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“It’s a ... Does It Matter: Analyzing the Ban on Sex-Selection Abortion in the United States”

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I. Introduction:

On January 7, 2015, the Prenatal Nondiscrimination Act (“PRENDA”) was introduced in the Senate.¹ The purpose of the proposed bill was to prohibit abortions based on the sex of the fetus.² The proposed Act would have imposed criminal penalties on anyone who knowingly or knowingly attempts to:

- (1) Perform an abortion knowing that the abortion is sought based on the sex or gender of the child,
- (2) Use force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection abortion,
- (3) Solicit or accept funds for the performance of such an abortion, or
- (4) Transport a woman into the United States or across a state line for the purpose of obtaining such an abortion.³

Similar bills have been proposed many times in recent years.⁴ For example, in 2012, the United States House of Representatives considered the “Prenatal Nondiscrimination Act of 2012.” The Act would have prohibited sex discrimination against an unborn child by proscribing the killing of the fetus based on his or her sex. A bipartisan majority of the House (246-168) voted in favor of PRENDA, but a two-thirds vote was necessary for passage.⁵ The 2015 proposed bill defined “sex-selection abortion” as an abortion undertaken to eliminate a fetus based on the sex or gender of the child. It excluded from the definition of “abortion” actions taken to terminate a pregnancy if the intent is to save the life or preserve the health of the unborn child, remove a dead unborn child caused by spontaneous abortion, or remove an ectopic

¹ Prenatal Nondiscrimination Act (PRENDA) of 2015, S. 48, 114th Cong. (1st Sess. 2015).

² *Id.*

³ *Id.*

⁴ AMS. UNITED FOR LIFE ON ABORTIONS FOR SEX-SELECTION AND GENETIC ABNORMALITIES: MODEL LEGISLATION & POLICY GUIDE (2015), available at http://www.aul.org/downloads/2015-Legislative-Guides/Abortion/Prenatal_Nondiscrimination_Act_-_2015_LG.pdf (last visited Mar. 23, 2015).

⁵ Prenatal Nondiscrimination Act of 2012, H.R. 3541, 112th Cong. (2012). See also Prenatal Nondiscrimination Act (PRENDA) of 2013, S. 138, 113th Cong. (1st Sess. 2013).

pregnancy.⁶ The proposed bill was accompanied by legislative findings asserting that a majority of the American public, as well as the American medical community, support a prohibition on sex-selection abortions.⁷

Additionally, in 2007, the United States delegation led a resolution calling on countries to condemn sex-selection abortion at the Annual Meeting of the Commission of the Status of Women, 51st Session, yet sex-selection abortions were not expressly prohibited by the United States law or the laws of 47 states.⁸ During this session, the United Nations Commission on the Status of Women urged governments of all nations “to take necessary measures to prevent... prenatal sex selection.”⁹ Furthermore, the American Society for Reproductive Medicine (“ASRM”) expressed concerns about the potential for “inherent gender discrimination,” the “risk of psychological harm to sex-selected offspring,” and the “reinforcement of gender bias in society as a whole” that is associated with sex-selection abortion.¹⁰ The American Congress of Obstetricians and Gynecologists (“ACOG”) and the American Association of Pro-Life Obstetricians and Gynecologists (“AAPLOG”) also argued that sex-selection abortion poses dangers to American society, including sexist practices, danger to the health of pregnant mothers, and the risk of “dehumanization” and “new eugenics.”¹¹

This Note argues that, despite the positions of these professional associations, laws prohibiting sex-selection abortion prohibition should not be enacted for two reasons: (1) the prohibition places an undue burden on women seeking an abortion and (2) Congress has no

⁶ *Id.*

⁷ Prenatal Nondiscrimination Act (PRENDA) of 2015, S. 48 § 7, 114th Cong. (1st Sess. 2015) (stating that, according to a March 2006 Zogby International poll, 86% of Americans believe that sex-selection abortion should be illegal).

⁸ S. 48 § 6, 8.

⁹ *Id.*

¹⁰ S. 48 § 11.

¹¹ *Id.*

constitutional authority to enact a law like this.¹² Part II of this Note discusses the background and origin of the increasing concern about sex-selection abortions in the United States, and the influence of other countries on American legislation. Part III explains the existing framework of abortion law in the United States, and demonstrates that a ban on sex-selection abortion cannot be reconciled with longstanding precedent, specifically the “undue burden” test. Part IV examines whether the Constitution empowers Congress to create a federal sex-based abortion ban under the Commerce Clause or the Necessary and Proper Clause. Part V discusses the moral and ethical claims that drive the argument in favor of a ban on sex-selection abortion. Part VI proposes alternatives to a federal ban on sex-selection abortion. Part VII concludes that the policy concerns related to the practice of sex-selection abortions do not justify enacting an unconstitutional law.

II. Background/History:

A. States that Have Adopted Sex-Selection Bans

Only six states ban abortions based on the sex of the child: Illinois, Kansas, Minnesota, North Carolina, Oklahoma, and Pennsylvania, and South Dakota.¹³ Illinois became the first state to adopt such a law in 1975.¹⁴ The law states “no person shall intentionally perform an abortion with knowledge that the pregnant woman is seeking the abortion solely on account of the sex of the fetus.”¹⁵ The law includes an exception for abortions related to genetic disorders. Later in 1989, Pennsylvania enacted The Abortion Control Act, which states that physicians may only perform abortions that are “necessary” and “no abortion which is sought because of the sex of

¹² Justin Gillette, *Pregnant and Prejudices: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 648-49 (2013).

