THE VIABILITY OF CHANGE: FINDING ABORTION IN EQUALITY AFTER *OBERGEFELL*

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Until the U.S. Supreme Court's decision in Obergefell v. Hodges*, the doctrine surrounding the Equal Protection and Due Process Clauses of the Fourteenth Amendment indicated two clearly distinct clauses. As the literature explains, that distinction seems to explain the Court's rationale in prior landmark cases grounding previously unrecognized constitutional rights in due process. Pertinent here, the Court's desire to use history to support its holding that the Fourteenth Amendment protects the right to abortion explains why the Court, in its landmark decision in* Roe v. Wade*, relied on the Due Process Clause as the source of the right.*

However, since the Court's decision in Roe*, scholars have debated whether the Equal Protection Clause would have provided a more appropriate rationale for determining that the Constitution protects the right to choose. Also since* Roe*, the Court has continuously debated the proper framework for reviewing abortion legislation. As abortion remains at the forefront of national debate and on the Court's docket, it is likely that providing new routes, especially more sound ones, to protecting the constitutional right to abortion is now more critical than ever.*

This Article explains how Justice Kennedy's majority opinion in Obergefell *significantly changed the relationship between the Due Process and Equal Protection Clauses of the Fourteenth Amendment. After that decision, the two clauses are not so distinct, but rather operate cooperatively. As a result, this Article argues,* Obergefell *opened the door for the Court to ground the right to abortion in equal protection—as scholars have urged since* Roe*—while still maintaining the desired requisite historical support.*

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Introduction

The U.S. Supreme Court's landmark decision in *Roe v. Wade* in 1973 established that "the right of personal privacy [founded in the Due Process Clause of the Fourteenth Amendment to the U.S. Consti-

tution] includes the abortion decision."[1] A close reading of the Court's decision in *Roe* indicates the Court's desire to rely on history as support for its holding. As a result of that desire, the Court was confined by constitutional jurisprudence to rely on the Due Process Clause rather than the Equal Protection Clause in establishing the constitutional right to access abortion.[2] However, numerous scholars have long-debated whether the Court's decision in *Roe* employed the best and most intellectually honest route to establishing a constitutional right to abortion and, more broadly, protecting the reproductive rights of American women.[3]

One of the most notable of these scholars is Justice Ginsburg, who wrote on the topic before joining the Court. After *Roe*, now-Justice Ginsburg predicted that "excessive restrictions on where abortions can be performed and medical benefits that can be applied to abortions would still have to be challenged."[4] Indeed, following the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court affirmed the central holding of *Roe* relying on the doctrine of due process,[5] an epidemic of pro-life incrementalist legislation began restricting the right to abortion,[6] especially in southern states. Despite several lawsuits challenging these incrementalist laws since *Casey*,[7] the "undue burden" standard announced in *Casey* remains the controlling framework, and the constitutional right to abortion remains grounded in due process. However, the Justices have continuously disputed the correct application of the standard.

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1. Roe v. Wade, 410 U.S. 113, 154 (1973). This Article refers to the U.S. Supreme Court as "Supreme Court" or "Court."

2. *See* Melanie Kalmanson, *[A] History [of Discrimination] Only Goes So Far [in Equal Protection Litigation]*, 45 FLA. ST. U. L. REV. 42, 59 (2018) (reviewing how history is not generally accepted as support for an equal protection analysis); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 152 (2015).

3. The Supreme Court conceptualizes pregnancy and legal issues related thereto to be a concern of only women as a result of biological differences between the genders. While this Article uses female nouns and pronouns, this discussion is not meant to exclude or address the rights of trans, non-binary, or gender non-conforming people who may also become pregnant and need reproductive care.

4. IRIN CARMON & SHANA KNIZHNIK, NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG 59 (2015).

5. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

6. CARMON & KNIZHNIK, *supra* note 4, at 131.

7. *See generally, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Gonzales v. Carhart, 550 U.S. 124 (2007); Stenberg v. Carhart, 530 U.S. 914 (2000).

Although *Casey*'s undue burden standard remains, states continue to pass pro-life incrementalist laws purporting to restrict the right to abortion. These laws, such as those passed by the state legislatures in Georgia, Mississippi, Kentucky, Ohio, and Missouri, include measures "banning abortion after a heartbeat is detected," which "could effectively prohibit abortions as early as six weeks into a pregnancy, when many women do not yet know they are pregnant."[8] Alabama took an even more extreme approach by passing a law banning abortion in all circumstances, regardless of fetal viability, except when the life of the mother is in danger.[9] In the midst of these new laws, in October 2019, the Supreme Court agreed to hear a challenge to a Louisiana law that, if enacted, allegedly will leave the state with only one doctor authorized to provide abortions.[10]

As the Supreme Court ruled on the Louisiana law in the summer of 2020, the Court once again had the opportunity to revamp abortion jurisprudence and move away from *Casey*'s undue burden standard in *June Medical*.[11] Moreover, after Justice Anthony Kennedy—who was known as the swing vote in many of the Court's most impactful cases[12]—retired and was replaced by Justice Brett Kavanaugh, the constitutional right to abortion has again come to the forefront of public debate and legal speculation.[13] Since Justice Kennedy's retirement, scholars have debated whether *Roe* will survive the new Court's jurisprudence.[14] Some predicted that the new Court would reconsider the

8. Rick Rojas & Alan Blinder, *Alabama Abortion Ban Is Temporarily Blocked by a Federal Judge*, N.Y. Times (Oct. 29, 2019), https://www.nytimes.com/2019/10/29/us/alabama-abortion-ban.html.

9. Chris Cillizza, *What the Alabama Abortion Bill Really Aims to Do*, CNN (May 15, 2019, 8:06 PM), https://www.cnn.com/2019/05/15/politics/alabama-abortion-law-roe-v-wade/index.html.

10. *See, e.g.*, *June Medical Services LLC v. Russo*, SCOTUSblog, https://www.scotusblog.com/case-files/cases/june-medical-services-llc-v-gee-3/ (last visited Apr. 20, 2020); Adam Liptak, *Supreme Court to Hear Abortion Case from Louisiana*, N.Y. Times (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/us/politics/supreme-court-abortion-louisiana.html.

11. Cillizza, *supra* note 9.

12. *E.g.*, Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—and the Landmark Cases It Swayed*, NPR (June 27, 2018, 7:00 PM), https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed.

13. *See, e.g.*, Mary Ziegler, Abortion and the Law in America: Roe v. Wade to the Present 5, 10 (2020); Sarah McCammon, *What Justice Kennedy's Retirement Means for Abortion Rights*, NPR, https://www.npr.org/2018/06/28/624319208/what-justice-kennedy-s-retirement-means-for-abortion-rights (last updated June 29, 2018, 12:28 PM); Maya Rhodan, *Both Sides of the Abortion Debate Think Justice Kennedy's Retirement Is a Game-Changer*, Time (June 27, 2018, 6:16 PM), http://time.com/5323890/anthony-kennedy-retirement-abortion-rights/.

14. *See, e.g.*, sources cited *supra* note 13.

jurisprudential validity of the constitutional right to abortion altogether in *June Medical*.[15]

Before *June Medical*, the last time the Court weighed in on abortion was before Justice Kennedy's retirement in *Whole Woman's Health v. Hellerstedt*,[16] in which the Court reviewed a Texas statute that severely restricted abortion. Although some predicted the Court would significantly change abortion jurisprudence in *Hellerstedt*, the Court ultimately declined to do so.

The same year as *Hellerstedt*, the Court decided *Obergefell v. Hodges*—the landmark decision holding that the Due Process Clause of the Fourteenth Amendment protects a fundamental right to marry that States cannot deny to same-sex couples.[17] Like the Court's majority opinion in *Roe*, Justice Kennedy's majority opinion in *Obergefell* recounted decades of legal and social history related to the right at issue (marriage) as well as historical mistreatment of the affected persons (homosexual individuals) and society's gradual acceptance of same-sex couples.[18] While the Court's historical discussion signified that the Court's decision was grounded in due process,[19] Justice Kennedy's majority opinion in *Obergefell* was unique in the way it discussed the Fourteenth Amendment.[20]

For the first time, Justice Kennedy in *Obergefell* expressly fused the Due Process and Equal Protection Clauses of the Fourteenth Amendment as sources of constitutional rights, reasoning that the two clauses are symbiotic. He explained that although, in some cases, one clause may capture the essence of a right more comprehensively than the other, both clauses "may converge in the identification and definition of the right."[21] Concluding that these two clauses aid each other, Justice Kennedy wrote: "Each concept—liberty and equal protection—leads to a stronger understanding of the other."[22]

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15. *See, e.g.*, sources cited *supra* note 13.

16. 136 S. Ct. 2292 (2016).

17. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

18. *Id.* at 2594–96, 2598–99.

19. Kalmanson, *supra* note 2, at 68; Yoshino, *supra* note 2, at 151 (discussing Glucksberg); *id.* at 152–53 ("In the academic literature, Professor Cass Sunstein has affirmed the 'backward-looking' nature of the Due Process Clause, distinguishing it from the 'forward-looking' nature of the Equal Protection Clause." (first citing Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994) [hereinafter Sunstein, *Homosexuality and the Constitution*]; then citing Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI L. REV. 1161, 1163 (1988) [hereinafter Sunstein, *Sexual Orientation and the Constitution*])).

20. *E.g.*, Yoshino, *supra* note 2, at 163.

21. *Obergefell*, 135 S. Ct. at 2603.

22. *Id.*

Justice Kennedy's analysis of the Fourteenth Amendment in *Obergefell* suggests that the Due Process and Equal Protection Clauses together form a single overarching principle of liberty and equality, protected by the Fourteenth Amendment. In the wake of Justice Kennedy's novel discussion of the Fourteenth Amendment in *Obergefell*, scholars quickly began to speculate what this may mean for constitutional law going forward.[23] Most discussions focus on the effect *Obergefell* will have on rights grounded in substantive due process.[24]

This Article contends that the relationship *Obergefell* created between the Due Process and Equal Protection Clauses paves the path to grounding the right to abortion in equality, rather than due process. Indeed, this new approach to conceptualizing abortion may be the way to save the right to abortion in light of Justice Kennedy's retirement and in the wake of the "new" Court's review of abortion legislation. Part I reviews pertinent jurisprudence on the constitutional right to abortion, beginning with *Roe v. Wade* in 1973, and highlights the Court's use of historical support to ground the right to abortion within the personal liberties protected by the Due Process Clause of the Fourteenth Amendment. Part II canvasses leading arguments for grounding the right to abortion in equality, as presented by Ruth Bader Ginsburg (before joining the Supreme Court) and Professors Reva and Neil Siegel. Part III analyzes Justice Kennedy's majority opinion in *Obergefell v. Hodges* and explains how the opinion affected the relationship between the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Finally, Part IV contends that after *Obergefell*, support exists for grounding abortion in equal protection without sacrificing the Court's valued historical support for the right. Part IV then explains how, if its constitutional foundation were equal protection, the implementation of the right to abortion and its implementation may change.

23. *See, e.g.*, Richard S. Myers, Obergefell *and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54, 68 (2016); Anthony O'Rourke, *Substantive Due Process for Noncitizens: Lessons from* Obergefell, 114 MICH. L. REV. FIRST IMPRESSIONS 9, 10, 13 (2015); Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksberg, 21 LEWIS & CLARK L. REV. 245, 273–74 (2017); Yoshino, *supra* note 2, at 162–63.

