prong of the Court's due process analysis. In section A, I explore this first prong, including the nature of the procreative liberty interest at stake and its evolution through the Supreme Court's jurisprudence. I conclude that women possess some fundamental procreative liberty interest in accessing information made available by preimplantation genetic screening and prenatal genetic testing.

Should it similarly find a procreative liberty interest in this information, the Court would next perform the second prong of its fundamental-rights analysis: the balancing of the liberty interest with the State's interests in preservation and promotion of life. In section B, I detail the changing nature of this second prong as well as the Court's use of this prong to constrain the procreative liberty interest previously recognized. I conclude that recent Supreme Court decisions undermine the purpose of the current balancing test. In response, I propose a new analytical framework that will provide a transparent language for the Court to employ in articulating the competing concerns at issue.

A. THE FIRST PRONG: THE PROCREATIVE LIBERTY INTEREST AT STAKE

Although not always operating within the confines of the Fourteenth Amendment Due Process Clause, the Supreme Court has a long history of recognizing the fundamentality and intimacy implicit in decisions about procreation. Though decided under the guise of equal protection analysis, *Skinner v. Oklahoma* represents the Court's first treatment of procreation as a fundamental right. In *Skinner*, the Court invalidated a law which permitted the involuntary sterilization of certain classes of convicted *Id. at 536, 543.* In doing so, the Court emphasized that procreation

76. Suter, supra note 23, at 1518.
77. Id. at 1536 (emphasis added).
78. 316 U.S. 535, 541 (1942).
79. Id. at 536, 543.
is "fundamental to the very existence and survival of the race." In *Griswold v. Connecticut*, the Court protected a married couple's right to obtain and use contraceptives, reasoning that "allow[ing] the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives... is repulsive to the notions of privacy surrounding the marriage relationship." Seven years later, the Court expanded upon the right enumerated in *Griswold*. In *Eisenstadt v. Baird*, the Court powerfully suggested that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Representing the pinnacle of the Court's broad expansion of this fundamental right as to "whether to bear or beget a child," *Roe v. Wade* recognized the ability to procure an abortion as a fundamental procreative liberty interest.

The Court reaffirmed *Roe's* essential holdings in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The Court once again broadly construed the procreative liberty right, opining that "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." Although the *Casey* Court upheld an informed consent requirement, a twenty-four hour waiting period, a parental notification requirement, and a record-keeping and reporting requirement, it did so under the second prong of fundamental rights analysis, discussed infra

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80. *Id.* at 541.
82. 405 U.S. 438, 453 (1972).
83. 410 U.S. 113, 153 (1973) ("This right of privacy... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").
85. *Id.* at 851. The Court noted, "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Id.* at 848.
86. *Id.* at 883 (plurality opinion) ("[R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the mother to choose childbirth over abortion.").
87. *Id.* at 886 ("Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.").
88. *Id.* at 899 ("[A] State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.").
89. *Id.* at 900-01 (majority opinion) ("At most [these requirements] might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.").
section B. As to the first prong, *Casey* recognized a broad, fundamental procreative liberty interest in procuring an abortion.90

However, in *Washington v. Glucksberg*, the Court seemingly abandoned the *Casey* conception of fundamental rights in favor of an emphasis on liberties "deeply rooted in this Nation’s history and tradition."91 Focusing on the law's historical unwillingness to allow physician-assisted suicide, the *Glucksberg* Court refused to recognize a fundamental right to such a medical procedure.92 The Court reasoned that "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field'..."93 The majority thus defined the potential liberty interest at stake as the "right to commit suicide with another’s assistance."94 Notably, the Court could have adopted a broader construction of the liberty interest at stake and asked "whether there is a liberty interest in determining the time and manner of one's death," as the Court of Appeals did, rather than whether there is a liberty interest in committing suicide with another's assistance.95 The adoption of the former framework might have presented a historical perspective more conducive to recognizing a liberty interest in physician-assisted suicide. In keeping with his narrow construction of liberty interests, Chief Justice Rehnquist announced that merely because "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise."96

After the *Glucksberg* detour from a broad construction of liberty interests, the Court in *Stenberg v. Carhart*97 once again affirmed the fundamental procreative liberty interest recognized in *Roe* and *Casey*. In *Stenberg*, the Court held unconstitutional a Nebraska statute that

90. *Id.* at 851; Suter, *supra* note 23, at 1521–22 ("[I]n 1991, Planned Parenthood of Southeastern Pennsylvania *v. Casey* affirmed Roe’s ‘essential holding.’ In so doing, *Casey*, even more than *Roe*, emphasized the individualistic and self-defining aspects of reproductive autonomy...." (footnotes omitted)).


92. *Id.* at 728 ("The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted ‘right’ to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.").

93. *Id.* at 720–21 (quoting Collins *v. Harker Heights*, 503 U.S. 115, 125 (1992)).

94. *Id.* at 724.

95. *Id.* at 722 (quoting Compassion in Dying *v. Washington*, 79 F. 3d 790, 801 (9th Cir. 1996)).

96. *Id.* at 727–28 (internal citation omitted); Suter, *supra* note 23, at 1541.

prohibited previability partial-birth abortion without providing for a health exception. The Court in Gonzales v. Carhart, the Court upheld Congress's Partial-Birth Abortion Ban Act, even though it notably lacked a health exception. The Act completely outlawed a previability, second-trimester abortion procedure known as intact dilation and extraction, or partial-birth abortion, in which "the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart." Despite the Act's regulation of previability procedures and medical uncertainty about whether the Act posed significant health risks to the mothers, the Court found that it did not constitute an undue burden on a woman's right to have an abortion. Although "Gonzales broadens the range of state interests that can justify limiting reproductive choices to include protecting community sensibilities," these State interests are dealt with in the second balancing prong discussed infra in section B. In order to reach any analysis of the State interest, Justice Kennedy had to recognize the existence of a procreative liberty interest in abortion. Before discussing the State interest in banning partial-birth abortion, Justice Kennedy conceded that "a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'"

As the above decisions evidence, the Court continues to recognize a procreative liberty interest in certain areas of reproduction. However, as discussed below, it has recently undermined this recognized liberty interest through use of the second prong balancing of interests. The question thus becomes whether the procreative liberty interest subsumes reproductive technologies like preimplantation genetic screening and prenatal genetic testing. If the Court adopts a narrow Glucksberg-like "history and tradition" approach to the right to access such technological information, any procreative liberty interest in reproductive technologies would arguably cease to exist. Because reproductive technologies are modern scientific inventions, a narrow historical approach would allow the Court to quickly dismiss any claims that access to reproductive

