

1-1-2021

The Death of Abortion: If Roe v. Wade is Overturned, Can the Right to Choose Be Upheld Under the Arguments Used to Establish an Individual's Right to Physician-Assisted Suicide?

Jennifer McCoy
Suffolk University Law School

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

26 Suffolk J. Trial & App. Advoc. 79 (2020-2021)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

THE DEATH OF ABORTION: IF *ROE V. WADE* IS OVERTURNED, CAN THE RIGHT TO CHOOSE BE UPHELD UNDER THE ARGUMENTS USED TO ESTABLISH AN INDIVIDUAL'S RIGHT TO PHYSICIAN-ASSISTED SUICIDE?*

*We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views . . . [T]he right of personal privacy includes the abortion decision, but this right is not unqualified and must be considered against important state interests in regulation.*¹

I. INTRODUCTION

Throughout the judicial history of the United States, courts have never been tasked with establishing a man's right to control his own reproductive health.² However, only forty-five years ago, women fought their way up to the Supreme Court to receive recognition for the same liberties afforded to men.³ Issued in the early 1970s, the *Roe v. Wade* decision shaped women's rights regarding their reproductive health.⁴ This decision not only granted women control over their bodies, but it also emboldened them with the power to stand up for their personal reproductive rights through case law.⁵ However, with the appointment of Justice Brett Kavanaugh to the Supreme Court, states are again questioning whether *Roe v. Wade* should remain valid case law in the federal judicial system.⁶

**Editor's Note: This note was written in the Fall of 2019. All representations made in this article are based on precedent and historic events that occurred between Fall 2019 and Spring 2020.*

¹ *Roe v. Wade*, 410 U.S. 113, 116, 154 (1973) (describing sensitive nature of women's reproductive rights).

² *See id.* at 117 (suggesting "what history reveals about man's attitudes toward the abortion procedure over the centuries.")

³ *See id.* at 166-67 (holding that women have power to make reproductive decisions regarding their abortions).

⁴ *See id.* at 147-52 (establishing *Roe*'s importance in context of United States history).

⁵ *See Roe v. Wade: Its History and Impact*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/files/3013/9611/5870/Abortion_Roe_History.pdf (last updated Jan. 2014) (discussing impact of *Roe* on women's lives since 1973).

⁶ *See* Melissa Murray, *Symposium: Party of Five? Setting the Table for Roe v. Wade*, SCOTUSBLOG (July 24, 2019, 3:18 PM), <https://www.scotusblog.com/2019/07/symposium-party-of-five-setting-the-table-for-roe-v-wade/> (discussing how Justice Kavanaugh's appointment could "be a fifth vote to overrule *Roe v. Wade* and decimate the right to abortion"); Shira A.

Overturing *Roe v. Wade* not only will be catastrophic to a woman's right to control her body, but will also undo decades of well-established precedent.⁷ Although abortions would not be considered unconstitutional per se, the Supreme Court could still determine that abortions should not receive special protection as a fundamental right.⁸ Consequently, states would be free to pass laws that restrict abortions at any and all stages of pregnancy.⁹ States could potentially revert women's reproductive rights back to the restrictive period prior to *Roe v. Wade*.¹⁰ However, if *Roe v. Wade* is overturned and the right to abortion is no longer constitutionally protected under the Fourteenth Amendment, states may pass laws that affirmatively give women the freedom to make decisions about their own reproductive health, as opposed to reverting to the oppressive world that existed before.¹¹

Scheidlin, *If Roe v. Wade is Overturned, We Should Worry About the Rule of Law*, THE GUARDIAN (May 21, 2019, 8:15 AM), <https://www.theguardian.com/commentisfree/2019/may/21/trump-abortion-roe-v-wade-supreme-court-judges> (“[R]eshaping the supreme court through . . . [the] appointments of Justices Neil Gorsuch and Brett Kavanaugh and . . . appoint[ing] more than 100 judges to the courts of appeals and the district courts, many of whom have been openly hostile to abortion rights in their academic writings, public speeches or judicial decisions. [Trump] now expects these judges to achieve the big prize – the overturning of *Roe v. Wade*.”); Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> (highlighting that SCOTUS now has conservative majority needed to overturn *Roe*).

