



A WOMAN'S RIGHT TO DIGNITY: EQUALITY, LIBERTY, AND ABORTION

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INTRODUCTION

*Call me Mary Beton, Mary Seton, Mary Carmichael
or any other name you please – it is not a matter of
importance.*

Virginia Woolf's casual tone betrays a conception of women that remains true today. The lack of importance given to the narrator's identity in *A Room of One's Own* reflects society's own disregard for the female. Viewed as a supplement rather than a complement to her male counterpart, Judith Shakespeare's life ended tragically and unremarkably despite the intellectual and artistic equality she shared with her brother. Centuries later,

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women continue to be both forgotten and spoken for politically, economically and socially; their identities shaped by imputed conceptions of their proper role.

The United States Constitution protects liberty and equality in two discrete provisions: The Due Process Clause and the Equal Protection Clause. The former recognizes that certain rights are fundamental to the constitutional guarantees of life, liberty and property, and the latter requires that those rights be granted equally among citizens. Although the principles of liberty and equality began as two distinct textual commitments, they have converged into one principle of "dignity."¹ Over the course of several decades, the Court has effectively intertwined the two in order to expand the rights of individuals and ensure that those rights are provided for even-handedly. This development eases the Court of its "pluralism anxiety," by which it refuses to expand equal protection to encompass new groups and subgroups,² while simultaneously allowing the Court to retain its role as a guardian of minority interests. Doctrinally, the unification into a dignity principle permits courts to sidestep the obstacles present in both substantive due process and equal protection jurisprudences. The Court has carved an alternative path of protection by eliminating the rigid framework of the latter and inflecting the former with a concern for group subordination. The recent gay rights cases, *Lawrence v. Texas*,³ *United States v. Windsor*⁴ and *Obergefell v. Hodges*,⁵ highlight the Court's fusion of both principles into one and open the door for a similar development in abortion. Viewed as a right with profound

¹ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011); see also Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (referring to the intertwining of due process and equal protection as a "double helix").

² Yoshino, *supra* note 1, at 747.

³ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴ See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

effects on women's economic and social status vis-à-vis men, the right to terminate a pregnancy provides the Court with an opportunity to further combine both doctrines in order to save the right from further erosion.

Currently, women make up seventy-three million workers in the United States,⁶ despite receiving degrees and filling entry-level positions as co-equals with men. Many women eventually leave the workforce due to a perception that family and career cannot coexist, leaving men to account for over 85% of all executive officer positions.⁷ This perception is warranted.⁸ While at work, women are pressured to "cover their status as potential or actual mothers."⁹ Anecdotally, one female attorney shared her view that "[t]here is a sentiment [in the workplace] that pregnancy and motherhood [have] softened her, that she is not going to work as hard."¹⁰ Mothers who work suffer financially as well; on average, each child results in a 5% reduction in pay, or about \$230,000 over the lifetime

⁶ Women make up 21% of CEOs of Fortune 500 companies, 14% of executive officer positions and 17% of board seats. SHERYL SANDBERG, *LEAN IN* 5 (2013).

⁷ Catalyst, *2012 Catalyst Census: Fortune 500 Women Executive Officers and Top Earners* (December 2012), <http://www.catalyst.org/2012-catalyst-census-fortune-500-women-executive-officers-and-top-earners>. Of those women who do remain in the workforce, 49 percent of them are childless, "[while] only 19 percent of 40-year-old male executives in an equivalent earnings bracket do not have children." KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 150 (2006).

⁸ See *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 n.2 (2003) (quoting 29 U.S.C. § 2601(a)(5) (2012)) (After eight years of study, "Congress found that, 'due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.'").

⁹ YOSHINO, *supra* note 7, at 150.

¹⁰ *Id.*

of a highly skilled worker.¹¹ As a result of the pressure, some women choose not to have children altogether.¹² It follows then that the right to terminate a pregnancy does not only concern decisional autonomy over the body; it also plays a central role in the ability of women to maintain careers and achieve financial success at the same rate as men.¹³ The importance of that right cannot be overstated. As a society, we “preserve[] the dominance of men by creating obstacles to women’s ability to control their reproductive capacity” with lasting effects both inside and outside of the workforce.¹⁴

The Supreme Court guaranteed women a control over their bodies and reproductive lives in 1973 in *Roe v. Wade*.¹⁵ Yet the right to terminate a pregnancy, and consequently the ability of women to order their affairs, has since been undermined. Post-*Roe* rulings chipped away at the right and paved the way for states to regulate a woman’s decision. Clinic closures have plagued several states and the issue remains unsettled; the Court recently heard oral arguments in an abortion case this term in *Whole Woman’s Health v. Hellerstedt*. In order to address the erosion of the right to terminate a pregnancy and the subordination of women, several scholars have argued that the right should be governed by equal protection as a form of gender discrimination. Recent developments in substantive due process, the doctrinal home of the right to an abortion, may

¹¹ Erik Sherman, *What Hurts Working Women Most, Going Childless or Having Kids?*, FORTUNE (Dec. 4, 2015, 1:32 PM), <http://fortune.com/2015/12/04/working-women-kids-no-kids/>.

¹² YOSHINO, *supra* note 7, at 150 (quoting Sylvia Ann Hewlett, “one pair of figures from corporate America says it all: 49 percent of women executives earning \$100,000 or more a year are childless, while only 19 percent of 40-year-old male executives in an equivalent earnings bracket do not have children”).

¹³ See also KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1985).

¹⁴ Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 960–62 (1984).

¹⁵ See *Roe*, 410 U.S. 113.

provide a new alternative. Inflecting equality principles from equal protection to the liberty interest already identified in *Roe* provides a more feasible solution for those seeking a revitalization of the right to terminate a pregnancy.

This paper seeks to address the status of the right to terminate a pregnancy under current substantive due process jurisprudence, evaluate the feasibility and desirability of analyzing the right as an equal protection violation, recognize a trend towards an intertwining of liberty and equality principles, and ultimately recommend that the Court apply that trend in the context of abortion. In Part I, this paper provides an overview of the origins of substantive due process rights, the original test the Court invoked in recognizing new liberties and a reworking of that test that may be applied to abortion. In Part II, the arguments advocating for the application of equal protection to abortion are addressed and challenged. The benefits and disadvantages of equal protection application are evaluated and its use is rejected. In Part III, a development in the courts is identified, principally in the context of gay rights. Finally, in Part IV, I suggest that the development be extended to the right to terminate a pregnancy in order to expand the rights of women and elevate them to equal status among men.

I. ABORTION AS A DUE PROCESS RIGHT

A. HISTORICAL OVERVIEW OF SUBSTANTIVE DUE PROCESS

Substantive due process permits the Court to recognize rights under the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁶ The Court first recognized the need for substantive due process rights in a series of cases involving the right to

¹⁶ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

contract.¹⁷ The *Lochner* era, named after its seminal case *Lochner v. New York*,¹⁸ is known for judicial application of strict scrutiny to economic legislation. Generally, judicial scrutiny in substantive due process involves a close look into the government interests behind a piece of legislation and the nexus between that interest and the law or policy under review. Under strict scrutiny, the government interest at stake must be “compelling” and the law “narrowly tailored” to achieve that end.¹⁹ The Court, however, ultimately concluded that application of strict scrutiny to ordinary economic legislation proved overly burdensome upon the government and instead held that it is governed by rational-basis review, a presumptively constitutional default whereby the Court simply asks whether a government interest exists that is plausibly related to the law in question.²⁰ Following the *Lochner* era, the Court began to recognize fundamental rights outside of the realm of commerce. For instance, from the right to use contraception to the right to marriage, the Court began developing a body of law identifying

¹⁷ See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down federal legislation mandating a minimum wage level for women and children); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal regulation of child labor); *Adair v. United States*, 208 U.S. 161 (1908) (striking down federal legislation prohibiting railroad companies from demanding that a worker not join a labor union as a condition for employment).