98. Id. at 929–30.
100. Id. at 137.
101. Id. at 147.
102. Id. at 162; see also id. at 177 (Ginsburg, J., dissenting) ("During the District Court trials, 'numerous' 'extraordinarily accomplished' and 'very experienced' medical experts explained that, in certain circumstances and for certain women, [the banned abortion procedure] is safer than alternative procedures and necessary to protect women's health.").
103. Id. at 160, 164 (majority opinion).
104. Suter, supra note 23, at 1568.
106. See Suter, supra note 23, at 1525.
technological information has been a traditionally accepted liberty interest.\footnote{107} However, the Court might avoid narrow construction of this interest should it adopt a more general approach to the "history and tradition" test. In his \textit{Glucksberg} concurrence, Justice Souter emphasized the importance of "living tradition," which envisions a more lenient construction of "history and tradition."\footnote{108} Arguably, the right to access genetic information about an embryo or fetus could be more generally described as the right to make an informed decision about whether or not to have a child—in this case, a particular child. Professor John Robertson asserts that "denying a person information about the package of burdens, benefits, and rearing responsibilities that will ensue, or denying her the ability to avoid or engage in reproduction based on that information, would affect her decision whether to reproduce at all and would interfere with her procreative liberty."\footnote{109}

In keeping with this assertion, I argue that reproductive technological information falls within the sweep of procreative liberty interests by a somewhat transitive property. Because these technologies exist to provide greater information to parents about the benefits and burdens of continuing a particular pregnancy, they necessarily implicate parents' ability to make an informed decision about whether they can or want to have a particular child. When construed as a decision about discard or abortion, the decision whether or not to have a particular child falls within the Supreme Court's abortion jurisprudence, which has recognized a procreative liberty interest in procuring a previability abortion.\footnote{110} This transitive argument places access to reproductive technological information squarely within the procreative liberty interests recognized in \textit{Roe} and \textit{Casey}.

If the Court applies the \textit{Roe} or \textit{Casey} conception of the procreative liberty interest, then the right to access these technologies would most likely be protected as a fundamental right. The genetic information provided by preimplantation genetic screening or prenatal genetic testing may lead parents to make "intimate and personal choices"\footnote{111} about whether to have a particular child. Thus, access to that information and

\begin{footnotes}
\item[107] If the Court did adopt such an approach, petitioners challenging the constitutionality of these regulations would be best served by argument detailing the lengthy history of the right to procure an abortion. Justice Blackmun articulated such an argument in \textit{Roe v. Wade}. See 410 U.S. 113, 129-41 (1973); \textit{see also}, e.g., \textit{id.} at 140 ("[Historically,] a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.").


\item[110] \textit{See infra} Part IV.A (discussing the Court's recognition of a broad procreative liberty interest).

\end{footnotes}
the resulting choice it entails become "central to the liberty protected by
the Fourteenth Amendment." Assuming that the Court recognizes the
use of technologies as part of a broader procreative liberty right, the
right remains subject to further restriction under the second prong
balancing test, currently known as the undue burden test.

B. WEIGHING COMPETING INTERESTS: THE SECOND PRONG OF
FUNDAMENTAL RIGHTS ANALYSIS

The second "balancing" prong accounts for government interests
and allows the Court to constrain an otherwise broad liberty interest. As
Professor Jack Balkin points out, the Roe decision contained multiple
holdings, not limited to the recognition of abortion as a fundamental
right. The Court explicitly stated that "some...argue that the
woman's right is absolute and that she is entitled to terminate her
pregnancy at whatever time, in whatever way, and for whatever reason
she alone chooses. With this we do not agree." The Roe decision paid
homage to the strict scrutiny test, which first assesses whether a
fundamental interest is at stake, and upon such a finding, analyzes
whether State interests are sufficiently compelling to overcome that
interest. Roe recognized that the State possessed an interest in preserving
potential life from the moment of conception, although that interest
could not become compelling before fetal viability, interpreted as being
after the second trimester. The Court also recognized that the State
interest in protecting the mother's health could not become compelling
until after the first trimester.

In Casey, the Court seemed to discard the Roe strict scrutiny test in
favor of the undue burden test. The undue burden test prohibits
legislatures from placing "substantial obstacle[s] in the path of a woman
seeking an abortion before the fetus attains viability." This test
eliminated the Roe trimester framework. After Casey, legislatures
could regulate abortion to promote maternal or fetal health at all times

112. Id.
113. Jack M. Balkin, How New Genetic Technologies Will Transform Roe v. Wade, 56 EMORY L.J. 843, 848 (2007); see also Roe v. Wade, 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the
right of personal privacy includes the abortion decision, but that this right is not unqualified and must
be considered against important state interests in regulation.").
115. Id. at 162-63; Balkin, supra note 113, at 848-49.
116. 410 U.S. at 163 ("With respect to the State's important and legitimate interest in potential life,
the 'compelling' point is at viability.").
117. Id. at 163-64.
119. Id. at 875 ("Not all governmental intrusion is of necessity unwarranted; and that brings us to
the other basic flaw in the trimester framework: even in Roe's terms, in practice it undervalues the
State's interest in the potential life within the woman.").
during pregnancy—not just after the first trimester—so long as such regulation did not impose an undue burden to obtaining a previability abortion.\(^{120}\) In essence, the Court no longer required a State’s interests to become compelling but rather allowed state regulation from the outset (so long as it did not impose an undue burden).\(^{121}\) With the undue burden test, the Court moved toward a standard of reasonableness, or an evenly weighted balancing of liberty and State interests.\(^{122}\) Of course, consistent with Roe, after viability legislatures could completely ban abortion procedures.\(^{123}\) While the balancing nature of the undue burden test possesses numerous advantages, it also provides the Court with a great amount of discretion, “with no clear rules detailing its approach” to balancing private and State interests.\(^{124}\)

In its Gonzales decision, the Court seemingly weakened the undue burden test through its deferential approach to congressional findings and its consequent lack of consideration for the procreative liberty interest at stake.\(^{125}\) The Court upheld Congress’s Partial-Birth Abortion Ban Act, which notably lacked a health exception,\(^{126}\) despite medical uncertainty about whether the absence of an exception posed significant health risks to women.\(^{127}\) In so holding, the Court reasoned that “[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others.”\(^{128}\) Nowhere in this section of the opinion did the Court reference its prior “viability” jurisprudence.

Applying a rational-basis-type deference,\(^{129}\) the Court found that “Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical

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\(^{120}\) See id. at 869 (“The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.”) (emphasis added)).

