NOTE

The Religious Right to Therapeutic Abortions

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ABSTRACT

Religion is a common theme in the abortion dialogue. Much of the religious rhetoric focuses on religious objections to abortion, but there is another side of this discourse. Abortion is not only a political issue or constitutional right, it is a religious obligation: explicitly mandated by some texts, grounded in doctrine related to health, or a conscience and moral choice. The Supreme Court has consistently protected the right to therapeutic abortions for the life and health of the mother. Yet the most recent Supreme Court decision that addressed this issue, Gonzales v. Carhart*, signaled that exceptions for abortions when the life and health of the mother are at risk may not be as essential as once contemplated to maintain a law's constitutionality. In the face of the changing political landscape of abortion laws, what then can a religious woman do when she faces serious health complications as a result of her pregnancy?*

A combination of free exercise and self-defense rights as a hybrid claim can provide salience to her right to a health exception. Together, the religious obligation to have an abortion when her life and health are at risk and a woman's constitutional right to self-defense, provide a claim that is subject to strict scrutiny review. In the face of strict review, states must provide pregnant women with religious exemptions for health exceptions to protect their constitutional rights.

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* J.D., 2017, The George Washington University Law School; B.A., International Relations, 2014, University of Rochester. I would like to thank *The George Washington Law Review* for the incredible honor to publish this Note and for the friendships and experiences of the past two years. Thank you to my parents for their unwavering support and encouragement. And finally, I am grateful for the insights, advice, and incomparable patience of my fiancé Jeremy throughout my law school endeavors.

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INTRODUCTION

In a survey of patients visiting a medical clinic at the University of Pennsylvania, sixty-six percent said that in the event that they became seriously ill, their religious beliefs would influence their medical decisions and course of action.[1] A study of patients with advanced lung cancer indicated that decisions on chemotherapy were profoundly influenced by their faith in God, second only to an oncologist's recommendations.[2] Like countless other medical issues, adherents turn to their religious and spiritual beliefs for guidance on abortion. Much of this discussion has focused on religious objections to abortion.[3] Yet there is another side to the dialogue. Some religions condone, support, and even mandate abortion in certain circumstances.[4] Specifically, therapeutic abortions, or abortions to protect a woman's life or health, are an important right recognized by some religions and obligated by others, grounded in religious tenets based on the sanctity of life, prohibitions on self-harm, and the importance of the life of the mother.[5]

Since *Roe v. Wade*[6] in 1973, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[7] the Supreme Court has recognized a constitutional due process right to abortion, grounded in the right to privacy and incorporated by the Fourteenth Amendment.[8] The current standard protects a woman's right to abortion previability.[9] Postviability, states retain the discretion to proscribe abortion so long as it does not create an undue burden on a woman's access to abortion.[10] The *Roe* and *Casey* Courts also required abortion exceptions for the life and health of the mother.[11] *Gonzales v. Carhart*,[12] however, took an unexpected turn from the health requirement, opening the door to

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1 Harold G. Koenig, *Religion, Spirituality, and Medicine: Research Findings and Implications for Clinical Practice*, 97 S. MED. J. 1194, 1196 (2004).

2 *Id.*

3 *See, e.g.*, Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1, 1–3 (1994) (discussing the focus on religion in the constitutional treatment of abortion).

4 *See infra* Part I.

5 *See infra* Part I.

6 410 U.S. 113 (1973).

7 505 U.S. 833 (1992).

8 *See infra* notes 52–53 and accompanying text.

9 *See Casey*, 505 U.S. at 846.

10 *See Casey*, 505 U.S. at 846, 876–77. The Undue Burden Test will be explained in further detail in Section II.A. *See infra* notes 65–66 and accompanying text.

11 *See Casey*, 505 U.S. at 879; *Roe*, 410 U.S. at 164–65.

12 550 U.S. 124 (2007).

the next dilemma women face in preserving their reproductive rights. Although medical professionals argued partial-birth abortions could be necessary for the health of the mother, the Court approved a law banning the procedure without the once-essential health exception.[13] *Gonzales* signaled that the health of the mother may become less important than *Roe* and *Casey* once indicated.[14]

Although seemingly well-established, recent legislation demonstrates states pushing against the established abortion standards. A number of states provide exceptions merely for the "life" of the mother, as opposed to the required health or life.[15] Other states are testing the limits of the viability framework.[16] In 2013, North Dakota approved a fetal heartbeat ban on abortions, prohibiting the procedure once a fetal heartbeat is detected, which can be as early as six weeks after conception; two years after its enactment, the Eighth Circuit finally struck the law down.[17] In September 2015, the U.S. House of Representatives advanced a federal twenty-week abortion ban, with an exception only for the life of the mother; it failed by just six votes in the Senate.[18] Most recently in December 2016, the Ohio House and Senate adopted a fetal "Heartbeat Bill" banning abortion as soon as a fetal heartbeat is detected.[19] Furthermore, with consistent

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13 *Gonzales* addressed the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2012), which prohibited doctors from performing partial-birth abortions. The act defined partial-birth abortion, also known as intact dilation and extraction ("D&E"), as a form of abortion often used in the second trimester where the doctor dilates the cervix and removes the fetus by attempting to pull out the entire body intact as opposed to smaller pieces. *See Gonzales*, 550 U.S. at 136–37.

14 *Compare id.* at 166–67 (finding the Partial-Birth Abortion Ban Act constitutional despite its lack of health exception), *with Roe*, 410 U.S. at 165 (holding that States may not prohibit abortion where necessary for the life or health of the mother), *and Casey*, 505 U.S. at 879 (same).

15 *Compare Casey*, 505 U.S. at 879, *with infra* notes 201–05.

16 *See infra* notes 17–19, 194.

17 *See* Jennifer Haberkorn, *North Dakota's Six-Week Abortion Ban Struck*, POLITICO (July 22, 2015, 11:48 AM), http://www.politico.com/story/2015/07/north-dakota-abortion-ban-120467.

18 Peter Sullivan, *Democrats Block 20-Week Abortion Ban*, THE HILL (Sept. 22, 2015, 11:29 AM), http://thehill.com/policy/healthcare/254497-dems-block-20-week-abortion-ban; Frank Thorp V, *Senate Democrats Block 20-Week Abortion Ban Bill*, NBC NEWS (Sept. 22, 2015, 12:11 PM), http://www.nbcnews.com/news/us-news/senate-democrats-block-20-week-abortion-ban-bill-n431641.

19 *House Joins Senate in Approving Heartbeat Abortion Bill*, COLUMBUS DISPATCH (Dec. 7, 2016 3:29 AM), http://www.dispatch.com/content/stories/local/2016/12/06/ohio-senate-passes-heartbeat-bill.html ("The bill would make it a fifth-degree felony, punishable by up to one year in prison, for a physician to perform an abortion without checking for a fetal heartbeat or performing the procedure after it can be detected."). Governor Kasich vetoed this bill on December 13, 2016, but he later signed a bill prohibiting abortion at twenty weeks, four weeks shy of what is typically considered the point of viability. Sandhya Somashekhar, *Ohio Governor Vetoes*

5–4 votes in the post-*Roe* Court, the security of the right to an abortion is not necessarily guaranteed among the Justices either.[20] There is potential for changes to the Court's abortion jurisprudence depending on Justice Gorsuch's vote, as well as those of any other Justices President Donald Trump may nominate to the Court. In the final presidential debate of October 2016, when asked whether he would want the Supreme Court to overturn *Roe v. Wade*, President Trump responded that this would happen because "I will be appointing pro-life judges . . . ."[21] In light of these campaign comments, it is very likely that strong conservative votes will join the Court with any future Trump appointments.

As the due process right to previability abortion is clouded and there is potential for a shift in the Court's position, the right to a therapeutic abortion easily faces attack next. In many cases, therapeutic abortions are a religious right or even a religious mandate, not merely a political or reproductive issue. There must be another way to ensure its protection. So, we must ask, how can religious women retain their impartial constitutional right?

This Note proposes that religion, abortion, and self-defense rights, when interconnected, can be understood to protect the right to exceptions for the health of the mother, regardless of the current standard established by the Court or possible lack of life or health exceptions provided under state law. Part I of this Note explores the varied religious positions on abortion, focusing on the obligation some religions impose to seek a therapeutic abortion. Part II creates a background for the discussion that follows, establishing the legal foundation and Supreme Court's position on the rights to abortion, self-defense, and religious free exercise. Part III discusses the anomaly the *Gonzales* Court created, opening the door to the rejection of health exceptions. Part IV articulates a proposal that the right to a therapeutic abortion retains salience by conceptualizing the issue as a hybrid rights claim, combining free exercise and self-defense. Part IV

'Heartbeat Bill' But Signs Another Abortion Restriction into Law, WASH. POST (Dec. 13, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/12/13/ohio-governor-vetoes-heartbeat-bill-but-signs-into-law-another-abortion-restriction/?utm_term=.6cc6b8c016ab.

20 *Casey*, *Stenberg*, and *Gonzales* were all 5–4 decisions by the Court. *See* David Masci & Ira C. Lupu, *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RES. CTR. (Jan. 16, 2013), http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/.

21 Anna North, *Donald Trump's Evasiveness on Abortion*, N.Y. TIMES (Oct. 19, 2016, 10:08 PM), http://www.nytimes.com/interactive/projects/cp/opinion/clinton-trump-third-debate-election-2016/donald-trumps-evasiveness-on-abortion.

also applies the *Sherbert* strict scrutiny test for free exercise to restrictive abortion laws lacking life and health exceptions, demonstrating that such laws would not withstand strict scrutiny review and arguing that a woman is then entitled to a religious exemption for her health if the law does not provide an exception. Part V contemplates the potential issues and future considerations that arise under this proposal.

I. The Spectrum of Religious Perspectives on Abortion

America represents a melting pot of religions. These religions, as well as their various subsects and denominations, represent a broad range of abortion positions.[22] Some religious perspectives maintain that life begins at conception, making abortion morally wrong.[23] Other religions condone abortion as a matter of a woman's right to conscientious choice, support abortion under certain circumstances, or even explicitly advocate for the right.[24] Though partly attributable to differing positions about when life itself begins, the disagreement extends much farther. Religions disagree "over whether and how much the government should interfere with a woman's decision to terminate or continue her pregnancy . . . ."[25] Based on this disagreement, some pro-choice litigants assert that anti-abortion positions represent a limited subset of religions.[26] These diverse positions, grounded in religious doctrine, practices, and ideology, also evoke issues of free exercise. Anti-abortion laws, restricting the *Roe* and *Casey* rights to abortion access and removing the right to therapeutic abortions, interfere with a woman's religious exercise.