¹⁸ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁹ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (applying for the first time the standard of review known as strict scrutiny derived from *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938)).

²⁰ See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 393 (1937) (“In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression.”); see also *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

rights so fundamental to our notions of life, liberty and property that they merit strict scrutiny analysis.

When the Court began developing a test for recognizing unenumerated rights it was confronted with two alternative paths: a common law approach and a formulaic approach. An open-ended common law approach centered on a balancing test saw its early roots in Justice Harlan's dissent in *Poe v. Ullman*.²¹ Until recently, the Court rejected Justice Harlan's approach, opting instead for a formulaic approach in identifying substantive due process rights. In *Washington v. Glucksberg*, the Court explained its two-pronged test focused on tradition and specificity.²² By giving weight to the nation's "deeply rooted traditions," the *Glucksberg* test is backward looking, rather than forward looking, and protects longstanding community values rather than recognizing new concerns and

²¹ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) ("Due process . . . cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.").

²² See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) ("Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' Second, we have required in substantive-due-process cases a 'careful description of the asserted fundamental liberty interest.'").

dangers.²³ As to specificity, the meaning of a “careful description” was taken from *Michael H*'s plurality opinion where the Court determined that the lowest level of generality governs the inquiry.²⁴ The Court also concluded that the Constitution protects negative liberties, freedom from governmental intrusion, and not positive liberties, freedom to receive a benefit from the government.

In a series of recent decisions, the Court reworked, if not overruled, the *Glucksberg* formula. In 2003, for instance, the Court revisited the history prong of *Glucksberg*, without directly referencing the decision, and considered trends and trajectories regarding the right to intimacy and privacy in striking down a Texas anti-sodomy statute.²⁵ In other words, the Court asked where the country was headed rather than where it had been. The Court doubled down on this view of tradition last term in *Obergefell v. Hodges*, stating that,

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a

²³ See 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) (“The [Due Process Clause] has [] been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history. The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding.”).

²⁴ *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion); see also *Reno*, 507 U.S. 292; *Glucksberg*, 521 U.S. 702.

²⁵ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (“[The Framers] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”).

charter protecting the right of all persons to enjoy liberty as we learn its meaning.²⁶

Explicitly adopting Justice Harlan's view of tradition in *Poe*, the Court found that tradition remains important and relevant to the analysis, but should be analyzed through common law rather than through public opinion.²⁷ The Court implicitly rejected the specificity prong of *Glucksberg* by recognizing the right not on its most specific level, but instead by framing the liberty interest on a higher level of generality in terms of intimacy and privacy.²⁸ Sealing the fate of *Glucksberg*, the *Obergefell* Court retreated on its prior distinction between negative and positive rights by requiring states to confer a benefit upon individuals.

B. THE FUNDAMENTAL RIGHT TO TERMINATE A PREGNANCY

While the United States Constitution does not explicitly mention reproductive rights, including whether to have a child or to terminate a pregnancy, the Supreme Court recognized them as fundamental to an individual's liberty across a series of cases.²⁹ However, like most constitutional rights, the right to terminate a

²⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

²⁷ Tribe, *supra* note 1, at 1899.

²⁸ See *Lawrence*, 539 U.S. at 566–67.

²⁹ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing the fundamental right to terminate a pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (inflecting equality into the fundamental right to contraception by holding that the right must be granted to both married and unmarried couples alike); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a fundamental right to the use of contraception); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . There is no redemption for the individual whom the law touches. . . . He is forever deprived of a basic liberty.”).

pregnancy is not absolute.³⁰ Thus, a government may restrict or deprive an individual of the right if a compelling state interest exists and the law is narrowly tailored to achieve those ends.³¹ The Court in *Roe* outlined a trimester framework to aid lower courts in determining when the state's interest in protecting the health and safety of the mother begins and strict scrutiny analysis is triggered. During the first trimester, a state cannot regulate abortion beyond requiring that a physician perform the procedure under safe conditions.³² After the first trimester, a state may regulate so long as those regulations reasonably relate to the protection of the health and safety of the mother.³³ After viability, a state may even ban abortion altogether unless necessary to save the life or health of the mother.³⁴

In *Planned Parenthood of Southeastern Pennsylvania v. Casey* a plurality of the Court defined a new level scrutiny applicable to abortion cases and rejected the trimester framework of *Roe*.³⁵ The *Casey* Court held that a state actor may regulate the right to an abortion so long as the regulation does not impose an "undue burden" upon the exercise of that right.³⁶ Accordingly, a lower court applying the undue burden standard should inquire whether the regulation at issue has the "purpose or effect," or both, of placing a "substantial obstacle" in the path of a woman seeking an abortion.³⁷ This undue burden standard was and remains a novel development in constitutional law; its meaning can only be drawn from the Court's limited, and often unenlightening, abortion

³⁰ *Roe*, 410 U.S. at 153.

³¹ *See id.* at 154-55.

³² *Id.* at 163.

³³ *Id.*

³⁴ *Id.* at 163-64.

³⁵ *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872-74 (1992).

³⁶ *Id.* at 874.

³⁷ *Id.* at 877.

decisions. The standard derives from the strict scrutiny standard initially applied in *Roe*, and thus ostensibly constitutes something more exacting than rational-basis review, although the exact level remains unclear. In *Casey*, the Court applied this standard and concluded that a state may express its preference for life by persuading a woman to carry to term, but is prohibited from forcing the hand of the woman.³⁸ The *Casey* Court held that the 24-hour waiting period and parental consent provisions of the Pennsylvania statute³⁹ were constitutional since they expressed a preference for life and did not constitute an undue burden.⁴⁰ The spousal consent provision, however, was struck down because the Court determined it did, indeed, present an undue burden on the right on at least two grounds. First, the Court recognized that a potential for abuse exists when a husband learns of his wife's wishes to terminate a pregnancy.⁴¹ Second, the Court rejected a paternalistic view of marriage and the decision to bear and beget a child when it explained that while a husband has an interest in his unborn child, he "has no enforceable right to require a wife to advise him before she exercises her personal choices. . . . A state may not give to a man the kind of dominion over his wife that parents exercise over their children."⁴²

Strikingly, the undue burden standard deviates from both strict scrutiny and rational-basis review in a key respect. While the traditional inquiries seek to evaluate the connection between the

³⁸ *Id.* at 878.

³⁹ 18 PA. CONS. STAT. §§ 3205–06 (2016).

⁴⁰ *Casey*, 505 U.S. 833.

⁴¹ *Id.* at 898.

⁴² *Id.* ("[The spousal notification] requirement embodies a view of marriage consonant with the common-law status of married women but [is] repugnant to our present understanding of marriage and of the nature of rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry.").

law and the state's interest, undue burden might seem to lack the nexus question. For instance, under a strict scrutiny framework a state interest is identified and the regulation's ability to achieve that end is evaluated, yet in abortion cases lower courts are instructed to identify the interest and then inquire as to whether, and to what extent, the regulation imposes a burden on the woman not whether the regulation actually achieves the purported interest. Thus, it seems possible that a reviewing court could identify a government interest yet uphold a regulation bearing no relation whatsoever with that interest. Lower courts, however, have read into the undue burden standard a nexus requirement when evaluating the compelling state interests. For instance, Judge Posner reads the undue burden standard as an inquiry into whether "a burden significantly exceeds what is necessary to advance the state's interests."⁴³ "The feebler the medical grounds . . . the likelier is the burden on the right to abortion to be disproportionate to the benefits and therefore excessive," he posits, thus requiring a nexus between the regulation and the interest in making a determination regarding the weight of the burden.⁴⁴

The *Casey* Court gave states the ability to place side constraints on the right to terminate a pregnancy at a point earlier than that permissible under *Roe*. The Court rejected the *Roe* framework in favor of viability, the point where a fetus gains the capacity to survive outside of the womb.⁴⁵ Consequently, the first trimester, previously untouchable under *Roe*, is now subject to state regulation as a state's interest begins at a time earlier than viability and is simply strengthened once that line is crossed.⁴⁶ Tying the undue

⁴³ *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2013) (quoting *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 913 (9th Cir. 2014)).