\(^{121}\) Garrison, supra note 12, at 1626.


\(^{123}\) Casey, 505 U.S. at 870 (plurality opinion).

\(^{124}\) Note, Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization, 118 Harv. L. Rev. 2792, 2808 (2005).

\(^{125}\) 550 U.S. 124, 163 (2007) (“The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.”); see also Suter, supra note 23, at 1568 (“[T]he Court [in Gonzales] weakens the undue burden test.”).

\(^{126}\) Gonzales, 550 U.S. at 166–67.

\(^{127}\) Id. at 164; see also id. at 177 (Ginsburg, J., dissenting) (“During the District Court trials, ‘numerous’ ‘extraordinarily accomplished’ and ‘very experienced’ medical experts explained that, in certain circumstances and for certain women, [the banned abortion procedure] is safer than alternative procedures and necessary to protect women’s health.”).

\(^{128}\) Id. at 158 (majority opinion) (emphasis added).

\(^{129}\) In her dissent, Justice Ginsburg noted that “[i]nstead of the heightened scrutiny we have previously applied, the Court determines that a ‘rational’ ground is enough to uphold the Act.” Id. at 187 (Ginsburg, J., dissenting) (citation omitted).
and moral concerns that justify a special prohibition. These moral concerns included partial-birth abortion’s alleged similarity to infanticide, maternal regret after undergoing partial-birth abortion, and protection of the medical field’s integrity as well as society’s confidence in that field. Professor Suter asserts that "Gonzales broaden[ed] the range of state interests that can justify limiting reproductive decisions to include the state interest in protecting society and the medical profession against moral ‘coarsen[ing].’" In essence, the Court utilized moral repugnance as a justification for completely eliminating a previability abortion procedure. While other previability procedures remain accessible, the decision’s significance lies in the Court’s willingness to ignore, and thus overstep, previously erected previability boundaries in order to completely ban intact dilation and extraction. In addition, the Court employed deferential rational basis review to effect its unprecedented minimization of the fundamental right at issue.

In many ways, the Gonzales decision collapsed the framework constructed in Casey. As discussed in greater depth in Part IV.B, Casey recognized a State’s interest in promoting fetal life, an interest which accrues at conception and remains subject only to the undue burden standard until viability. Hence, the Court upheld an informed consent requirement, a twenty-four hour waiting period, a parental notification requirement, and a record keeping and reporting requirement as regulations designed to promote life. Casey also

130. Id. at 158 (majority opinion) (emphasis added).
131. Id.
132. Id. at 159–60.
133. Id. at 160.
135. See Gonzales, 550 U.S. at 158.
136. See, e.g., id. at 171 (Ginsburg, J., dissenting) (“It blurs the line, firmly drawn in Casey, between previability and postviability abortions.”).
137. See 505 U.S. 833, 872 (1992) (plurality opinion) (“Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . .”).
138. Id. at 883 (“[R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the mother to choose childbirth over abortion.”).
139. Id. at 886 (“Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.”).
140. Id. at 899 (“[A] State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.”).
141. Id. at 900–01 (majority opinion) (“At most [these requirements] might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.”).
recognized that a State can move beyond mere promotion and can "ban" abortion procedures post fetal viability:

The concept of viability... is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman." 142

In essence, Casey articulated two State rights: (1) the pre-viability right to promote life through nonburdensome regulation, and (2) the post-viability right to ban abortion procedures entirely.

Thus, in banning a pre-viability abortion procedure, the Gonzales Court overstepped Casey's viability boundary. Furthermore, the ban did not further any State interest in preserving fetal life, as other previability, second trimester procedures remained legally available. 143 The Gonzales Court's willingness to ignore its own precedent raises the concern that the Court might now be able to uphold bans on other previability procedures—and under a rational-basis-type review nonetheless.

In her dissent in Gonzales, Justice Ginsburg reiterated this concern: "Ultimately, the Court admits that 'moral concerns' are at work, concerns that could yield prohibitions on any abortion. . . . One wonders how long a line that saves no fetus from destruction will hold in face of the Court's 'moral concerns.'" 144 For example, although the Court deems the intact dilation and extraction procedure particularly morally repugnant, nonintact dilation and extraction by fetal dismemberment—a procedure which is currently legal—seems no less gruesome. 145 Under the Court's rationale, Congress could impose a similar ban on such a procedure, citing moral concerns as its justification. In sum, after Gonzales, the fundamental right test's second prong involves the application of a deferential undue burden—or rational-basis-type—test to all abortion regulations and bans, regardless of whether they affect previability abortions. Furthermore, the Court has recognized moral repugnance as a sufficiently compelling State interest to justify a previability ban.

The inconsistencies between Casey and Gonzales raise questions about the current state of the second prong of the test. Likely, the Roe Court, and perhaps even the Casey Court, could not have conceived of the specific medical advances that engendered the issues surrounding a procedure like the intact dilation and extraction at issue in Gonzales. However, reproductive technological procedures will continue to

142. Id. at 870 (plurality opinion).
143. Gonzales v. Carhart, 550 U.S. 124, 181 (2007) (Ginsburg, J., dissenting) ("The law saves not a single fetus from destruction, for it targets only a method of performing abortion.").
144. Id. at 182, 186.
145. See id. at 181–82.
advance and raise difficult questions. Now is the time for the Court to reconcile its conflicting jurisprudence and to define a clearer second prong balancing test. In essence, when the Court is faced with these difficult questions, it must be prepared to analyze the balance between procreative liberty interests and State interests in such a way that gives fair consideration to both sides. Suter suggests:

What Gonzales and Casey show us is that we do not yet have a comfortable way of discussing liberty and social concerns in the context of reproduction that allows us to recognize the pluralism of our society and to protect individuals from oppression, while also recognizing the way in which reproductive decisions affect society and others.¹⁴⁶

Rather than eliminate a second prong balancing test altogether, the Court should elucidate the factors it chooses to weigh. By making the process more transparent, both the liberty interest and State interest will be protected. Professor Michael Malinowski argues, ""Traditional medical ethics...has relied on principles other than utility in determining what is and is not ethically appropriate in the practice of medicine in the research and therapeutic settings,’ and such must be the case with ART [assisted reproductive technology].”¹⁴⁷ In keeping with Professor Malinowski’s argument, I propose that the Supreme Court move beyond its reliance on a veiled balancing test toward an open acknowledgement of the importance of science and social perception in determining the constitutionality of legislation that restricts procreative liberty rights.