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22 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 160–61 (1973); Rev. Dr. Carlton W. Veazey & Marjorie Brahms Signer, *Religious Perspectives on the Abortion Decision: The Sacredness of Women's Lives, Morality and Values, and Social Justice*, 35 N.Y.U. Rev. L. & Soc. Change 281, 283–88 (2011); *Religious Groups' Official Positions on Abortion*, Pew Res. Ctr. (Jan. 16, 2013), http://www.pewforum.org/2013/01/16/religious-groups-official-positions-on-abortion/.

23 *See* Veazey & Signer, *supra* note 22, at 295.

24 *See* Brief of Amici Curiae Religious Coalition for Reproductive Choice and Thirty-Four Other Religious and Religiously Affiliated Organizations and Individual Clergy and Theologians in Support of Respondents at 8–14, Gonzales v. Carhart, 550 U.S. 124 (2006) (No. 05-1382), 2006 WL 2736634, at *7–9 [hereinafter Amicus Brief of RCRC, Gonzales v. Planned Parenthood].

25 Brief of Amici Curiae Religious Coalition for Reproductive Choice, Fifty-Three Other Religious Organizations and Religiously Affiliated Organizations, and Fourteen Clergy and Laypersons in Support of Respondent, Stenberg v. Carhart, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 340115, at *9–10 [hereinafter Amicus Brief of RCRC, Stenberg v. Carhart].

26 *See* Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court's Abortion Cases*, 23 Regent U. L. Rev. 1, 2–3 (2010). This point is also demonstrated by the preceding discussion of the different positions many religions take on abortion, some of which are pro-choice. *See supra* note 22.

Some religious denominations expressly support or even mandate abortion in the event the health or life of the mother is at risk. "For some faiths, [respect for human life and health] is paramount and *requires* that a woman be able to obtain an abortion when her health or life is at risk."[27] There are times when a "clergyman advises [a pregnant woman] to procure an abortion as a matter of religious obligation."[28] Such guidance is grounded in religious ideology regarding the sanctity of life, prohibitions on self-harm or suicide, and the importance of the life of the mother.[29]

The Jewish faith and its doctrinal obligations exemplify this position. The Mishnah, the codification of Jewish oral laws, explicitly teaches, "[i]f a woman is having difficulty in childbirth (so that her life is endangered), one cuts off the embryo, limb by limb, because her life takes precedence over its life."[30] It follows from this passage that Judaism requires therapeutic abortion for a woman's well-being.[31] The text of Ohalot is closely related to the Jewish law of the *rodef*, which permits one to kill a pursuer in self-defense.[32] One is *obligated* to kill a pursuer when it is the only way to prevent a *rodef* from killing his intended victim.[33] "The status of *rodef* [is] further applied to a fetus whose mother is endangered by the pregnancy, thereby mandating an abortion, even as the fetus certainly has no malicious intent."[34] Because Judaism places great emphasis on the right of self-defense, many

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27 Amicus Brief of RCRC, Gonzales v. Planned Parenthood, *supra* note 24, at 12.

28 Brief of Agudath Israel of America as Amicus Curiae in Support of Robert P. Casey, et. al., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006427, at *12.

29 Amicus Brief of RCRC, Stenberg v. Carhart, *supra* note 25, at 10–19 (discussing the positions on therapeutic abortions of various religious sects and denominations in America).

30 Robert Gordis, *Abortion: Major Wrong or Basic Right?*, *in* LIFE AND DEATH RESPONSIBILITIES IN JEWISH BIOMEDICAL ETHICS 221, 224 (Aaron L. Mackler ed., 2000) (quoting *Ohalot* 7:6 (Mishnah)). The Mishnah was intended to supplement scriptural law and the Bible. *See Mishna*, ENCYCLOPEDIA BRITANNICA (July 20, 1998), http://www.britannica.com/topic/Mishna.

31 *The Abortion Controversy: Jewish Religious Rights and Responsibilities*, UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM, http://www.uscj.org/JewishLivingandLearning/SocialAction/SocialJustice/CurrentIssues/Political_SocialIssues/TheAbortionControversy.aspx (last visited Mar. 20, 2017) (referencing the United Synagogue Resolution on Abortion passed at the 1991 Biennial Conference).

32 *See* Yosef Fleischman & Asher Flegg, *The Halachah of Rodef: Killing the Deadly Pursuer (1)*, 68 TORAH & HORAAH 1–2 (Pinchas 5771).

33 Yehoshua Pfeffer, *The Deadly Pursuer (2): Killing One for Saving Many*, INST. FOR DAYANIM (July 23, 2011), http://dinonline.org/2011/07/23/the-deadly-pursuer-2-killing-one-for-saving-many/.

34 Shlomo Brody, *Ask the Rabbi: The Right to Self-Defense*, JERUSALEM POST (Dec. 3, 2010, 2:11 PM), http://www.jpost.com/Jewish-World/Judaism/Ask-the-Rabbi-The-right-to-self-defense.

rabbis find it is justifiable to terminate a fetus that takes on the status of a *rodef* by endangering a woman's health or life.[35]

These concepts are based on the value of life, which is regarded as one of the greatest values in Judaism.[36] One has an affirmative obligation and duty to "[t]ake utmost care and watch yourself scrupulously"[37] and specifically "guard [your] physical health."[38] These provisions are extremely important relative to other Jewish law.[39] They create a standard of Jewish law against self-harm, thus a Jewish woman cannot allow her health or body to be injured.[40]

Other religions similarly encourage women to seek therapeutic abortions. Within Islam, scholars from the four Sunni and Shiite teachings permit abortion after four months of pregnancy in order to save the mother's life.[41] According to ayatollahs, a group of Shiite Muslim scholars at the most senior level of jurists who are qualified to make rulings on issues in the Quran, abortion earlier in pregnancy is allowed when it leads to a fatal condition for the mother or "in cases where the mother has an advanced disease as such that her life is threatened by the continuation of pregnancy . . . ."[42] Abortion is permitted here based on the Islamic principle of *al-ahamm wa 'l-muhimm*, or the lesser of two evils, which requires that when two things come upon a person, the lesser should be sacrificed for the greater.[43] In the event the mother's life is at risk, abortion and the loss of fetal life is the lesser evil because the mother's life is well-established, she is part of the family, she has responsibility, and to continue

35 *See* Yehoshua Pfeffer, *Abortion in Torah Law*, INST. FOR DAYANIM (Feb. 6, 2015), http://dinonline.org/2015/02/06/abortion-in-torah-law/.

36 Fleischman & Flegg, *supra* note 32, at 3.

37 *Deuteronomy* 4:9, 15.

38 *Judaism and Smoking*, UNITED SYNAGOGUE OF CONSERVATIVE JUDAISM (Spring 1997), http://www.uscj.org/JewishLivingandLearning/SocialAction/SocialJustice/CurrentIssues/HealthIssues/JudaismandSmoking.aspx (citing various canons of Judaic law and textual commentary). This article, an excerpt from the *United Synagogue Review*, Spring 1997, discusses the rationale behind Conservative Judaism's resolution to end smoking and tobacco use. The community, along with a majority of Jewish communities, officially declared smoking to be prohibited by Jewish law due to its potential to endanger one's life.

39 *Id.*

40 *Id.*

41 K. M. Hedayat et al., *Therapeutic Abortion in Islam: Contemporary Views of Muslim Shiite Scholars and Effect of Recent Iranian Legislation*, 32 J. MED. ETHICS 652, 653 (2006).

42 *Id.* at 654.

43 *See, e.g.*, SAYYID MUHAMMAD RIZVI, MARRIAGE AND MORALS IN ISLAM ch. 4 (1993), http://www.al-islam.org/marriage-and-morals-islam-sayyid-muhammad-rizvi; *Islam: Abortion*, BBC (Sept. 7, 2009), http://www.bbc.co.uk/religion/religions/islam/islamethics/abortion_1.shtml; Ibrahim B. Syed, *Abortion*, ISLAMIC RES. FOUND. INT'L, http://www.irfi.org/articles/articles_101_150/abortion.htm (last visited Mar. 20, 2017).

the pregnancy while her health is at risk could also result in harm to the fetus.[44] In contemporary practice, Islamic scholars broadened the conditions under which a woman may seek therapeutic abortion.[45] Iranian legislation, which is made in accord with Islamic Shari'a law and passed before a council of religious jurists selected by the Supreme Religious Leader, permits therapeutic abortions before four months of pregnancy for fifty-one medical conditions and maternal diseases.[46]

Moreover, the United Church of Christ notes that a number of factors and family conditions may overcome the potentiality of life during earlier stages of pregnancy, and during later stages, abortions for a mother's health and life remain acceptable.[47] Similarly, the United Methodist Church recognizes that it "is not a moral necessity" to continue a pregnancy that endangers the life or health of the mother, and "the path of mature Christian judgment may indicate the advisability of abortion."[48] More generally, doctrine of the Catholic Church can also support abortion, to the extent that the U.S. Conference of Catholic Bishops feared that the Religious Freedom Restoration Act ("RFRA") would permit women to make claims for religiously motivated abortions, specifically using tenets of the Catholic faith to argue for a religious right to an abortion under RFRA's framework.[49]

The breadth of religious positions explored above demonstrates that religious beliefs greatly inform a woman's decision to have an abortion. Some faiths permit or support women having therapeutic abortions, and in at least one faith, this is a matter of religious obligation.[50] Though Judaism provides a compelling example, the teachings of other religions evidence that this concept is not limited to one faith. With this obligation and doctrinal origin in mind, self-defense and religious free exercise can play an important role in preserving a woman's right to an abortion.

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44 *See Islam: Abortion*, *supra* note 43.

45 Hedayat et al., *supra* note 41, at 656.

46 *Id.* at 654. The final version of the legislation specifies that the problems must cause "extreme suffering or hardship for the mother" and her life "should be in danger." *Id.*

47 *See* UNITED CHURCH OF CHRIST GENERAL SYNOD STATEMENTS AND RESOLUTIONS REGARDING FREEDOM OF CHOICE, UNITED CHURCH OF CHRIST 2 (1991), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedon-of-Choice.pdf?1418425637.

48 THE BOOK OF RESOLUTIONS OF THE UNITED METHODIST CHURCH 2025 (2016).

49 Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 429 (2016), http://www.yalelawjournal.org/forum/reconstructing-rfra-the-contested-legacy-of-religious-freedom-restoration.

50 *See supra* notes 27–28 and accompanying text.

II. The Legal Standards: Abortion, Self-Defense, and Religious Rights

Abortion, self-defense, and the free exercise of religion are three seemingly distinct and potentially unrelated legal issues. Their backgrounds, however, are essential to understanding the religious obligation to therapeutic abortions. This Part focuses on the foundations of a therapeutic abortion: Supreme Court developments related to the due process right to an abortion, the right to self-defense and abortion as self-defense, and the First Amendment right to religious free exercise.