24. *See, e.g.*, sources cited *supra* note 23.

I.
Reviewing Relevant Constitutional Jurisprudence, Legislation, and Litigation

Before contemplating the future of the constitutional right to abortion, we must first consider its history. This Part first explains the distinction between rights grounded in due process versus equal protection and then reviews milestone opinions on the constitutional right to abortion, to demonstrate that, although the right to abortion has been grounded in the Due Process Clause, the Court's abortion jurisprudence has strong equality undertones.

A. Explaining the Difference Between Due Process and Equal Protection

When the Supreme Court determines that the Fourteenth Amendment protects a new, previously unrecognized constitutional right, it essentially has two options: equal protection or due process.[25] The Court's determination whether the right is grounded in the Due Process Clause or the Equal Protection Clause essentially defines that right and is significant for several reasons.

For one, it directs the jurisprudence that applies in regulating and managing the right going forward. If the right is grounded in due process, litigation surrounding the right in the future will involve due process jurisprudence, and the inquiry will be whether any state action has unconstitutionally deprived a litigant of that right.[26] If the right is grounded in equal protection, litigation surrounding the right in the future will involve equal protection jurisprudence, and the inquiry will be whether any state action has wrongly and inequitably denied the right to a litigant who is part of a protected class.[27] In sum, depending on the Court's determination as to which clause the right will be grounded in, courts must engage in a different analysis—perhaps ap-

25. *See, e.g.*, Yoshino, *supra* note 2, at 152–53. *See generally* U.S. Const. amend. XIV. For an explanation of the Supreme Court's jurisprudence surrounding the recognition of new rights under the Due Process Clause, see, e.g., Yoshino, *supra* note 2, at 149–52.

26. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (citations omitted)).

27. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification.").

plying a different level of scrutiny in reviewing a law that purportedly infringes on the right.[28]

In addition, the Court's determination triggers different legislative implications regarding the right or interest created. In other words, this determination also affects how states may impact the right with legislation. Specifically, "when a fundamental right is rooted in the Due Process Clause, the state may not regulate the right unless the restriction passes constitutional muster under strict scrutiny review."[29] But "when a right is rooted in the Equal Protection Clause, the state may regulate it so long as the regulation affects all equally and passes the appropriate level of constitutional review," depending upon the class that is affected by the challenged law.[30]

In making the determination whether to ground a right in due process or equal protection, history seems to play an important role. The Supreme Court may and frequently does use longstanding history and tradition to support holding that a new right or interest is protected by the Fourteenth Amendment.[31] Indeed, the Court did so in establishing in *Roe v. Wade* that the Due Process Clause of the Fourteenth Amendment protects the right to abortion.[32] But, if the Court seeks to use history for support, it is essentially bound to a due process analysis because equal protection jurisprudence precludes the Court from using history, specifically a history of discrimination, in an equal protection analysis.[33]

The distinction between rights grounded in the Due Process and Equal Protection Clauses and the pre-*Obergefell* binary framework courts faced in making this determination is at the heart of the discussion in this Article. The majority opinion in *Obergefell* changed the binary framework, and could have significant ramifications on Fourteenth Amendment jurisprudence.

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28. For example, in a due process analysis, the level of scrutiny depends upon the right being infringed, but in an equal protection analysis, the level of scrutiny depends upon the class being affected. *See generally, e.g.*, Kalmanson, *supra* note 2.

29. Kalmanson, *supra* note 2, at 67.

30. *Id.* at 68.

31. *See* Yoshino, *supra* note 2, at 152 (stating that the Court often "reason[s] from history," as it did in *Roe* and *Lawrence v. Texas*); *see, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *Roe*, 410 U.S. at 114.

32. *See Roe*, 410 U.S. at 130–52, 154.

33. *See id.*; *see also, e.g.*, Yoshino, *supra* note 2, at 152 (first citing Sunstein, *Homosexuality and the Constitution*, *supra* note 19, at 3; then citing Sunstein, *Sexual Orientation and the Constitution*, *supra* note 19, at 1163). *See generally* Kalmanson, *supra* note 2 (explaining how the Court's jurisprudence disallows the Court from using history as support when relying on the Equal Protection Clause and therefore requires the Court to rely on the Due Process Clause if it intends to use history for support).

B. Federal Abortion Jurisprudence

This Section reviews critical abortion jurisprudence since the Court's landmark decision in *Roe v. Wade* in 1973, focusing specifically on how the Court used history for support and, therefore, grounded its decisions in due process. While the Court has not strayed from its due process holding in *Roe*, it developed a new framework for reviewing abortion legislation nineteen years after *Roe* in *Casey*, and the Court's discussions have incorporated hints of an equal protection analysis, as this Section highlights.

1. Roe v. Wade *in 1973*

In 1973, the Supreme Court decided *Roe v. Wade*,[34] its landmark decision on abortion that determined a woman's right to choose to have an abortion is protected by the Due Process Clause of the Fourteenth Amendment. Addressing this polarized, political issue, the Court was careful to draw its support from uncontroverted history, stating: "We seek earnestly to do this, and, because we do, *we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals* about man's attitudes toward the abortion procedure over the centuries."[35]

First, the Court reviewed the history of abortion as a medical procedure. Before addressing the appellant's claim that a woman's right to choose to terminate her pregnancy was grounded in the concept of personal liberty embodied in the Due Process Clause, the Court stated, "we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws."[36] The Court began by stating that the restrictive criminal abortion laws in the majority of states at the time were "of relatively recent vintage . . . [and] not of ancient or even common-law origin," coming from statutory changes that occurred in the latter half of the 19th century.[37]

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34. *Roe*, 410 U.S. at 113.

35. *Id.* at 116–17 (emphasis added).

36. *Id.* at 130 (emphasis added). For further discussion on the Ninth Amendment, see generally Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223 (1983). For discussion on the Ninth Amendment as a route to granting constitutional protection, see, e.g., Melanie Kalmanson, *Filling the Gap of Domestic Violence Protection: Returning Human Rights to U.S. Victims*, 43 FLA. ST. U. L. REV. 1359 (2016).

37. *Roe*, 410 U.S. at 129.

In its historical review, the Court assessed "Ancient attitudes,"[38] "[t]he Hippocratic Oath,"[39] common law,[40] English statutory law,[41] American law,[42] and the positions of several organizations: the American Medical Association,[43] the American Public Health Association,[44] and the American Bar Association.[45] Thereafter, the Court provided three reasons that historically have been used to explain "the enactment of criminal abortion laws in the 19th century and to justify their continued existence"[46]: (1) that abortion laws were previously "the product of a Victorian social concern to discourage illicit sexual conduct," (2) at the time most of the criminal laws were enacted, the abortion procedure itself was hazardous for a woman's life, and (3) the State has an interest in protecting potential prenatal life.[47]

Then the Court reviewed the history of the Due Process Clause as a source of rights, emphasizing "the Court has recognized that a right of personal privacy . . . does exist under the Constitution."[48] Moreover, past precedent makes it clear the guarantee of personal privacy only extends to rights deemed "fundamental" or "implicit in the concept of ordered liberty" and this right "has some extension to activities relat[ed] to marriage, procreation, contraception, family relationships, and child rearing and education."[49] The Court concluded that this right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy . . . [but] this right is not unqualified and must be considered against important state interests in regulation."[50]

Relying on this historical background, "[t]he Court declared that a woman, guided by the medical judgment of her physician, had a 'fundamental' right to abort a pregnancy, a right the Court anchored to a concept of personal autonomy derived from the due process guarantee."[51] But due to constitutional jurisprudence limiting how history

38. *Id*. at 130.
39. *Id.* at 130–32.
40. *Id*. at 132–36.
41. *Id.* at 136–38.
42. *Id.* at 138–41.
43. *Id.* at 141–44.
44. *Id.* at 144–46.
45. *Id.* at 146–47.
46. *Id.* at 147.
47. *Id.* at 148–50.
48. *Id.* at 152.
49. *Id.* (citations omitted).
50. *Id.* at 153–54.
51. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality to* Roe v. Wade, 63 N.C. L. Rev. 375, 380–81 (1985) (citing *Roe*, 410 U.S. at 140).

may be used in an equal protection analysis, the Court's desire to use history as support for its highly contested ruling in *Roe* dictated its reasoning. The Court's use of history required the Court to rely on the Due Process Clause rather than the Equal Protection Clause to determine that the right to choose to have an abortion is fundamental within the "libert[ies]" of the Fourteenth Amendment to the U.S. Constitution.[52]

Criticizing *Roe*, Ruth Bader Ginsburg, before becoming a Justice on the Supreme Court, argued that "[a]cademic criticism of *Roe* . . . might have been less pointed had the Court placed the woman alone, rather than the woman tied to her physician, at the center of its attention."[53] Seemingly heeding Ginsburg's criticism in 1992, the Supreme Court, again addressing abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, redefined the right to abortion as an individual right of women, rather than one within the medical relationship between a woman and her physician. The *Casey* decision is discussed below.

2. Planned Parenthood of Southeastern Pennsylvania v. Casey *in 1992*

Nineteen years after *Roe*, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[54] the Supreme Court reviewed the constitutionality of the Pennsylvania Abortion Control Act of 1982 ("the Act").[55] Petitioners were "five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services," who were challenging the facial validity of the Act.[56] In response, the State of Pennsylvania sought the Court's reversal of *Roe*.[57]

Ultimately, the Court held: "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again

52. Kalmanson, *supra* note 36, at 1367–68 (explaining how U.S. Supreme Court precedent generally precludes courts from using history as support for equal protection reasoning); *see* Katharine Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 540–41 (2012).

53. Ginsburg, *supra* note 51, at 382. For a more in-depth discussion of Ginsburg's criticism of the *Roe v. Wade* decision, see *infra* Part II.

54. 505 U.S. 833 (1992).

55. *Id.* at 844.

56. *Id.* at 845.

57. *Id.* at 844.

reaffirmed."[58] This central holding is explained in Section I.B.2.a below. However, the Court changed the standard by which courts reviewed legislation restricting abortion; this new standard, known as the undue burden standard, is explained in Section I.B.2.b below.

a. Affirming the Central Holding of Roe

First, the *Casey* Court affirmed the three-part holding of *Roe*: (1) women have a "right . . . to choose to have an abortion before viability and to obtain it without undue interference from the State"; (2) the State may "restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"; and (3) "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[59] In reaching this holding, the Court reasoned that it was constrained by *stare decisis* to uphold the central holding of *Roe*, especially considering that neither the "factual underpinnings" of *Roe* nor the Court's understanding of that decision had changed.[60]

Again, because the reasoning was grounded in due process, the Court could use history as support. The *Casey* Court relied on history of "at least 105 years" to support its decision, explaining:

> Constitutional protection of the *woman's decision* to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. . . . The controlling word [of the Due Process Clause] in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, *for at least 105 years*, . . . the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them."[61]

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58. *Id.* at 845–46. While *Casey* is a plurality opinion, for ease of discussion, this Article refers to the plurality of Justices O'Connor, Kennedy, and Souter as "the Court."

59. *Id.* at 846.

60. *Id.* at 863–64 (emphasis added) (citations omitted).