IV. TOWARD A NEW BALANCING TEST: INCORPORATING BIOETHICAL PRINCIPLES

I begin this Part with a discussion of the four principles of biomedical ethics discussed in Beauchamp and Childress’s Principles of Biomedical Ethics.¹⁴⁸ These principles include respect for autonomy, nonmaleficence, beneficence, and distributive justice.¹⁴⁹ I propose that courts use these principles as guideposts in the second prong balancing

¹⁴⁶ Suter, supra note 23, at 1598.
¹⁴⁷ Malinowski, supra note 63, at 204–05 (first alteration in original).
¹⁴⁸ See Beauchamp & Childress, supra note 29. Dr. Tom Beauchamp is a professor of philosophy at Georgetown University. He is also a senior research scholar at Georgetown’s Kennedy Institute of Ethics. He has published over one hundred scholarly articles and specializes in research on biomedical ethics. See Tom L. Beauchamp, Georgetown Univ., General Profile, http://explore.georgetown.edu/people/beauchat/?PageTemplateID=79 (last visited Mar. 17, 2010). Dr. James Childress is the John Allen Hollingsworth Professor of Ethics and a professor of medical education at the University of Virginia. He also directs the Institute for Practical Ethics and Public Life. He has similarly published numerous articles and books on the subject of biomedical ethics. See Home Page for James F. Childress, Virginia Law, http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbU11529287OpenDocument&ExpandSection=4 (last visited Mar. 17, 2010).
¹⁴⁹ Beauchamp & Childress, supra note 29.
test in order to eliminate current confusion surrounding the Court's recent *Gonzales* decision and its effect on reproductive-rights jurisprudence.

The interaction among these four principles reflects many of the concerns that the Court has previously articulated, while providing a more structured mechanism for weighing them. For example, though the principle of autonomy appears quite broad, Beauchamp and Childress argue that such a right cannot become "a practical guide to conduct" until specification of the right and consequent valid exceptions to that right evolve.\(^{150}\) In essence, the authors suggest,

Respect for autonomy has only prima facie standing and can sometimes be overridden by competing moral considerations. Examples include the following: If our choices endanger the public health, potentially harm others, or require a scarce resource for which no funds are available, others can justifiably restrict our exercises of autonomy.\(^{151}\)

The remaining factors—nonmaleficence, beneficence, and distributive justice—constitute these competing moral considerations, which can override a prima facie deference to the autonomy, or procreative liberty, interest. At some point, as the Court has previously acknowledged, the State's moral interest in preserving life and promoting maternal health ripens into a valid exception to honoring the fundamental procreative liberty interest.\(^{152}\) For example, the Court has previously limited certain abortion-related reproductive choices to the point at which a fetus becomes viable,\(^{153}\) and, after *Gonzales*, to the point at which moral outrage overwhelms the perceived fundamentality of the right, even if that point occurs before viability.\(^{154}\) Weighing Beauchamp and Childress's four principles in the context of reproductive technologies will help the Court identify the tipping point at which State interests outweigh the liberty interest at issue.

A. RESPECT FOR AUTONOMY

As defined by Beauchamp and Childress, autonomy subsumes "liberty rights, privacy, individual choice, freedom of the will,. . . [and] being one's own person."\(^{155}\) The broad scope of this definition invites comparison to the procreative liberty interests referenced in the

\(^{150}\) Id. at 64.
\(^{151}\) Id. at 65.
\(^{153}\) See *Casey*, 505 U.S. at 870 (plurality opinion).
\(^{155}\) BEAUCHAMP & CHILDRESS, *supra* note 29, at 58.
Supreme Court's fundamental rights precedents. Beauchamp and Childress argue, "Respect for autonomy is not a mere ideal in health care; it is a professional obligation. Autonomous choice is a right, not a duty of patients." The requirement that physicians secure a patient's informed consent to a medical procedure represents a quintessential example of the autonomy right. Even outside of its procreative liberty jurisprudence, the Court has recognized the importance of autonomy in making substantial health decisions.

For the purposes of evaluating the autonomy principle, I will treat the procreative liberty interest as akin to such a principle. As I have previously argued, the procreative liberty interest remains (somewhat) intact. However, as reproductive technologies continue to advance, such evolution will necessitate reexamination of the scope of—or at a minimum, the definition of—the procreative liberty interest in the context of these new technologies. In defining the autonomy interest, one must remember that the interest can be subsequently constrained by other bioethical factors within this balancing test; it need not be narrowly construed from the outset. Thus, I propose that the autonomy right broadly encompass a right to access the information provided by these reproductive technologies. As Professor Robertson has asserted, the denial of access to reproductive technological information equates to denying her "information about the package of burdens, benefits, and rearing responsibilities that will ensue, or denying her the ability to avoid or engage in reproduction based on that information." Denial of the right to make an informed choice about discard or abortion constitutes an infringement upon the procreative liberty interest. In essence, this right to information dictates that parents should be able to use these technologies to garner information about a particular embryo or fetus.

With a broad autonomy interest in access to reproductive technologies, the Court need not distinguish between therapeutic and nontherapeutic technological uses at this level. Rather, the Court can use the other second prong factors discussed below to differentiate between these uses on a case-by-case basis. In essence, the extent of this broad right to information must be balanced against the other limitations.

156. See discussion supra Part III.A.
157. BEAUCHAMP & CHILDRESS, supra note 29, at 63.
158. Id. at 77–80.
159. For example, the Court has recognized an autonomy interest in refusing life-saving treatment. See Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990). Furthermore, the Court has recognized that even an incompetent person can refuse such life-saving treatment upon a showing of clear and convincing evidence that the person, while competent, expressed a wish to refuse such treatment. Id. at 285.
160. See discussion supra Part III.A.
161. Robertson, supra note 109, at 426–27.
162. See id.
described below. Such an analysis preserves the fundamentality of this procreative liberty interest, while giving weight to the State’s interest in preserving and promoting life.

B. NONMALEFICENCE

The principle of nonmaleficence encompasses the duty to do no harm. This duty remains “distinct from obligations to help others” and thus “only requires intentionally refraining from actions that cause harm.” For example, the obligation to do no harm equates to the State’s ability to protect viable fetal life by banning postviability abortion procedures. Although some overlap exists, the ability to completely ban postviability abortions remains theoretically distinguishable from the ability to promote previable life. While a ban connotes a negative duty to refrain from doing any harm, promotion of potential life implicates an active State role in protecting, though not necessarily “saving,” that life. Furthermore, though it cannot ban abortion prior to viability, the State can promote life from the moment of conception. Thus, the Casey Court found no undue burden in affirming a State’s informed consent, twenty-four hour waiting period, and parental notification requirements.