⁴⁴ *Id.* at 920.

⁴⁵ *Casey*, 505 U.S. at 870, 873.

⁴⁶ *Id.*

burden standard to the point of viability puts the right in a precarious situation. Science and innovation are constantly advancing and viability can only occur sooner and sooner in prenatal development. For example, the point of viability shifted between *Roe* and *Casey* from week twenty-eight to week twenty-four and is likely to continue pushing forward.⁴⁷

In *Gonzales v. Carhart*, the Court upheld the viability framework espoused in *Casey* and finds that the federal partial-birth abortion ban does not constitute an undue burden on the right.⁴⁸ Citing legislative findings extensively, the Court concluded that a partial birth abortion accomplished via an intact dilation and extraction was never medically necessary in light of other alternatives that are not any more dangerous.⁴⁹ As a result, Congress, endorsed by the Court, commands a challenger to prove the negative, a heavy if not impossible burden to shoulder. Furthermore, the Court said that in cases of medical uncertainty as to the health risks, state and federal legislatures have broad discretion to legislate.⁵⁰ Critics of *Gonzales* focus on the standard of review employed by the Court.⁵¹ *Roe* mandated a strict scrutiny analysis of restraints on the right to terminate a pregnancy, but the *Gonzales* Court seems to use a much more forgiving standard, approaching rational-basis review. *Gonzales*, and subsequent legislative enactments, embodies Justice Blackmun's fear that the Court "implicitly invites every state . . . to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down

⁴⁷ See *Casey*, 505 U.S. at 860.

⁴⁸ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

⁴⁹ *Id.* at 163–66.

⁵⁰ *Id.* at 163.

⁵¹ See RICHARD A. POSNER, *HOW JUDGES THINK* (2008) (criticizing the *Gonzales* result on the grounds that the case is indistinguishable from precedent); Bruce Fein, *Hoisted On Their Own Petard*, WASH. TIMES, May 1, 2006, at A16 (*Gonzales* is "an orgy of intellectual incoherence").

the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before [Roe]."⁵²

These post-*Roe* rulings severely undermine the right to terminate a pregnancy by creating the space necessary for the successful passing of Targeted Regulations of Abortion Providers, or TRAP laws, and closing of clinics nationwide. TRAP laws are laws that regulate healthcare providers by focusing on health risks and safety procedures. Unlike laws that regulate the woman directly, such as counseling requirements, waiting periods,⁵³ and parental consent,⁵⁴ TRAP laws instead regulate clinics and physicians directly by imposing standards and requirements. The most common TRAP laws take the form of ambulatory surgical centers, or ASC, requirements, physician admitting privileges, gestational limits, insurance coverage and ultrasound requirements. Although seemingly benign licensing and inspection requirements, these regulations are often not imposed upon non-abortion clinics and physicians who provide similar, or even riskier, procedures.⁵⁵

⁵² *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting).

⁵³ Today, almost half of the states currently require a woman to wait twenty-four hours prior to undergoing an abortion procedure.

⁵⁴ Strikingly, although a large number of states permit minors to marry without parental consent, the majority require at least one parent's involvement in a minor's decision to have an abortion, either through notification, consent or both.

⁵⁵ *See, e.g., Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 914 (7th Cir. 2013) ("No other procedure performed outside a hospital, even one as invasive as a surgical abortion, is required by Wisconsin law to be performed by doctors who have admitting privileges at hospitals within a specified radius of where the procedure is performed. And that is the case even for procedures performed when the patient is under general anesthesia, and even though more than a quarter of all surgical operations in the United States are now performed outside of hospitals. . . . Wisconsin appears to be indifferent to complications of any other outpatient procedures, even when they are far more likely to produce complications than abortions are. For example, the rate of complications

Abortion clinics disproportionately suffer from unannounced, warrantless searches oftentimes involving the copying of patients' confidential medical records.⁵⁶ In other situations, the regulations are so burdensome upon the abortion providers themselves that clinics are forced to shut down altogether. For example, hanging in the balance in *Whole Woman's Health v. Hellerstedt*, pending before the Court this term, lies the closure of all but eight abortion clinics in the State of Texas.⁵⁷ The Texas TRAP laws at issue require abortion clinics to be ambulatory surgical centers and abortion doctors to have admitting privileges at hospitals in the area.⁵⁸

While proponents of these laws point to the health and safety of the mother and the potential human life at stake, these interests cannot, constitutionally, be conflated.⁵⁹ If a law purports to regulate health, actual health benefits must be shown to outweigh the burden placed on a woman trying to terminate a pregnancy.⁶⁰ *Casey* permits a state to protect the potential life by persuading a mother to reconsider or reflect on what she is about to do, for example via waiting and counseling requirements. *Casey* also permits a state to

resulting in hospitalization from colonoscopies done for screening purposes is four times the rate of complications requiring hospitalization from first-trimester abortions.”).

⁵⁶ See *Tuscon Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004).

⁵⁷ The case involves consideration first about whether, when applying the “undue burden” standard of *Casey* a court errs by refusing to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health, and second, whether the Fifth Circuit erred in concluding that this standard permits Texas to enforce laws that would cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health of the mother).

⁵⁸ TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 245.010 (West 2015).

⁵⁹ *Schimel*, 806 F.3d 908; see also Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice*, 125 YALE L.J. 1428 (2016).

⁶⁰ 806 F.3d at 919.

protect the health and safety of the mother by ensuring that doctors and clinics meet certain standards without imposing an undue burden on the woman's decision. In other words, "courts must confirm that [state] laws actually serve health-related ends and do not instead provide a backdoor way of protecting potential life."⁶¹ Thus, in *Whole Woman's Health* the Court must find the Texas regulations unconstitutional if they do not in fact advance the health interests of the mother.

II. ABORTION AS SEX DISCRIMINATION

A. EQUAL PROTECTION

The Fourteenth Amendment guarantees to each person "equal protection of the laws."⁶² The Equal Protection Clause was drafted and included to signal the end of constitutional discrimination and subordination of African Americans. Although initially drafted to protect racial minorities from discrimination, the Clause has subsequently been invoked to protect other "discrete and insular minorities."⁶³ The Court applies heightened scrutiny to laws discriminating on the basis of race,⁶⁴ national origin,⁶⁵ alienage,⁶⁶ gender,⁶⁷ and non-marital parentage.⁶⁸ Heightened scrutiny is divided between strict and intermediate scrutiny. Strict involves the

⁶¹ Greenhouse & Siegel, *supra* note 59, at 1432.

⁶² U.S. CONST. amend. XIV, § 1.

⁶³ *United States v. Carolene Products Co.*, 304 U.S. 144, n.4 (1938) (establishing the tiered scrutiny framework applicable to laws discriminating against certain groups).

⁶⁴ *See Brown v. Board of Education*, 347 U.S. 483 (1954) (applying strict scrutiny and finding that laws establishing separate but equal facilities on the basis of race fail the standard of review and are unconstitutional).

⁶⁵ *Oyama v. California*, 332 U.S. 633 (1948).

⁶⁶ *Graham v. Richardson*, 403 U.S. 365 (1971).