⁷ See Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 611-14 (2007) (describing potential implications of *Roe* being overturned). Fallon describes one of these implications as follows: “The overruling of *Roe* would revitalize pre-existing abortion prohibitions in a number of states. In addition, overruling *Roe* would create potential legal issues about whether women and doctors could be sanctioned under pre-1973 statutes for actions in which they engaged prior to *Roe v. Wade*’s being overruled.” *Id.* at 614.

⁸ See *id.* at 612-14 (stating that abortion is protected fundamental right that could be reversed).

⁹ See *id.* at 611-12 (describing how states could reduce women’s rights).

¹⁰ See *Roe v. Wade: Its History and Impact*, *supra* note 5 (discussing very restrictive regulations regarding pregnancy decisions prior to *Roe*). “Many of these [abortion] laws dated back to the mid-1800s, when state legislatures moved to ban abortion despite this nation’s history since colonial times of allowing abortion prior to ‘quickening.’” *Id.*

¹¹ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (finding rights of unmarried people are same as married people, therefore expanding right to contraceptives). Cases prior to *Roe* laid the groundwork for individual rights, specifically the right to choose. See also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (articulating right to marital privacy includes right to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535, 542-43 (1942) (establishing fundamental right to procreate); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (concluding fundamental rights include rights of family in marriage and child rearing); *Doe v. Doe*, 314 N.E.2d 128, 132-33 (Mass. 1974) (holding it was woman’s right to decide to get an abortion, rather than paternal father’s). *Doe*, decided a year after *Roe v. Wade*, centered on an estranged husband and his pregnant wife. *Doe*, 314 N.E.2d at 129. The wife wanted to an abortion, yet her husband did not want her to terminate

Outside the scope of abortion rights, some states have passed laws that grant individuals the freedom and control over their bodies—specifically in the context of physician-assisted suicide.¹² In *Roe v. Wade*, the Court addressed the strain that legalizing a woman’s right to choose may put on some physicians—a concern that was at the forefront of the argument against physician-assisted suicide.¹³ Both individual states and the United States Supreme Court have used the Fourth Amendment Due Process Clause and the right to privacy to argue that people possess an “individual right” to control decisions that affect “how their bodies and mind should be treated.”¹⁴ If *Roe v. Wade* is overturned, perhaps states can use a parallel argument to those made in support of the right to physician-assisted suicide—as both discuss control over one’s own body.¹⁵ This Note will address and determine whether states may also successfully utilize this argument to preserve the women’s right to choose.¹⁶

the pregnancy. *Doe*, 314 N.E.2d at 129. The court held that, because of both the fundamental right of privacy and the right to choose granted in *Roe v. Wade*, it was ultimately the mother’s, and not the paternal father’s, decision to get an abortion. *Doe*, 314 N.E.2d at 132-33.

¹² See *Washington v. Glucksberg*, 521 U.S. 702, 705-06 (1997) (introducing notion of right to physician-assisted suicide in federal case law). “The question presented in this case is whether Washington’s prohibition against ‘causing’ or ‘aiding’ a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.” *Id.* at 705-06.

¹³ See *Roe v. Wade*, 410 U.S. 113, 116, 130-32 (1973) (describing physician’s role in terminating life and adherence to Hippocratic Oath); see also *Glucksberg*, 521 U.S. at 730-32 (deliberating balance between physician’s duty to prevent harm, state interest, and patient autonomy).

¹⁴ See *Glucksberg*, 521 U.S. at 722-24, 766, 774 (questioning whether “right to die” exists and fleshing out idea of “self-sovereignty”).

¹⁵ See *id.* at 778 (Souter, J., concurring) (describing similarities between right to choose and right to physician-assisted suicide). “Constitutional recognition of the right to bodily integrity underlies the assumed right . . .” *Id.*

¹⁶ See *id.* (Souter, J., concurring) (comparing physician-assisted suicide and abortion rights). Souter states:

The analogies between the abortion cases and this one are several. Even though the State has a legitimate interest in discouraging abortion . . . the Court recognized a woman’s right to a physician’s counsel and care. Like the decision to commit suicide, the decision to abort potential life can be made irresponsibly and under the influence of others, and yet the Court has held in the abortion cases that physicians are fit assistants. Without physician assistance in abortion, the woman’s right would have too often amounted to nothing more than a right to self-mutilation, and without a physician to assist in the suicide of the dying, the patient’s right will often be confined to crude methods of causing death, most shocking and painful to the decedent’s survivors.

Id. (citations omitted).