A. The Supreme Court's Evolving Jurisprudence on Abortion

Roe v. Wade was the seminal case that established the Court's jurisprudence on abortion, subsequently reaffirmed and clarified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*. The Court first proposed a framework to analyze abortion regulations in *Roe*, which involved a class action challenge to Texas's and Georgia's abortion laws, attacking the states' limitations on a woman's access to abortion.[51] Declaring Texas's criminal abortion statute unconstitutional, the Court determined that the right to have an abortion is protected by the Due Process Clause.[52] The abortion right originates in the right to privacy, "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," or, alternatively, can be supported by "the Ninth Amendment's reservation of rights to the people."[53]

However, the right to abortion remains subject to state interests.[54] States retain two legitimate and important interests: first, the health of the mother, and second, "the potentiality of human life."[55] Crafting a framework based on the trimesters of pregnancy,[56] the Court found that a state's interest in fetal life becomes compelling at the point of viability, when life can survive outside of the womb.[57] The state can, then, freely proscribe abortion after viability for "both logical and biological justifications."[58] The state's interest in the mother's

51 Roe v. Wade, 410 U.S. 113, 116 (1973).

52 *Id.* at 153–55, 164 (establishing that the right to an abortion is a due process right protected by the Fourteenth Amendment, warranting heightened protection).

53 *Id.* at 153.

54 *Id.* at 153–54.

55 *Id.* at 162.

56 *See id.* at 163; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872 (1992).

57 *Roe*, 410 U.S. at 163.

58 *Id.* at 163–64.

health becomes compelling at the end of the first trimester, at which point abortions can become more dangerous, warranting regulation of procedures.[59] The opinion underscored the importance of maternal health at all stages of the framework, limiting the state's ability to ban abortion when it is medically necessary to preserve the mother's life or health.[60]

Almost twenty years later, *Casey* considered five allegedly unconstitutional provisions of Pennsylvania's Abortion Control Act of 1982.[61] Relying on the doctrine of stare decisis, the Court retained and affirmed *Roe*'s essential holding.[62] The Court upheld a woman's due process right to choose to terminate her pregnancy previability and the state's right to restrict abortion access post-viability.[63] But the Court overruled the rigid trimester framework established in *Roe*, instead relying only on the point of viability and adopting the Undue Burden Test.[64] Under this Test, state restrictions designed to protect fetal life are unconstitutional if they place an undue burden on a woman's access to abortion.[65] An undue burden is a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," even if it amounts to less than an "absolute obstacle[ ]" or "severe limitation[ ]."[66] Again, the Court noted the important limitation that laws must contain "exceptions for pregnancies which endanger the woman's life or health."[67] In so doing, the Court maintained its general position on the abortion issue: states can only limit a woman's access to abortion post-viability and must protect maternal health with exceptions for the life and health of the mother.[68]

Although the Court had preserved the health and life exception, it was highly debated in the early 2000s through cases regarding the

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59 *Id.* at 163.

60 *Id.* at 165.

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

62 *Id.* at 846.

63 *Id.*

64 *Id.* at 873–74.

65 *Id.* at 876–77.

66 *Id.* at 877; Linda J. Wharton et al., *Preserving the Core of* Roe*: Reflections on* Planned Parenthood v. Casey, 18 YALE J.L. & FEMINISM 317, 331–32 (2006) (quoting City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting)) (discussing that the plurality opinion rejected Justice O'Connor's previous description of an undue burden to be an absolute obstacle or severe limitation on the abortion choice in favor of this more lenient standard).

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

68 *Id.*

constitutionality of partial-birth abortion procedures.[69] First, in *Stenberg v. Carhart*,[70] the Court invalidated a Nebraska law banning partial-birth abortions, in part because it lacked an exception for the health and life of the mother as required by *Roe* and *Casey*.[71] Nebraska argued that a health exception was not necessary when safer abortion alternatives were available to women.[72] The Court rejected Nebraska's position, finding the state failed to adequately support its position with medical evidence.[73] In fact, the record contained strong medical evidence from the American College of Obstetricians and Gynecologists that partial-birth abortions can be the most appropriate abortion procedure in certain situations for the safety of the mother.[74] A health exception was still essential: "'[N]ecessary' in *Casey*'s phrase . . . cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion."[75] Once again, the Court emphasized the importance of the health of the mother and noted its prior decisions "repeatedly invalidated statutes" that impose health risks, regardless of whether those risks arise from barring abortion or from limiting access to certain abortion procedures.[76] Finding Nebraska's law unconstitutional, the Court heavily relied on *Casey*'s holding that the state cannot endanger a woman's life or health or subject her to medical risks in its regulation of abortion.[77]

Despite its holding in *Stenberg*, the Court took a different approach in *Gonzales v. Carhart*, potentially causing the health exception to lose some of its footing. The Court declared the federal Partial-Birth Abortion Ban Act of 2003 ("PBABA"),[78] which was similar to

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69 The partial-birth abortion procedure is the same procedure discussed above. *See supra* note 13.

70 530 U.S. 914 (2000).

71 *See id.* at 929–30; *see also id.* at 948 (O'Connor, J., concurring).

72 *Id.* at 931 (majority opinion).

73 *Id.* at 932.

74 *Id.*

75 *Id.* at 937 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992)). The Court discusses the implications and meaning behind *Casey*'s phrasing "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* (quoting *Casey*, 505 U.S. at 879).

76 *See id.* at 931.

77 *See id.* at 929–31.

78 Partial-Birth Abortion Ban Act (PBABA) of 2003, Pub. L. No. 108–105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2012)).

Nebraska's ban, to be constitutional notwithstanding its lack of a health exception.[79] With PBABA's enactment, Congress responded to the concerns raised by the *Stenberg* Court in two ways.[80] First, Congress conducted its own inquiries and made factual findings to support the ban.[81] Second, the Act was written to include a life exception, permitting partial-birth abortions only when a woman's life is physically endangered by a condition caused by the pregnancy.[82] The district court found PBABA unconstitutional without a health exception to permit the procedure when the health of the mother is at risk.[83] The Supreme Court disagreed, holding that the lack of a health exception did not make the Act facially invalid.[84] The Court reasoned that the medical necessity of partial-birth abortions is "a contested factual question" and "both sides have medical support for their position."[85] Where the *Stenberg* Court found such disagreement enforced the need for a health exception, the *Gonzales* Court reasoned that PBABA could withstand medical uncertainty because "[t]he Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[86] As Justice Ginsburg opined, the decision was "alarming" in its "refus[al] to take *Casey* and *Stenberg* seriously."[87] For the first time, "the Court blesse[d] a prohibition with no exception safeguarding a woman's health."[88]

Since *Roe*, the Court has consistently protected the right to an abortion through the Fourteenth Amendment's substantive Due Process Clause. The health exception to limitations on abortions remains in flux. The right to self-defense, however, is an alternative avenue to maintain the right to health exceptions for abortion.

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79 Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

80 *Id.* at 141.

81 *Id.*

82 *Id.* Congress's findings specifically noted that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." *Id.* (alteration in original) (quoting the PBABA § 2, 117 Stat. at 1201).

83 *See id.* at 143.

84 *Id.* at 166–67.

85 *Id.* at 161.

86 *Id.* at 163.

87 *Id.* at 170 (Ginsburg, J., dissenting).

88 *Id.* at 171.

B. The Fundamental and Constitutionally Protected Right to Self-Defense

Because the need for an abortion arises when a woman's life and health are at risk, the right to abortion coincides with the right to self-defense. The right to self-defense has long been recognized as an essential and inalienable right of natural law.[89] Philosopher John Locke, who profoundly influenced the Founding Era,[90] believed that in the state of nature, every man has an inherent duty of self-preservation, and that it is a "fundamental, sacred, and unalterable" right.[91] When man enters the social compact of society, he cedes certain rights, including the use of force.[92] But if another person uses force against him, he enters the state of war and can use force or kill in his defense.[93] This concept is echoed in the modern notion of lethal self-defense: "using deadly force to protect one's life against humans or animals (or to prevent serious injury, rape, or kidnapping)—has long been the basis for a general exception to nearly all criminal laws . . . ."[94] The constitutions of forty-four states preserve the right to lethal self-defense.[95]

1. Self-Defense and the Due Process Right to Bear Arms

The due process right to bear arms is intimately connected to and heavily based on the right of self-defense. In *District of Columbia v. Heller*,[96] the Supreme Court upheld an individual's Second Amendment right to possess firearms for lawful, nonmilitia purposes.[97] The Court in *Heller* recognized that the imperative right of self-defense was the underlying purpose of the Second Amendment.[98] To do so, the Court detailed a lengthy history in support of self-defense, dating back to sixteenth-century England.[99] Notably, the writings of Blackstone attributed the significance of the right to arms use to self-preser-

89 *See* District of Columbia v. Heller, 554 U.S. 570, 594 (2008).

90 *See* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1562 & n.8 (1989).

91 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 9, 78 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

92 *See id.* at 15–16.

93 *See id.* at 15.

94 Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1817 (2007).

95 *See id.* at 1819.

96 554 U.S. 570 (2008).

97 *See id.* at 635.

98 *See id.* at 603.

99 *See id.* at 593–606.

vation and defense, and this instilled in the Founders that "the right to enable individuals to defend themselves" is indispensable.[100] The comprehensive history also cited arms provisions of early state constitutions, analogous to the Second Amendment and explicitly for the defense of citizens.[101]

Relying on *Heller*, the Court went one step further in *McDonald v. City of Chicago*.[102] The *McDonald* Court held that the Second Amendment right to bear arms is incorporated by the Due Process Clause of the Fourteenth Amendment against the states.[103] To reach this conclusion, the Court adopted the extensive history outlined in *Heller*: "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right."[104] The Second Amendment's history of self-defense played a key role in the due process analysis, as rights incorporated and protected by the Due Process Clause are those considered to be fundamental to the concept of ordered liberty and entrenched in our nation's tradition.[105] The long-standing history of the Second Amendment evidenced that the right to self-defense (and to bear arms for self-defense) is a fundamental right "deeply rooted in this Nation's history and tradition."[106] Although the Court focused on the essential nature of self-defense for purposes of the Second Amendment,[107] self-defense has efficacy beyond the context of the right to bear arms.

2. Reframing Therapeutic Abortions as an Act of Self-Defense

There is a compelling analogue between the rights of abortion and self-defense.[108] Prominent philosopher Judith Jarvis Thomson is

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100 *Id.* at 593–95 (discussing the emphasis placed on self-defense in William Blackstone's commentaries and the influence it had on the Framers).