⁶⁷ *See Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to legislation discriminating on the basis of gender).

⁶⁸ *Trimble v. Gordon*, 430 U.S. 762 (1977).

same compelling interest and narrow tailoring inquiries as it does in substantive due process jurisprudence, but intermediate scrutiny is unique to equal protection. Currently, gender classifications receive intermediate scrutiny and a court must ask whether an “important” government interest exists and whether the law at issue is “substantially related” to achieve that end.⁶⁹ Non-suspect classes, or classes that do not meet one of the Court’s requirements triggering heightened scrutiny,⁷⁰ receive rational-basis review much like economic legislation under substantive due process. However, in a series of cases the Court ostensibly applies something greater

⁶⁹ *Id.* For a discussion of the application of strict scrutiny to gender discrimination and the near passage of the Equal Rights Amendment, see generally *Frontiero*, 411 U.S. at 688 (plurality opinion) (“classifications based on sex, like classifications based upon race, alienage or national origin, are inherently suspect and must therefore be subjected to strict judicial scrutiny”) (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally such discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage” at 684) (“[W]omen still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market, and perhaps most conspicuously, in the political arena. Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by birth, the imposition of special disabilities upon members of a particular sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility” at 686); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

⁷⁰ In a series of decisions, the Court has found that one of the following must be met in order to attain suspect classification status:

The group has historically been discriminated against, or have been subject to prejudice, hostility, or stigma, due, at least in part, to stereotypes.

They possess an immutable characteristic

They are powerless to protect themselves via the political process or in other words is a “discrete and insular minority”

The group’s distinguishing characteristic does not inhibit it from contributing meaningfully to society.

than rational-basis review to non-suspect classes.⁷¹ Recognized by scholars as “rational-basis with teeth” or “bite,”⁷² this level of scrutiny is not formally acknowledged or embraced by the Court but may provide additional protections to marginalized groups that do not receive heightened protections. This impetus to expand protections but hesitance to overtly do so may be explained by the Court’s “pluralism anxiety.”⁷³ Plagued by growing apprehension stemming from the Court itself and from the public, the Court has shied away from recognizing new suspect classes and has instead turned to other alternatives to protect minority rights.

B. GENDER DISCRIMINATION

Until the 1970s, the Supreme Court applied rational-basis review to gender classifications and consistently rejected constitutional attacks on statutes disadvantaging women.⁷⁴ Contemporaneous with the efforts of the American Civil Liberties Union under the direction of now-Justice Ginsburg, the Court

⁷¹ *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

⁷² Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972).

⁷³ Yoshino, *supra* note 1.

⁷⁴ *See, e.g.*, *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding as “rational” a jury selection system excluding women who did not affirmatively indicate a desire to serve); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan statute prohibiting a woman from working as a bartender unless she was the wife or daughter of bar’s male owner); *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon statute prohibiting the employment of women in factories for more than 10 hours per day, distinguishing men from women on the basis of inherent differences justifying limitations on a woman’s right to contract); *Minor v. Happersett*, 88 U.S. 162 (1875) (holding that the right to vote was not a privilege of citizenship and that women, despite their status as both persons and citizens within the meaning of the Fourteenth Amendment, could be denied the franchise); *Bradwell v. Illinois*, 83 U.S. 130 (1873) (upholding an Illinois law refusing to grant women a license to practice law finding that the sphere of the woman is the home and she is too timid and delicate for many professions).

became more receptive to constitutional attacks on gender.⁷⁵ Creating and applying intermediate scrutiny to gender discrimination cases, the Court asks whether the state interest is an “important” one and whether the means used to achieve it are “substantially related.”⁷⁶ Framing the state’s burden in terms of an “exceedingly persuasive justification,” Justice Ginsburg in *United States v. Virginia* not only confirms the application of intermediate scrutiny, first announced in *Craig v. Boren*,⁷⁷ but also takes great pains to clarify that the review is more akin to strict scrutiny as opposed to rational-basis review.⁷⁸ The standard of review demands “more than minimal rationality but less than a near-perfect fit between legislative ends and means.”⁷⁹ In *Virginia* the Court found that classifications on the basis of gender differences are not *ipso facto* invalid but they may not be overly generalized.⁸⁰ In other words, “real differences” are constitutionally stable footing for distinguishing among the sexes but “archaic overgeneralizations”

⁷⁵ See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding a state statutory scheme imposing alimony obligations on husbands but not wives unconstitutional); *Craig v. Boren*, 429 U.S. 190 (1976) (striking a Oklahoma law burdening men, rather than women, under intermediate scrutiny); *Stanton v. Stanton*, 421 U.S. 7 (1975) (striking down Utah’s definitions of adulthood on the basis of gender under rational basis review finding that stereotypes were not a legitimate basis for official policies that treated women differently); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down a federal law granting family military benefits on the basis of sex, but dividing over the applicable standard of review); *Reed v. Reed*, 404 U.S. 71 (1971) (marking the first time the Court invalidated a gender classification and it did so under the Equal Protection Clause).

⁷⁶ *Craig*, 429 U.S. at 197.

⁷⁷ *Id.*

⁷⁸ *United States v. Virginia*, 518 U.S. 515 (1996).

⁷⁹ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

⁸⁰ *Virginia*, 518 U.S. at 516 (“The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females”).

are not.⁸¹ Additionally, the Court noted that sex classifications could be used to celebrate or benefit women, but not “to create or perpetuate the legal, social, and economic inferiority of women.”⁸² For example, a classification can be used to compensate women for particular “economic disabilities they have suffered, to promote equal employment opportunity or to advance full development and talent.”⁸³

In proving a gender classification case, a plaintiff must prove that a statute or policy is either facially discriminatory or that, despite being facially neutral, the law disparately impacts one gender and was motivated by a discriminatory purpose. Statutes and policies like those at issue in *Craig* and *Virginia* involved discrimination through the law’s very terms. In *Craig* and *Virginia* the state actions distinguished between men and women. The first set different drinking ages for men and women and the second excluded women from attending the Virginia Military Institute. Alternatively, laws which appear neutral may be challenged on the grounds that they are either implemented in a discriminatory fashion or that they disproportionately fall upon one group over another and this result was the intent of the legislature. For example, the Massachusetts law at issue in *Personnel Administrator of Massachusetts v. Feeney* gave a preference in hiring veterans, both male and female, yet males represented over 98% of veterans

⁸¹ *Id.* at 550 (“[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.

In contrast to the generalizations about women on which Virginia rests, we note again these *dispositive* realities: VMI’s implementing methodology is not *inherently* unsuitable to women; *some* women do well under the adversative model; *some* women, at least, would want to attend VMI if they had the opportunity; *some* women are capable of all of the individual activities required of VMI cadets and can meet the physical standards VMI now imposes on men”).

⁸² *Id.* at 534.

⁸³ *Id.* at 533.

residing in the state.⁸⁴ Despite this disparate impact, however, the Court rejected plaintiff's claim holding that disparate impact alone does not prove an equal protection claim; discriminatory purpose must be proved as well.⁸⁵

The Court typically deems distinctions between men and women based on stereotypical assumptions of gender roles constitutionally defective,⁸⁶ while classifications based on biological differences or remedying past discrimination tend to pass constitutional muster. The Court has consistently invalidated state policies based on stereotypes such as the woman's place being in the home⁸⁷ or occupations meant exclusively for women.⁸⁸

⁸⁴ 442 U.S. 256 (1979).

⁸⁵ See also *Washington v. Davis*, 426 U.S. 229 (1976) (holding that to prove a race claim on equal protection grounds, a plaintiff must prove both discriminatory effect and purpose when a law is facially neutral).