61. *Id.* at 846 (emphasis added) (citations omitted) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). While substantive due process is strongly supported by case law, *see generally* United States v. Carolene Products Co., 304 U.S. 144 (1938), jurists and scholars have vehemently contested its validity for decades. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 792 (2010) (Scalia, J., concurring) (citing Albright v. Oliver, 510 U.S. 266, 275 (1994)) (referencing his "misgivings about Substantive Due Process"). *See generally, e.g.*, John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172 (2009) (critiquing the Supreme Court's due process jurisprudence). In fact, one of the most notable skeptics

So, constrained by *stare decisis* to uphold the basis of *Roe*, the Court continued to ground the right to abortion in due process, using history for support.

However, the *Casey* decision has strong notes of equal protection throughout its discussion.[62] For one, the Court stated that "[t]he ability of women to participate *equally* in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[63] As discussed in Part IV *infra*, this notion of women having societal participation equal to men was essentially Justice Ginsburg's argument as to why the right to abortion should have originally been founded in the Equal Protection Clause.

Similarly, discussing the spousal notice provision of the Act, which the Court ultimately struck down, the Court noted its precedential "rejection of the common-law understanding of a woman's role within the family."[64] The Court discussed its prior decision in *Planned Parenthood of Central Missouri v. Danforth*, "that the Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion."[65] In other words, *Casey* clarified that women shall have the opportunity to play equal societal roles to men, despite their biologically unique role of childbirth—an equal protection-type argument.

Indeed, the Court noted the inherent biological preference as to who ultimately holds the decision to terminate a pregnancy, stating:

> It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.[66]

Considering the dangers posed by the spousal consent provision, especially for women in abusive relationships, the Court concluded that "[w]omen do not lose their constitutionally protected liberty when

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of this theory is the late Justice Scalia; his opposition to the theory is made clear in his concurring in part and dissenting in part opinion in *Casey*, 505 U.S. at 979–1002.

62. In fact, as Professor Mary Ziegler writes in her 2020 book, attorneys from the ACLU focused on equality-based arguments leading up to the Court's decision in *Casey*. ZIEGLER, *supra* note 13, at 4. "These arguments spotlighted the relationship between abortion and equality between the sexes." *Id.*

63. *Casey*, 505 U.S. at 856.

64. *Id.* at 897.

65. *Id.* (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976)).

66. *Id.* at 896.

they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family."[67] This conclusion exemplifies how the Equal Protection and Due Process Clauses could function together as a source of rights in abortion jurisprudence—first distinguishing between men and women as separate-but-equal genders, even in marriage, but, then, defining their rights as "liberty" emanating from the Due Process Clause.

Despite retaining the central holding of *Roe*, the *Casey* Court completely restructured the abortion framework, getting rid of the trimester framework from *Roe* and creating the "undue burden framework," which is explained below.

b. Redefining the Standard: Casey*'s Undue Burden Framework*

In *Casey*, the Court shifted abortion jurisprudence from *Roe*'s trimester framework to the undue burden framework. The Court explained it rejected the trimester framework and did not consider the framework to "be part of the essential holding of *Roe*," as its formulation "misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life."[68] Moreover, *Roe*'s central holding "and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life" conflicted with the trimester framework's "rigid prohibition on all previability regulation aimed at the protection of fetal life."[69]

The Court articulated the undue burden standard as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[70] It went on to explain that state regulations that merely create a structural mechanism which allow the State, or a parent or guardian of a minor, to "express profound respect for the life of the unborn," such as parental consent requirements, are not a substantial obstacle to a woman's exercise of her right to choose.[71] However, state regulations enacted "to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[72]

67. *Id.* at 898.
68. *Id.* at 873.
69. *Id.*
70. *Id.* at 877.
71. *Id.*
72. *Id.*

Ultimately, under the undue burden standard, "[o]nly where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[73]

Elaborating on this new standard, the Court explained that it was not exactly novel, as "early abortion cases adhered to this view."[74] The Court reiterated several times that the undue burden standard was proper because the right to abortion was not unlimited. For example, in *Maher v. Roe*, "*Roe* did not declare an unqualified 'constitutional right to an abortion.'"[75] "Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[76] In addition, the *Casey* Court cited *Danforth* for the proposition "that it is an overstatement to describe [the nature of abortion] as a right to decide whether to have an abortion 'without interference from the State.'"[77] Contextualizing the issues that arise in all abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy. Again, although the decision was grounded in due process, the statements that seem to protect women based on biological differences suggest equal protection undertones.

Testing the bounds of *Casey*'s undue burden standard, states continued legislating on abortion and confronting courts with various definitions of what actually amounts to an "undue burden."[78] Indeed, as the jurisprudence reviewed below shows, the Supreme Court has also grappled with the validity and application of *Casey*'s undue burden standard in future cases, with each Justice ultimately contending that his or her own application of *Casey* was the correct one.[79] The Court's jurisprudence since *Casey* indicates that the Court has yet to settle on the proper interpretation and application of the undue burden standard. Thus, with critical cases continuously presented to the Court that could threaten the future of the right to abortion,[80] the right to abortion could greatly benefit from a sounder basis and framework.

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73. *Id.* at 874 (citations omitted).

74. *Id.*

75. *Id.* (quoting Maher v. Roe, 432 U.S. 464, 473–74 (1977)).

76. *Id.* (quoting *Maher*, 432 U.S. at 473–74).

77. *Id.* (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 61 (1976)).

78. *See* ZIEGLER, *supra* note 13, at xii–xiii.

79. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Gonzales v. Carhart, 550 U.S. 124 (2007); Stenberg v. Carhart, 530 U.S. 914 (2000).

80. *See, e.g.*, ZIEGLER, *supra* note 13, at xiii.

3. Stenberg v. Carhart *in 2000*

In 2000, in *Stenberg v. Carhart*, the Court reviewed a Nebraska law banning "partial birth abortion," starting its opinion with: "We again consider the right to an abortion."[81] The Nebraska statute banned partial birth abortions unless "necessary to save the life of the mother whose life is endangered . . . including a life-endangering physical condition caused by or arising from the pregnancy itself."[82] As the Nebraska law sought to ban partial birth abortions generally, which could include several methods of aborting a pregnancy, the Court discussed various abortion procedures, focusing on the methods commonly called "dilation and evacuation" (D & E) and "dilation and extraction" (D & X) performed during the second trimester of pregnancy.[83] The Court found the plain language of the Nebraska law banned both D & E and D & X procedures in practice.[84]

Justice Breyer, writing for the majority, began the opinion by recognizing the controversial nature of these cases, explaining that "[m]illions of Americans . . . recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty."[85] Thus, while Justice Breyer almost immediately suggested the right to choose an abortion stems from equality, he also emphasized that the Court had already "determined and then redetermined that the Constitution offers a basic protection to the woman's right to choose," presumably referring to a due process analysis per past precedent.[86]

In *Stenberg*, the Court made clear that it would not "revisit those legal principles" set forth in *Roe* and *Casey*, and therefore, would not change the Court's prior holdings that a woman's right to choose an abortion is a liberty protected by the Due Process Clause.[87] Rather, the Court applied *Roe* and *Casey*'s legal principles to the issue presented, ultimately finding the Nebraska statute unconstitutional for two reasons.[88] First, the statute contained no exception for the preservation of

81. *Stenberg*, 530 U.S. at 920.

82. *Id.* at 921–22 (quoting NEB. REV. STAT. ANN. § 28-328(1) (1999)). The statute defined "partial birth abortion" as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." *Id.* at 922 (quoting § 28-326(9)).

83. *Id.* at 923–24.

84. *Id.* at 939.

85. *Id.* at 920.

86. *Id.* at 921.

87. *Id.*

88. *Id.* at 930.

the health of the mother.[89] Second, as the law targeted physicians who performed D & E procedures, the most commonly used method for second trimester abortions, the statute imposed "an undue burden on a woman's ability to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself."[90]

Dissenting, Justice Scalia focused on criticizing the undue burden test from *Casey*, rather than the Nebraska statute in question, stating the undue burden test "created a standard that was 'as doubtful in application as it is unprincipled in origin' . . . 'hopelessly unworkable in practice,' . . . [and] 'ultimately standardless.'"[91] Justice Kennedy, joined by Chief Justice Rehnquist, also authored a dissent, mainly criticizing the majority's "further and basic misunderstanding of *Casey*."[92] As Professor Mary Ziegler writes, "[t]he split in *Stenberg* guaranteed that pro-lifers would continue promoting" statutory bans on the D & X procedure.[93] More broadly, *Stenberg* would not be the last decision in which members of the Court fundamentally disagreed on the holding, underlying merits, and correct application of *Casey*'s undue burden standard. Importantly, these repeated disagreements and critiques signal the perceived weakness of the undue burden standard and seem to invite a more constitutionally sound standard of review.

4. Gonzales v. Carhart *in 2007*

In 2007, the Supreme Court decided *Gonzales v. Carhart*, upholding Congress's Partial-Birth Abortion Ban Act of 2003.[94] Similar to *Stenberg*, the subject of *Gonzales* also related to different methods of aborting a second trimester pregnancy and much of the opinion discussed the various abortion procedures in great detail.[95] But, in contrast to *Stenberg*, the Partial-Birth Abortion Ban more specifically banned an "intact D & E" procedure in practice, but allowed a standard D & E procedure.[96]

89. *Id.*

90. *Id.* at 929–30.

91. *Id.* at 955 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 986–87 (1992)).

92. *Id.* at 964–65 (Kennedy, J., dissenting).

93. ZIEGLER, *supra* note 13, at 165.

94. Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

95. *Id.* at 135–40.

96. *Id.* at 150. The standard D & E procedures allowed were those where "the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery." *Id*. at 151.

Moreover, the composition of the Court had changed since *Stenberg*.[97] Justice Alito had replaced Justice O'Connor, the necessary fifth vote in *Stenberg*.[98] This time, Justice Kennedy wrote for the majority, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.[99] Unsurprisingly, *Casey* was yet again a major feature of the *Gonzales* opinion, and Justice Kennedy explained that *Casey* struck a balance between two competing interests.[100] A State, on one hand, may not prohibit a woman from choosing to terminate her pregnancy and also may not impose an undue burden on this right.[101] On the other hand, State regulations "which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[102] Under *Casey*'s balancing principles, which the Court "accepted as controlling," the Court determined the Partial-Birth Abortion Ban Act was neither facially void for vagueness, nor did it impose an undue burden on a woman's right to choose an abortion, based on its overbreadth or failure to provide health exceptions.[103]

Justice Ginsburg authored a "scathing" dissent,[104] stressing that *Gonzales* "refuse[d] to take *Casey* and *Stenberg* seriously" and notably, framed a woman's right to choose an abortion as one of equal protection.[105] Justice Ginsburg emphasized that "a woman's 'control over her [own] destiny'" is at stake in these cases challenging abortion restrictions.[106] Importantly, "legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine

97. *See* ZIEGLER, *supra* note 13, at 177.

98. Stenberg v. Carhart, 530 U.S. 914, 920 (2000); *see* ZIEGLER, *supra* note 13, at 177.

99. *Gonzales*, 550 U.S. 124.

100. *See id.* at 146; ZIEGLER, *supra* note 13, at 179.

101. *Gonzales*, 550 U.S. at 146. The Court stated an undue burden exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* (quoting *Casey*, 505 U.S. at 878).

102. *Id.* (quoting *Casey*, 505 U.S. at 877).

103. *Id.* at 168. The Court further reasoned that the Partial-Birth Abortion Ban Act did not impose "a substantial obstacle to late-term, but previability, abortions" because only the intact D & E procedures are effectively banned by the Act, leaving alternative options to the prohibited procedure available, such as a standard D & E procedure. *Id.* at 155–65.