101 *Id.* at 601. The language of Pennsylvania's Declaration of Rights of 1776 is particularly persuasive, as it provided "the people have a right to bear arms *for the defence of themselves* and the state . . . ." *Id.* (quoting PA. CONST. OF 1776, DECLARATION OF RIGHTS, art. XIII, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909)).

102 561 U.S. 742 (2010).

103 *Id.* at 791.

104 *Id.* at 767 (footnote omitted) (quoting *Heller*, 554 U.S. at 599); *see also id.* at 768 (noting that *Heller* "explored the right's origins").

105 *Id.*

106 *Id.* at 768 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

107 *See id.*

108 *See, e.g.*, Stephen G. Giles, Roe*'s Life-or-Health Exception: Self-Defense or Relative-Safety?*, 85 NOTRE DAME L. REV. 525, 537 (2010); Nicholas J. Johnson, *Supply Restrictions at the*

widely known for her piece *In Defense of Abortion*,[109] which advances arguments for the right to abortion through a number of hypothetical thought experiments that parallel situations throughout a woman's pregnancy.[110] To demonstrate the idea of abortion as self-defense, Thomson asks the reader to find herself trapped in a "very tiny house" with "a rapidly growing child," and in moments the reader will be "crushed to death."[111] The reader will die, but the child will be fine.[112] Although the child is innocent, Thomson argues that a woman does "not have to wait passively while it crushes [her] to death" because the woman who houses the child is still a person herself.[113] Thomson then concludes "a woman surely can defend her life against the threat to it posed by the unborn child, even if doing so involves its death."[114]

The Model Penal Code's concept of self-defense provides another argument for a woman's right to an abortion when her life and health are at risk. As a threshold matter, if one accepts that abortion is the active choice to kill a fetus, arguably a woman does so out of self-defense.[115] "According to the Model Penal Code, deadly force may be used to defend oneself against death, serious bodily harm, rape, or kidnapping."[116] The Model Penal Code's language mirrors the classic definition of self-defense, permitting a person to take action when she is "confronted by a serious threat of bodily harm or death, the threat was imminent, and [her] response was both necessary and proportionate."[117] Some go so far as to argue that the physical injury, pain, and burden that comes with ordinary child-bearing could even be suffi-

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Margins of Heller *and the Abortion Analogue:* Stenberg *Principles, Assault Weapons, and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285, 1309–10 (2009); Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1570 (1979); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 52–53 (1971).

109 *See* Thomson, *supra* note 108; *see also* Johnson, *supra* note 108, at 1311; Regan, *supra* note 108, at 1576 n.4.

110 *See* Thomson, *supra* note 108, at 52–54.

111 *Id.* at 52.

112 *Id.*

113 *Id.* at 52–53.

114 *Id.* at 53.

115 Regan, *supra* note 108, at 1611.

116 *Id.* at 1613 (citing MODEL PENAL CODE § 3.04(2)(b) (AM. LAW INST., Proposed Official Draft 1962)).

117 V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1239 (2001); *see also* Brown v. United States, 256 U.S. 335, 343 (1921) ("[I]f a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and . . . if he kills him he has not exceeded the bounds of lawful self-defense."); RESTATEMENT (SECOND) OF TORTS § 65(1) (AM. LAW INST. 1965); Giles, *supra* note 108, at 537 n.55 (noting the Restatement of Torts and Model Penal Code both permit self-defense for threat of serious bodily harm).

cient to suggest a woman can exercise self-defense.[118] Although the argument for self-defense is at its strongest when the life of the mother is at risk from the pregnancy,[119] serious bodily injury does not necessarily require risk of death.[120] Therefore, the doctrine of self-defense supports a woman's right to a therapeutic abortion, short of life-and-death necessity.

The "relative-safety" interpretation of *Roe* broadens the circumstances under which a woman can have abortion in self-defense.[121] The relative-safety theory posits that the *Roe* and *Casey* medical exception has two possible interpretations.[122] The language "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" can be understood as either the traditional concept of self-preservation or a more relaxed relative-safety approach to self-defense.[123] The relative-safety approach provides women with a much wider breadth of rights, supporting abortion when "pregnancy and childbirth are believed to pose marginally greater risks to the mother's physical or mental health than a post-viability abortion would."[124] The underlying rationale is that with medical developments, traditional self-defense "would rarely block the application of a ban on post-viability abortions because very few pregnancies nowadays pose grave dangers of death or serious health impairment that can only be avoided by abortion."[125] Therefore, relative-safety justifies abortion for "all non-negligible health risks . . . ."[126]

The Supreme Court's inconsistent interpretations of its own life and health exception support the application of the relative-safety approach. On one hand, the *Gonzales* Court approved PBABA without a health exception, despite medical evidence of its importance.[127] On

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118 *See* Regan, *supra* note 108, at 1614–16. Regan's argument, though broad, was intended to apply to the context of unwanted pregnancies. *Id.* at 1579, 1615. This Note does not demand such a sweeping interpretation that pregnancy in and of itself is serious bodily harm. Yet the basic premise of his argument and reliance on the Model Penal Code is still tenable beyond the scope of unwanted pregnancy.

119 Johnson, *supra* note 108, at 1310.

120 Regan, *supra* note 108, at 1616.

121 *See* Giles, *supra* note 108, at 533–34.

122 *Id.* at 526–27.

123 *Id.*

124 *Id.* at 528, 542. This approach is advocated for by Professor Cyril Means, General Counsel of the National Abortion and Reproductive Rights Action League ("NARAL"). *Id.* at 541–42.

125 *Id.* at 527.

126 *Id.* at 565.

127 *See* Gonzales v. Carhart, 550 U.S. 124, 163 (2007). Giles notes that in *Gonzales* "the Court implicitly endorsed a version of the self-defense approach—but did so in a half-hearted

the other hand, the Court has diligently preserved a broad interpretation of health. In *United States v. Vuitch*,[128] the Court defined health to encompass both mental and physical states, not merely physical conditions.[129] Additionally, in *Doe v. Bolton*,[130] the Court recognized that a number of factors pertain to the concept of health.[131] To benefit the pregnant woman, exceptions permit doctors to exercise judgment "in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[132] Although the Court was more hostile towards health exceptions in *Gonzales*, *Bolton* evidences that a broader definition is possible under the Court's past practice. The relative-safety interpretation of *Roe* retains merit to bolster a woman's access to therapeutic abortions.

The fundamental right of self-defense provides women with an argument in support of abortions that actively preserve a woman's life.[133] But the permissive breadth of the Model Penal Code and the relative-safety theory support a woman's right to therapeutic abortions, short of life-threatening or emergency risk.[134] As demonstrated above, a similar right to self-preservation and defense is also found within religious beliefs, thereby implicating issues of free exercise.

C. Religious Freedom and the Progression of Free Exercise Protection

The issue of abortion and self-preservation is directly related to the exercise of religion.[135] The First Amendment of the Constitution establishes the "zealously protected" and "fundamental" right to religious freedom in America.[136] Encapsulating two important clauses—the Establishment Clause and the Free Exercise Clause—the First Amendment guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

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manner that sends only a muted signal to lower courts and legislature," therefore still failing to "definitively embrace[ ]" either approach. Giles, *supra* note 108, at 529 (footnote omitted).

128 402 U.S. 62 (1971).

129 *Id.* at 71–72.

130 410 U.S. 179 (1973).

131 *Id.* at 191–92; *see also* Giles, *supra* note 108, at 556–58 (discussing *Bolton*'s broad range of factors that doctors should consider in their medical judgment of health risks, effectively affirming that "previability abortions must be permitted even if they involve concerns about a women's 'well-being' ").

132 *Bolton*, 410 U.S. at 192.

133 *See supra* notes 108–14 and accompanying text.

134 *See Regan*, *supra* note 108, at 1615–16.

135 *See supra* notes 32–44 and accompanying text.

136 Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).

thereof . . . ."[137] In this "dual aspect," the First Amendment both "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" and "safeguards the free exercise of the chosen form of religion."[138] The First Amendment's religious protections are incorporated by the Due Process Clause of the Fourteenth Amendment, and are therefore applicable to and enforceable against the states.[139] Although some abortion litigants argue Establishment Clause violations,[140] the Free Exercise Clause provides a viable argument for a woman's religious interest in and obligation to an abortion.

1. The Free Exercise Clause Through the Lens of the Supreme Court

Since the Framing of the Constitution, there has been a great deal of emphasis on the right to the free exercise of religion. In the words of James Madison, "[t]he Religion then of every man must be left to the conviction and conscience of every man . . . to exercise it as these may dictate."[141] The Framers "fashioned a charter of government which envisaged the widest possible toleration of conflicting views [and one's] relation to his God was made no concern of the state."[142] Because of its inalienable nature, governments and courts can neither make decisions regarding religious beliefs and observances nor doubt their truth, value, and sensibility.[143] "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[144]

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137 U.S. CONST. amend. I.

138 United States v. Ballard, 322 U.S. 78, 86 (1944) (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

139 *Cantwell*, 310 U.S. at 303.

140 These arguments assert that criminal abortion laws reflect or are written to express certain religious beliefs, thus claiming religious motivation to the legislation. Steven L. Skahn, Note, *Abortion Laws, Religious Beliefs and the First Amendment*, 14 VAL. U. L. REV. 487, 513 (1980).

141 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments, [ca. 20 June] 1785*, *in* 8 THE PAPERS OF JAMES MADISON, 10 MARCH 1784–28 MARCH 1786, at 295 (Robert A. Rutland & William M.E. Rachal eds., 1973), http://founders.archives.gov/documents/Madison/01-08-02-0163 (online version annotated by Nat'l Archives and Records Admin. Oct. 5, 2016). In this piece, Madison challenged the constitutionality of a proposed Virginia law because of the limitations it placed on one's free exercise of religion and his "duty towards the Creator" as opposed to other men. *Id.*

142 *Ballard*, 322 U.S. at 87.

143 *See id.* at 87–88 ("[T]he District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents.").

144 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (quoting Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981)).