In the context of reproductive technologies, the State—and its doctors—possess a duty to do no harm. Here, the harm arguably occurs when parents access reproductive technological information and consequently discard or abort a previable embryo or fetus based on that information. Thus, “doing no harm” would likely involve attempts to prevent such selective discard and abortion. While Casey held that the State lacks the ability to ban abortion outright until the point of

163. Beauchamp & Childress, supra note 29, at 113.
164. Id. at 114.
165. Id. at 115.
166. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (“[V]iability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”); see also id. at 870 (plurality opinion), 879 (majority opinion). However, the Gonzales decision has arguably eradicated some of these distinctions. See supra Part III.B (discussing how the Gonzales decision altered the previability-postviability framework).
167. See, e.g., Gonzales v. Carhart, 550 U.S. 124, 145 (2007) (“[T]he government has a legitimate and substantial interest in preserving and promoting fetal life…”); see also supra Part III.B (discussing promotion of life and banning abortion). For further discussion of promotion, see infra Part IV.C.
168. Casey, 505 U.S. at 869, 872 (plurality opinion) (“Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [the mother] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy…”).
169. Id. at 883.
170. Id. at 886.
171. Id. at 899.
viability, the Court’s decision in Gonzales suggests otherwise. The Gonzales Court upheld a ban on partial-birth abortion based upon “ethical and moral concerns that justified a special prohibition.” The Court compared this new previability exception to the rule espoused in Casey, which “confirm[ed] the State’s interest in promoting respect for human life at all stages in the pregnancy.” Justice Kennedy further likened the informed consent law upheld in Casey to the Partial-Birth Abortion Ban Act upheld in Gonzales. In doing so, Justice Kennedy merged the State’s interest in promoting life, which accrues at conception, with the State’s ability to ban abortion, which accrues only at viability. However, a complete ban on an abortion procedure is not akin to an informed consent requirement, which merely promotes life but cannot prevent a mother from obtaining an abortion. A ban on a particular procedure effectively prevents a woman from obtaining that abortion procedure. In upholding Congress’s previability ban on partial-birth abortion, the Court crossed Casey’s viability line, and, moreover, it recognized moral repugnance as a sufficient State interest to justify such a ban.

Returning to the subject of reproductive technologies, the State arguably possesses a strong nonmaleficence interest in protecting potential life from selective discard or abortion, even absent the State’s maximized moral interest espoused in Gonzales. Because these reproductive technologies implicate a choice not to have this child (the “harmful act”), rather than the choice simply not to have a child, the State arguably possesses a heightened concern for protecting these lives from such discrimination. This fundamental difference might justify previability regulation with respect to reproductive technologies, so long as the remaining factors also weighed in favor of such regulation.

C. BENEFICENCE

In many ways, beneficence overlaps with nonmaleficence, in that beneficence principles include: “One ought to prevent evil or harm,” “One ought to remove evil or harm,” and “One ought to do or promote good.” In this Note, I focus on beneficence as the promotion of good, or as a positive duty to do good, in order to maintain a separation between nonmaleficence and beneficence. Examples of the rules of

172. Id. at 860, 879 (majority opinion); id. at 870 (plurality opinion).
174. Id. at 136–37, 156.
175. Id. at 158.
176. Id. at 163.
177. Id.
178. Beauchamp & Childress, supra note 29, at 115.
beneficence include “Protect and defend the rights of others” and “Remove conditions that will cause harm to others.” Although these bioethical principles represent a continuum of sorts, categorically speaking, nonmaleficence subsumes the State’s interest in protecting embryonic and fetal life from selective discard and abortion, while beneficence subsumes the State’s interest in promoting maternal, embryonic, and fetal life in light of any inherent risks in the technological procedures. Both the Casey and Gonzales decisions agree that the State possesses an interest in promoting potential life and maternal health from the point of conception. Thus, the beneficence principle seems to weigh in favor of some state regulatory power. For example, in the abortion context, the State can promote fetal life and maternal health by implementing informed consent requirements, twenty-four hour waiting periods, and parental notification laws.

However, the State’s beneficence interest is directly constrained by two factors: (1) a cost-/risk-benefit analysis, and (2) the autonomy principle. First, because most medically beneficent procedures entail some risk to the patient, a doctor should only perform such procedures when their benefits outweigh risks and costs. The Gonzales Court arguably trampled upon the duty of beneficence in its refusal to require a health exception to Congress’s partial-birth abortion ban. In her dissent, Justice Ginsburg argued that “numerous ‘extraordinarily accomplished’ and ‘very experienced’ medical experts [had] explained that, in certain circumstances and for certain women, intact [dilation and extraction] is safer than alternative procedures and necessary to protect women’s health.” The lack of a health exception effectively strips a doctor of his or her ability to use the partial-birth abortion procedure despite his or her estimation that the risks of another second trimester abortion procedure outweigh the risks inherent in partial-birth abortion. In this context, the lack of a health exception arguably interferes with the duty of beneficence by preventing the doctor from performing the least-risky second trimester abortion procedure.

Second, autonomy constrains beneficence so as to keep a patient’s rights in balance with her medical needs. This constraint is epitomized by a doctor’s duty of beneficence to the embryo or fetus: the doctor’s

179. Id. at 167.
180. See discussion supra Part IV.B.
182. See 550 U.S. at 163.
183. See supra notes 86–89 and accompanying text.
185. 550 U.S. at 164.
186. Id. at 177 (Ginsburg, J., dissenting).
187. King & Moulton, supra note 184, at 436.
duty to promote the potential child’s health must be balanced against the patient’s autonomous decision to discard embryos or abort a fetus.

In applying beneficence principles to the reproductive-technologies context, I argue that the State has a duty to ensure that doctors, clinics, and patients use reproductive technologies in responsible ways that promote the “good” of the mother, potential life, and society. For instance, restricting the types of nontherapeutic genes for which parents can test may promote potential life and societal interest by discouraging—though not prohibiting outright—discard or abortion based upon nontherapeutic genetic traits. Furthermore, any potential risks to the embryonic or fetal health from technological testing would also weigh against using such technology, unless the information provided from such a test greatly outweighed the risk presented by its performance.

On the other hand, the State could arguably extend these restrictions too far by preventing testing for certain therapeutic genes. Promotion of maternal psychological health weighs in favor of allowing a mother to know whether her embryo or fetus carries a certain disease or disorder. Also, in some contexts, promotion of embryonic or fetal life may encourage such therapeutic testing. If she should choose to carry such a child to term, knowing about the potential child’s disease or disorder would allow her to prepare to care for that child and would allow her to take medically necessary steps to maximize the potential health of the embryo or fetus. Such knowledge allows a mother to weigh the impact of the disease or disorder upon that potential child’s life and to decide whether to have a child whose limited years will be marked by pain and suffering. In this manner, technologies could be used to promote healthy mothers and healthy children.