¹³ AMS. UNITED FOR LIFE, *supra* note 4.

¹⁴ *Id.* at 650.

¹⁵ 720 Ill. Comp. Stat. 510/6(8) (2012).

the unborn child shall be deemed a necessary abortion.”¹⁶ In 2011, Arizona enacted the Susan B. Anthony and Fredrick Douglass Prenatal Discrimination Act, which imposed criminal penalties on those who “perform an abortion knowing that the abortion sought is based on the sex or race of the child or the race of a parent of that child.”¹⁷ Most recently, North Dakota became the first state to sign into law a ban on sex-selection abortions using the AUL Model legislation.¹⁸ This law considers the following a class A misdemeanor, punishable by up to one year in prison:

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

The anti-choice group American United for Life (“AUL”) supported the North Dakota bill, creating model language for states and the federal government to use in legislation.¹⁹

B. Origin of Sex-Selective Abortions

Sex-selection abortions are most common in China, India, and South Korea, where there is a strong desire in families for the birth of boys.²⁰ These countries use sex-selection as a tool for gender discrimination because they highly promote patriarchal values.²¹ In India, for

¹⁶ 18 Pa. Cons. Stat. Ann. § 3204(c) (West 2012).

¹⁷ Ariz. Rev. Stat. Ann. § 13-3603.02(A)(1) (2013).

¹⁸ N.D. Cent. Code Ann. § 14-02.1-04.1 (Westlaw through 2013 Reg. Sess.); *North Dakota Becomes First State to limit Abortions Based on Sex-Selection and Genetic Abnormalities Using AUL Model Legislation*, AMS. UNITED FOR LIFE (Mar. 26, 2013), <http://www.aul.org/2013/03/north-dakota-becomes-first-state-to-limit-abortions-based-on-sex-selection-and-genetic-abnormalities-using-aul-model-legislation/> (hereinafter *North Dakota Becomes First*)

¹⁹ Greer Donley, *Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential for Disability Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20 MICH. J. OF GENDER & L. 291, 303 (2013). AMS. UNITED FOR LIFE, *supra* note 4. The remaining states follow similar language in enacting laws that ban sex-selection abortions.

²⁰ Kirssa Webb, Note, *Gender Mis-Conception The Prenatal Nondiscrimination Act as a Remix of the Abortion Debate*, 11 GEO. J.L. & PUB. POL'Y 257, 258-259 (2013).

²¹ *Id.* at 257.

example, the birth of a son is associated with social, political, and economic entitlement.²² Coincidentally, India is also cited as having the starkest disparity between the birth ratio of boys versus girls.²³ While the normal at-birth ratio for boys to girls is 1000 to 952, the birth ratio in India is 1000 to 943.²⁴ Furthermore, South Korean statistic reflects a 1.52 son ratio for every 1 daughter in cases of second pregnancies.²⁵ Certain scholars assume that this disparity in birth ratio is a result of sex selection procedures.²⁶ While male preference was largely established through infanticide in previous eras, new prenatal technology has made it easier to abort a child before she is even born.²⁷ The concern resulting from the change in birth rate lends itself onto the ongoing conversation among anti-abortion legislators and groups in the United States.²⁸ Many of the proposed bills advocating for a ban on sex-selection abortion contain extensive references to sex-selection in countries such as India.²⁹

Furthermore, recent surveys, individual interviews, and focus groups have indicated that sex preference also exists in America, especially among the Asian American community.³⁰ Although a simple preference does not necessarily lead to specifically targeting the abortions of female fetuses, it is true that advances in reproductive technology have made it possible to identify the sex of a fetus at earlier stages of pregnancy.³¹ Preference of a certain sex has also

²² *Id.* at 258

²³ Sital Kalantry, *Sex Selection in the United States and India: A Contextualist Feminist Approach*, 18 *UCLA J. INT'L L. & FOR. AFF.* 61, 62 (2013).

²⁴ *Id.* at 62-63.

²⁵ Webb, *supra* note 20 at 259.

²⁶ Kalantry, *supra* note 23 at 63.

²⁷ Webb, *supra* note 20 at 259.

²⁸ Kalantry, *supra* note 23 at 63.

²⁹ *Id.* at 64.

³⁰ Sujatha Jesudason and Anat Shenker-Osorio, *Sex Selection in America: Why It Persists and How We Can Change It*, *THE ATLANTIC* (May 31, 2012) <http://www.theatlantic.com/politics/archive/2012/05/sex-selection-in-america-why-it-persists-and-how-we-can-change-it/257864/>.

³¹ Gillette, *supra* note 12 at 647.

contributed to seven states passing sex-selection bans.³² For example, the Gallup poll, taken in 2011, found that forty-nine percent of Americans preferred the birth of a boy as compared to twenty-two percent who found the birth of a girl preferable.³³

In lawmaking, the seven states took into account the attitudes and practices of Chinese and Indians as evidence for passing the ban.³⁴ The difficulty in using these statistics lies within drawing a line between when it is acceptable to intervene in the woman's decision-making autonomy on abortion and "applying the notions of 'choice' to germinate restrictive notions of gender."³⁵ While it is important to take into consideration statistics from other countries, it is equally critical to note that the implications of limitations on abortions in America differ vastly than those of other countries. For one, there is a key difference in legal frameworks between other countries and the United States as illustrated by principle cases such as *Roe v. Wade* and *Planned Parenthood v. Casey*.³⁶ Additionally, there is no evidence demonstrating that individuals, in fact, do act upon their desire to predetermine the sex of their child.³⁷ Therefore, it is best to analyze any existing sex-selection problem in America through the accurate constitutional lens.

