

## **Don't Fight the Phony Wars** The US Exportation of Gender Inequality

### **Gonzales and the Implications of US Reproductive Rights Policy Abroad**

Over the last thirty years the United States Supreme Court, while paying lip service to advancing women's equality, has simultaneously radically redefined what constitutes sex discrimination by excluding all laws based on physical differences from the jurisprudence of "equality"—mainly those dealing with pregnancy and abortion. The recent Gonzales decision is yet another blow to the equality rights of women living in the United States as well as abroad. It is imperative that we find the political will to repudiate this twisted definition of women's equality, which embeds rather than rejects the "biology is destiny" stereotype. We need the United States to lead, or at least join the global movement for women's equality under law—not undermine it, or worse, export this false version of women's equality to other regions of the world.

### **The Gonzales Opinion: Embedding Women's Inequality into the Constitution**

The Supreme Court's 5-4 decision in *Gonzales v. Carhart* makes clear that *Roe v. Wade* is not only dead, but that women's rights are even further determined by "morals" legislation than ever before. This kind of restriction on women's access to potentially life-saving reproductive health services is one that promotes "respect for unborn life" even at the expense of a woman's dignity, autonomy, conscience, health, and rights.

#### **What was the Gonzales decision?**

By 5-4 in *Gonzales*, the Supreme Court upheld the Partial Birth Abortion Ban Act of 2003, directly reversing its precedent in 2002 which struck down a similar law in *Carhart v. Stenberg* because it had no health exception. The Court held the ban on this one procedure, even if it does not stop abortions, because the banned procedure "devalues human life."

#### **What are the implications of Gonzales?**

This decision is a serious blow to all equality precedents, and opens the door to even more criminal laws regulating reproductive rights on theological, ideological and/or moral grounds.

- 1) This law, effective in all states, applies to abortions at any stage of pregnancy, although the discussion focuses on one procedure which is after 12 weeks.
- 2) The Federal ban is a criminal statute which carries with it up to a two year prison term for the doctor. The woman cannot be held criminally liable even as an accomplice.
- 3) The Ban also gives rights civilly (not addressed by court) to maternal grandparents and/or husbands to sue the doctors for damages so long as they did not consent to the abortion—regardless if the pregnancy was the product of rape, if a serious anomaly existed in the fetus, or if it is past viability.
- 4) This decision opens the door for states to reenact the bans found unconstitutional under *Stenberg*, such as the Wisconsin PBA Ban with the penalty of life imprisonment for the doctor.
- 5) The state only has to show that the law is "rational" and "marginal safety" concerns should not block its goal of respecting unborn life.

### Four Pillars of *Roe*

#### How a Fundamental Constitutional Right Was Dismantled

<i>Roe v. Wade</i> 1973	Strict scrutiny	Government neutrality	Viability line	Women's life and health always paramount
<i>Harris v. McRae</i> 1980	Upheld Hyde amendment; a funding program does not affect any rights	No, with funding can promote child birth		No
<i>Planned Parenthood v. Casey</i> 1992	Undue burden	State can favor childbirth over abortion, reversed Akron & Thornberg	Yes	Yes
<i>Stenberg v. Carhart</i> 2000	Undue burden			Yes
<i>Ayotte v. Planned Parenthood</i> 2006	Undue burden			Yes
<i>Gonzales v. Carhart</i> 2007	Rational basis review	Must let government express opposition to abortion, promote moral vision of life, and protect women from themselves	No	No, questions of marginal risks for a woman not relevant under a rational basis scrutiny

### Implications of *Gonzales* Abroad: Don't Fight the Phony Wars

We are at a critical juncture in the fight for establishing legal rights for women worldwide. The watered-down definitions of sex discrimination our Supreme Court has developed are pernicious precedents, both at odds with and a threat to evolving global standards for women's rights. Currently, there are some ongoing "phony wars" for women's rights which are starting out with rights so compromised that winning them would be worse than losing.

### PHONY WAR #1: The Federal ERA

Forget about any move to resuscitate the Federal ERA. It is so riddled with political baggage that it is better to sink it once and for all. The federal ERA deliberately excludes laws based on physical differences, mainly pregnancy and abortion, from the ambit of laws to be considered factually discriminatory. In fact, even without having been ratified, this limited understanding of equality in

the ERA was used to frame the first Supreme Court decision finding discrimination against pregnant women was not sex discrimination (Geduldig 1974).

You might ask, why not just amend the federal ERA to make it clear it covers physical differences like pregnancy? Well, it is too late for this ERA because too many states ratified it based on the clear statements by its proponents it would not apply to any abortion restrictions. If the ERA was ratified tomorrow we would be tied up in courts endlessly arguing about the legal relevance of its convoluted legislative history.