The Free Exercise Clause specifically prohibits laws from either impeding the observance of religion or discriminating between religions.[145] The Court first addressed free exercise with regard to neutral laws in *Reynolds v. United States*,[146] upholding a federal law banning polygamy despite objection by members of the Mormon faith.[147] The Court reasoned that this ban was constitutional because it was within the legitimate purview of the state to enact such social laws, and the law permissibly interfered with religious practices or conduct, as opposed to beliefs and opinions.[148] In *Sherbert v. Verner*,[149] however, the Court abandoned such deference and reliance on belief versus conduct.[150] The appellant in *Sherbert* was denied unemployment compensation after she could not find work, because she consistently refused to work on Saturdays, the day of rest for Seventh-Day Adventists.[151] Greatly concerned by the governmental imposition of a choice that would lead someone to abandon "one of the precepts of her religion,"[152] the Court found that an exception was necessary to protect her religious beliefs and the exercise of those beliefs.[153] To do so, the Court applied a strict scrutiny standard of review, which became the prevailing interpretation of the Free Exercise Clause.[154] Under *Sherbert*'s strict scrutiny test, the Court asks two questions to determine if a law poses an unconstitutional limitation on free exercise: (1) whether the law imposes any burden on the free exercise of an individual's religion, and (2) whether there is a compelling state interest to justify an infringement on the appellant's First Amendment right.[155] The burden on religious exercise can be indirect,[156] but a mere

145 Sherbert v. Verner, 374 U.S. 398, 404 (1963) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

146 98 U.S. 145 (1878).

147 *See id.* at 166.

148 *Id.*

149 374 U.S. 398 (1963).

150 *See id.* at 404; Shiva Falsafi, *Religion, Women, and the Holy Grail of Legal Pluralism*, 35 CARDOZO L. REV. 1881, 1896–97 (2014).

151 *Sherbert*, 374 U.S. at 399–400.

152 *Id.* at 404.

153 *See id.* at 409–10.

154 *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 858–59 (2006). Strict scrutiny is a standard of review considered to be most fatal to legislation. This form of review was first evoked in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and is considered a far less lenient and more searching form of judicial review. *See* Winkler, *supra*, at 798–800. *Carolene Products* envisioned strict scrutiny for protection of the most fundamental rights. *See id.*

155 *See Sherbert*, 374 U.S. at 403, 406 (finding a state's denial of unemployment benefits to Seventh-Day Adventist who could not accept work due to her day of reset imposed burden on free exercise of religion, and burden was not overcome by state interest); *see also* Holt v. Hobbs,

rational basis for the government's interest will not pass muster under the "compelling" standard imposed on states.[157]

The Court affirmed this test in *Wisconsin v. Yoder*,[158] reasoning that the exercise of religion is a fundamental right to be "zealously protected, sometimes even at the expense of other interests of admittedly high social importance."[159] Under this test, the Court held that neither facial neutrality nor general applicability of a law precludes a Free Exercise Clause violation:

> [T]here are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.[160]

Courts embraced this balancing test, weighing burdens versus state interests, as the standard for the Free Exercise Clause, until *Employment Division v. Smith*.[161]

Smith qualified the concept of free exercise law that followed *Sherbert*'s holding in 1963. Addressing the legality of a statute prohibiting controlled substances (including ceremonial and religious peyote use), Justice Scalia opined for the Court "that an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[162] Because the law was facially neutral and not discriminatory in purpose, the Court found Oregon need not provide exemptions for religious uses of peyote.[163] The Court refused to apply the *Sherbert* test, deeming it inappropriate for challenges to neutral laws of general applicability.[164]

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135 S. Ct. 853, 859 (2015) (framing the strict scrutiny test as "whether a challenged government action that substantially burdened the exercise of religion [is] necessary to further a compelling state interest").

156 *Sherbert*, 374 U.S. at 404 (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

157 *See id.* at 406.

158 406 U.S. 205 (1972).

159 *Id.* at 214.

160 *Id.* at 220 (citation omitted).

161 494 U.S. 872, 884–85 (1990).

162 *Id.* at 878–79.

163 *See id.* at 882, 878–79.

164 *See id.* at 884–85. Discussing the limited context of the *Sherbert* test, the Court found it explicitly inappropriate for criminal laws. "Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." *Id.* at 884.

The Court also generally rejected the exemption framework for such laws: "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, to 'become a law unto himself'—contradicts both constitutional tradition and common sense."[165]

2. Understanding the Hybrid Rights Doctrine

In an effort to reconcile its previous decisions that granted free exercise exemptions to neutral and generally applicable laws, the Court characterized two situations that would constitute exceptions to its new holding: unemployment compensation and hybrid cases.[166] These situations warrant application of *Sherbert*'s strict scrutiny compelling interest standard due to their distinct nature involving either individualized review of religious beliefs by a government agent[167] or two constitutional rights brought in conjunction.[168] A number of previous holdings evinced that "[t]he only instances where a neutral, generally applicable law had failed to pass constitutional muster . . . were cases in which other constitutional protections were at stake."[169] The First Amendment could warrant exemptions when a free exercise claim accompanied another constitutionally protected right, but the facts of *Smith* presented no such "hybrid situation."[170]

From this distinction, the hybrid rights doctrine emerged. Under an additive theory, the inclusion of a companion claim with a free exercise claim makes for a stronger constitutional claim worthy of strict scrutiny.[171] In other words, the combination of two constitutional rights, not just one alone, will elicit greater protection from the courts.[172] The Court suggested five exemplary constitutional protec-

165 *Id.* at 885 (citation omitted) (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)) (rejecting the compelling interest standard due to the constitutional anomaly of private rights ignoring general laws).

166 *See id.* at 880–83; *see also* Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 630, 633 (2003).

167 *See Smith*, 494 U.S. at 884.

168 *See* Lund, *supra* note 166, at 630.

169 City of Boerne v. Flores, 521 U.S. 507, 513–14 (1997).

170 *See Smith*, 494 U.S. at 881–82 (discussing cases involving free exercise in conjunction with freedom of speech and press or the right of parents to control their child's education).

171 *But see* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 857–58 (2001) (the author acknowledges, though calls into question, the additive theory of hybrid rights).

172 *See* James G. Dwyer, *The Good, The Bad, and The Ugly of* Employment Division v. Smith *for Family Law*, 32 CARDOZO L. REV. 1781, 1785–86 (2011) (discussing the idea that

tions, including "freedom of speech, freedom of the press, the right of parents to direct the education of their children, freedom from compelled expression, and freedom of association."[173] Some of the listed protections reflect earlier Free Exercise Clause cases before the Court, but others were concepts one could "envision."[174] The Court, however, did not restrict the possibility of bringing a hybrid rights claim in combination with any rights not expressly listed.[175]

In the wake of *Smith*, this admittedly controversial hybrid doctrine led to three interpretations by the circuit courts: denial of the doctrine, the minimal requirement of a colorable claim, and the stricter requirement of an independently viable claim.[176] Some courts are entirely unwilling to recognize a hybrid claim, asserting that the doctrine is not binding precedent or is untenable.[177] Other circuits willingly consider and apply the doctrine,[178] but "are also divided on the strength of the independent constitutional right claim that is required to assert a cognizable hybrid rights claim . . . ."[179] Some courts in the latter camp believe the hybrid rights doctrine requires a colora-

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allegedly weaker constitutional rights may constitute a stronger right warranting more protection when conceptualized together rather than alone).

173 Ryan S. Rummage, Comment, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1185 (2015).

174 *Smith*, 494 U.S. at 881–82 ("And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.").

175 *See id.* at 881 (using the language "such as" before listing the five exemplary hybrid claims).

176 *See, e.g.*, Ryan M. Akers, *Begging the High Court for Clarification: Hybrid Rights Under* Employment Division v. Smith, 17 REGENT U. L. REV. 77, 87 (2004).

177 *See, e.g.*, Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 247 (3d Cir. 2008) (calling the hybrid doctrine merely dicta); Knight v. Conn. Dep't. of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (same); Kissinger v. Bd. of Trs., 5 F.3d 177, 180 (6th Cir. 1993) (describing the hybrid claims for strict scrutiny as "completely illogical"); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment) (noting that the *Smith* hybrid rights distinction is "ultimately untenable"); Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 128 (2000).

178 *See, e.g.*, Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1407 (9th Cir. 1992) (discussing circumstances where there is no free exercise clause violation, including if a law "does not implicate another constitutional [right] other than free exercise of religion and thereby give rise to a 'hybrid claim'" (quoting NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1305 (9th Cir. 1991) (amended opinion))); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991) (finding district court's rejection of hybrid claim improper, noting "reversal of the summary judgment orders breathes life back into the Church's 'hybrid rights' claim; thus, the district court should consider this claim").

179 Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 656 (10th Cir. 2006) (rejecting plaintiff's claim because he failed to establish that the companion constitutional claim was sufficiently colorable).

ble claim to prevail, such that two weaker and less sufficient constitutional claims will trigger a compelling interest standard and are more likely to prevail together.[180] Finally, others interpret this doctrine to mean that the companion claim must be strong enough to independently survive summary judgment, outside of the hybrid context.[181]

3. A Response to Smith*: The Religious Freedom Restoration Act*

In 1993, Congress responded to *Smith* with the passage of RFRA,[182] to preserve the previous breadth of religious protection.[183] RFRA was written "(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[184] Where the *Smith* Court found "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability,'"[185] Congress observed that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[186]

Shortly thereafter, the constitutionality of RFRA was challenged in *City of Boerne v. Flores*.[187] Enacted pursuant to the Enforcement Clause of the Fourteenth Amendment, RFRA's original construction had exceptionally wide breadth and universal coverage, applying to all incarnations of both state and federal law.[188] But the Court found that in this breadth, RFRA violated the very clause on which Congress

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180 *See Grace United Methodist Church*, 451 F.3d at 656; Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 49 (2012) ("More formally, consider a claim that a statute violates two provisions of the Constitution, X and Y, where the plaintiff can show that the statute does not serve a compelling state interest under the strict scrutiny test. Although the statute does not violate X or Y individually, it does violate them jointly, and thus would be struck down.").

181 Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995).

182 Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

183 *See id.*

184 *Id.* § 2000bb(b).

185 Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (citations omitted) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

186 42 U.S.C. § 2000bb(a)(2).

187 521 U.S. 507 (1997).

188 *Id.* at 516. The Act included "any 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,' as well as to any 'State, or . . . subdivision of a State.'" *Id.* (alteration in original) (quoting 42 U.S.C. § 2000bb-2(1) (1994) (the original 1994 construction of RFRA)).

relied.[189] Historical applications of the Enforcement Clause indicate it is a strictly remedial power,[190] while RFRA went beyond remedial or preventative legislation to establish a substantive right and determine "what constitutes a constitutional violation."[191] Thus, RFRA's widespread protections were short-lived, as the Court found the Act could not constitutionally modify state law.[192] Although RFRA is still applicable to federal law, *Smith*'s holding remains the Free Exercise Clause standard for all state action.[193]

III. The Open Space After *Gonzales v. Carhart*

While seemingly independent, the three issues of abortion, self-defense, and religion are highly interconnected. These rights directly correspond with religious positions on therapeutic abortion. With state legislatures aggressively challenging abortion standards,[194] recognizing the intersection of abortion, self-defense, and free exercise exemptions is increasingly important.