C. Sex-Selection in the United States

Although gender preference is a proven problem in other countries, in order to determine the constitutionality of PRENDA, it is important to determine whether sex-selection is a reason

³² Kalantry, *supra* note 23 at 63-64.

³³ *Id.* Frank Newport, *Americans Prefer Boys to Girls, Just as They Did in 1941*, GALLUP, (June 23, 2011) <http://www.gallup.com/poll/148187/americans-prefer-boys-girls-1941.aspx>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Naryung Kim, *Breaking Free from Patriarchy: A Comparative Study of Sex Selection Abortion In Korea and the United States*, 17 UCLA PAC. BASIN L.J. 301, 308 (2000).

³⁷ *Id.*

women seek an abortion in the United States. In a 2014 empirical study conducted by Cornell University Law School, researchers attempted to uncover the myths behind sex-selective abortion laws in the United States.³⁸ One of the myths unraveled in this study states that “male-biased sex ratios at birth are proof that sex-selection abortions are occurring.”³⁹ The study explains that these ratios are misleading in light of newer technology such as “sperm sorting,” that allow the fertilization of an egg with a desired sex even before insemination.⁴⁰ Therefore, the proponents of sex-selection bans are quick to jump to the conclusion that any disparity in sex ratios are solely due to abortions.⁴¹ In light of such studies, both quantitative and qualitative studies have presented controversial conclusions as to sex-selection abortions.⁴² In some studies, the ethnic communities studied constituted a very small proportion of the wider American population.⁴³ Additionally, the disparate ratios in the studies were not clearly explained.⁴⁴ Therefore, “neither opponents nor proponents of sex-selective abortion bans strengthen their case by arguing that there is no desire to select for sex or that sex selection is a rampant problem in the [United States].”⁴⁵

III. The Constitutional Right to Abortion

A. Existing Abortion Framework in the United States

³⁸ Brian Citro et al., *Replacing Myths with Facts: Sex-Selective Abortion Laws in the United States*, CORNELL LAW FACULTY PUBLICATIONS (June 2014) <http://scholarship.law.cornell.edu/facpub/1399>.

³⁹ *Id.* at 6.

⁴⁰ *Id.* at 7. The process known as sperm sorting allows sex selection achieved by a technique known as preimplantation genetic diagnosis (PGD). Medical professionals remove eggs from a woman and fertilize them outside of the body using a procedure called in-vitro fertilization (IVF). Only the embryos of the desired sex are implanted in the uterus.

⁴¹ *Id.*

⁴² Rachel Rebouche, *Testing Sex*, 49 U. RICH. L. REV. 519, 531-33 (2015).

⁴³ *Id.* at 533.

⁴⁴ *Id.*

⁴⁵ *Id.* at 534.

Many countries have addressed sex-selection abortions with prohibitions, but it is harder for the United States to do so, given that its legal precedent gives preference to individual autonomy and personal preference over “societal effects, limiting the birth rate, and the status of women.”⁴⁶ The United States Supreme Court has laid out the basis of the abortion framework. Before viability, the state cannot pass measures that pose an “undue burden” on the woman’s ability to obtain an abortion.⁴⁷ Because the United States legal framework on abortion is already developed, proponents of the sex-selection abortion ban would have to carve out a prohibition within the existing framework.⁴⁸

While States cannot directly interfere with a woman’s decision-making before the fetus is viable, the Supreme Court has left power amongst the states to place certain restrictions on when an abortion can be performed; what kind of medical procedures can be used; and what information the State can require doctors to provide pregnant women who are seeking an abortion. An attempt to enact federal legislation such as PRENDA will begin a complex constitutional discussion about whether banning sex-selection abortions will infringe on liberty and privacy interests.⁴⁹

i. Roe v. Wade

In *Roe v. Wade*, the Court found that the right of privacy within the Fourteenth Amendment encompasses a woman’s decision to terminate her pregnancy.⁵⁰ While recognizing

⁴⁶ Webb, *supra* note 20 at 263.

⁴⁷ *Casey*, 505 U.S at 877-78.

⁴⁸ Webb, *supra* note 20 at 263.

⁴⁹ Webb, *supra* note 20 at 264.

⁵⁰ *Roe v. Wade*, 410 U.S. 113, 153 (1973). “...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...” U.S. CONST. amend. XIV. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

the right of a woman to terminate her pregnancy, the Court also recognized the State's right to safeguard the health of both woman and child.⁵¹ Therefore, the privacy right of a woman in terminating a pregnancy is not absolute.⁵² However, because a woman's right to terminate her pregnancy falls within the right of privacy, which is a "fundamental right," any restrictions on that right must be justified by a "compelling state interest."⁵³

The Court concluded that the balance between the woman's right and the state's interest changes over the course of the pregnancy.⁵⁴ In the first trimester, the woman's interest is paramount, and "the decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."⁵⁵ The government may not prohibit abortions and may regulate them only as it regulates other medical procedures.⁵⁶ In the second trimester, "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health."⁵⁷ Finally, in the third trimester, "the State, in promoting its interest in the potentiality of human life, may if it chooses, regulate, and even prescribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁵⁸

ii. *Planned Parenthood v. Casey*

Although *Casey* reaffirmed that a woman has a constitutionally protected right to choose to terminate a pregnancy under the Due Process Clause of the Fourteenth Amendment,⁵⁹ the

⁵¹ *Roe*, 410 U.S. at 154.