104. ZIEGLER, *supra* note 13, at 180.

105. *Gonzales*, 550 U.S. at 170–72 (Ginsburg, J., dissenting).

106. *Id.* at 171.

her life's course, and thus to enjoy equal citizenship stature."[107] In conclusion, Justice Ginsburg candidly stated, "the Act, and the Court's defense of it cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives."[108]

Again, the Court's decision invited further antiabortion legislation.[109] Indeed, states continue testing the limits of antiabortion legislation.[110] The Court next faced abortion head-on in *Whole Woman's Health v. Hellerstedt*. The case gave the Court the opportunity to completely reconstruct abortion jurisprudence, by potentially clarifying the undue burden standard set forth in *Casey* or even changing a woman's right to choose from a due process right to one of equal protection.

5. Whole Woman's Health v. Hellerstedt *in 2016*

Texas's House Bill 2 (HB2), which was under review in *Hellerstedt*, exemplifies state legislatures approaching the constitutional boundary of an undue burden in efforts to restrict abortion. HB2 slashed the number of operative abortion clinics in the State of Texas from over forty to less than ten, all of which were operated by Whole Woman's Health.[111] Facing challenges imposed by HB2 that would cause them to close even more abortion clinics, Whole Woman's Health filed suit against the State of Texas challenging the constitutionality of HB2.[112] After the U.S. Court of Appeals for the Fifth Circuit held that HB2 was, in fact, constitutional, the Supreme Court granted Whole Woman's Health petition for writ of certiorari on November 13, 2015.[113] While the Court's decision was pending, many debated whether the Court would, as mentioned above, use *Hellerstedt* as an opportunity to completely revamp abortion law.[114]

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107. *Id.* at 172.

108. *Id.* at 191.

109. *See* ZIEGLER, *supra* note 13, at 180.

110. *See id.* at xii–xiii.

111. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2301 (2016).

112. *Id.*

113. *Docket for No. 15-274*, SUP. CT. UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-274.htm (last visited Mar. 31, 2020).

114. *See, e.g.*, Robert Barnes, *The Supreme Court Is Hearing Arguments in a Key Abortion Case. Here's What to Know*, WASH. POST (Mar. 2, 2016, 10:00 AM), https://www.washingtonpost.com/news/post-nation/wp/2016/03/02/what-is-whole-womens-health-v-hellerstedt-scotus-aboriton-case/ (outlining the potential effects of a ruling for either side in the case); Erik Eckholm, *Supreme Court Abortion Case Seen as a Turning Point for Clinics*, N.Y. TIMES (Feb. 24, 2016), https://www.nytimes.com/2016/02/25/us/whole-womans-health-v-hellerstedt-supreme-court.html (same).

Before the Court reached a decision, Justice Scalia's unexpected death left a vacant seat on the country's highest Court.[115] An eight-member Court made it more difficult to garner a majority and, likewise, created the risk of a 4-4 split decision, which would force the Supreme Court to affirm the lower court's decision.[116] Thus, on a contentious topic like abortion, the authoring Justice would likely be even more reserved in writing the majority opinion to avoid a 4-4 split. Assuming that Justice Kennedy would have remained in the majority, the Court prior to Justice Scalia's death could have taken this opportunity to formally endorse Justice Ginsburg's view that a woman's right to choose should be grounded in equality. However, with only an eight-member Court, Justices were likely skeptical of making any drastic change to abortion jurisprudence.

Although some predicted that the Court would upend the abortion framework in *Hellerstedt*,[117] the Court ultimately avoided any disruption to its abortion jurisprudence. Seemingly taking the path of least resistance, on June 27, 2016, the eight-Justice Court issued its 5-3 opinion, joined by Justices Breyer, Ginsburg, Sotomayor, Kennedy, and Kagan, applying the undue burden framework from *Casey* and invalidating HB2.[118] Contrary to most predictions, the majority avoided changing the standard for reviewing abortion legislation. Chief Justice Roberts and Justices Alito and Thomas dissented.[119]

Justice Ginsburg wrote a one-paragraph concurring opinion seemingly commenting on the epidemic of state-imposed abortion restrictions since *Casey*, which Ginsburg argued serve no purpose but to complicate women's access to reproductive care.[120] Noting the lack of medical foundation for HB2 and other abortion restrictions, Justice Ginsburg suggested that these abortion restrictions, while disguised as protections for the woman,[121] are meant to restrict a legitimate medical procedure that is inherently available to only women—again suggesting that the right to abortion is a right that inheres in the Equal Protection Clause.

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115. Reuters, *The U.S. Supreme Court Will Return with Only 8 Justices*, FORTUNE (Sept. 30, 2016, 10:29 AM), http://fortune.com/2016/09/30/us-supreme-court-justices.

116. *Id.*

117. *See, e.g.*, sources cited *supra* note 114.

118. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

119. As to the composition of the eight-member Court at the time, it is quite possible that the majority opinion would have been different had Justice Scalia still been on the Court because Justice Scalia would have likely joined the dissenters, causing a 5-4 split rather than a 5-3 split.

120. *Hellerstedt*, 136 S. Ct. at 2321 (Ginsburg, J., concurring).

121. *See* CARMON & KNIZHNIK, *supra* note 4, at 57.

Justices Thomas and Alito wrote separate, dissenting opinions.[122] Echoing Justice Scalia's argument from *Casey*, Justice Thomas argued that *Hellerstedt* epitomized the Court's long-standing error in using "substantive due process" as a source of new rights.[123]

Ultimately, while *Hellerstedt* reiterated that Legislatures are not at will to improperly restrict abortion,[124] it contributed little as to the ultimate resting point on which abortion restrictions may or may not pass constitutional muster. Rather, the majority focused on the intricacies of HB2 and its validity under *Casey*'s undue burden framework.[125] Perhaps the Court's narrow holding in *Hellerstedt* was a product of the eight-member Court's desire to avoid a 4-4 split. Regardless, *Hellerstedt* indicated the Court was not prepared to disrupt abortion jurisprudence, which remains grounded in due process.[126]

C. Recent Abortion-Restrictive Legislation in the States and Pending Litigation

Until the Supreme Court either establishes a concrete rule as to when abortions are permitted or overturns *Roe* to establish that abortions are never permitted, abortion will likely remain a topic of political polarization and legal debate.[127] Moreover, since *Hellerstedt*, Justice Kennedy, the Court's key swing vote, has retired, creating even greater uncertainty in abortion cases. Indeed, some predict the new Court will change the right to abortion.[128] In anticipation of this, it seems that states are already experimenting with new, more restrictive abortion laws to determine whether they will pass muster under the new Court.

Notably, in May 2019, the Governor of Alabama signed into effect a controversial abortion bill, the Alabama Human Life Protection Act, which sought to ban abortion in all circumstances, regardless of

122. *Hellerstedt*, 136 S. Ct. at 2321–30 (Thomas, J., dissenting); *id.* at 2330–53 (Alito, J., dissenting). Chief Justice Roberts and Justice Thomas joined Justice Alito's dissent. *Id.* at 2330.

123. *Id.* at 2329–30 (Thomas, J., dissenting) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989)).

124. *See generally id.*

125. *See generally id.*

126. *See* ZIEGLER, *supra* note 13, at xiii. *See generally Hellerstedt*, 136 S. Ct. 2292.

127. *See, e.g.*, Emily Crockett, *Congress Members Casually Compare Abortion to Slavery, Black Genocide, and Killing Puppies*, VOX (Sept. 23, 2016, 4:20 PM), http://www.vox.com/identities/2016/9/23/13029778/congress-abortion-puppies-genocide-slavery-steve-king (exemplifying the diatribe commonly present in political discussions about abortion). Likewise, technological and medical advances and current issues will continue to challenge the standing abortion framework from *Casey*.

128. *See, e.g.*, sources cited *supra* note 13.

fetal viability, except when the life of the mother is in jeopardy.[129] The bill's primary sponsor stated the bill's purpose was "about challenging *Roe v. Wade* and protecting the lives of the unborn."[130]

Alabama is not the only state to enact restrictive abortions laws in the wake of *Hellerstedt*. Legislatures in Georgia, Ohio, Kentucky, Mississippi, and Missouri all "passed laws banning abortion after a heartbeat is detected, measures that could effectively prohibit abortions as early as six weeks into a pregnancy, when many women do not yet know they are pregnant."[131] Similarly, legislatures in Arkansas and Utah approved eighteen-week bans.[132] Ultimately, all laws, including the Alabama law, were blocked after federal judges issued preliminary injunctions.[133] With states enacting an increasing number of laws that on their face appear to directly contradict Supreme Court precedent on the right to abortion,[134] the Court is faced with the decision whether to grant review of these laws.

Indeed, on October 4, 2019, the Court agreed to hear a challenge to a Louisiana law, which was strikingly similar to Texas' HB2 that the Court struck down in 2016. If upheld, the Louisiana law at issue in *June Medical Services LLC v. Russo* would have left the state with only one doctor authorized to provide abortions.[135] *June Medical* was the Court's first abortion case since *Hellerstedt*, after the appointment of Justice Gorsuch, replacing the late Justice Scalia, and Justice Kavanaugh, successor to Justice Kennedy—changes that experts suspected would shift the Court's views on controversial issues like abortion.[136]

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129. Cillizza, *supra* note 9; Tara Law, *Here Are the Details of the Abortion Legislation in Alabama, Georgia, Louisiana, and Elsewhere*, TIME, https://time.com/5591166/state-abortion-laws-explained/ (last updated July 2, 2019, 5:21 PM).

130. Cillizza, *supra* note 9.

131. *See, e.g.*, ZIEGLER, *supra* note 13, at xiii; *see also, e.g.*, Rojas & Blinder, *supra* note 8.

132. *See, e.g.*, Andrew DeMillo, *Arkansas, Utah Lawmakers Pass 18-Week Abortion Bans*, PBS NEWSHOUR (Mar. 14, 2019, 10:12 AM), https://www.pbs.org/newshour/nation/arkansas-utah-lawmakers-pass-18-week-abortion-bans.

133. Rojas & Blinder, *supra* note 8.

134. Indeed, U.S. District Judge Myron H. Thompson, who issued the order enjoining enforcement of the Alabama law, concluded, "Alabama's abortion ban contravenes clear Supreme Court precedent. It violates the right of an individual to privacy, to make 'choices central to personal dignity and autonomy.'" Robinson v. Marshall, 415 F. Supp. 3d 1053, 1059 (M.D. Ala. 2019). Moreover, "[i]t diminishes the capacity of women to act in society, and to make reproductive decisions. It defies the United States Constitution." *Id.* (internal quotation marks and citation omitted).

135. Liptak, *supra* note 10.

136. *See, e.g.*, Liptak, *supra* note 10; ZIEGLER, *supra* note 13; Mary Ziegler, Opinion, *The Supreme Court's* June Medical *Decision Is Part of a Decades-Long Shift in the Fight Over Abortion—and Offers a Clue About What's Next*, TIME (June 29, 2020, 2:18 PM), https://time.com/5861196/june-medical-abortion-history/.