In light of this political demeanor, the decision in *Gonzales* may have left a key aspect of reproductive rights void of protection.[195] Before *Gonzales*, the Court continuously held that laws restricting abortions are subject to exceptions to preserve the life and health of the mother.[196] However, after *Stenberg*, Congress carefully crafted the language of PBABA to exclude situations only when a woman's life was physically endangered.[197] When addressing the constitutionality of

189 *See id.* at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

190 *Id.* at 519.

191 *Id.* at 519, 532–33 (contrasting RFRA with voting laws designed and implemented where voting discrimination was flagrant and where constitutional violations were most likely).

192 *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 472 (2010).

193 *Id.* at 471–72.

194 *See supra* notes 17–19 and accompanying text. Arkansas provides another example of this trend: in 2013, Arkansas approved an abortion ban twelve weeks after conception that remained on the books for two years until the Eighth Circuit invalidated the law. Bill Chappell, *Federal Appeals Court Blocks Arkansas Ban on Abortion After 12 Weeks*, NPR (May 27, 2015, 10:34 AM), http://www.npr.org/sections/thetwo-way/2015/05/27/409999722/federal-appeals-court-blocks-arkansas-ban-on-abortion-at-12-weeks. In response, the Arkansas legislature approved a bill that prohibits abortion twenty weeks after conception. *Id.*; *see also Abortion Bans Throughout Pregnancy*, NARAL Pro-Choice America, http://www.prochoiceamerica.org/what-is-choice/fast-facts/abortion-bans-after-12-weeks.html (last visited Feb. 27, 2017).

195 *See* Gonzales v. Carhart, 550 U.S. 124, 170–71 (2007) (Ginsburg, J., dissenting).

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

197 *See* 18 U.S.C. § 1531(a) (2012) ("This subsection does not apply to a partial-birth abor-

PBABA, the *Gonzales* Court found this valid.[198] *Gonzales* only addressed partial-birth abortions,[199] but the implications of declaring a law without a health exception facially constitutional are widespread. Because it is arguably unclear whether health exceptions are still required, the Court left open a dangerous space, essentially condoning states to reject a traditional aspect of the constitutional position on abortion.[200]

Several states have done so, contradicting the express requirement of *Roe* and *Casey* that exceptions must be for *both* the life and health of the mother. As of January 1, 2016, twenty-nine state laws lacked health exceptions for certain abortion procedures, permitting abortions only in emergency medical situations or if the mother faces life-threatening physical danger.[201] Florida law prohibits all forms of abortion unless "the termination of the pregnancy is necessary to save the pregnant woman's life or avert a serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman . . . ."[202] The law further requires "a medical necessity for legitimate emergency medical procedures for termination of the pregnancy to save the pregnant woman's life . . . ."[203] Florida's exception expressly excludes psychological or mental health conditions.[204] Similarly, Louisiana limits abortions "to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman."[205] These laws only recognize emergency situations that pose an immediate risk to life. In reality, like PBABA, they provide a

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tion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.").

198 *Gonzales*, 550 U.S. at 163 (2007).

199 *See id.* at 132–33 (discussing the constitutionality of PBABA, which regulated use of certain abortion procedures in later stages of pregnancy).

200 *See id.* at 170–71 (Ginsburg, J., dissenting).

201 *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2159 (2012); FLA. STAT. § 390.0111 (2016), http://www.leg.state.fl.us/statutes/index.cfm?App_mode=display_Statute&Search_String=&URL=0300-0399/0390/Sections/0390.0111.html; LA. STAT. ANN. § 14:87 (2012); MISS. CODE ANN. § 97-3-3 (1972); *see also* NARAL PRO-CHOICE AM., ABORTION BANS ENDANGER WOMEN'S HEALTH 6 (2017), https://www.prochoiceamerica.org/wp-content/uploads/2017/01/2.-Abortion-Bans-Without-Exceptions-Endanger-Womens-Health.pdf ("Of the 30 states with laws on the books banning safe and medically appropriate abortion procedures (so-called 'partial-birth' abortion bans), 29 have absolutely no health exception.").

202 FLA. STAT. § 390.0111(1)(a).

203 *Id.* § 390.0111(1)(b).

204 *Id.* § 390.0111(1)(a).

205 LA. STAT. ANN. § 14:87(B)(3).

limited veil of protection. There is a vast possibility of health risks involved in pregnancy, many of which remain out of the reach of such exceptions.[206] One can imagine a woman with an ongoing medical condition that becomes exacerbated during pregnancy thus putting her health in serious danger, or a pregnant woman who develops health complications that can become problematic later in life, but do not require emergency lifesaving action in the present.[207] For example, consider a woman diagnosed with heart disease while pregnant.[208] She learns that bearing a child and giving birth can lower her life expectancy by ten years due to her condition.[209] If she is diagnosed post-viability in a state that has only life, not health, exceptions, she will have to carry her child to term and face serious impact on her health and life expectancy.

The *Gonzales* holding and the existing limited state exemptions for the life and health of the mother represent more than the waning of a constitutional protection. Together they can implicate religious obligations that are paramount to religious adherents.[210] Regardless of the legal viability of the health of the mother exception, a woman staunchly devoted to the obligations imposed by her religion would stand by the importance of taking action in the event her health were at risk.[211] Recognizing therapeutic abortions as a religious obligation provides an alternative argument to preserve the *Roe* and *Casey* right to abortions for both the life and health of a pregnant woman.

IV. Viewing Abortion Exceptions for Life and Health as a Hybrid Rights Claim

In light of the interrelated nature of abortion, self-defense, and free exercise, a hybrid rights claim provides a solution in support of therapeutic abortions. After the free exercise decision in *Smith*, it seemed that religious rights and obligations lost efficacy to provide

206 Office on Women's Health, U.S. Dep't of Health & Human Servs., *Pregnancy*, Womens health.gov, http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html (last updated Feb. 1, 2017) (providing an expansive list including pre-pregnancy problems exacerbated by pregnancy like high blood pressure, seizure disorders, depression, and thyroid disease; problems that result from pregnancy like anemia, preeclampsia, and gestational diabetes; and infections resulting from pregnancy including hepatitis B and influenza).

207 *See* NARAL Pro-Choice Am., *supra* note 201, at 3 ("Without health exceptions, women who have high-risk pregnancies would be forced to continue the pregnancy at the expense of their own health and sometimes lives.").

208 *Id.*

209 *Id.*

210 *See supra* Part I.

211 *See supra* Part I.

exemptions for religious observers.[212] Although the Court expressly declared that it no longer intended to provide exemptions for neutral laws of general applicability, certain situations still warrant higher scrutiny.[213] Although doubt is cast on the strength of this doctrine,[214] the hybrid case was one of the two key features the Court relied on to distinguish earlier cases that evoked the *Sherbert* strict scrutiny test.[215] Based on this distinction, when a hybrid rights claim is successfully established, the interest is subject to strict scrutiny.[216]

A. Building a Hybrid: A Religious Obligation and Companion Constitutional Claim

A situation involving a hybrid claim combines a free exercise right and another right, building a claim against some government conduct "threaten[ing] not only free exercise rights, but other constitutional rights as well."[217] Courts require this additional claim be "recognized and specific"[218] or receive "express constitutional protection[ ]."[219] The nature of the hybrid claim warrants a fact-driven, case-by-case determination.[220] Justice Scalia referenced *Yoder* as an example of a successful hybrid claim.[221] *Yoder* involved religious exercise plus the parental right to control a child's education.[222] A claimant can build a viable hybrid rights argument on free exercise plus political expression and association or free speech,[223] or excessive

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212 *See supra* note 165 and accompanying text.

213 *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881–82, 885 (1990) (rejecting the exemption framework for generally applicable laws, but recognizing the unique nature of hybrid cases and situations of review by a government agent demanding strict scrutiny).

214 *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case.").

215 *See Smith*, 494 U.S. at 882.

216 *See* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1031 (9th Cir. 2004); Miller v. Reed, 176 F.3d 1202, 1207–08 (9th Cir. 1999); Hinrichs v. Whitburn, 772 F. Supp. 423, 432 (W.D. Wis. 1991).

217 Case Comment, *Religious Exemptions from Generally Applicable Laws*, 104 HARV. L. REV. 198, 205 (1990); *see Smith*, 494 U.S. at 881.

218 Swanson *ex rel* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998).

219 Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1992).

220 Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004).

221 *See Smith*, 494 U.S. at 881.

222 *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972).

223 *See* United States v. Hsia, 24 F. Supp. 2d 33, 46 (D.D.C. 1998), *reconsideration denied*, 24 F. Supp. 2d 63 (D.D.C. 1998), *rev'd in part on other grounds, appeal dismissed in part*, 176

entanglement under the Establishment Clause.[224] On the other hand, a general and loosely asserted right, like the right to employ or travel, fails to pass muster.[225]

Religious exercise and the right of self-defense form a compelling hybrid to protect women's reproductive rights. The free exercise basis of the claim is the religious obligation to have an abortion in the event the life or health of the mother is at risk.[226] The companion claim is the right of self-defense,[227] which is both a fundamental and constitutionally protected right at the foundation of the due process right to bear arms.[228] Here, a therapeutic abortion would be an act of self-defense, either for self-preservation or the relative safety of the mother.[229] As previously explored, self-defense is a popular argument in support of a woman's right to abort a fetus to protect her own life.[230]

This claim has salience regardless of how a court interprets the hybrid rights doctrine. The depth of discussion in *Heller* and *McDonald* supporting the right to self-defense, the long-standing use of self-defense for situations of serious bodily injury or death, and the arguments for therapeutic abortion for self-defense evidence the strength of this right to stand independently or within a hybrid claim.[231] Even under the stricter interpretation requiring the companion claim be independently viable, not merely colorable, the proposed hybrid would survive summary judgment.[232]

F.3d 517 (D.C. Cir. 1999) (political expression and association); First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 181–82 (Wash. 1992) (free speech).

224 EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) ("[T]he EEOC's attempt to enforce Title VII would both burden Catholic University's right of free exercise and excessively entangle the Government in religion. As a consequence, this case presents the kind of 'hybrid situation' referred to in *Smith* that permits us to find a violation of the Free Exercise Clause . . . .").

225 Miller v. Reed, 176 F.3d 1202, 1208 (9th Cir. 1999) (right to drive or travel); Am. Friends Serv. Comm. Corp. v. Thornburgh, 961 F.2d 1405, 1408 (9th Cir. 1992) (right to hire or employ).

226 *See supra* Part I.

227 *See supra* Section II.B.1.

228 *See* McDonald v. City of Chicago, 561 U.S. 742, 744–45 (2010) (recognizing the *Heller* Court's conclusion that self-defense is a basic right that is deeply rooted in the country's history and tradition).