⁵² *Id.*

⁵³ *Id.* at 154-55.

⁵⁴ *Id.* at 162-163.

⁵⁵ *Id.* at 164.

⁵⁶ *Roe*, 410 U.S. at 164.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Casey*, 505 U.S. 845.

Court rejected the trimester framework previously set forth in *Roe*. In its place, it adopted a new analytical framework under which the state may not place “undue burdens” on a woman’s right to choose to terminate a pregnancy pre-viability.⁶⁰ An “undue burden,” as defined by the Court in *Casey*, means the placement of a “substantial obstacle” in the path of a woman seeking an abortion of a nonviable fetus.⁶¹ The Court explained that this standard does not preclude states from attempting to persuade women to choose childbirth over an abortion.⁶²

In this case specifically, the Court decided that the following restrictions under the Pennsylvania law did not unduly burden a woman seeking an abortion: (1) informed consent/24-hour waiting period; (2) parental consent; (3) additional record keeping; and (4) narrow medical emergency exception.⁶³ The Court concluded, however, that spousal consent was unduly burdensome for a woman seeking an abortion.⁶⁴

After the holding of *Casey*, a new issue was presented questioning when an obstacle was a “substantial” obstacle.⁶⁵ The Court distinguished between a costly abortion, which was not considered to be an obstacle, from a statute that prevented a “large fraction” of women from exercising their right to abortion, which was considered to be a substantial obstacle.⁶⁶ While the Court left lower courts to analyze what is substantial and what is not, no determinative framework had been established.⁶⁷ The Court did, however, decide that a statute substantially hindered women’s free choice if it

⁶⁰ *Id.* at 872-73.

⁶¹ *Id.* at 877.

⁶² *Id.* at 878.

⁶³ *Casey*, 505 U.S at 879-87.

⁶⁴ *Id.* at 887-99.

⁶⁵ Kali Ann Trahanas, *How the Undue Burden Standard is Eroding Informed Consent*, 10 SETON HALL CIR. REV. 231, 247 (2013).

⁶⁶ *Id.*

⁶⁷ *Id.* at 248.

consisted of unnecessary health regulations and if it interfered with a woman's ability to make a free choice pre-viability.⁶⁸ Despite the attempt at specificity, these two examples still left lower courts with many inferences to make regarding what statutes are unconstitutional under the *Casey* framework.

Subsequent state and federal statutes have been tested under the undue burden standard to discern the parameters of permissive regulation. In *Stenberg v. Carhart*, the court struck down a Nebraska law banning "dilation and extraction" (D&E) abortions because it was unduly burdensome on the woman's right to choose to terminate her pregnancy.⁶⁹ The Court reasoned that because the method of D&E was the most common form of abortion method for performing pre-viability, second trimester abortions, restricting its use on pregnant women would be unduly burdensome.⁷⁰ The Court differentiated the Nebraska law from similar laws in Kansas, Utah, and Montana, which were tailored to proscribing the use of a specific type of D&E procedure. By limiting the restriction to just one type of method, these states, the Court reasoned, were not placing an undue burden on the woman seeking an abortion, particularly because other methods of abortion were available.⁷¹ The concurring opinion in *Stenberg* went on to describe a statute that it would have held constitutional under the undue burden test: one that places a ban on partial-birth abortion that only proscribes one method of abortion and included an exception to "preserve the life and health of the mother."⁷²

The Court's example in *Stenberg* came to life in 2007, in *Gonzales v. Carhart* 550 U.S. 124 (2007), where a similar law on partial-birth abortion was upheld because "[r]egulations

⁶⁸ *Id.* at 249.

⁶⁹ *Stenberg v. Carhart*, 530 U.S. 914, 948 (2000).

⁷⁰ *Id.* at 949.

⁷¹ *Id.* at 950.

⁷² *Id.* at 951.

which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."⁷³ This Act was distinguishable from the law in *Stenberg* because it described the procedure specifically so that doctors would not be prosecuted for performing D&E, which is legal.⁷⁴ Additionally, the law specified a specific form of D&E that was prohibited, rather than an entire range of D&E procedures, and it included an exception for the health of the mother.⁷⁵ Currently, the legal framework on abortion in America is characterized by balancing the competing interest of a woman's reproductive autonomy and the State interest in fetal life and in the woman's health.⁷⁶

B. The Application of the Undue Burden Standard to Prohibitions on Sex-Selection Abortions

Generally, restrictions on abortion require a showing that the regulations do not impinge on the two recognized bases for a woman's right: (1) the health of the mother and (2) her right to choose whether or not to have a child within a limited window of her pregnancy.⁷⁷ On the other hand, the state also reserves the right to protect interest in potential life.⁷⁸ Traditionally the framework for abortion regulation has been seen as a compromise between women's reproductive rights and the state's interest in protecting potential life.⁷⁹ In order to assess prohibitions on sex-selection abortion under the *Casey* framework, however, Courts must ask whether the nature of a woman's right is unduly burdened by the regulation at hand.⁸⁰

⁷³ *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

⁷⁴ *Id.* at 141.