⁸⁶ See, e.g., *Orr*, 440 U.S. 268 (striking an Alabama law that allowed women but not men to receive alimony); *Caban v. Mohammed*, 441 U.S. 380 (1979) (invalidating a statute requiring consent of the mother, but not the father, before a nonmarital child could be placed for adoption) (Maternal and paternal relations are not "invariably different in importance"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (striking provision of the Social Security Act that allows a widow, but not a widower, to receive benefits) ("[M]ale workers earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support). But see *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981) (upholding statutory rape law criminalizing the behavior of men only) ("[T]he risk of pregnancy itself constitutes a substantial deterrence to young females. No similar natural sanctions deter males"); *Lehr v. Robertson*, 463 U.S. 248 (1983) (upholding statute allowing a child to be adopted without notice to the father if he had not lived with mother and child or registered his intent to claim paternity with the state); *Parham v. Hughes*, 441 U.S. 347 (1979) (upholding a statute permitting the mother, but not the father, to sue for the wrongful death of nonmarital child on the grounds that the distinction was not between men and women, but instead between men who had established paternity and those who had not).

⁸⁷ See, e.g., *Stanton v. Stanton*, 421 U.S. 522 (1975).

⁸⁸ See, e.g., *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729 (1982) (holding that state policy of operating a nursing school that excluded men is unconstitutional) ("Rather than compensate for discriminatory barriers faced by

However, inherent differences stemming from biology and physiology legitimize paternalistic state policies in the eyes of the Court:

[W]omen's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence Differentiated by these matters from the other sex, she is properly placed in a class by herself, and the legislation designed for her protection may be sustained, even when the legislation is not necessary for men and could not be sustained.⁸⁹

In the context of biological differences, the Court's decisions remain inconsistent. For example, in *Nguyen v. Immigration and Naturalization Service* the Court permitted the INS to favor mothers over fathers because of the alleged certainty of the identity of the mother and greater opportunity mothers have in establishing a relationship with their child.⁹⁰ Yet in *General Elec. Co. v. Gilbert*⁹¹ and *Geduldig v. Aiello*⁹² the Court declines to use biological differences, the exclusive ability of women to bear and beget a child, as a legitimate basis for distinguishing among the sexes in terms of pregnancy-related disabilities under insurance programs leaving pregnancy discrimination outside the ambit of the Fourteenth Amendment. Thus, under equal protection jurisprudence, although "[n]o longer is the female destined solely for the home and the

women, MUW's policy tends to perpetuate the stereotyped view of nursing as an exclusively woman's job").

⁸⁹ *Muller*, 208 U.S. at 421-22.

⁹⁰ 533 U.S. 53 (2001).

⁹¹ 429 U.S. 125 (1976) (finding that women unable to work due to pregnancy or childbirth could be excluded from disability coverage because, according to the Court, these classifications were not gender-based on their face, and were not shown to have any sex-discriminatory effect since all "non-pregnant persons" were treated alike).

⁹² 417 U.S. 484 (1974).

rearing of the family, and only the male for the marketplace and the world of ideas,"⁹³ stereotypes persist under the guise of inherent differences between the sexes.

C. ABORTION AS GENDER DISCRIMINATION

Since *Roe*, many scholars have advocated for the application of equal protection to abortion.⁹⁴ Equal protection would free abortion jurisprudence of its paternalism and rid women of the stigma and burdens associated with their reproductive decisions. Moreover, its application would bring to substantive due process the strides women have made under equal protection.⁹⁵ However, application of equal protection to the right to terminate a pregnancy is unfeasible and unnecessary in order to enhance its legal protections. Forthcoming is an explanation of what a potential equal protection analysis would entail and result in, followed by a discussion of *Geduldig v. Aiello*,⁹⁶ the lead case that stands between abortion and equal protection.

A sex-discrimination claim for abortion must either make a claim that a law discriminates on its face or, alternatively, that

⁹³ *Stanton*, 421 U.S. 522.

⁹⁴ Ginsburg, *supra* note 79. See also Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1997); Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491 (2002); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99 (2007) [hereinafter Karst, *The Liberties of Equal Citizens*]; Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) [hereinafter Siegel, *Dignity and the Politics of Protection*]; Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) [hereinafter Siegel, *Reasoning from the Body*].

⁹⁵ Siegel, *supra* note 94, at 1792 ("Gender paternalism of *this* kind denies women the very forms of dignity that *Casey* – and the modern equal protection cases – protect").

⁹⁶ 417 U.S. 484 (1974).

despite its facial neutrality results in a discriminatory impact driven by a discriminatory purpose. TRAP laws often distinguish on the basis of sex as a result of the clinics and procedures they do and do not regulate. For example, TRAP laws that do not impose regulations on clinics providing reproductive care for men or other male-only healthcare needs, but do impose rules on abortion clinics discriminate on the basis of gender. Male-only procedures and diseases such as vasectomies and gout are not subject to government regulation. To undergo a vasectomy, the law simply requires that a man be eighteen years of age and of "sound mind." Thus, whatever a man chooses to do with his reproductive system is left entirely to him. In fact, although there are dozens of laws across the country regulating abortions, very few laws regulate male health in a meaningful way. In the context of pregnancy in particular, the state imposes no comparable "duties, burdens or sanctions" on the men who have contributed in equal part to these pregnancies.⁹⁷

TRAP laws perpetuate stereotypical assumptions of gender roles in a constitutionally impermissible manner. For instance, despite the Court rejecting any and all arguments in denying the right to abortion based on the regulation of women's sexual conduct in the liberty context, laws with rape or incest exceptions center upon "normative judgments about women's sexual conduct." Termination of life is permissible when we do not consent to sex, imposing a paternalistic value judgment and stereotype of female purity, which reveals an unstated assumption that women who consent to sex may be legitimately forced to bear children.⁹⁸ Furthermore, TRAP laws perpetuate the stereotype that

⁹⁷ *Id.*

⁹⁸ Siegel, *Reasoning From the Body*, *supra* note 94, at 364.

women, and not men, are bound to the consequences of sexual activity.⁹⁹

TRAP laws instead rely on inherent biological differences among men and women, namely women's exclusive ability to become pregnant, as a legitimate justification for distinguishing between the two.¹⁰⁰ These biological differences are simply a means of perpetuating gender roles. The Court has rejected physiological differences as grounds for excluding women from [public life],¹⁰¹ yet allows the differences when regulating reproductive rights. Women, who physically carry the fetus, are responsible for the child once it is born yet men can opt into, or out of, parenthood.¹⁰² The capacity to become pregnant thus serves the basis of justification for distinguishing between the sexes legislatively.¹⁰³ However, the Court looks to too specific a level of generality. The fact that women, and not men, can become pregnant should not affect the stakes. Women and men both have an interest in their sexual activity and the consequences that result. Bearing a child impacts private life and the privilege in deciding how to conduct one's intimate affairs does not depend on gender. The Court's acceptance of this biological difference as a basis for allocating different burdens on men and women perpetuates the archaic view that

⁹⁹ See Kim S. Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1238 (2007). ("At common law, heterosexual men were exempted from the reproductive consequences of their unwed sexual conduct unless they opted to accept responsibility by marrying the women to taking other steps to recognize the child"); Law, *supra* note 14, at 960-62.

¹⁰⁰ *Lehr v. Robertson*, 463 U.S. 248 (1983); *Parham v. Hughes*, 441 U.S. 347 (1979); *Caban v. Mohammed*, 441 U.S. 380 (1979) (Classifications treating mothers and fathers differently "reflect the physical reality that only the mother carries and gives birth to the child, as well as the undeniable social reality that the unwed mother is always an identifiable parent and custodian of the child").

¹⁰¹ See, e.g., *Hibbs*, 538 U.S. 721; *Stanton v. Stanton*, 429 U.S. 501 (1977).