Once again, *June Medical* provided the Court with the opportunity to revamp abortion jurisprudence and move away from *Casey*'s undue burden standard.[137]

The Court decided *June Medical* in late June 2020, where it reversed and invalidated the Louisiana statute in a 5-4 plurality decision written by Justice Breyer.[138] Chief Justice Roberts, who "may be the Court's new swing justice on abortion," wrote the concurring opinion, which is the crux of the decision.[139] Rather than supporting abortion rights, "Roberts emphasized respect for precedent all while arguing that the Court's 2016 decision in *Whole Women's Health v. Hellerstedt* . . . was wrongly decided."[140] In other words, *June Medical* did not change the fact that the right to abortion needs a more sound foundation to last.

The next Part describes the arguments presented by leading scholars—Ruth Bader Ginsburg and Professors Reva and Neil Siegel—as to why abortion should be an equality right, instead of a due process right. This argument, especially after *Obergefell*, could be key to saving the abortion right in the wake of Justice Kennedy's retirement.

II.
Leading Scholars' Arguments for Why Abortion Should Be Grounded in Equality

The idea of conceptualizing abortion in equality is not novel. In fact, from the time *Roe* was decided—even argued to the Supreme Court—scholars have argued that the Court should have grounded the constitutional right to access abortion in equality as a gender-specific right. As Professor Mary Ziegler has explained:

> The Supreme Court's decision [in *Roe*] did reorient discussion about abortion, focusing debate on the justices' reasoning. Nonetheless, activists deliberately reinterpreted *Roe*. Far from shutting down movement efforts to redefine abortion rights, the Court's decision became a vehicle for activists seeking to change the public's understanding of what the justices had said and whether reproductive freedom deserved support.[141]

137. Cillizza, *supra* note 9.

138. June Med. Servs. L.L.C. v. Russo, Nos. 18-1323 & 18-1460, 2020 U.S. LEXIS 3516, at *9–12 (June 29, 2020).

139. Ziegler, *supra* note 136; *see June Med. Servs. L.L.C.*, 2020 U.S. LEXIS 3516, at *64–84.

140. Ziegler, *supra* note 136.

141. Mary Ziegler, After Roe: The Lost History of the Abortion Debate 160 (2015).

Narrowing in on equal protection within the abortion context, this Part details two of the most popular arguments for grounding abortion in equality: the first presented by Justice Ruth Bader Ginsburg before she took her seat on the Supreme Court in 1993, and the second presented by Professors Reva and Neil Siegel, scholars who are well-known for their work in reproductive rights and gender equality.

A. Ruth Bader Ginsburg: Abortion Is Within a Woman's Right, Equal to a Man's, to Define Her Place in Society

When the Supreme Court decided *Roe v. Wade*, now-Justice Ruth Bader Ginsburg of the Supreme Court was an attorney for the ACLU's Women's Rights Project.[142] Ginsburg had spent years working to vindicate women as equal to their male counterparts in society and the law. In her brief to the Supreme Court in *Reed v. Reed*,[143] she wrote, "[t]he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."[144]

In 1985, reacting to the Court's decision in *Roe*, Ginsburg wrote a law review article titled *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade,[145] in which she argued that the Supreme Court "ventured too far in the change it ordered and presented an incomplete justification for its action."[146] Noting the disparity between due process and equal protection jurisprudence and how the Court has chosen different paths for gender discrimination and reproductive rights, Ginsburg wrote, "[t]he High Court has analyzed classification by gender under an equal protection/sex discrimination rubric; it has treated reproductive autonomy under a substantive due process/personal autonomy headline not expressly linked to discrimination against women."[147]

Justice Rehnquist echoed similar critiques in his dissenting opinion in *Roe*, stating: "Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify."[148] Justice Rehnquist further remarked on the majority's decision, stating:

142. *See* CARMON & KNIZHNIK, *supra* note 4, at 59.
143. *See generally* Reed v. Reed, 404 U.S. 71 (1971) (involving a challenge to Idaho Code section 15-312, which provided that "males must be preferred to females" if several individuals were equally entitled to administer an intestate estate).
144. CARMON & KNIZHNIK, *supra* note 4, at 57.
145. Ginsburg, *supra* note 51.
146. *Id.* at 376.
147. *Id.* at 375–76.
148. Roe v. Wade, 410 U.S. 113, 177 (1973) (Rehnquist, J., dissenting).

> The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. . . . [T]he Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.[149]

Essentially, scholars and jurists alike pondered why the Court chose to ground the right to abortion in due process when abortion was seemingly an obvious issue of equal protection because its benefits implicate the biology of only women. Under this reasoning, to not grant abortion to women would be to unequally deny them the right to freely define their role in society by forcing them to take on a role they do not desire.[150]

Following *Roe*, pro-choice organizations argued that "*Roe* stood for women's interests in decisional freedom and bodily integrity."[151] Under this view, states prohibiting or criminalizing abortion causes improper and governmentally forced motherhood on women who may become pregnant, leaving them without any choice to direct or control their identity or reproduction. While Ginsburg and pro-choice organizations criticized the Court's reasoning but nonetheless supported its outcome, "pro-life organizations . . . sought to build women's opposition to the Supreme Court's decision."[152] Flipping Ginsburg's argument, these organizations argued that "*Roe* addressed only physicians' rights and did nothing at all to help women."[153] Specifically, for example, then-President of the National Right to Life Committee, Dr. Mildred F. Jefferson, in an effort to denigrate the Court's opinion in *Roe*, purported that the decision "only reaffirmed physicians' control over women" and only served to "undermine their ability to pursue their dreams."[154] Dr. Gloria Volini Heffernan of Illinois "contended that abortion facilitated the sexual exploitation of women."[155]

As to *Casey*, Ginsburg felt that, although the "decision wasn't perfect, and . . . the restrictions it blessed would burden poor women,"

149. *Id.* at 173 (citations omitted).
150. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) ("The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role.").
151. ZIEGLER, *supra* note 141, at 169.
152. *Id.* at 159.
153. *Id.*
154. *Id.* at 158.
155. *Id.* at 171.

the Court's decision in *Casey* "could have been worse."[156] At least in *Casey*, the Court "explicitly recognized women's rights and spoke about their equality,"[157] stating: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[158]

Ginsburg joined the Supreme Court one year after the Court decided *Casey*, "feeling unusually optimistic about abortion."[159] Her first opportunity to address the issue of reproductive rights came in *Stenberg v. Carhart*, in which she joined the majority and wrote a short concurring opinion, which Justice Stevens joined, explaining that the statute was nothing more than an attempt to narrow the right to abortion. Ginsburg wrote in pertinent part:

> Seventh Circuit Chief Judge Posner correspondingly observed . . . that the law prohibits the D & X procedure . . . . [B]ecause the state legislators seek to chip away at the private choice shielded by [*Roe*], even as modified by [*Casey*]. A state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" violates the Constitution. Such an obstacle exists if the State stops a woman from choosing the procedure her doctor "reasonably believes will best protect the woman in [the] exercise of [her] constitutional liberty." Again as stated by Chief Judge Posner, "if a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."[160]

Ginsburg was "insulted . . . to her core" by Justice Kennedy's majority opinion in *Gonzales*.[161] Dissenting, Ginsburg returned to her fundamental notion of gender equality that women must be given equal access to society and the ability to control their affairs and their bodies, writing, "Women, it is now acknowledged, have the talent, capacity, and right 'to participate equally in the economic and social life of the Nation.'"[162] Moreover, "[t]heir ability to realize their full potential, the Court recognized, is intimately connected to 'their ability to control their reproductive lives.'"[163]

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156. CARMON & KNIZHNIK, *supra* note 4, at 131.
157. *Id.*
158. *Id.* (quoting *Casey*, 505 U.S. at 856).
159. *Id.*
160. Stenberg v. Carhart, 530 U.S. 914, 951–52 (2000) (Ginsburg, J., concurring) (citations omitted).
161. CARMON & KNIZHNIK, *supra* note 4, at 133; *accord* Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting).
162. *Gonzales*, 550 U.S. at 171.
163. *Id.*

Like Justice Ginsburg, Professors Reva and Neil Siegel have also argued that the right to abortion should be grounded in equality rather than due process. Their arguments are explained below.

B. Professors Reva and Neil Siegel: Equality Arguments for Abortion Rights

Professors Reva and Neil Siegel ("Professors Siegel") offer critiques of *Roe* similar to Ginsburg's, advocating that the right to abortion should come from the Equal Protection Clause. As Professors Siegel explain, "equality arguments are premised on the view that restrictions on abortion may be about *both* women *and* the unborn—*both and*."[164] Moreover, rather than assume abortion restrictions "are entirely benign or entirely invidious, equality analysis entertains the possibility that gender stereotypes may shape how the state pursues otherwise benign ends. The state may protect unborn life in ways it would not, but for stereotypical assumptions about women's sexual or maternal roles."[165] Thus, "[w]hen abortion restrictions reflect or enforce traditional sex-role stereotypes, equality arguments insist that such restrictions are suspect and may violate the U.S. Constitution."[166]

Significant to these equality arguments, Professors Siegel argue that "in the four decades since *Roe*, the U.S. Supreme Court has come to recognize the abortion right as an equality right as well as a liberty right."[167] As explained fully in Part I, while the Court incorporated equal protection arguments in its abortion jurisprudence throughout time, the Court has not formally grounded or endorsed a woman's right to an abortion in equality. Similar, but less explicitly, to Justice Kennedy employing principles of both liberty and equality to find a fundamental right to same-sex marriage, "[t]he Court has also invoked equality concerns to make sense of the Due Process Clauses in the area of abortion rights."[168] Professors Siegel argue that drawing on equality values not only helps the Court make sense of the abortion right substantively under the Due Process Clause, but "[e]quality values [also] help to identify the kinds of restrictions on abortion that are unconstitutional under *Casey*'s undue burden test."[169]

Professors Siegel also note that besides "recogniz[ing] equality arguments for the abortion right based on the Due Process Clauses

164. Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. Rev. Disc. 160, 163 (2013).
165. *Id.*
166. *Id.* at 164.
167. *Id.* at 162.
168. *Id.* at 164.
169. *Id.* at 165.

. . . . [A] growing number of justices have asserted equality arguments for the abortion right independently based on the Equal Protection Clause."[170] In *Gonzales*, Justice Ginsburg wrote for four justices and "insisted that 'legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy *equal citizenship stature*.'"[171] Those four justices "emphasized that freedom from state-imposed roles is fundamental to equal citizenship."[172]

Finally, in addition to arguing that abortion should be recognized in equality (and foreshadowing the structure of the *Obergefell* opinion), Professors Siegel also argue that "grounding the right in the Equal Protection Clause, as well as the Due Process Clauses, can enhance the political authority of the right."[173] Recognizing "the abortion right as an equality right" would arguably strengthen a woman's right to choose in both the eyes of the American people and the Court.[174] More importantly, "a future Court might be less likely to take this right away," which continues to be a fear for many prochoice Americans.[175]

III.
How Justice Kennedy's Majority Opinion in *Obergefell v. Hodges* Affected the Fourteenth Amendment

A. Looking Closer at Obergefell*'s Impact on Due Process and Equal Protection Jurisprudence*

In 2015, the Supreme Court decided the landmark case of *Obergefell v. Hodges*, which involved challenges to laws from Michigan, Kentucky, Ohio, and Tennessee that, by "defin[ing] marriage as a union between one man and one woman," had refused to recognize same-sex marriage.[176] The two questions presented to the Court were whether the Fourteenth Amendment requires a State (1) to license a same-sex marriage, or (2) to recognize a same-sex marriage performed

170. *Id.* at 164.
171. *Id.* at 166 (emphasis added) (quoting Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)).
172. *Id.*
173. *Id.* at 169–70.
174. *Id.* at 170.
175. *Id.*
176. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

validly out-of-state.[177] Ultimately, the Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty."[178]

While *Obergefell* is colloquially known for making same-sex marriage legal, as *Roe* did for abortion, this Part explains how the Court's Fourteenth Amendment analysis in *Obergefell* affects constitutional law at large.[179] As explained fully below, Justice Kennedy's majority opinion in *Obergefell* created a synergy between the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment that did not exist before and opens the door for the Court to ground the right to abortion in equality.