⁷⁵ *Id.*

⁷⁶ *Gillette*, *supra* note 12 at 664.

⁷⁷ *Webb*, *supra* note 20 at 269.

⁷⁸ *Id.* at 273.

⁷⁹ *Id.*

⁸⁰ *Id.*

Proponents of a ban on sex-selection abortions argue that a prohibition would protect rather than limit, a women's rights of health and choice. They argue that women bear the social burden of producing sons and are often punished if they do not.⁸¹ Furthermore, proponents of the ban argue the coercion and perhaps violence that stems from deciding to forego a sex-selective abortion negates a woman's right of health.⁸² Additional consequences of such an abortion on women's health include psychological harm and emotional trauma.⁸³ Similarly, because of coercion to abort, a woman's interest in choice might also be at risk. "Sex-selective abortion regulation thus acknowledges that sex-selective abortion threatens the right of the mother by depriving her of her right [to] govern her body and parenting choice."⁸⁴

In contrast, opponents of legislation to ban sex-selection abortion argue that such laws are a "novel" and "aggressive" intrusion on a women's right to choose.⁸⁵ They note that while male preference might be prevalent in countries such as China and India, there is less intense sexism and discrimination in the United States.⁸⁶ In response to the burden of bearing sons, opponents of the sex-selection ban argue that the power to decide will give woman the option to refuse giving birth to sons and even avoid motherhood altogether.⁸⁷ Moreover, proponents of sex selection point to the advantage of avoiding sex-linked diseases by allowing women to abort children with such infirmities.⁸⁸

⁸¹ Jodi Danis, *Recent Development: Sexism and "The Superfluous Female": Argument for Regulating Pre-Implantation Sex Selection*, 18 Harv. Women's L.J. 219, 224 (1995).

⁸² Webb, *supra* note 20 at 269.

⁸³ *Id.*

⁸⁴ *Id.* at 271.

⁸⁵ Donley, *supra* note 19 at 323.

In light of the Court’s analysis in *Casey* and subsequent decisions, the opponents appear to have the stronger arguments. One of the major flaws with PRENDA is that it subjects women who are seeking an abortion to intense scrutiny, thus reversing the established framework under *Casey*.⁸⁹

First, it inadvertently places certain classes of women at a higher level of scrutiny because of the preconceived notion that many of these women come to the United States to seek a “safe haven” away from the restrictive abortion legislation in their countries.⁹⁰ Specifically, a federal ban risks subjecting Asian women to strict scrutiny by their doctors when seeking an abortion, solely because these groups of women are the ones who typically come to America for sex-selection abortions⁹¹. Some might argue that a sex-selection abortion ban places a burden upon less than one percent of the women seeking abortions.⁹² This argument, however, does not save the ban from facial invalidity, for an analysis of facial invalidity looks to the women who might seek a reason-based abortion, not women who are seeking an abortion as a whole.⁹³

Secondly, the “reporting requirement” under PRENDA would be ineffective, for there is no actual way of finding out a woman’s true motivation behind an abortion.⁹⁴ PRENDA mimics the language of existing statutes in Illinois and Pennsylvania, which ban any abortions sought “solely” on account of the sex of the fetus.⁹⁵ Such language assumes that women have a single reason for an abortion that can be easily determined.⁹⁶ “Finding out the reason for abortion and

⁸⁹ Eugene Park, Note: *Hopping for Gender: The Unlawfulness of an Unregulated Market for Parental Gender Selection and Selective Gender Abortion*, 20 CARDOZO J.L. & GENDER 521, 546 (2014).

⁹⁰ *Id.* at 531.

⁹¹ *Id.* at 546.

⁹² *Id.*

⁹³ Donley, *supra* note 19 at 324.

⁹⁴ Park, *supra* note 89 at 546.

⁹⁵ Owen D. Jones, *Sex Selection: Regulating Technology Enabling the Predetermination of a Child’s Gender*, 6 HARV. J. LAW & TEC 1, 44 (1992).

⁹⁶ *Id.*

weeding out those aborting due to gender issues would be next to impossible.”⁹⁷ The legal effect of PRENDA becomes minimal when courts attempt to measure the subjective motives of a pregnant woman.⁹⁸ If a woman is physically coerced to undergo the abortion, it is unlikely that she will bring a suit against her doctor or coercer because of the added pressure.⁹⁹ Additionally, in cases where the woman is socially or psychologically coerced to undergo a sex-selective abortion, it again seems unlikely that she will later take action towards the doctor or the coercer.

Because the motivation of an abortion is indiscernible, a federal ban would be far-reaching in nature. Using the North Dakota ban, for example, a sex-selection abortion goes beyond an attempt to persuade a woman against abortion; rather it prohibits the abortion altogether.¹⁰⁰ This is distinguishable from *Gonzales*, in which a specific procedure was banned rather than a sweeping abortion ban.¹⁰¹ In fact, the Court in *Gonzales* made it clear that the ban it was placing was dependent on the D&E procedure remaining available to women.¹⁰² Therefore, the Court’s ruling should be read as to only prevent any true pre-viability abortion ban.¹⁰³ The North Dakota abortion ban, however, exceeds the ruling in *Gonzales* by outlawing certain pre-viability abortions, contradicting the ruling in *Casey*.¹⁰⁴

Furthermore, the criminal sanctions imposed by the government upon violators of PRENDA make it problematic for medical professionals to perform any abortions on women.¹⁰⁵ The proposed law prohibits any abortion that practitioners had “knowledge” of being motivated

⁹⁷ *Id.* at 547.