¹⁰² Buchanan, *supra* note 99.

¹⁰³ Law, *supra* note 14, at 957-62.

women, and not men, must take responsibility for the fruits of passion: "Society, not anatomy, 'places a greater stigma on unmarried women who become pregnant than on the men who father their children.'"¹⁰⁴

Two circuits facing the issue have declined to apply equal protection analysis to TRAP laws. The Fourth and Ninth Circuits declined to apply heightened scrutiny to challengers' equality claims in *Greenville Women's Clinic v. Bryant*¹⁰⁵ and *Tuscon Woman's Clinic v. Eden*¹⁰⁶, respectively, opting instead to analyze the claims under *Casey's* undue burden standard. This analysis is incorrect. *Casey's* standard exists to weigh the competing interests of the mother's privacy and the state's interest in the potentiality of human life.¹⁰⁷ Neither of the TRAP laws at issue, however, involved an interest in fetal life.¹⁰⁸

Alternatively, the Court could create a subclass of pregnant women and apply a lower standard of scrutiny. For instance, while heightened scrutiny under traditional equal protection analysis is "fatal in fact"¹⁰⁹ rational-basis review no longer sounds the death knell for plaintiffs nor does it provide a free pass for the state in every instance. In a trilogy of cases,¹¹⁰ the Court has struck down state action under rational-basis review, implying that something more than complete deference was operating. Under this rational-basis review with teeth standard, the Court will strike down state

¹⁰⁴ Ginsburg, *supra* note 79. See also Karst, *Foreword, supra* note 94.

¹⁰⁵ 222 F.3d 157 (4th Cir. 2000).

¹⁰⁶ 379 F.3d 531 (9th Cir. 2004).

¹⁰⁷ Kim S. Buchanan, *The Sex Discount*, 57 U.C.L.A. L. REV. 1149, 1191-92 (2010).

¹⁰⁸ *Id.*

¹⁰⁹ See Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

¹¹⁰ U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Romer v. Evans, 517 U.S. 620 (1996).

action that represents a “bare congressional desire to harm a politically unpopular group” on the grounds that such a desire can never “constitute a legitimate government interest.”¹¹¹ Given the extensive literature and data on the effects of pregnancy and child bearing within the workforce, it is likely that plaintiffs could bring forth a case claiming a bare desire to harm women as a group. Despite the existence of this legal avenue, however, rational-basis review with teeth has never been formally accepted or acknowledged by the Supreme Court or the lower courts, it exists only in academic writings with no precedential or legal weight making it a less than ideal, or solid, ground for further protection of the right.

While equal protection application would provide increased security for the right to terminate pregnancy,¹¹² *Geduldig* would have to be overruled. If the Court were to overrule the case, abortion would be an easy fit into the current doctrine. It would not cause any of the anxieties and difficulties of identifying a new suspect class since gender equality is already protected under equal protection and thus the meaning of heightened scrutiny would not be diluted.¹¹³ However, although “[c]riticizing *Geduldig* has...become a cottage industry,”¹¹⁴ it remains good law and thus

¹¹¹ *Cleburne*, 473 U.S. at 643–35.

¹¹² *Id.* at n.319 (citations omitted) (“The ‘exceedingly persuasive justification’ required by the articulation of heightened scrutiny in *United States v. Virginia* is undoubtedly more stringent than the ‘undue burden’ standard articulated in *Casey*, especially since *Gonzales* removed the requirement for a health exception and used deferential language in describing the ‘undue burden’ standard.”).

¹¹³ For a discussion of pluralism anxiety, see Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

¹¹⁴ Law, *supra* note 14, at 983–84. See also Buchanan, *supra* note 107, at 1239 (“*Geduldig* ... carves out an exception to gender equality that threatens to swallow the rule”); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Wendy Williams, *Equalities Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985).

an obstacle standing between abortion and gender equality. Overturning precedent is risky business to the Court as it sees its legitimacy and authority hanging in the balance. To overturn *Geduldig*, and make way for a four-corner equality decision in the abortion context, the Court must weigh a set of objective factors: reliance interests, a subsequent change in fact or law, or a change in environment rendering the prior holding "irrelevant or unjustifiable."¹¹⁵ Thus, a rule of constitutional *stare decisis*, or a rule that gives weight to precedent, requires more than a conviction that the prior decision was wrong. While Congress overruled *Geduldig* legislatively,¹¹⁶ the Court reaffirmed its holding in *Bray v. Alexandria Women's Health Clinic*.¹¹⁷ While it remains unlikely that *Geduldig* would be overruled because of the Court's strong preference to not overrule its own decisions on the grounds of legitimacy and reliance interests,¹¹⁸ one parallel doctrinal development offers a window, if not a door.

III. AN INTERTWINING OF THE TWO DOCTRINES

Fostering a dialogue between the principles of equality and liberty is crucial to the preservation of each; one cannot be fully

¹¹⁵ *Casey*, 505 U.S. at 855.

¹¹⁶ Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (amending 42 U.S.C. 2000e (1976)).

¹¹⁷ 506 U.S. 263 (1993).

¹¹⁸ *Casey*, 505 U.S. at 865-866 ("[A] decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation").

achieved without the other.¹¹⁹ Once a right is deemed fundamental to an individual, it must follow that the right is granted equally among citizens. Despite the Constitution's textual commitment to this principle in the Privileges and Immunities Clause,¹²⁰ the Court stripped Privileges and Immunities of power in the *Slaughterhouse Cases*.¹²¹ Justice Bradley, writing in dissent, realized the fault of his colleagues belonging to the majority: "If a man be denied full equality before the law, he is denied one of the essential rights of citizenship as a citizen of the United States."¹²² However, Justice Bradley's dissent did achieve constitutional recognition in *Allgeyer v. Louisiana*, where the Court recognized the right of "liberty to contract."¹²³ Signaling the beginning of the *Lochner* era, where the Court applied heightened scrutiny to economic legislation, *Allgeyer* was the first case in which the Court recognized substantive due process rights. Although the Court ultimately spurned *Lochner*,¹²⁴ it continued to develop substantive due process rights outside the realm of economic legislation, often invoking equality interests while doing so.

The Court's liberty jurisprudence reflects a doctrinal evolution.¹²⁵ For instance, in 1917 the Court invalidated a racial

¹¹⁹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

¹²⁰ U.S. CONST. art. IV, § 2, cl. 1.

¹²¹ *The Slaughter-House Cases*, 83 U.S. 36 (1873). For a discussion on the proposition that these cases were wrongly decided see, for example, LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 197-1311 (3d ed. 2000).

¹²² 83 U.S. at 113 (Bradley, J., dissenting).

¹²³ *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897).

¹²⁴ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), marking the end of heightened scrutiny for economic liberties under the *Lochner* era).

¹²⁵ Karst, *The Liberties of Equal Citizens*, *supra* note 94, at 142 ("Lawrence stands at the pinnacle of a huge doctrinal edifice, built over the course of a century, in

zoning ordinance on due process grounds, but with “racial equality inflections . . . patent throughout” expressing a concern for the subordination of African Americans.¹²⁶ In the same vein, yet after the passage of the Civil Rights Act of 1965, the Court again expressed race-based equality and liberty concerns in regards to the institution of marriage in *Loving v. Virginia*.¹²⁷ In the educational context, the Court recognized the right of parents to educate their children while ensuring that ethnic and religious minorities received equal treatment under the law.¹²⁸ In recognizing a right to privacy and striking down a law prohibiting the use of contraception in *Griswold v. Connecticut*, the Court also pointed to

which concerns about group subordination have contributed to a notable development in the law of substantive due process. Today, the results of that development are plainly visible in a principle of equal liberties.”).