D. DISTRIBUTIVE JUSTICE

Lastly, the Court should consider the principle of distributive justice. Beauchamp and Childress define distributive justice as “fair, equitable, and appropriate distribution determined by justified norms that structure the terms of social cooperation.” They note, “Problems of distributive justice arise under conditions of scarcity and competition to obtain goods or to avoid burdens.” Within the reproductive technologies context, distributive justice implicates two ideas. First, the notion of distributive justice becomes somewhat parallel to Justice O’Connor’s undue burden test and may cut in favor of a procreative liberty interest. Second, distributive justice problematizes the effects of

188. Beauchamp & Childress, supra note 29, at 226.
189. Id.
unequal access to these technologies. Both of these ideas are discussed in greater depth below.

Justice O'Connor defined an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." In explaining why these substantial obstacles cannot exist, Justice O'Connor resorted to equal protection language, arguing that

[the mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role ...].

In essence, undue abortion regulation forces a woman to bear the unique burden of pregnancy at her own expense. In Gonzales, the dissenting Justices based the right to abortion on "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." The undue burden test recognizes that women's ability "to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." The notion of distributive justice subsumes this emphasis on equality and unique burden. Reproductive technologies afford women access to information that allows them to make an informed decision about whether to bear the burden and costs of becoming pregnant with a specific child or continuing a specific pregnancy.

However, problems continue to surround such a decision. Distributive justice weighs heavily in favor of allowing parents to discover certain therapeutic traits of their potential child because caring for children with certain diseases, disorders, or disabilities likely constitutes a unique burden upon the parents, one that the state should not necessarily force them to bear. Thus, with respect to therapeutic traits, the balance likely tips in favor of honoring the procreative liberty interest in accessing such information. If parents could access such information, they could control what type of financial and psychological burden they take on in having a particular child.

191. Id. at 852 (majority opinion).
192. See Roe v. Wade, 410 U.S. 113, 153 (1973) ("The detriment that the State would impose upon the pregnant woman by denying this choice [to have an abortion] altogether is apparent . . . . Maternity, or additional offspring, may force upon the woman a distressful life and future.").
194. Casey, 505 U.S. at 856.
Nontherapeutic traits, in contrast, likely impose a minimal burden upon parents. In this situation, the duties of nonmaleficence, beneficence, and distributive justice align. First, as to nonmaleficence, the State possesses an interest in protecting these potential lives from superficial discrimination based on nontherapeutic traits. Moreover, as to beneficence, the mother's health is less implicated by nontherapeutic genetic testing and society's interest in preventing such discrimination remains heightened. Lastly, as to distributive justice, nontherapeutic traits arguably do not constitute any unique burden upon parents. Of course, some genetic traits straddle the line between therapeutic and nontherapeutic, in which case the individual burdens upon parents must be assessed and weighed against the autonomy, nonmaleficence, and beneficence interests.

Even though distributive justice, at times, may weigh in favor of upholding the procreative liberty interest, as in the case of testing for therapeutic genetic characteristics, these cases still raise concerns about another aspect of distributive justice: access. Because reproductive technologies remain somewhat cost prohibitive,195 only a certain class of women will have access to these technologies. When these technologies are used to selectively discard or abort based upon any genetic trait, they create a risk that society will become stratified among those who can select against certain traits and those who cannot. Such social stratification evokes concerns that society as a whole will become less tolerant of those with certain genetic characteristics, particularly disabilities and disorders. If parents use these technologies to avoid disability—or to select for blue eyes and blonde hair—society faces the risk not only of an uneven distribution of certain traits but also discrimination against those with less desired traits. In essence, the potential for discrimination raises concerns about a technological eugenics movement.196 When viewed in this light, distributive justice weighs in favor of technological regulation.

E. APPLYING THE FOUR PRINCIPLES OF BIOETHICS

The principles of autonomy, nonmaleficence, beneficence, and distributive justice provide a framework within which the Court can weigh the procreative liberty interest in accessing reproductive technologies.195 See, e.g., King, supra note 12, at 296–97 ("One cycle of IVF ranges in price from $10,000 to $12,000. While a handful of states require insurance companies to cover all or a portion of the costs associated with IVF, a substantial percentage of IVF patients remain uncovered by insurance and are forced to pay for the procedure out of pocket." (footnote omitted)).

196. See, e.g., Malinowski, supra note 63, at 131–33. "[T]here are compelling arguments that support immediate infusion of comprehensive regulation into the field of ART [assisted reproductive technologies]." Id. at 197. "[W]e have a moral obligation to reflect on our not-too-distant eugenics past . . . ." Id. at 203.
technological information against the State's interest in regulating these technologies. In assessing the constitutionality of reproductive technological regulation, these four factors would require the Court to balance the procreative liberty interest in accessing such information; the State interest in protecting potential life from discard or abortion; the State interest in promoting maternal, embryonic, and fetal life; the undue burden such regulation might place upon the liberty interest; and the greater effects of such regulation upon society as a whole. Though therapeutic and nontherapeutic characteristics represent two poles on a genetic continuum, it seems likely that the balancing test would favor regulation of traits readily identified as nontherapeutic, while allowing greater leeway for the procreative liberty interest with regard to traits that have clear therapeutic implications. However, regulation of traits like the breast cancer gene and phenylketonuria present closer questions. 197

For example, the Court would likely uphold regulation that prevented parents from selecting for blue eyes and blonde hair. 198 These traits represent typical nontherapeutic traits. While the autonomy interest exists in accessing information about these traits, even a broad construction of an autonomy interest recognizes that certain decisions are more fundamental to autonomy principles than others. The decision to have a blue-eyed, blonde-haired child arguably presents a relatively minimal autonomy interest; although concededly important to some people, cosmetic appearance arguably should not be a weighty deciding factor in deciding whether to bear a child.

On the other hand, the State's duties of nonmaleficence and beneficence likely tip the balance in favor of regulation. The nonmaleficence argument achieves maximum power in the context of testing for nontherapeutic genetic characteristics. Though nonmaleficence always weighs in favor of protecting life, such an interest is heightened by the mere cosmetic purpose and lack of medical significance behind nontherapeutic testing. A ban preventing selective discard or abortion based upon cosmetic genetic characteristics only minimally interferes with the liberty interest at stake. Furthermore, beneficence weighs heavily in favor of regulation, as any inherent embryonic or fetal risk in performing these tests likely outweighs the test's informational value.