⁹⁸ Webb, *supra* note 20 at 274.

⁹⁹ *Id.*

¹⁰⁰ Donley, *supra* note 19 at 323.

¹⁰¹ *Gonzales*, 550 U.S. at 150-55.

¹⁰² *Id.*

¹⁰³ Donley, *supra* note 19 at 324.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

by sex-selection.¹⁰⁶ Determining whether a medical professional had such knowledge is just as impossible as determining a woman's motivation for the abortion, if not more.¹⁰⁷ Hence, the fear of lawsuits can consequentially infringe on a woman's right to access an abortion generally because doctors and medical professionals will be reluctant to perform abortions.¹⁰⁸ The breach in the relationship between provider and patient is also of concern if a ban is placed upon sex-selective abortion.¹⁰⁹ While women might initially rely on a doctor's expertise and advice on the abortion they seek, such disclosures might be withheld in fear of criminal sanctions.¹¹⁰ Predicting the most negative outcome, it might even be possible that women would result into seeking illegal abortions.¹¹¹ Banning sex-selective abortions can endanger both the life of the women and the child, risking the abuse and neglect of both.¹¹²

Additionally, in *Casey*, the Court did not discuss how the undue burden status would apply in the event of "inconclusive or disputed medical authority, or where states exaggerate the creditability of ill-supported studies and information."¹¹³ PRENDA is based upon statistics from foreign countries, such as China and India, and it is difficult to determine with the statistics at hand whether or not sex-selection abortions pose a large enough problem in the United States. Nevertheless, there are reported incidents where physicians express concerns when their patients ask for an abortion based on gender preference.¹¹⁴ Once again, the lack of guidance by the

¹⁰⁶ Jones, *supra* note 95 at 45.

¹⁰⁷ *Id.*

¹⁰⁸ Park, *supra* note 89 at 546.

¹⁰⁹ Annie Moskovian, *Bans on Sex-Selective Abortions: How Far is Too Far?*, 40 HASTINGS. CONST. L.Q. 423, 440 (2013).

¹¹⁰ *Id.*

¹¹¹ Jones, *supra* note 95 at 46.

¹¹² Moskovian, *supra* note 109 at 440.

¹¹³ Trahanas, *supra* note 67 at 250-51.

¹¹⁴ Sarah Terzo, *Sex-Selective Abortion Laws in the United States*, LIVE ACTION NEWS (Feb. 7, 2013) <http://liveactionnews.org/sex-selection-abortion-in-the-united-states/>.

Casey framework makes it hard to pick which one of these factors weigh heavier than the other in analyzing the constitutionality of a PRENDA: simple statistics or factual accounts. As argued commonly in abortion legislation, “the existence of some *trivial* reasons should not deter ... from the larger goal of protecting the right of women to make such decisions in the first place [emphasis added]” With these contrasting outlooks, there is no predicting whether a larger disparity in birth ratios would deem the ban unconstitutional. Ultimately, it is best to apply a totality of circumstances test, under which it becomes apparent that the chances of PRENDA surviving under a constitutional shield is slim.

IV. Congressional Authority

A. Congress’s Power under the Commerce Clause

Even if sex-selection bans pass the undue burden standard, it is not clear whether Congress has the power to pass such legislation. The Commerce Clause authorizes Congress to regulate interstate commerce.¹¹⁵ Congress may regulate three broad categories under the Commerce Clause: the use of channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and activities having a substantial relation to interstate commerce.¹¹⁶ Abortion does not fit into the first two categories, so the only way Congress would have the power to pass a sex-selection abortion ban is by showing that there is a substantial economic effect on interstate commerce.¹¹⁷

¹¹⁵ U.S. Const. art. I, § 8, cl. 3.

¹¹⁶ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

¹¹⁷ *Webb*, *supra* note 20 at 266. [T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence, which we have discussed above to see that Congress may -- as it has -- prohibit racial discrimination by motels serving travelers, however "local" their operations may appear. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258, 85 S. Ct. 348, 358 (1964)

The Court in *United States v. Lopez* held that the link between national productivity and possession of firearm was too attenuated.¹¹⁸ The Act under question in this case was the Gun-Free School Zones Act, which made it federal offense for any individual knowingly to possess firearm in place that individual believes or has reasonable cause to believe is school zone.¹¹⁹ The Court held that the Gun-Free School Zones Act, which made it a federal crime to knowingly possess firearm in a school zone exceeded Congress' authority under the Commerce Clause.¹²⁰ In *Lopez*, the court developed a four-point analysis to determine whether there was a substantial economic effect on interstate commerce. First, the court observed that this Act was a criminal statute that had nothing to do with commerce or any sort of economic activity.¹²¹ Second, the court found that the Act contained no express jurisdictional hook, such as a limitation to a discrete set of firearm possessions that have an explicit connection with interstate commerce.¹²² Third, the Court observed that the legislative history behind the Act contained no congressional findings regarding the effects upon interstate commerce of gun possession in school zones.¹²³ Finally, the decision in *Lopez* concluded that the connection between gun possession and interstate commerce was too attenuated.¹²⁴ Ultimately, the court rejected the Act because it feared that anything could fall under Congressional power in the name of economic productivity, including matters of family law such as marriage, divorce, and child custody.¹²⁵

¹¹⁸ *Lopez*, 514 U.S. at 600-02. In this case, the Court held that the Gun-Free School Zones Act, which made it a federal crime to knowingly possess firearm in a school zone exceeded Congress' authority under the Commerce Clause.