¹²⁶ Yoshino, *supra* note 1, at 788; *see also* Buchanan v. Warley, 245 U.S. 60, 77 (quoting Strauder v. West Virginia, 100 U.S. 303, 307-10 (1880)) (“[T]hat all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race . . . no discrimination shall be made against them by law because of their color . . . Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property.”).

¹²⁷ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citation omitted) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom [of marriage] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”).

¹²⁸ *See, e.g.*, *Farrington v. Tokushige*, 273 U.S. 284, 290-91 (1927) (holding that a Hawaiian law requiring the licensing of schools using languages other than English and Hawaiian and conditioning such a license on the teaching of “Americanism” violated the Due Process Clause of the Fourteenth Amendment); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down an Oregon statute requiring all children to attend public schools; a law aimed at reducing Catholic parochial schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a state law forbidding the teaching of foreign languages to children on due process grounds).

the strong concerns regarding the subordination of women imbued in this type of regulation.¹²⁹

The Court inflects liberty concerns into its equal protection jurisprudence as well, though to a lesser extent. For example, by recognizing the right to travel,¹³⁰ the right to vote,¹³¹ and the right to access the courts¹³² on equal terms, the Court vindicated the rights of the poor even during a time when it was unwilling to recognize wealth-based classifications as giving rise to heightened scrutiny.¹³³ Further, in *Skinner v. Oklahoma* and *Eisenstadt v. Baird* the Court combined both doctrines in order to provide increased protections to sexual autonomy. In *Skinner*, the Court recognized procreation as “one of the basic civil rights of man. . . . fundamental to the very existence and survival of the race.”¹³⁴ A majority of the Court based its holding on equal protection grounds but Justice Stone, concurring, would have identified a right to procreation under substantive due process in striking the Oklahoma sterilization statute. *Eisenstadt* provides a bridge between *Griswold* and *Roe* by holding that the right to contraception, announced in the former and reaffirmed in the latter, must be protected equally among the married and unmarried.¹³⁵ These early liberty and equality cases set the stage for a more explicit interweaving of the two doctrines.

In its most recent gay rights cases, the Court draws upon both liberty and equality more explicitly in order to protect dignity.¹³⁶ Justice Kennedy wrote the majority in *Lawrence v. Texas* “as a

¹²⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹³⁰ *See Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹³¹ *See Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

¹³² *See Griffin v. Illinois*, 351 U.S. 12 (1956).

¹³³ *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 22-25 (1973).

¹³⁴ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹³⁵ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹³⁶ *See United States v. Windsor*, 133 S. Ct. 2675 (2013); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

substantive due process case inflected with equality concerns.”¹³⁷ Although the Court could have invalidated the anti-sodomy statute on equality grounds and leveled upwards, the Court instead chose the route that involved overturning precedent. Invalidating the statute on liberty grounds, by identifying a fundamental right to engage in private, intimate conduct, the Court seemed cognizant that a due process holding would provide more expansive protection for individual rights. The Court’s rationale seems to imply that it could have reached the same conclusion under either doctrine but chose the rarer and broader path.¹³⁸ Therefore, it could be deduced that a liberty finding is not mutually exclusive from an equality finding, and perhaps there must always exist a defensible equality interest where a liberty interest is recognized by law. The Court expressly embraced this implication in *United States v. Windsor*.¹³⁹ While overturning the Defense of Marriage Act, the Court embraced both equality and liberty and found that “DOMA’s principal effect is to identify a subset of state-sanctioned marriages and make them unequal. . . . Responsibilities, as well as rights, enhance the *dignity* and integrity of the person.”¹⁴⁰

¹³⁷ Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 173 (2015).

¹³⁸ *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003) (“That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”).

¹³⁹ *Windsor*, 133 S. Ct. at 2695 (“The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.”).

¹⁴⁰ *Id.* at 2694 (emphasis added).

Last Term in *Obergefell v. Hodges*, the Court undertook its most intricate and explicit weaving of liberty and equality. Rather than focus on equality, *Obergefell* “made liberty the figure and equality the ground.”¹⁴¹ Justice Kennedy, writing for the majority, proclaimed:

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 co-extensive, 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. This interrelation of the two principles furthers our understanding of what freedom is and must become.¹⁴²

According to Kenji Yoshino, “the synergy that [Justice Kennedy] discussed meant that equal protection analysis could inform substantive due process in such a way that would perforce change the ‘usual framework’ of analysis.”¹⁴³ In *Obergefell* the Court did not change the analysis exclusively in the context of gay marriage; instead the new framework must be applied to all substantive due process rights, including the fundamental right to terminate pregnancy.

¹⁴¹ Yoshino, *supra* note 137, at 148.

¹⁴² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015).

¹⁴³ Yoshino, *supra* note 138, at 172.

IV. THE SYNTHESIS APPLIED TO ABORTION

In its abortion jurisprudence, the Court has struggled in invoking both substantive due process and equal protection in order to recognize the fundamental right to terminate a pregnancy and eschew the subordination of women. The application of dignity onto abortion requires a reconciliation of Justice Kennedy's jurisprudence in gay rights and reproductive rights. As the Justice most willing to drive the intertwining of the doctrines, the disparities present in his abortion opinions must be addressed. For instance, despite recognizing the importance of the social and economic status of women and how the right to terminate a pregnancy directly affects that status in *Casey*,¹⁴⁴ Justice Kennedy employs paternalistic language permitting the subordination of women on the grounds of their inherent weakness in *Gonzales*.¹⁴⁵

Application of both equality and liberty will revitalize the right to terminate pregnancy. By avoiding the rigid doctrinal framework and hurdles of equal protection, the Court can provide greater protections to women seeking to terminate a pregnancy by inflecting equality principles without applying its levels of scrutiny. Although strict scrutiny provides heightened levels of protection, the hurdles that must be overcome to reach it are steep. As a result, the Court affords gender discrimination intermediate scrutiny under equal protection jurisprudence. While higher than the presumptively constitutional default of rational-basis review, intermediate scrutiny may not provide much more than the "undue burden" standard. The greatest danger in equal protection

¹⁴⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 835 (1992) ("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.").

¹⁴⁵ *Gonzales v. Carhart*, 550 U.S. 124, 128-129 (2007) (citation omitted) ("Whether to have an abortion requires a difficult and painful moral decision, which some women come to regret.").

application is a subgrouping of pregnant women. For example, if the Court finds that pregnancy merits its own subclass or group within equal protection it may place it among the ranks of legislation affecting children, the elderly and the disabled, giving nothing more than a cursory look into whether a rational relation between the regulation and the government purpose is plausible. Under that analysis, TRAP laws across the country would survive. Instead, the ideal result for the right to choose would be an outright sidestepping of the equality framework. For example, in *Nyugen v. INS*, the Court evaded the intermediate versus strict scrutiny trigger.¹⁴⁶ This approach could similarly be applied to reproductive rights by combining equality and liberty rather than deciding the issue solely under the former. Freeing abortion rights from the problem of leveling down¹⁴⁷ and the negative and positive liberty distinction¹⁴⁸ that remain alive under equal protection, the Court could reduce the legislative side constraints on the right and elevate the decisional autonomy and equality of women.

¹⁴⁶ *Nguyen v. INS*, 533 U.S. 53 (2001).