B. Due Process Analysis

As explained above, like many other Fourteenth Amendment cases and in particular those involving the Due Process Clause, the *Obergefell* majority began by discussing relevant history.[180] Justice Kennedy explained that "[t]he history of marriage is one of both continuity and change."[181] He noted that marriage, as an institution, has gone through progressive changes throughout history, such as being viewed as an arrangement between the couple's parents or as making the wife the husband's property.[182] Justice Kennedy explained, "[t]hese and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential."[183] Thus, "[t]hese new insights," which have evolved over time, "have strengthened, not weakened the institution of marriage."[184]

Justice Kennedy's majority opinion then shifted to explain the history of homosexuality, specifically its condemnation "[u]ntil the mid-20th century . . . as immoral."[185] In fact, many people in the

177. *Id.*
178. *Id.* at 2604.
179. Professor Kenji Yoshino also addressed how the constitutional discussion in *Obergefell* was different than other Fourteenth Amendment jurisprudence. *See generally* Yoshino, *supra* note 2.
180. *Obergefell*, 135 S. Ct. at 2593.
181. *Id.* at 2595.
182. *Id.*
183. *Id.*
184. *Id.* at 2596.
185. *Id.*

United States "did not deem homosexuals to have dignity in their own distinct identity. . . . [And] homosexuality was treated as an illness."[186] As a result, "[g]ays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate."[187] However, "following substantial cultural and political developments" in the late 20th century, same-sex couples began leading more open and public lives and establishing families, bringing rise to "a shift in public attitudes towards greater tolerance."[188] Soon after, questions about the rights of homosexuals reached the courts; eventually, there was a call for the legalization of same-sex marriage.[189]

Discussing how the Court identifies unenumerated rights protected by the Due Process Clause, Justice Kennedy stated that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present."[190] Framing the majority's conclusion as an evolution of constitutional understanding and societal acceptance, "[t]he nature of injustice is that we may not always see it in our own times."[191] Thus, although a right may not have been historically recognized as fundamental—and, in this case, criminalized for a significant period of time—new societal understandings can reveal the fundamental nature of a right, which must then be protected by the Constitution.[192]

Following this historical analysis, the *Obergefell* Court held that the Fourteenth Amendment requires States to both license new same-sex marriages and recognize existing, valid same-sex marriages from other states.[193] Recognizing that it has "long held the right to marry is protected by the Constitution," the Court, for the first time, specifically identified the "right to marry" as a fundamental right protected by the Due Process Clause.[194] Conceding that the "Court's cases describing the right to marry presumed a relationship involving oppo-

186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 2596–97.
190. *Id.* at 2598 (citation omitted).
191. *Id.*
192. *See id.* at 2602 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.").
193. *Id.* at 2604–05.
194. *Id.* at 2598–99.

site-sex partners. . . . In defining the right to marry these cases have [nonetheless] identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond."[195]

To substantiate the majority's conclusion, Justice Kennedy listed four principles and traditions that demonstrate that the right to marry applies to heterosexual couples and homosexual couples alike.[196] First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy" rooted in the Court's due process case law, where other choices "concerning contraception, family relationships, procreation, and childrearing" are constitutionally protected decisions.[197] Second, *Griswold v. Connecticut*[198] and *Lawrence v. Texas*[199] confirm that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association."[200] Third, recognizing the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education," which are "a central part of the liberty protected by the Due Process Clause."[201] Finally, Justice Kennedy explained that "marriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress.' "[202]

As explained above, history and tradition typically play a crucial role when discussing fundamental rights protected by the Due Process Clause but are doctrinally precluded as evidence that a law violates the Equal Protection Clause.[203] Thus, the majority in *Obergefell* was required to ground the right to marry, which includes same-sex marriage, in the Due Process Clause if it wanted to rely on history for support.

C. Equal Protection Analysis

Although the Court's analysis in *Obergefell* could have ended after concluding the right for same-sex couples to marry is protected by the Due Process Clause of the Fourteenth Amendment, Justice Kennedy continued with an equal protection analysis, though it seems unnecessary in the sense that the right did not need further constitu-

195. *Id.* at 2598.
196. *Id.* at 2599.
197. *Id.*
198. 381 U.S. 479, 485–86 (1965).
199. 539 U.S. 558, 558 (2003).
200. *Obergefell*, 135 S. Ct. at 2599–600.
201. *Id.* at 2600 (citation omitted).
202. *Id.* at 2601 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).
203. *See supra* Section I.A.

tional justification. Similar to the abortion cases, which were clearly based in due process, the equality discussion in *Obergefell* was unnecessary but seems to have provided the majority with additional support. This secondary analysis fused the Due Process Clause and Equal Protection Clause together to form a single source of rights, guaranteeing both liberty and equality under the Fourteenth Amendment.

Discussing the source of rights, which guarantees same-sex couples the right to marry, Justice Kennedy reasoned:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right.[204]

Thus, the interrelation of the Due Process and Equal Protection Clauses further "our understanding of what freedom is and must become."[205] While the Court's abortion cases merely hinted at equality notes underlying the right itself, in *Obergefell*, Justice Kennedy explicitly cited Court precedent to demonstrate "[t]he synergy between the two protections," which establish a relationship between the two clauses, and more generally, liberty and equality.[206]

Similar to the Court's abortion cases, the Court's substantive due process cases before *Obergefell* that were specifically related to family-related rights also had hints of equality, but they were included by blending an analysis of equality rights with the liberty protected under the Due Process Clause.[207] For example, in *Loving v. Virginia*,[208] "the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause."[209] The *Loving* Court "declared the prohibition invalid because of its unequal treatment of interracial couples" and also because it "offended central

204. *Obergefell*, 135 S. Ct. at 2602–03.
205. *Id.* at 2603.
206. *Id.* at 2604.
207. *See* Loving v. Virginia, 388 U.S. 1, 1–2 (1967); Zablocki v. Redhail, 434 U.S. 374, 374–76 (1978); Lawrence v. Texas, 539 U.S. 558, 575 (2003).
208. *Loving*, 388 U.S. at 1–2.
209. *Obergefell*, 135 S. Ct. at 2603.

precepts of liberty . . . depriv[ing] all the State's citizens of liberty without due process of law."[210] Justice Kennedy elaborated on the *Loving* holding and explained, "[t]he reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions."[211] Thus, the existence of a fundamental right under the Due Process Clause may become more "clear and compelling" in light of past unequal treatment and the injuries sustained from denial of equal protection of the laws.[212]

"The synergy between the two protections is illustrated further" in *Zablocki v. Redhail*,[213] in which the challenged law "barred fathers who were behind on child-support payments from marrying without judicial approval."[214] Justice Kennedy reasoned, "[t]he equal protection analysis depended in central part on the Court's holding that the law burdened a right 'of fundamental importance.' "[215] Moreover, "[i]t was the essential nature of the marriage right . . . that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of each other."[216] Justice Kennedy explained, "these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution."[217]

Finally, Justice Kennedy explained that while *Lawrence v. Texas*[218] invalidated homosexual sodomy laws under the Due Process Clause, the opinion "acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State."[219] "*Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State 'cannot demean their existence or control their destiny by making their private sexual conduct a crime.' "[220] Justice Kennedy concluded:

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210. *Id.* (internal quotation marks omitted).
211. *Id.*
212. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528–29 (1989) (Marshall, J., dissenting).
213. 434 U.S. 374 (1978).
214. *Obergefell*, 135 S. Ct. at 2603.
215. *Id.*
216. *Id.*
217. *Id.* at 2604.
218. 539 U.S. 558 (2003).
219. *Obergefell*, 135 S. Ct. at 2604.
220. *Id.* (quoting *Lawrence*, 539 U.S. at 578).

> This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm.[221]

Thus, both the Due Process Clause and the Equal Protection Clause prohibit the "unjustified infringement of the fundamental right to marry."[222]

Ultimately, Justice Kennedy used the Court's precedent to "confirm th[e] relationship between liberty and equality."[223] As previously mentioned, this is significant because the Court began its opinion by concluding the right for same-sex couples to marry is protected by the Due Process Clause, and the analysis could have ended there. The decision went on to create a relationship between the Due Process and Equal Protection Clauses as a single source for future rights, using a few familial relationship cases as support, which did not merge the two rights as explicitly as Justice Kennedy had done.[224] This poses the

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221. *Id.* (emphasis added).

222. *Id.*

223. *Id.* Interestingly, Justice Kennedy does not cite *United States v. Windsor*, 133 S. Ct. 2675 (2013), in the due process section of *Obergefell*. In *Windsor*, the Court struck down the Defense of Marriage Act ("DOMA"), which provided a federal definition of "marriage" and "spouse." *Id.* at 2683. While DOMA was struck down, *inter alia*, as a deprivation of liberty protected under the Due Process Clause of the Fifth Amendment, the case arguably contributed to equal protection jurisprudence. *See id.* at 2695–96. The majority opinion, written by Justice Kennedy, focused on the inequalities that DOMA imposed on same-sex couples and identified its principal effect as "identify[ing] a subset of state-sanctioned marriages and make them unequal," and "[t]he principal purpose is to impose equality." *Id.* at 2694–96. The relevant history and tradition the Court emphasized in *Windsor* is also telling. Justice Kennedy stated, "DOMA's unusual deviation from the *usual tradition of recognizing and accepting state definitions of marriage* here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages." *Id.* at 2693 (emphasis added). Perhaps Justice Kennedy aimed to avoid using *Windsor* as precedent in *Obergefell* because relying on *Windsor*'s relevant history and tradition—allowing states to define marriage themselves—would not amount to a finding of a fundamental right to same-sex marriage, which all states must legally accept.

224. Justice Kennedy's unique role in the same-sex marriage cases, but specifically, *Obergefell*, is worth noting. At the time, he held a powerful position as one of the Court's most senior Associate Justices. In both *Windsor* and *Obergefell*, because Chief Justice Roberts did not vote in the majority alignment after oral arguments, Justice Kennedy was able to assign both opinions to himself. Riley E. Fredrick, *Marriage Equality: The Paralleled Progress Between Public Approval and Supreme Court Decisionmaking*, 44 FLA. ST. U. L. REV. 819, 844 (2017) (citation omitted).

question of whether other rights such as the right to choose an abortion, which were previously grounded in substantive due process alone, can now become more clear and compelling by analyzing any inequality which may result from the denial of equal protection of the law.

Significantly, this fusion of the Due Process and Equal Protection Clauses as a single source of rights opens the door to finding new rights within its boundaries—namely, grounding a woman's right to choose to terminate a pregnancy in equality. The next Part discusses the landscape in which *Obergefell* could be used to transform abortion to an equality right.