Lastly, carrying a child with certain nontherapeutic traits likely does not constitute an undue burden upon a mother's ability to maintain equal citizenship because the choice is whether to carry a particular child, not whether to carry a child at all. In fact, a woman using these technologies

197. See Sagi et al., supra note 8; Guldberg et al., supra note 7.
198. See Branicki et al., supra note 3, at 164.
implies that she wants to bear the burdens of pregnancy and to have a child. In addition, other distributive justice concerns about a technological eugenics movement, or the creation of a blue-eyed, blonde-haired elitist class, also weigh in favor of regulating nontherapeutic trait testing in order to preserve a diverse society. Thus, the Court could potentially uphold regulation of clearly nontherapeutic genetic testing, as nonmaleficence, beneficence, and distributive justice easily trump a de minimis autonomy interest.

On the other hand, the Court would likely hold unconstitutional a regulation that prevented parents from discarding or aborting an embryo or fetus with Tay-Sachs disease. This disease is always fatal and currently no cure exists. As with the above hypothetical, the procreative liberty interest in accessing this information exists. In this context, the autonomy interest seems maximized, as decisions and information about medical health remain at the heart of such an interest.

In opposition to this autonomy interest, the State maintains a strong interest in protecting potential life from selective discrimination, as the decision to discard or abort remains contingent on the fact that the parents do not want this particular child. The beneficence factor can be manipulated in favor of or against regulation in this context. If promotion of embryonic and fetal life includes accounting for that potential child’s future health, then beneficence may honor a mother’s decision not to bear a child who will necessarily suffer and die within a few years of birth. In this way, beneficence cuts against regulation, although promotion of embryonic and fetal health is arguably limited to prenatal development. It should also be noted that in this context, risk to embryonic and fetal health from the actual testing is likely outweighed by the importance of the genetic information provided. The State’s interest in promoting maternal health, psychological or otherwise, favors allowing genetic testing for therapeutic characteristics.

Finally, distributive justice would suggest that regulation that prevents testing for Tay-Sachs disease constitutes an undue burden upon a woman by forcing her to undertake psychological, financial, and temporal burdens to care for a terminally ill child. Some proponents of

201. See supra Part IV.A (discussing autonomy).
202. For an interesting argument that women should not be forced to endure any of the burdens associated with pregnancy, see Judith Jarvis Thomson, A Defense of Abortion, 1 PHIL. & PUB. AFF. 47, 48–49 (1971), arguing that the law should not force a woman to use her body to sustain the life of another, just as people are not required to donate their organs to save the lives of others. Professor Thomson also stressed:
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regulation may argue the other side of distributive justice: that permitting selection against this disease will jeopardize research to find a cure or social acceptance of certain diseases and disorders. However, this somewhat obscure threat cannot likely upset the balance already in favor of the procreative liberty interest.

Certain genetic characteristics, such as a predisposition to breast cancer, straddle the line between therapeutic and nontherapeutic. These traits present a more difficult regulatory question and thus underscore the importance of balancing each factor in coming to a decision. A broad construction of autonomy recognizes a procreative liberty interest in accessing genetic information about a potential child. While the interest is not de minimis, as with the case of purely cosmetic genetic characteristics, it falls somewhat short of the maximal interest in the Tay-Sachs disease example. BRCA1 and BRCA2, the breast cancer genes, do not dictate that carriers will develop breast cancer, but rather indicate a predisposition. Because the information provided by these genes is not determinative, it cannot trigger a maximized autonomy interest in the way a determinative genetic medical diagnosis would. Against the autonomy interest, the Court must weigh nonmaleficence, beneficence, and distributive justice.

As with the examples above, the nonmaleficence viewpoint emphasizes protection of embryonic and fetal life through restrictive regulation, which provides something of a prior restraint on selective discard and abortion based upon genetic characteristics. The need to protect potential life in this context remains particularly high. Although breast cancer has lethal potential, the presence of the BRCA1/2 genes is not a death sentence, unlike in the Tay-Sachs disease context. A potential child could live many years without breast cancer. Arguably, this child could closely monitor her gynecological health in order to proactively protect against breast cancer and could live a healthy, long life. Thus, the State's interest in nonmaleficence supports technological regulation of genetic information to prevent a general risk of selective discard and abortion.

I am not arguing that people do not have a right to life—quite to the contrary, it seems to me that the primary control we must place on the acceptability of an account of rights is that it should turn out in that account to be a truth that all persons have a right to life. I am arguing only that having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself.

Id. at 56.
203. Cf. King, supra note 43, at 393 ("[T]he creation of a regulatory agency that works with representatives from the disability community to develop regulations for the use of reproductive genetic testing could bring more light to their experiences, values, and concerns . . . .").
204. Sagi et al., supra note 8, at 508.
Again, the duty of beneficence cuts in favor of both state regulation and autonomy. In terms of promoting embryonic and fetal health, beneficence suggests that regulation would be an appropriate means for realizing this State interest. Unlike in the Tay-Sachs disease context, a potential child who carries the BRCA1/2 genes could live a long, healthy life. In essence, as with the cosmetic genetic characteristic example, there is a potential and substantial life for the State to promote. Based upon this information, promotion of embryonic and fetal health includes protection from any inherent risks involved in the genetic testing. Arguably, the information provided from such a test is not sufficiently important to risk embryonic or fetal health. However, promotion of maternal health may cut against regulation in this context. A mother may carry immense psychological guilt or concern about bearing a child with the potential to develop breast cancer. Because breast cancer is becoming more treatable and because predisposition is not a diagnosis, promotion of embryonic and fetal health likely trumps promotion of maternal health. Thus, beneficence weighs in favor of some technological regulation.

Lastly, distributive justice does little to discourage regulation in this context. Because breast cancer normally occurs later in a woman's life, presence of the BRCA1/2 genes in a potential child would not constitute a unique financial burden to potential parents any more than regular physician check-ups constitute a burden to parents of non-predisposed children. Although the genes may present some psychological burden for parents, the existence of effective treatments and preventative medicine mitigates the burden. Because the presence of BRCA1/2 does not implicate a unique (financial) burden, a distributive justice rationale cannot be used to bolster the autonomy argument in favor of no regulatory control.