229 *See supra* Section II.B.2.

230 *See supra* notes 111–16 and accompanying text.

231 *See supra* Section II.B.2.

232 *Compare* Swanson *ex rel.* Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) ("At a minimum . . . it cannot be true that a plaintiff can simply invoke the parental rights doctrine [and] combine it with a claimed free-exercise right . . . . [W]e believe that

Others have contemplated a hybrid rights claim for reproductive rights.[233] Combining a woman's religious beliefs that prohibit certain medical procedures and her Fourteenth Amendment privacy and liberty interest to refuse life-saving medical treatment, a woman could likewise retain the right to receive a therapeutic abortion for religious reasons.[234] This argument finds support in several state court cases, demonstrating the viability of a hybrid claim in the realm of reproductive rights.[235]

B. Protecting the Life and Heath Exception: Applying Strict Scrutiny to the Free Exercise and Self-Defense Hybrid Claim

A hybrid rights claim combining free exercise and self-defense provides salience for the rights of a religious woman whose life or health is threatened by pregnancy. With a successfully pled hybrid claim and the benefits of strict scrutiny review,[236] a mother's right would likely prevail, demanding a religious exemption to an abortion law lacking its own proper exception. Strict scrutiny review under free exercise "asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."[237]

First, a law without a therapeutic abortion exception places a burden on a mother's ability to freely exercise her religion. A woman can first demonstrate a substantial burden by demonstrating a conflict exists between faith and some obligation or prohibition imposed by law.[238] The burden from these laws impedes the observance of religion.[239] The Court has recognized that interference with religious activities is not enough to qualify as a burden; rather, a claim for an exemption should be based on some "specific doctrinal obligation."[240] For example, in *United States v. Lee*,[241] the Court found claimants pled

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it at least requires a colorable showing of infringement . . . ."), *with supra* note 181 and accompanying text.

233 April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 614–15 (2002).

234 *Id.*

235 *See infra* Section IV.B.

236 *See supra* note 216 and accompanying text.

237 Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989).

238 *See* United States v. Lee, 455 U.S. 252, 257 (1982).

239 *C.f.* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (quoting Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

240 *See Hernandez*, 490 U.S. at 699–700.

241 455 U.S. 252, 257 (1982).

a sufficient burden when members of the Amish sect argued paying taxes towards social security conflicted with the Amish obligation to support community members—under their beliefs, failure to do so is a sin.[242] In *Sherbert*, the Court found a burden when the appellant was denied unemployment benefits based on her refusal to work on Saturdays, because this objection was grounded in religious principles founded in Seventh-Day Adventist tenets and biblical interpretations prohibiting work on Saturday.[243]

The proposed hybrid claim here asserts that it is a burden on religious exercise based on the woman's *duty* to act for her own life as grounded in her religious beliefs.[244] The religious interest here involves obligations and ideologies found in religious texts and inherent tenets related to the importance of health, obligations to preserve one's life, and even text that explicitly mandates abortion in the event a mother's life is at risk.[245] As Judaism demonstrates, this obligation to preserve one's health is one of the most paramount obligations of Jewish law.[246] When a woman's health is at risk, to deny her access to abortion places a burden on her doctrinal obligations, and thus religious exercise.

Next, the state's interest, though compelling, cannot overcome the mother's interest in both self-defense and religious exercise. Here, the state has an evident compelling interest in the mother's life and potential fetal life.[247] Although the interest in life is legitimate, religious obligations can overcome this interest permitting individuals to refuse medical treatment.[248] "When a competent adult declines medical treatment on religious grounds, the Court is obligated to respect this decision, even in a life or death situation, unless the state can 'demonstrate a compelling interest that would justify overriding the individual's choice.'"[249] For example, the same issue arises in the case of a Jehovah's Witness, who is prohibited from accepting blood products and transfusions because it is a form of cannibalism or "eating

242 *Id.* at 255, 257, 260 (finding, despite the claimant's alleged religious burden, the government's interest was sufficiently compelling to outweigh that burden).

243 *Sherbert*, 374 U.S. at 399 n.1, 403.

244 *See supra* Part I.

245 *See supra* Part I.

246 *See supra* notes 36–40 and accompanying text.

247 Roe v. Wade, 410 U.S 113, 162 (1973).

248 *See, e.g.*, Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319, 1326 (Ill. App. Ct. 1986), *cert. denied*, 479 U.S. 915 (1986) ("[A] competent adult has the right under the first amendment to refuse medical treatment when it conflicts with his religious beliefs.").

249 *In re* A.C., 573 A.2d 1235, 1261 (D.C. 1990) (quoting *In re* Boyd, 403 A.2d 744, 748 (D.C. 1979)).

blood"—a sin against God according to the language of Genesis, Leviticus, and Deuteronomy.[250] In a case before the Illinois Supreme Court, *In re Estate of Brooks*,[251] the court found that requiring a Jehovah's Witness to receive a blood transfusion was in effect "a governmental agency compelling conduct offensive to [one's] religious principles."[252] Relying on Supreme Court precedent that underscored the absolute nature of religious freedom, the court reasoned that absent a danger to society, the state could not compel a practice so forbidden and contrary to her religious obligations and ideals.[253]

The same rationale has been used to grant religious exemptions and allow a pregnant woman to refuse medical treatment, even when necessary for the life of the fetus.[254] In these circumstances, when a procedure (such as a transfusion or C-section) is medically necessary to save a baby, some state courts have recognized that a woman retains the inherent right to determine what to do with her body.[255] Courts also respect a right of refusal on religious grounds.[256] A woman is thus permitted to deny medical treatment because she cannot be forced to comply with conduct forbidden by her faith.[257] For instance, the Appellate Court of Illinois recognized that during pregnancy "[t]he woman retains the same right to refuse invasive treatment, even of lifesaving or other beneficial nature, that she can exercise when she is not pregnant."[258] The court emphasized Illinois state precedent, which "rejected the view that the woman's rights can be subordinated to fetal rights."[259] Although this view is not widely embraced, cases in

250 *See In re* Estate of Brooks, 205 N.E.2d 435, 437 (Ill. 1965); Cherry, *supra* note 233, at 565–66 n.13 (2002).

251 205 N.E.2d 435 (Ill. 1965).

252 *Id.* at 442.

253 *Id.*

254 *See generally* Cherry, *supra* note 233, at 563–66.

255 *See, e.g.*, Taft v. Taft, 446 N.E.2d 395, 397 (Mass. 1983) (finding a pregnant woman need not submit to an operation required to maintain her pregnancy).

256 *See id.* (noting that the religious beliefs that the operation should not be performed were also implicated and her constitutional rights could not be curtailed); *see also* Cherry, *supra* note 233, at 615 (discussing *In re* Baby Boy Doe, 632 N.E.2d. 326, 335 (Ill. App. Ct. 1994)); Lidia Hoffman & Monica K. Miller, *Inconsistent State Court Rulings Concerning Pregnancy-Related Behaviors*, 22 J.L. & HEALTH 279, 284–85 (2009) (citing contrasting state court decisions addressing a pregnant woman's refusal of medical treatment).

257 Cherry, *supra* note 233, at 584, 590–91. Cherry discusses several cases here, including two Supreme Court cases, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 261–63 (1990), both of which supported the right to refuse medical treatment. *See* Cherry, supra note 233, at 584, 590–91.

258 *Baby Boy Doe*, 632 N.E.2d at 332.

259 *Id.* at 332; *see also* Stallman v. Youngquist, 531 N.E.2d 355, 359 (Ill. 1988) (discussing the belief that a woman's rights to control her life becomes subordinate to fetus when she becomes

Massachusetts, the District of Columbia, Illinois, and other states exhibit it is a strong logical argument with merit.[260]

Under the proposed hybrid analysis, state court holdings granting religious exemptions demonstrate that the compelling interest of the state cannot necessarily withstand strict scrutiny. Permitting a woman to refuse medical treatment necessary for the life of the fetus on religious grounds is analogous to a woman's choice or religious obligation to have a therapeutic abortion. The hybrid claim also involves a woman's interest to elect, not refuse, a procedure that would save, not harm, her own life for religious reasons. The state's compelling interest in fetal life cannot overcome a woman's combined interests in her own health and right to free exercise. The Court already recognizes that states retain an interest in a woman's health when considering the safety of abortion procedures.[261] Given its interest in maternal health, the state cannot utilize its competing interest in fetal life to overcome a woman's fundamental right to self-defense.[262] Moreover, in the cases described above, permitting a woman to refuse medically necessary treatment had a more dramatic result. Courts consciously gave religious adherents the right to harm their own lives or even cause de facto abortions in the exercise of their religious beliefs.[263] free exercise claims, on their own, overcame the state's interest in life.[264] A woman's free exercise and self-defense claims, together, can overcome the interest in fetal life.

The religious right to an abortion for the life and health of the mother may find constitutional protection as a hybrid claim. If afforded higher protection under strict scrutiny, the hybrid claim would prevail and women would be entitled to health exceptions from re-

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pregnant, noting "[w]hile such a view is consistent with the recognition of a fetus' having rights which are superior to those of its mother, such is not and cannot be the law of this State").

260 *Compare, e.g.*, *In re* A.C., 573 A.2d 1235, 1261 (D.C. 1990) (quoting *In re* Boyd, 403 A.2d 744, 748 (D.C. 1979)), *In re* Estate of Brooks, 205 N.E.2d 435, 442 (Ill. 1965), Baumgartner v. First Church of Christ, Scientist, 490 N.E.2d 1319, 1326 (Ill. App. 1986), *and Taft*, 446 N.E.2d at 397, *with* Jefferson v. Griffin Spalding Cty. Hosp. Auth., 274 S.E.2d 457, 460 (Ga. 1981) (finding the state's interest in fetal life outweighs the mother's refusal of Caesarean section on religious grounds), *and* Crouse-Irving Mem'l Hosp., Inc. v. Paddock, 485 N.Y.S.2d 443, 445 (N.Y. Sup. Ct. 1985) (authorizing the hospital to give blood transfusions to save the baby's life despite religious objections).

261 Roe v. Wade, 410 U.S 113, 162 (1973).

262 Giles, *supra* note 108, at 536 ("The state's interest in viable fetal life can override the woman's liberty to choose an abortion but cannot override her traditional right to self-preservation. . . . [A] woman's right to self-preservation can plausibly be deemed so fundamental that it overcomes the state's otherwise compelling interest . . . .").

263 *See Baby Boy Doe*, 632 N.E.2d at 332, 334; *Taft*, 446 N.E.2d at 397.

264 *See supra* note 263.

strictive laws with only life exceptions. Therefore, strict scrutiny consideration of the hybrid will successfully protect the religious rights of the mother.