IV.
APPLYING *OBERGEFELL* TO MODIFY THE ROLE OF HISTORY IN EQUAL PROTECTION DOCTRINE

Justice Kennedy's discussion in *Obergefell* of the interaction between the Equal Protection and Due Process Clauses of the Fourteenth Amendment distinguishes *Obergefell* from its due process compatriots. While other due process cases such as *Casey* have grappled with the equal protection concept or merely hinted at the perceived relationship, none have so explicitly bound the two. Section IV.A argues that, after *Obergefell*, jurisprudence is ripe for grounding a woman's right to choose to terminate her pregnancy in equality rather than due process. Then, Section IV.B explains how the right to abortion would change if this doctrinal change were implemented. Finally, Section IV.C explains how courts may reach this change.

A. How Obergefell *Makes Finding Abortion in Equality Possible*

Abortion, like same-sex marriage, has been the topic of political debates for decades and has, likewise, experienced an evolution of political acceptance. As the background discussion above shows, the Court's jurisprudence until now has continuously provided opportunities for states to continue toeing the line with more and more restrictive abortion legislation.[225] Thus, perhaps we have reached the point of viability for a change in the underlying rationale of the right to abortion. This discussion accepts *arguendo* the arguments presented

"This position gave him 'substantial agenda control over the context of the opinion' and did in fact 'determine[ ] the future direction of law and policy' in regard to same-sex marriage." *Id.* at 844–45 (citing Isaac Unah & Ange-Marie Hancock, *U.S. Supreme Court Decision Making, Case Salience, and the Attitudinal Model*, 28 LAW & POL'Y 295, 299 (2006)).

225. *See supra* Section I.C.

above as to why abortion should be, or should have been, a right founded in equal protection rather than due process. Likewise, we are neutral to the argument that the advantages of this route justify its vindication.

Reviewing the jurisprudence, this Article contends that *Obergefell* opened the door or laid the foundation necessary to maintain an argument with a historical basis, while still grounding abortion in equality. Before *Obergefell*, the Court was bound to ground a right in due process if it wanted to use history as support.[226] In *Obergefell*, the Court removed the barrier between due process and equal protection such that the two are no longer an absolute either/or but rather work in conjunction. The symbiotic relationship between equal protection and due process that Justice Kennedy created in *Obergefell* provides a landscape where the Court may ground a right in equality while still using history (generally a due process reasoning) because, as Justice Kennedy explained, one leads to another. Put another way, under this newly explained symbiotic relationship where the rights function as parts of a whole, the Court may rely on history to justify the equality right.

Further, as demonstrated by the *Obergefell* decision, it is clear that the Court emphasizes societal support in creating or recognizing a new right, in addition to applying a substantive due process analysis. "In 1973, when *Roe* issued, abortion law was in a state of change across the nation. There was a distinct trend in the states, noted by the Court, 'toward liberalization of abortion statutes.'"[227] As Justice Rehnquist stated in his dissenting opinion in *Roe*, "[e]ven today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe."[228]

When the Court decided *Obergefell*, public acceptance of same-sex marriage was at an all-time high in the United States.[229] Perhaps this explains why Justice Kennedy, also writing for the majority in *United States v. Windsor* a mere three years before *Obergefell*, failed to make the same declaration as he did in *Obergefell*, that the right to marry is fundamental under the Due Process Clause and applies to

226. *See supra* Section I.A.

227. Ginsburg, *supra* note 51, at 379–80 (quoting Roe v. Wade, 410 U.S. 113, 140 (1973)).

228. *Roe*, 410 U.S at 174 (Rehnquist, J., dissenting).

229. Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx.

same sex-couples.[230] In *Windsor*, Justice Kennedy avoided the underlying question of whether there was a fundamental right to same-sex marriage, perhaps in part because societal support for such decision was not strong enough yet.[231] Ultimately, "*Windsor* set the stage for lower courts to decide that question independently, leaving the door open for the questions that were ultimately presented in *Obergefell*."[232] Significantly, and perhaps how Justice Kennedy predicted, support for same-sex marriage did not become stagnant after *Windsor*. By 2015, a record high sixty percent of Americans were in favor of the legalization of same-sex marriage, and the Court would find a fundamental right to same-sex marriage roughly one month later in *Obergefell*.[233]

Against the predictions of many, though, abortion has remained a vastly polarized topic since *Roe*.[234] In the initial years following *Roe*, 54% of Americans believed abortion should be legal but only under certain circumstances.[235] In addition, "roughly equal percentages of Americans said abortion should be legal under any circumstances [versus] illegal in all circumstances, about 20% each."[236] The height of support for legalization of abortion under all circumstances was in 1992, with 34% reporting it should be legal under all circumstances versus 13% reporting it should be illegal in all circumstances.[237] However, just four years later, the percentage saying abortion should be legal under all circumstances dropped to 25%, and the percentage say-

230. *Compare* United States v. Windsor, 133 S. Ct. 2675, 2716 (Alito, J., dissenting) ("Perhaps because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. . . . The Court's holding, too, seems to rest on the equal protection guarantee of the Fourteenth Amendment . . . ." (internal quotation marks omitted)), *with* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("[U]nder the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that [fundamental] right and liberty.").

231. Specifically, in 2013, the year *Windsor* was decided, public acceptance of same-sex marriage was at fifty-three percent. Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP (May 13, 2013), https://news.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx.

232. Fredrick, *supra* note 224, at 837. Indeed, Justice Scalia criticized this aspect of the *Windsor* opinion and "accused Justice Kennedy of writing an opinion 'deliberately transposable,' in the near future, into a federal constitutional right to same-sex marriage." *Id.* at 838 (quoting Michael J. Klarman, Windsor *and* Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 158 (2013)).

233. Fredrick, *supra* note 224, at 839 (citing McCarthy, *supra* note 229).

234. ZIEGLER, *supra* note 13, at 185.

235. Lydia Saad, *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP (Jan. 22, 2013), https://news.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx.

236. *Id.*

237. *Id*.

ing abortion should be illegal in all circumstances rose slightly to 15%.[238] This abrupt shift "coincided with a then-new national debate over partial-birth abortion playing out in Congress."[239]

Controversy surrounding abortion has remained after *Roe*, which is perhaps most "evident in the nearly even split between Americans calling themselves 'pro-choice' and those calling themselves 'pro-life,' and the wide variation in attachment to these terms by the political left and right."[240] One of the major pro-life strategies following *Roe* was incrementalism—to gradually restrict the right to abortion through legislation, as absolute bans on abortion would have directly contradicted the holding of *Roe*.[241]

> [P]ro-life incrementalism sought to enact restrictions that would further complicate a woman's access to abortion without restricting abortion altogether, blatantly violating *Roe*. Proponents of this strategy believed that with enough cumulative success with incremental provisions restricting access to abortion, the pro-life movement could accomplish their overall mission to eliminate abortion and thereby undermine the Court's holding in *Roe*. "Incrementalists focus on middle-ground restrictions stemmed from a belief that the pro-life movement had to achieve something concrete in order to remain a viable political force."[242]

Indeed, the provisions at issue in *Casey* were byproducts of this incrementalist strategy.[243] After *Casey*, incrementalism gained even more headway. Although the political movement was unable "to ban abortion entirely [in *Roe* and *Casey*, it] found a way to make it ever harder to access, one seemingly benign regulation at a time."[244]

When the Court decided *Hellerstedt* in 2016, public acceptance of legalizing abortion only under certain circumstances was at 50%, with 29% of Americans believing it should be legal under any circumstances and 19% believing it should be illegal in all circumstances.[245] The split between identifying as pro-choice versus pro-life remained; 47% of Americans identified themselves as pro-choice and 46% iden-

238. *Id.*
239. *Id.*
240. *Id.*
241. *See* CARMON & KNIZHNIK, *supra* note 4, at 131–32.
242. Melanie Kalmanson, *The Second Amendment Burden: Arming Courts with a Workable Standard for Reviewing Gun Safety Legislation*, 44 FLA. ST. U.L. REV. 347 (2016) (footnotes omitted) (citing ZIEGLER, *supra* note 141, at 59).
243. *See id*. (citing ZIEGLER, *supra* note 141, at 62–71).
244. CARMON & KNIZHNIK, *supra* note 4, at 131.
245. Lydia Saad, *U.S. Abortion Attitudes Stable; No Consensus on Legality*, GALLUP (June 9, 2017), https://news.gallup.com/poll/211901/abortion-attitudes-stable-no-consensus-legality.aspx.

tified themselves as pro-life.[246] Unlike public acceptance of same-sex marriage among Americans, which drastically increased from only twenty-seven percent supporting the legalization of same-sex marriage in 1996, to sixty percent supporting legalization in 2015, public acceptance of legalizing and the regulation of abortion remains split.[247]

One of the most contentious issues throughout the past two decades in the abortion debate is whether abortion should be legal in the second and third trimesters, suggesting the *Roe* trimester framework—although overruled by *Casey*—still remained very much a valid issue in the eyes of Americans.[248] Moreover, *Casey*'s undue burden standard proved vague and difficult to apply uniformly in practice.[249] The split public opinion regarding legalization and regulation of abortion, which does not appear to be improving like the public's gradual acceptance of same-sex marriage leading up to *Obergefell*, combined with the difficulty of applying the undue burden standard in practice, makes the timing certainly ripe for the Court to consider adopting a new standard of review for abortion jurisprudence.

As discussed above, *Obergefell*'s fusion of the Due Process and Equal Protection Clauses as a single source of rights could open the door for rights originally grounded in due process, specifically, a woman's right to choose to terminate a pregnancy, to find additional support in history as an equality right. While not as expressly as Justice Kennedy in *Obergefell*, the Court has invoked equality principles in abortion jurisprudence, in making sense of the due process analysis.[250] Recognizing abortion as an equality right by grounding it in both the Due Process and Equal Process Clauses, as *Obergefell* did for same-sex marriage, could not only enhance the political authority of the right, but also make a future Court less likely to remove or further restrict the right.[251] The next Section explains how the right would change if the Supreme Court were to follow the path paved by *Obergefell* and transform abortion into an equality right.

B. How the Right to Abortion Would Change as an Equality Right

When the Supreme Court determines that the Fourteenth Amendment protects a new, previously unrecognized right, it has essentially

246. *Id*.
247. Fredrick, *supra* note 224, at 846 (citing McCarthy, *supra* note 229).
248. *See* Saad, *supra* note 245 (explaining that public support is much lower for abortion during the second and third trimesters).
249. The undue burden standard is discussed in detail *supra* Section I.B.
250. Siegel & Siegel, *supra* note 164, at 163.
251. *Id.*

two alternative routes—equal protection or due process.[252] We now know that due process was the only way in which the Court could legitimately rely on history to support its politically polarized decision in *Roe* when it held that the Fourteenth Amendment protects the right to abortion, and then again in *Casey*.[253] So, despite the Court's understanding that abortion is a biologically specific right that seems to inhere in equality, the Court took the "safe" route where history was on its side and, in essence, granted this right to everyone—men and women alike—knowing that the right could physically be exercised by only women. But, how would the right look if the Court heeded Ginsburg's and the Siegels' advice?

The Equal Protection Clause of the Fourteenth Amendment denies "to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."[254] While "the government is not *required* to affirmatively act to protect citizens' rights under the Equal Protection Clause . . . [it] is *prohibited* from acting in such a way that denies the rights guaranteed by the Equal Protection Clause."[255]

If abortion were founded in equality or founded as a right guaranteed by both the Due Process and Equal Protection Clauses, the opinion would perhaps resemble the *Obergefell* decision. Like *Obergefell*, the Court's decision could begin by discussing the relevant history of abortion, the procedures, and reasons why the criminal laws restricting abortion were initially enacted in order to justify or reject their continued existence. The next portion of the analysis could reiterate the original holdings of *Roe* and *Casey*, that the right to choose an abortion is included in the personal privacy protected by the Due Process Clause.[256] Much like *Obergefell*, a due process rationale need not be discarded or overruled, but merely supplemented with an equal protection analysis to further support the decision.