Furthermore, distributive justice can be used to promote such regulation. If parents could effectively select against the BRCA1/2 genes, a population without genetic susceptibility could be created. Some people might fear that this stratification could discourage or quell the search for a breast cancer cure. This argument is somewhat strained, as breast cancer can develop even in the absence of a genetic predisposition. However, the fact that breast cancer can develop in the absence of genetic predisposition further supports the appropriateness of regulation. Even when selecting against the BRCA1/2 genes, any potential child will still remain somewhat susceptible to breast cancer.

Although the BRCA1/2 genes present a more difficult, searching question, by using the four principles of bioethics, the Court would likely

uphold regulation of this technological genetic information. Nonmaleficence, beneficence, and even distributive justice support regulation and its attempt to preserve and promote fetal life. As technology continues to evolve and difficult questions continue to arise, these four factors can remain constants in the Court’s analysis of procreative liberty interests.

F. THE ADVANTAGES OF THE FOUR PRINCIPLES OVER THE CURRENT BALANCING TEST

In applying a rational-basis-type review to the Partial-Birth Abortion Ban Act, the Gonzales Court made an unprecedented jurisprudential leap toward allowing broad moral concerns to trump the fundamental right to obtain a previability abortion. The implication of this decision is that the Court will defer to government assertions that such regulations are not burdensome—in other words, that regulation of medical procedures and technologies involving similar moral concerns will be per se constitutional under the Gonzales balancing test. As discussed above in Part III, the Gonzales Court’s application of the second-prong undue burden test presents stare decisis problems when contrasted with the Court’s prior procreative liberty jurisprudence. However, the problems with the application of this second balancing prong may run deeper than the four corners of the Gonzales decision.

I posit that the undue burden balancing test is inherently limited and flawed by (1) its inability to adapt to the scientific evolution of new medical procedures and technologies; and (2) its reliance upon an amorphous, easily manipulable concept (“undue burden”) as the heart of its test. I argue that these limitations and flaws allowed the Gonzales Court to reach a decision inconsistent with its precedent. By avoiding the two enumerated problems above, the four principles of biomedical ethics provide a more transparent language with which the Court can assess the liberty and State interests at stake.

1. The “Adaptation” Flaw

Technology has made it possible to discern detailed information about embryos and fetuses prior to implantation and viability. Reproductive technologies may provide information critical to the


207. Justice Ginsburg recognized the danger of a rational basis, morality-based test of constitutionality. She worried that such a deferential balancing prong could effectively serve to uphold any prohibition on abortion. See Gonzales, 550 U.S. at 182, 186–87 (Ginsburg, J., dissenting).
decision whether to discard or abort a particular embryo or fetus, as is the case with detection of fatal genetic diseases. These technologies can also be used to selectively discard and abort cosmetically undesirable embryos and fetuses. Acting through the State, society may wish to prohibit the use of these reproductive technologies to avoid "moral dilemmas." However, under a strict reading of Casey's undue burden test, any previability ban on the use of these technologies would arguably be akin to an outright ban on abortion—and thus unconstitutional—by preventing a mother from exercising her fundamental right to discard or abort an embryo or fetus. Under the new Gonzales standard, the State could seemingly ban all use of these technologies, citing to moral concerns as justification for such regulations. Neither result is particularly desirable, and neither result accounts for the sensitive balance between the liberty and State interests at issue.

As technologies evolve, ethical and moral questions become more complex and difficult to answer. The Casey Court's use of previability as a dividing line between constitutionally impermissible and permissible regulation makes the test inherently hostile to strict regulations of (or even bans on) new medical procedures and technologies which are available pre-viability. The Gonzales decision was in large part a backlash against such hostility. The undue burden test left the Court without a means to uphold a ban against what it perceived as an unnecessarily gruesome, pre-viability abortion procedure. By refusing to honor the previability dividing line in its decision, the Court recognized the need for a new test that transcended a largely obsolete temporal demarcation.

The four principles of bioethics offer the advantage of adaptability. The factors of autonomy, nonmaleficence, beneficence, and distributive justice will remain relevant in the face of technological advances. For example, applied to the partial-birth abortion ban at issue in Gonzales, the bioethical principles would allow the Court to weigh the procreative liberty interest (autonomy), and the burden the lack of a health exception places upon a woman (distributive justice), against the State's interest in preventing fetal harm (nonmaleficence), and promoting fetal life (beneficence). Under such an analysis, the Court might have held the ban unconstitutional for lacking a health exception.

208. See 505 U.S. at 878 (plurality opinion); see also id. at 869 ("The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted." (emphasis added)).

209. See 550 U.S. at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.").
2. The "Manipulable Test" Flaw

Another problem with the undue burden test is inherent in the manipulable definition of "undue burden." For example, the Casey Court suggested that an outright ban on a previability abortion procedure would be an undue burden on the exercise of a woman's right to obtain an abortion. However, in Gonzales, the Court held that an outright ban on a previability abortion procedure was not an undue burden on the exercise of a woman's right to obtain an abortion. The four principles of biomedical ethics rely on concrete, clearly defined terms, rather than an abstract legal standard. Moreover, because the area of reproductive procedures and technologies is scientific in nature, the four principles have the added advantage of using the language of science to assess constitutional issues. In other words, the four principles provide the Court with a functional language with which it can discuss the legal issues inherent in the regulation of science.

CONCLUSION

As modern technology continues to evolve, the Supreme Court will be faced with constitutional challenges to state regulation of reproductive technologies. Technologies like preimplantation genetic screening and prenatal genetic testing implicate issues of selective embryo discard and abortion: both procedures implicate a parental choice not to have a particular child, rather than a choice not to have a child. In response, new regulations will likely attempt to control the use of these technologies.

To assess the constitutionality of these regulations, the Court will need a clear framework in which to analyze the nature of the right at stake and the State’s competing interests. The four bioethical principles of autonomy, nonmaleficence, beneficence, and distributive justice provide an appropriate guide to balancing the procreative liberty interest in accessing such information with the State’s and society’s interests in preserving and promoting life. In applying this test, the Court will likely construe a flexible line between the continuum of therapeutic and nontherapeutic traits such that states can regulate clearly discernable nontherapeutic trait information. Moreover, these factors can evolve along with technology and society, thus providing the Court with a

210. See 505 U.S. at 860.
211. See supra notes 20–21 and accompanying text.
212. Professor Malinowski has emphasized the importance of viewing reproductive technologies regulations through a scientific lens: "[T]he United States should enact legislation that creates sufficient regulatory jurisdiction over this technology implemented by those with scientific expertise, who should become directly engaged in ART through the dynamism of ongoing regulation reflective of the changing nature of the underlying science and public opinion." Malinowski, supra note 63, at 216.
consistent means of assessing the constitutionality of reproductive technology regulations.