C. Expanding the Scope of Protection: Health v. Life Exceptions

To exclude a life exception in an abortion law would be a radical legislative decision. State laws that contain only "life" exceptions pose the greatest and most realistic danger to women's right to a therapeutic abortion.[265] Laws without exceptions for health complications, like PBABA in *Gonzales*, fail to recognize the wide variety of medical issues that can arise through pregnancy and do not provide adequate avenues of recourse and protection for those issues.[266] The foregoing hybrid rights proposal is not limited to emergency or life-threatening danger. A hybrid rights claim provides a vehicle by which women can claim a religious exemption to receive an abortion for health risks during pregnancy. Both prongs of the hybrid, religion and self-defense, protect a woman's right to a therapeutic abortion in non-life-threatening situations. The case study on Judaism exhibits that a religious doctrine can create an affirmative duty for a woman to always care for her own body and health.[267] The duty of self-care extends beyond immediate threats to life.[268]

The relative-safety approach to abortion further demonstrates that abortion for a woman's health, not merely life-threatening physical conditions, is plausible under the Court's precedent.[269] The Court's willingness to interpret health and health exceptions broadly supports a hybrid based on relative self-defense, short of life-threatening emergency conditions.[270] *Bolton* and *Vuitch* grant generous protection to health, including any factor related to a woman's well-being, including her mental health.[271] Therefore, this hybrid provides a challenge to restrictive abortion laws with exceptions only for life or serious physical impairment. A pregnant woman would be afforded an exemption to act on behalf of her mental health, the countless health risks that arise during pregnancy, or conditions exacerbated by pregnancy. Strict scrutiny would be applied to this hybrid in the same manner addressed

265 *See supra* notes 201–08 and accompanying text.

266 *See supra* note 197 and accompanying text.

267 *See supra* notes 36–40 and accompanying text.

268 *See supra* notes 36–40 and accompanying text.

269 *See supra* notes 124–32.

270 *See supra* notes 128–32 and accompanying text.

271 *See supra* notes 128–32 and accompanying text.

above.[272] Once again, the state's interest would likely fail in comparison to the woman's compelling hybrid claim.[273] The potential benefit of this claim is far-reaching.

V. Exploring the Limits of the Hybrid Claim and Future Considerations

The foregoing proposal offers a new way to conceptualize religious rights and abortion, evoking a few notable counterarguments and issues. While none of these counterarguments are fatal to this theory, they provide additional considerations for the scope of its application.

A. Criticism of the Hybrid Rights Doctrine: Dicta or Constitutional Holding?

Undeniably, the hybrid rights doctrine has faced a great deal of question and attack.[274] Some courts describe it as mere nonbinding dicta.[275] Others view it as an "expedient created by Justice Scalia to preserve the Court's prior jurisprudence, and thus garner the necessary votes to sustain the general *Smith* rule . . . ."[276] Characterizing the hybrid rights doctrine in such a manner is not fatal. The hybrid rights doctrine may still stand even if the doctrine is recognized as dicta.[277]

RFRA provides yet another solution. Following *Smith*, RFRA was intended to preserve *Sherbert*'s strict scrutiny test for Free Exercise Clause claims.[278] Although *Flores* severely limited RFRA's impact,[279] its scope was not entirely lost. The Act is still applicable to the federal government and all agencies, and several states have enacted

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272 *See supra* Section IV.B.

273 *See supra* Section IV.B.

274 *See supra* note 177; *see also* Robin Cheryl Miller, Annotation, *What Constitutes "Hybrid Rights" Claim Under* Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 163 A.L.R. Fed. 493, § 2[a] (2000) (noting that many believe this doctrine is "illogical and untenable").

275 *See* Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 244 (3d Cir. 2008) ("[T]he Second and Sixth Circuits have concluded the hybrid-rights language in *Smith* is dicta."); Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) (describing the "language relating to hybrid claims" as "dicta and not binding on this court").

276 Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 Penn St. L. Rev. 573, 600 (2003).

277 *See, e.g.*, Gary Lawson, Federal Administrative Law 543 (7th ed. 2016) (noting dicta in an earlier case on the D.C. Circuit Court of Appeals became settled law in the D.C. Circuit).

278 *See supra* Section II.C.3.

279 *See supra* note 189 and accompanying text.

their own state RFRAs.[280] A federal abortion law lacking a life and health exception or a similarly restrictive state law would still be subject to strict scrutiny under RFRA or an analogous state RFRA. And once again under strict scrutiny, such laws would demand exemptions.[281]

B. Lawful Self-Defense: Innocence and Proportionality

Two notable issues arise regarding the claim of self-defense. One objection begs whether "the innocence of the fetus creates wrinkles in [a] self-defense analogy,"[282] specifically due to its nature as an involuntary actor.[283] But two factors overcome this argument. First, if the life or health of the mother is at risk, one can counter that the fetus is in fact not innocent at all due to the danger the fetus poses to the life of the mother. Conversely, if one still views the fetus as an innocent actor, the right of self-defense does not necessarily limit the use of deadly force.[284] The Model Penal Code permits use of force against an innocent aggressor, only requiring that the aggressor make use of unlawful force against a potential victim.[285] Similarly, the Restatement of Torts does not foreclose the possibility that one can take action in self-defense against an innocent person.[286] Innocence does not automatically foreclose the strength of this hybrid.

Another objection is the requirement of proportionality under a classic self-defense claim.[287] Proportionality casts doubt on whether a woman can be justified in killing a fetus for her own health, not only to save her life. In this situation, a strict approach to proportionality demands that to protect herself, a woman must choose either to disproportionately harm another or to suffer harm herself because she cannot find a perfectly proportionate response. Self-defense, however, requires proportionality based on what a person reasonably believes is a threat of physical harm and what will reasonably protect her from

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280 *See generally* Lund, *supra* note 192, at 472–74 (noting that the Court prohibited the applicability of RFRA to state law in *Flores* and later asserted its applicability to federal law, leaving states to enact analogous versions of the statute).

281 *See supra* Section IV.B.

282 Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 107 (1997) (citing Donald H. Regan, *supra* note 108, at 1612).

283 *See* Giles, *supra* note 108, at 537.

284 *Id.* at 537–38, 538 n.57.

285 *Id.* at 538 n.57.

286 RESTATEMENT (SECOND) OF TORTS § 66 reporter's notes (AM. LAW INST. 1965) ("The Institute expresses no opinion as to whether there is a similar privilege of self-defense against conduct which the actor recognizes, or should recognize, to be entirely innocent.").

287 *See* Nourse, *supra* note 117, at 1239.

that harm.[288] A pregnant woman who is faced with some health risk might not know the long-term consequences at the moment, but could reasonably believe, in the height of the situation, that her response is appropriate.

C. Questioning Religion and Religious Authority

Another consideration examines the validity of a woman's religious beliefs. The Court has a long-standing tradition of respecting the asserted religious beliefs of a group: "It is not within 'the judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of . . . faith; '[c]ourts are not arbiters of scriptural interpretation.'"[289] Religion and religious beliefs are not subject to inquiry by government in any respect, so it is not within the purview of a court to doubt the legitimacy of a religious obligation.[290] Despite this breadth of respect for religious beliefs, a valid religious objection still requires an individual demonstrate an honest and sincere conviction.[291] Admittedly, the sincerity, coupled with the burden requirement, means that a limited class of women can argue that their religious denomination requires therapeutic abortions. But provided the claimant can demonstrate her belief is a sincerely held one, a court is still not permitted to question its logic or validity.[292] Additionally, a statutory scheme could be enacted with abortion laws requiring one swear under oath or sign under penalty of perjury that she relied on her religious beliefs in making her religious claim. Casting doubt on the veracity of religious assertions does not discredit the strength of this proposal.

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288 Brown v. United States, 256 U.S. 335, 343 (1921) ("Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense. That has been the decision of this Court."); *see also* United States v. Davis, 237 F.3d 942, 945 (8th Cir. 2001).

289 United States v. Lee, 455 U.S. 252, 257 (1982) (alteration of imbedded quotation in original) (quoting Thomas v. Review Bd., 450 U.S. 707, 716 (1981)) (accepting the contention that paying taxes and receiving social security benefits violates Amish law and is forbidden by their beliefs).

290 *See supra* note 144 and accompanying text.

291 *See Thomas*, 450 U.S. at 715 ("One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause . . . .").

292 *Id.* at 715–16.

Conclusion

To religious adherents, the obligations of their religion can take on the force of law. To frustrate these obligations is a violation of the Free Exercise Clause.[293] Access to therapeutic abortions is a reproductive right, a self-defense right, and can also be a religious obligation. This proposal, combining broad, philosophical concepts, is a theoretical one. In reality, however, it could provide salience to the religious rights of pregnant women. Facing the radical political landscape of states attempting to push against the established Supreme Court abortion standards,[294] as well as the unclear open space that resulted from the *Gonzales* decision,[295] a woman's access to abortion in particular circumstances cannot be considered absolute. The greatest dangers women face in their access to post-viability abortions are the limited health exceptions in abortion laws.[296]

"Judicial intervention in pregnancy [can] deprive women of their most basic civil rights and threaten their recognition as competent individuals with the ability to make their own treatment decisions."[297] Yet deference to a woman's constitutional interests under strict scrutiny judicial review protects these basic rights. The creation of a hybrid rights claim provides the vehicle for strict scrutiny review and, hopefully, exemptions for pregnant women. A woman's religious right or duty to have a therapeutic abortion is the free exercise claim.[298] Her fundamental right to self-defense is the companion constitutional claim.[299] Together, these rights can overcome the state's interest in fetal life.[300] Arguably, most states would not exclude life exceptions, restricting a woman's right to an abortion if her life is immediately in danger. This hybrid applies more broadly to laws without generalized health exceptions.[301] The broad interpretation of health and a relative-safety theory allows a woman to act on behalf of her health, short of life-and-death necessity.[302] Although this proposal may have limited applicability based on a woman's ability to establish the sincerity of her religious burden and obligation, the argument is still tenable.

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293 *See supra* note 144 and accompanying text.
294 *See supra* notes 15–19 and accompanying text.
295 *See supra* Part III.
296 *Supra* note 201–06 and accompanying text.
297 Hoffman & Miller, *supra* note 256, at 289.
298 *See supra* Part I.
299 *See supra* Section II.B.
300 *See supra* Section IV.B.
301 *See supra* Section IV.C.
302 *See supra* notes 270, 273 and accompanying text.

Through this hybrid claim, a pregnant woman bolstered by her religious beliefs can hopefully preserve her rights against restrictive and draconian abortion laws. The right to act for one's life and health is protected under the Due Process Clause, self-defense, and religious doctrinal teachings. And in combination, it can remain so.