Moving to the equal protection analysis, the opinion would not have to recreate the wheel. Rather, the opinion could rely on the equality-based statements in the Court's prior decisions—as highlighted above. For example, the opinion could highlight and expand upon the notes of equal protection from *Casey* by further emphasizing "[t]he ability of women to participate *equally* in the economic and

252. *See* sources cited *supra* note 25 and accompanying text.
253. Kalmanson, *supra* note 2, at 68.
254. Reed v. Reed, 404 U.S. 71, 75–76 (1971).
255. Kalmanson, *supra* note 2, at 46.
256. Roe v. Wade, 410 U.S. 113, 152 (1973).

social life of the Nation has been facilitated by their ability to control their reproductive lives."[257] Additionally, the Court could expand on this idea by incorporating Justice Ginsburg's previous arguments that legal challenges to abortion procedures "center on a woman's autonomy to determine her life's course, and thus to enjoy *equal citizenship stature*."[258] Thus, the decision would ultimately conclude that the right to choose is within the liberty protected by the Due Process Clause of the Fourteenth Amendment, while also finding that laws restricting the right "abridge central precepts of equality."[259]

Additionally, the right to abortion would be strengthened by incorporating elements of Professor (and Justice) Kimberly Mutcherson's own version of the *Roe* opinion, in which she agrees with the Supreme Court that the right is protected by the right to privacy but relies on equality for reaching that holding, as described by Rachel Rebouché.[260] Similar to Justice Kennedy's majority in *Obergefell*, Mutcherson draws from both due process and equal protection in reaching this holding.[261] On due process grounds, she argues that pregnancy affects "the constitutional right to bodily integrity."[262] As to equal protection, similar to Ginsburg's arguments, Mutcherson explains that "abortion bans penalize women, and only women, by forcing them to become mothers," and such obligation "carries professional and education disadvantages because pregnancy exacts costs and imposes burdens that," even with two active parents, "are not evenly distributed between the sexes" due to biological differences between the sexes.[263]

Also similar to Justice Kennedy's opinion in *Obergefell*, which drew from decades of Supreme Court jurisprudence, Mutcherson reasons that the decision regarding the right to abortion implicates a range of constitutional rights the Court has previously identified.[264] Ginsburg articulated similar sentiments in *Gonzales*—regarding both protecting the woman's intellectual autonomy and stability. In sum, a

257. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).
258. Siegel & Siegel, *supra* note 164, at 166 (emphasis added) (quoting Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)).
259. Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).
260. Rachel Rebouché, *Commentary on* Roe v. Wade, *in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 146, 147 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford eds., 2016) [hereinafter FEMINIST JUDGMENTS].
261. *Id.* at 147.
262. *Id.*
263. *Id.* at 147–48.
264. *See id.*

decision grounding the right to abortion in equality would be strengthened by drawing from prior Supreme Court cases regarding other privacy rights.

While the Court's opinion in *Roe* focused on the physician's role in the abortion decision, new abortion jurisprudence could strengthen the right by incorporating Mutcherson's careful dismissal of third parties as decisionmakers—for example, religious leaders and doctors—and, instead, separate the decision as one women make on their own based on their own private beliefs and practices with the autonomy to seek advice from whomever they choose.[265] Instead of relying on these third parties, the opinion could frame the issue in terms of the mother's choice to carry the pregnancy to term to therefore enter motherhood rather than the mother's choice to end the pregnancy—as Ginsburg has urged. Additionally, as Ginsburg has also urged, the Court could shift the focus from the State's interests in fetal life to the mother and her interests, such as her interest in equal participation in society. In other words, the discussion would be more based in the woman's interests in equality. This reframing of the issue to focus on the woman as the decisionmaker and her right to choose to become a mother or define her role in society lends itself to an equality-based argument.

Using these principles, the new abortion right proposed in this hypothetical opinion would enact what *Obergefell* prophesized—a right founded jointly in both due process and equality. The Court could affirm *Roe*'s holding that a woman's right to choose to terminate a pregnancy is grounded in the right to privacy protected by the Due Process Clause of the Fourteenth Amendment, while also holding that denying women the right to choose to terminate a pregnancy violates the Equal Protection Clause of the Fourteenth Amendment "as it demands that women, and only women, accede to the use of their bodies in a way that demeans them and that subjects them to significant personal, professional, and social obstacles only as a consequence of their sex."[266] The next Section blends the two—the Court's current

265. *See id.* at 159 ("[A] woman has a right to terminate a pregnancy and to do so without anyone's permission other than her own does not mean that others cannot seek to persuade her to make a different choice or, perhaps even better, to help avoid unplanned or unintended pregnancies in the first instance."); *see also id.* (noting that the Court's decision in *Roe* "says nothing of what conversations a woman might have with her religious advisor, a trusted friend, her husband, her romantic partner, her parents, or others whose counsel she trusts and might seek before ending a pregnancy").

266. *Id.* at 154.

framework and a new right grounded in equality—to explain how this new right could function in a post-*Roe* and post-*Casey* world.

C. Implementing this Change to the Right to Abortion

If the Court were to implement an abortion right under the Equal Protection Clause rather than the Due Process Clause, the Court would be challenged to shift the right to an equal protection framework. Thus, this Section converts the current undue burden standard to a standard for use within an equal protection framework. Ultimately, this Section determines that the undue burden standard is closer to intermediate scrutiny than strict scrutiny, despite the standard's protection of a fundamental right, which would ordinarily require strict scrutiny. Thus, in equal protection terms, those protected by the right to abortion are part of a quasi-suspect class.[267]

First, this is consistent with case law establishing that gender is a quasi-suspect class. As a result of key litigation from the women's rights movement, the Supreme Court determined that gender is a quasi-suspect class.[268] In other words, legislation that differentiates between genders should be reviewed under a higher level of scrutiny than rational basis. As Justice Ginsburg, before joining the Court, explained: "The Court's gender-based classification precedent impelled acknowledgement of a middle-tier equal protection standard of review, a level of judicial scrutiny demanding more than minimal rationality but less than a near-perfect fit between legislative ends and means."[269]

Consistent with gender being a quasi-suspect class, the current undue burden framework could apply even in an equal protection analysis, as this standard functions similarly to intermediate scrutiny—the applicable standard when reviewing legislation that affects a quasi-suspect class.

Under a literal reading of due process doctrine, legislation affecting or restricting fundamental rights should be reviewed under strict

267. A quasi-suspect class requires "a more exacting standard of judicial review than is normally accorded economic and social legislation." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985). *See* Kalmanson, *supra* note 2, at 55.

268. *See* LINDA HIRSCHMAN, SISTERS IN LAW 75–77 (2015); *see also* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (describing that classifications based on sex "are inherently suspect"); Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); United States v. Virginia, 518 U.S. 515, 533–34 (1996). *See generally* Reed v. Reed, 404 U.S. 71 (1971).

269. Ginsburg, *supra* note 51, at 378.

scrutiny.[270] Because *Roe* established that the right to choose to terminate a pregnancy is a fundamental right protected by the Due Process Clause, one would reasonably think that restrictive abortion legislation would be reviewed under strict scrutiny. However, a close review of the undue burden standard and how it has been applied reveals that it functions more like intermediate scrutiny and, therefore, would translate easily to a right grounded in equality based on gender.

Proponents of an equality-based reasoning for the right to choose make clear that heightened scrutiny is appropriate. Ginsburg, at least in her days as an advocate for women's rights, would argue that the standard should be strict scrutiny.[271] Likewise, Mutcherson wrote that the highest level of constitutional scrutiny is appropriate and stated that, if a fundamental right exists, "the state may not deny that right unless it has a compelling interest in doing so and chooses a narrowly tailored means of asserting that interest."[272]

If abortion were transformed into an equality right, the current undue burden standard would likely serve as the foundation for a sort of intermediate scrutiny standard that would apply going forward. Looking closely, although it purports to control legislation regarding a fundamental right, the undue burden standard created in *Casey* functions more like intermediate scrutiny, which applies to laws restricting something less than a fundamental right.[273] Indeed, the *Casey* Court created this standard as less than strict scrutiny from the beginning, stating: "Not all governmental intrusion is of necessity unwarranted."[274] In other words, rather than focusing on whether a State's infringement upon a constitutional right is justified, the undue burden standard focuses on whether a statute effectuates a substantial infringement, which seemingly means that restrictions are permissible so long as the right may still be accessed. Thus, the undue burden standard already functions like intermediate scrutiny, so grounding abortion in a gender-based equality right would not necessarily require revamping the governing standard. The undue burden standard would likely be translatable as a form of intermediate scrutiny.

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270. Kalmanson, *supra* note 2, at 55. Strict scrutiny is "the most rigorous standard under which a court reviews the validity of a law." *Id.* at 53. Applying this standard, "the court determines whether the statutory classification is 'narrowly tailored to further compelling governmental interests.'" *Id.* Thus far, the Supreme Court has reserved this scrutiny "for classifications based on race or national origin." *Id.*

271. *See* LINDA HIRSCHMAN, SISTERS IN LAW 75 (2015).

272. FEMINIST JUDGMENTS, *supra* note 260, at 156; *accord id.* at 154. *Contra id.* at 149.

273. *See* Kalmanson, *supra* note 2, at 54–55.

274. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 875 (1992).

Conclusion

Since the Supreme Court's landmark decision in *Roe v. Wade* in 1973, scholars have debated the wisdom of the Court's analysis, which grounded the right to abortion in the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. Several scholars have argued that the better route would have been for the Court to instead ground the right to abortion in equal protection based on its gender-specific application due to biological differences between men and women.

While abortion has remained a mainstream topic of discussion, it has recently risen to the forefront in light of Justice Kennedy's retirement and states' renewed efforts to enact antiabortion legislation. Likewise, as a result of the new composition of the Court due to Justice Kennedy's retirement and Justice Scalia's unexpected passing, scholars have debated the future of abortion in America and how the new Court will change the right and surrounding jurisprudence.[275] *June Medical* did not answer these questions.

Before his retirement, Justice Kennedy wrote the majority opinion in *Obergefell v. Hodges*. That opinion meant more for constitutional law, specifically the analysis of the Fourteenth Amendment, than just solidifying that the Fourteenth Amendment protects the constitutional right to marry. Doctrinally, his *Obergefell* opinion drew a connection between the Due Process and Equal Protection Clauses of the Fourteenth Amendment that did not otherwise exist in the Court's constitutional jurisprudence.

Drawing on Justice Kennedy's novel but intuitive explanation of the Fourteenth Amendment in *Obergefell*, this Article explained that the new synergy between the Due Process Clause and Equal Protection Clause creates support for the long-advocated argument that abortion would be more appropriately grounded in Equal Protection. It likewise provides the Court a path through which it can revisit abortion doctrine, especially in light of recent challenges to abortion legislation that the Court has accepted for review, and perhaps formulate a new standard for reviewing restrictive abortion legislation. In other words, equal protection may be the way to save the right to choose in a post-Kennedy era.

275. *See* sources cited *supra* note 13.