¹⁴⁷ See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Palmer v. Thompson*, 403 U.S. 217 (1971); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁴⁸ Freedom to versus freedom from survives under both equal protection and current abortion jurisprudence. See, for example, the abortion funding cases: *Rust v. Sullivan*, 500 U.S. 173 (1991) (extending *Maier* and *Harris* in holding that the government can subsidize family planning services which will lead to conception and childbirth, while declining to promote or encourage abortion); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (holding that the Due Process Clause did not require states to enter into the business of abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment prohibiting the use of federal Medicaid funds to perform abortions except where the life of the mother would be endangered or in cases of rape or incest); *Maier v. Roe*, 432 U.S. 464 (1977) (upholding state regulation granting Medicaid benefits for childbirth but denying such benefits for nontherapeutic abortions). By applying the Court's abolition of the distinction as articulated in *Obergefell* states will no longer be able to restrict the right to terminate a pregnancy by making the procedure unavailable to entire swaths of women.

Notwithstanding a disregard for the equal protection framework, applying equality principles to abortion jurisprudence will rid the doctrine of its current paternalism and align it with the Court's view of gender roles following *United States v. Virginia*. For instance, in *Gonzales v. Carhart* the Court relies on the vulnerability of pregnant women faced with the decision to terminate a pregnancy or carry the fetus to term.¹⁴⁹ Moreover, the Court paternalistically claims to protect women from the regret likely to ensue following an abortion.¹⁵⁰ Assuming that women do not, and perhaps cannot, conduct the appropriate research and inquiries into the procedures they will undergo, the Court takes the decision out of their hands and makes both health and life decisions on behalf of women. Reducing women to the status of children or the mentally unfit, the Court takes the position of guardian and the woman the ward of the state.¹⁵¹ This reasoning lies in direct opposition with the gender discrimination cases. In 1996, eleven years before *Gonzales*, the Court held that the Virginia Military Institute must accept women and that arguments regarding their physical or mental strength were based on stereotypes perpetuating an inequality of the sexes rather than truth.¹⁵² Thus, even if most women would struggle with their decision or come to regret it altogether, it is not

¹⁴⁹ *Gonzales*, 550 U.S. 124 (utilizing language such as "fraught with emotional consequence" and the "bond of love the mother has for her child" the Court makes gross assumptions regarding both the mental stability of women and the relationship between a woman and an unwanted pregnancy).

¹⁵⁰ *Id.* at 159-60 ("[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know . . .").

¹⁵¹ *Cf. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 898 (1992) ("A state may not give to a man the kind of dominion over his wife that parents exercise over their children").

¹⁵² *United States v. Virginia*, 518 U.S. 515 (1996).

for a government to step in and make the decision for every single woman: “[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”¹⁵³

Even before *Virginia*, the same paternalism present today in abortion was rejected as a legitimate basis for discriminating between genders in the 1970s.¹⁵⁴ Inflecting abortion decisions with the principles of equality among men and women will further work the Court already begun in *Casey*. For instance, a plurality recognized that the protection of the right to an abortion allows women to “organiz[e] intimate relationships and ma[k]e choices that define their views of themselves and their places in society [And] to participate equally in the economic and social life of the Nation”¹⁵⁵ Thus, recognizing the effect of reproductive rights on women’s place in society is not new to the Court. Viewing *Gonzales* as a misstep, the Court should harken back to *Roe* and *Casey* and continue inflecting the parallel developments in equal protection doctrine in order to protect the right, not only as a liberty interest, but also as one that must be even-handedly provided.

In the gay rights movement, opponents of *Windsor* and *Obergefell* often cite democratic institutions, such as the ballot box, as the proper vehicle to affect change. Nine justices sitting in an ivory tower, the argument goes, eclipse the democratic process and rip the debate from the people. Rather than be beholden to a national decision passed down from unelected justices, insular

¹⁵³ *Id.* at 550 (emphasis in original).

¹⁵⁴ See *infra* Part II.

¹⁵⁵ *Casey*, 505 U.S. at 856; see also Siegel, *Reasoning from the Body*, *supra* note 94, at 271 (“[The] choice in matters of motherhood implicates constitutional values of equality and liberty both.”).

minorities or those seeking added protections should convince their neighbors and citizens to believe in their cause. This argument was flawed in the gay rights movement and is flawed in abortion, as well. Once a right is deemed fundamental, or ought to be, “[a]lthough some mix of direct and representative democracy is presumed by our Constitution to be the ‘appropriate process for change,’ the ‘dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.’”¹⁵⁶ Justice Kennedy signs onto this constitutional prescription in *Obergefell* and informs critics that the very idea of our constitutional system, and more specifically of an unelected Court, is to “withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”¹⁵⁷ Thus, even if *Roe* was prematurely taken up by the Supreme Court in 1973, the right to terminate a pregnancy has been fundamental to our system of ordered liberties for over four continuous decades, and a decision by the Court in upholding and revitalizing that right is not only warranted by the Constitution, but is required by it.

Following *Roe* and the subsequent doctrinal developments, there must exist some identifiable equality interest in the right to terminate pregnancy and that interest is in the right to be free from gender-based discrimination. In expanding gay rights, the Court’s “discussion of the history of marriage is manifestly structured . . . to make ordinary people focus more closely on how the evolution of gender roles, among many other developments, has silently but assuredly transformed the institution’s meaning.”¹⁵⁸ Recognizing

¹⁵⁶ Tribe, *supra* note 1, at 25; *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

¹⁵⁷ *Obergefell*, 135 S. Ct. at 2606 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

¹⁵⁸ Tribe, *supra* note 1, at 24; *Obergefell*, 135 S. Ct. at 2595–96.

the link between gender roles, societal institutions, and common practices, the Court has already done the doctrinal work necessary to take this step. By continuing an intertwining of the two most important rights-granting clauses of the Constitution, the Court has the ability to recognize that a woman's control of her own destiny is on the line.¹⁵⁹ Decisional autonomy to determine her life's course and thus enjoy equal citizenship with men is required by both substantive due process and equal protection.¹⁶⁰

CONCLUSION

Justice Douglas cautioned in private letters: "As nightfall does not come at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we all must be most aware of change in the air . . . lest we become unwitting victims of the darkness."¹⁶¹ Although minority rights have greatly expanded since the time of Justice Douglas' writing, his words remain true. Women continue to achieve financial and career success at lower rates than men. Women continue to leave the workforce at higher rates than men. Women continue to have their reproductive affairs regulated at higher rates than men.

¹⁵⁹ *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) ("Thus, 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.").

¹⁶⁰ *Casey*, 505 U.S. at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

¹⁶¹ WILLIAM O. DOUGLAS, *To Young Lawyers Section of the Washington State Bar Association*, in *THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS* 162 (Melvin I. Urofsky, ed., 1987).

A woman attempting to break through the glass ceiling and societal norms must be able to order her affairs. So long as pregnancy and childbearing continue to constitute a stigma and adversely affect her in the workplace, the erosion of the right to terminate pregnancy is unconscionable. "An entire generation [of women] has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions,"¹⁶² and have ordered their affairs accordingly. The Court's acceptance of state regulations that close abortion clinics and remove the choice from the hands of the woman puts this reliance at risk. At its core, a state law effectively forbidding abortion is a state law deciding that something of great consequence is going to happen to this woman that she does not desire to have happen. The fusion of equality and liberty to protect individual dignity in the gay rights cases must be extended and applied to the right to terminate a pregnancy.

Judith Shakespeare "lives in you and in me ... for great poets do not die; they are continuing presences; they need only the opportunity to walk among us in the flesh."¹⁶³ As a society, we must take accountability and responsibility to ensure that opportunity survives. The distinction between Mary Beaton and Mary Seton is paramount. Each is an individual of a different background and capacity, as are the men that walk among them. They cannot be spoken for politically, economically or socially. They must be provided an opportunity to speak for themselves and order their affairs so that the greatness they seek to achieve is as attainable for them as it is for their brothers.

¹⁶² *Casey*, 505 U.S. at 860.

¹⁶³ VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (Martino Fine Books 2012) (1929).