¹¹⁹ *Lopez*, 514 U.S. at 561.

¹²⁰ *See generally* *United States v. Lopez*, 514 U.S. 549

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 562.

¹²⁴ *Id.*

¹²⁵ *Lopez*, 514 U.S. at 564.

Similar to *Lopez*, a sex-selection abortion ban would not pass the test of “substantial economic activity.”¹²⁶ A ban on sex-selection abortion is not economic in nature; rather, opponents of the ban argue that it is a way to regulate government moral disapproval of such action hidden under the pretense of sex discrimination prevention.¹²⁷ Traditionally, when medical practice has been a matter of state police powers, the allocation of power to the federal government is viewed as an infringement to the state’s right to regulate.¹²⁸ For example, in 2006, the Supreme Court held that the federal Controlled Substance Act could not be used to prosecute physicians who assist in suicide in states where suicide is already legal.¹²⁹ The reasoning behind this holding was that where states already had a reasonable position, there was no need for the federal government to invalidate merely because of opposing views.¹³⁰ A federal sex-selection ban would be equality problematic because the regulation of abortion correlates with “vastly different, and regionally correlated, public opinions.”¹³¹ Therefore, states are in the best position to create laws banning sex-selection abortions.¹³²

Additionally, the connection between sex-selection abortion and interstate commerce is highly attenuated.¹³³ For example, the report issued by the Committee on the Judiciary points to the fact that some women travel out of state to obtain an abortion; however, there is no data provided as to whether the purpose of these travels is specifically to obtain sex-selection

¹²⁶ Donley, *supra* note 19 at 310.

¹²⁷ *Id.* The sex-selection abortion analysis is analogous to abortion bans based on genetic abnormalities of the fetus.

¹²⁸ *Id.*

¹²⁹ *Id.* at 310-11.

¹³⁰ *Id.* at 311.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Donley, *supra* note 19 at 311.

abortions.¹³⁴ The data, however, in this circumstance is skewed.¹³⁵ It must be noted that the economic impact is based on abortions as a whole.¹³⁶ Sex-selective abortions only make up a small portion of overall abortions. Hence, the numbers provided by the Committee is misleading.¹³⁷

Lastly, even if the sex-selection abortion ban contained a jurisdictional hook, it would still fail three of the four elements presented under *Lopez*.¹³⁸ First, under PRENDA, Congress would not be regulating economic activity, but rather using moral arguments to impose stronger restrictions on the medical profession in performing abortions.¹³⁹ Second, legislative history that attempts to demonstrate a link between sex-selection abortion and interstate commerce is arguably “mere pretext,” motivated by the desire to simply pass the legislation based on moral judgment.¹⁴⁰ Third, the highly attenuated link between sex-selection abortion and interstate commerce leads to the question whether PRENDA was intended for an economic purpose at all, or rather was it simply put into place to regulate abortion.¹⁴¹ Ultimately, the decision to enact bans sex-selection abortion falls in the hands of the individual states.

B. Congress’s Power under the Necessary and Proper Clause

Federalism-based concerns were further addressed in *National Federation of Independent Business v. Sebelius*, in which the Court assessed the constitutionality of the Affordable Care

¹³⁴ *Id.*

¹³⁵ *Id.* at 312.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* An example of inserting a jurisdictional hook to the ban on sex-selective abortions would be if the criminal statute applied to women who travelled through interstate commerce to seek such an abortion. Adding this jurisdictional hook would not serve a valid purpose regardless. Most women would seek an abortion within their home state to avoid criminal sanctions under the law.

¹³⁹ Donley, *supra* note 19 at 313.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 314.

Act.¹⁴² After finding that the law did not pass muster under the Commerce Clause, the Court also concluded that the law could not be justified by the Necessary and Proper Clause.¹⁴³ This is premised around the fact that if “upholding the law based on the Commerce Clause implicates principles of federalism, so would upholding the law based on the Necessary and Proper Clause.”¹⁴⁴ An attempt to convince otherwise will be met with suspicion by the Court of the government’s attempt to invoke the Necessary and Proper Clause simply to overlook any federal intrusion into the states’ police power.¹⁴⁵ Given that a sex-selection abortion ban does not pass under the Commerce Clause, it is reasonable to assume that it similarly implicates federalism concerns under the Necessary and Proper Clause because it attempts to regulate legislative health and safety issues traditionally reserved for the states.¹⁴⁶

V. Moral and Ethical Implications

Although sex-selection abortion bans are not likely to overcome a constitutional bar, there are still deep-seated ethical and moral implications of the procedure. Son-preference was a problem before the development of sex selection technology. Because of the availability of modern technology, people are now allowed to subtly act on this preference and manifest entrenched gender discrimination and inequity that result from sex-selection abortions.¹⁴⁷ Two principal concerns arise from sex selection. First, sex selection technology “distorts the nature

¹⁴² *Id.* at 2577.