Any constitutional protection of gender equality and prohibitions against sex discrimination must accept without question that legal restrictions on a woman's ability to control decisions around pregnancy and abortion are sex-based classifications and violate basic human rights, *specifically the human right to be free from discrimination.*

### PHONY WAR #2: The US Ratification of CEDAW

The US version of CEDAW is not worth ratifying. To date 185 countries have ratified the treaty called "the international bill of rights for women" officially, the Convention for Elimination of all Forms of Discrimination against Women or CEDAW. Although the United States signed CEDAW in 1980, it was not until 2002 that the Senate Foreign Relations Committee voted to approve after hearings which imposed a bundle of "conditions and understandings" on CEDAW. This US version, CEDAW "lite" or CEDAW "lie" as I call it, has so limited the scope of equality rights that it could undermine rather than further women's rights globally.

The U.S. CEDAW conditions include an anti-abortion "understanding" sponsored by Senator Helms in 1994 which states:

*"nothing in this Convention shall be construed to reflect or create any right to abortion and in no case should abortion be promoted as a method of family planning."*

Already, Senator Barbara Boxer testified that CEDAW "has nothing to do with abortion"; Rep Carolyn Maloney testified to the Senate that "the CEDAW treaty has been identified as abortion-neutral by the State Department, Senator Helms lead the way in making this explicit". Over 180 groups have joined this chorus, including the American Bar Association.

Now, you might ask, what is wrong with that, what exactly does it do? Although these phrases may sound neutral—or even benign—they most decidedly are not. In fact, the language strikes at the central premise—and promise—of CEDAW which is the promise of full equality. Under CEDAW, all laws must be given the strictest scrutiny as to whether they act to impede women's rights to full citizenship and dignity. If any law fails this test, women have the right to have it invalidated as sex discriminatory.

Yet the U.S. version would exclude abortion, and *only* abortion from even this scrutiny. The phrase "abortion as a method of family planning" is a euphemism which has a legal definition that would mean CEDAW supports criminal abortion laws with the exception of those few for life, rape and incest. This is a replay of the entire ERA debacle *only worse*, because this U.S. anti-abortion interpretation of CEDAW is at odds with developing jurisprudence globally. The UN treaty monitoring bodies have repeatedly held countries responsible under both CEDAW and the ICCPR for the harms ensuing to women from restrictive abortion laws.

On May 10, 2006 the Constitutional Court in Colombia struck down Colombia's criminal abortion law on the ground it violated women's rights under a "bundle" of laws, with CEDAW at the centerpiece. The Court's language is noteworthy:

*"Sexual and reproductive rights also emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings and a step forward in humanity's advancement towards social justice."*

Proponents of CEDAW in the US vigorously deny that CEDAW could ever be what I think it could be—our strongest legal tool for women to fight abortion restrictions and redefine equality.

### PHONY WAR #3: "Roe v Wade" as it stands today is no right to fight for

"SAVE ROE!" What Roe? The political bandwagon supporting politicians who pledge to "save Roe," is meaningless without more. The constitutional protections Roe have been so chipped away over thirty years that in no way is the abortion choice a fundamental constitutional right in law or in fact. The legal standard is not only weak but actually encourages discriminatory, humiliating laws which reinforce stereotypes. Our Supreme Court jurisprudence on privacy in 2007 singles out women seeking abortions and permits the law to "burden" her but not "unduly". This strategic legal standard -undue burden- is one which gives less judicial scrutiny to criminal laws imposed on women seeking abortions than it gives laws regulating trucking under the Commerce Clause. In fact, over three hundred state criminal laws restricting various aspects of abortion that would have been invalid under the 1973 Roe decision are now "constitutional" under our 2007 "Roe". Yet, what politicians are out there pledging to restore full abortion decisional rights, equal funding, and elimination of restrictions on teenagers?

### PHONY WAR #3: The Global Gag Rule

The global censorship of abortion speech orchestrated by the United States, has fully saturated the U.N. and reaches inside over 170 countries. There are two restrictions, but only one has been subject to criticism, the gag rule. Under the gag rule over 400 nonprofit groups world wide will loose all U.S. health and democracy grants if they discuss abortion, even with their own funds. Women's groups in Iran are freer to discuss abortion (and their law has been liberalized) than women in Iraq where USAID money to women's groups preclude them from legal or public health discussions regarding abortion law. However pernicious this gag rule is, however, its repeal would not stop the problem. We must kill the virus which foments it, the Helms amendment. The 1973 Helms Amendment to the FAA prohibits US funding of any abortion services or speech except in cases of life or rape or incest. Although such funding is allowed in those cases the U.S. has never permitted it. For example, right now we could help the women in Sudan who suffer rape and forced pregnancy as war crimes. Abortion in the case of rape is *legal* in the Sudan, it is *legal* under Helms, but who is speaking up for this medical service to survivors? The Helms censorship has meant that all U.N. agencies now follow its strictures. UNFPA alone imposes censorship on abortion speech in all its projects, ones funded by some 171 donor countries totaling over \$350 million annually.

### Conclusion: Reproductive Justice is Global Justice

No one gains rights by calling them something else or watering them down. We can all make our way to pursue the same ends in different ways, but we cannot achieve any goal unless the true goal—in this case true reproductive rights for all of the world's women—becomes part of our present day conversation. The United States has lost its moral authority as a model of the rule of law. We must seek to regain that authority by actions not words, starting by affirming that gender justice, reproductive justice and Global Justice are inseparable. And that such global justice starts at home, right here, right now.