¹⁴³ *Id.* at 2592-93. In *United States v. Comstock*, 130 S. Ct. 1949, 1967-68 (2010), Justice Kennedy noted in his concurrence that “it is not of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper clause.”

¹⁴⁴ Donley, *supra* note 19 at 315.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 315-16.

¹⁴⁷ Sneha Barot, *A Problem-and-Solution Mismatch: Son Preference and Sex-Selective Abortion Bans*, GUTTMACHER INSTITUTE (May 16, 2012), available at <https://www.guttmacher.org/about/gpr/2012/05/problem-and-solution-mismatch-son-preference-and-sex-selective-abortion-bans>.

sex ratio leading to a gender imbalance.” Second, “it reinforces discriminatory and sexist stereotypes towards women by devaluing females.”¹⁴⁸ There is a strong possibility that a few people desire sex-selection abortion for gender-discrimination purposes. However, the issue becomes whether the gender-discrimination motive for abortion by a few is enough to lead to a widespread rejection of sex-selection for non-medical reasons.¹⁴⁹ Quite apparently, there is no further analysis yet available on the matter to address the issue, but PRENDA does bring to light new discussions with regard to sex-selection abortion

VI. Alternatives

Knowing that the passage of a federal sex-selection ban is difficult under constitutional restraints, the better alternative would be to direct attention towards the growing prenatal gender selection industry.¹⁵⁰ Abortion is not the only way sex selection can be achieved; reproductive technologies are a growing market without much regulation.¹⁵¹ Motives behind a woman’s choice to have an abortion are difficult to determine, but it is easier to detect the use of prenatal gender selection technology for non-necessary, non-life threatening reasons.¹⁵² Therefore, there is a better chance of monitoring the use of such technology through federal and state agencies to minimize harm to the consumer.¹⁵³

In addition, the medical community can engage in self-regulation where individual doctors may refuse to use sex selection technology for non-medical reasons.¹⁵⁴ Of course, there

¹⁴⁸ *Gender and Genetics*, WORLD HEALTH ORGANIZATION (2016), available at <http://www.who.int/genomics/gender/en/index4.html>.

¹⁴⁹ G. de Wert and W. Dondorp, *Preconception Sex Selection for Non-Medical and Intermediate Reasons: Ethical Reflections*, U.S. NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTES OF HEALTH (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4086011/>.

¹⁵⁰ Park, *supra* note 89 at 545.

¹⁵¹ Citro, *supra* note 38 at 27.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Danis, *supra* note 81 at 256.

are many obstacles to such regulation, such as some doctors taking advantage of the lucrative market of sex-selection technology and the risk of doctors making certain decisions for the woman.¹⁵⁵ These effects might be avoided if professional medical associations and licensing bodies were to place stringent regulations monitoring the use of sex selection technology.¹⁵⁶ For example, penalties on professional licenses must be placed by the medical community.¹⁵⁷ Although self-regulation by doctors seems like the ideal solution to deter sex-selection abortions, the use of sex selection technology is a growing market, that scientists and doctors do not wish to overlook.

Much of the advocacy of the sex-selection abortion ban revolves around information and statistics from abroad, often manipulated to garner support for the ban in the United States. If proponents of the ban hope to pass legislation, the next step is to show the effects of sex-selection abortion on individuals residing in the United States.¹⁵⁸ Furthermore, instead of reaching the conclusion of a ban, opponents of sex-selection abortions should first target public awareness and education campaigns since much of the practice is taboo and goes unmentioned.¹⁵⁹

VII. Conclusion

The future of a federal sex-selection ban is a difficult one to justify. The sex-selection abortion bans that have been enacted or proposed have been uniform.¹⁶⁰ Any federal sex-selective abortion ban will be invalidated based on an inappropriate use of enumerated federal

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 257.

¹⁵⁷ *Id.*

¹⁵⁸ Kalantry, *supra* note 23 at 85.

¹⁵⁹ Lauren Vogel, *Sex-Selective Abortions: No Simple Solution*, U.S. NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTE OF HEALTH (Feb. 21, 2012), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3281151/>.

¹⁶⁰ *Id.* at 1131.

powers and the current legal framework on abortion.¹⁶¹ The predicted unconstitutionality of a federal ban does not, however, indicate that sex-selection abortions are not a problem in the United States. Nevertheless, if attention must be given to the matter, better statistics on the effects of sex-selection abortion on American females and fetuses must be provided.

Furthermore, states are better capable of balancing interests by drafting their statutes to reflect more closely the differing standards that apply pre- and post-viability under *Casey*.¹⁶² For example, pre-viability, states can focus on prohibiting abortions based “solely” on gender preference.¹⁶³ Post-viability, state prohibition can focus on the element of “knowledge.”

Creating such distinctions does not guarantee that sex-selection bans will pass the constitutional muster, but it may maximize the effect of the ban.¹⁶⁴

¹⁶¹ Donley, *supra* note 19 at 328.

¹⁶² Thomas J. Molony, *Roe at 40: The Controversy Continues: Session 2: Roe, Casey, and Sex-Selection Abortion Bans*, 71 WASH. & LEE L. REV. 1089, 1131 (2014).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1132.