II. FACTS

Recently, the Supreme Court granted certiorari to review a Louisiana law that restricts a woman's access to abortion—a decision expected to be issued by June 2020.¹⁷ With the current conservative majority on the Supreme Court, an opportunity arises for the Court to find not only that the Louisiana law is constitutional, but also that the state's interests meet the standard of strict scrutiny—effectively overturning *Roe v. Wade*.¹⁸ This potential decision would overturn thousands of subsequent cases that rely on *Roe*'s authority, and may also cement the current restrictive laws already enacted by many states.¹⁹

If the Supreme Court decides to uphold the Louisiana law, it will create a growing concern for the women's rights movement across the United States.²⁰ First, if these restrictions are placed on a woman's ability to have an abortion, it could potentially create traumatic experiences for rape victims, especially if their attacker was a close friend or family member.²¹ Second, states will have the power to make abortions fully illegal, or alternatively, impose substantial barriers to women's access to abortions by requiring the paternal father's consent.²² Finally, women may be subjected to possible criminal repercussions, as was the reality before *Roe v. Wade*.²³

¹⁷ See *June Med. Servs. L.L.C. v. Gee*, 140 S. Ct. 35, 35 (2019) (granting certiorari to review 5th Circuit decision); *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787, 790-91 (5th Cir. 2018) (holding that Louisiana abortion restriction is constitutional); *June Medical Services LLC v. Russo*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/june-medical-services-llc-v-gee-3/> (last visited Mar. 1, 2020) (stating Supreme Court will hear Louisiana abortion restriction law case on March 4, 2020); Debra Cassens Weiss, *Supreme Court to Review Louisiana Abortion Law Nearly Identical to Texas Law It Struck Down in 2016*, ABA JOURNAL (Oct. 4, 2019, 9:57 AM), <http://www.abajournal.com/news/article/supreme-court-to-review-louisiana-abortion-law-nearly-identical-to-texas-law-it-struck-down-in-2016> (explaining law at issue, drawing parallels to similar 2016 Texas law Court abrogated).

¹⁸ See Weiss, *supra* note 17 (addressing how Kavanaugh's appointment could impact decision on Louisiana abortion restriction and overturn *Roe*).

¹⁹ See Fallon, *supra* note 7, at 612 (stating that although difficult, states could reinforce restrictive anti-abortion laws). "In a number of states, statutes enacted prior to the decision of *Roe* in 1973 remain on the books . . . [and] the old laws would sometimes, perhaps typically, become operative and enforceable unless repealed." *Id.*

²⁰ See *id.* at 611-14 (stating some potential implications if *Roe* is overturned).

²¹ See *Doe v. Doe*, 314 N.E.2d 128, 132 (Mass. 1974) (outlining some restrictions that would be grossly unfair following the decision in *Roe*). In the case of incestuous rape, for example, requiring a woman who wants to get an abortion to get the consent of the paternal father, who is a close family member, would force her to either have the baby or attempt to confront her abusive family member. *Id.* Regardless, such circumstances would effectively and completely take the right to abort away from her. *Id.*

²² See generally *Planned Parenthood v. Danforth*, 428 U.S. 52, 83-84 (1976) (holding that requiring spousal consent for abortion is unconstitutional following *Roe*). If *Roe* is overturned, the authority that *Planned Parenthood* relied on would no longer be valid. See *id.* at 62-63.

Since 2019, many states have enacted laws restricting a woman's right to choose.²⁴ All of the following states have passed laws that banned abortion in some form, but many have since been overturned by a federal court judge: Alabama, Louisiana, Kentucky, Utah, Ohio, Missouri, Mississippi, Iowa, Arkansas, Georgia, North Dakota and Pennsylvania.²⁵ Enacting these laws revitalized the conversation whether *Roe v. Wade* could be, or should be, overturned.²⁶ Many of the states that passed these restrictive laws asserted that there was a compelling state interest to protect the fetus

Therefore, states could constitutionally create laws requiring spousal consent for a woman to get an abortion. *See id.*

²³ *See Roe v. Wade*, 410 U.S. 113, 117-19 (1973) (examining Texas statute that criminalized punishment for abortions). The Texas statute that *Roe v. Wade* deemed unconstitutional criminalized abortion without the consent of the paternal father. *Id.* at 117-19.

²⁴ *See Abortion Restrictions*, LIFT LOUISIANA, <https://liftlouisiana.org/issues/abortion-restrictions> (last visited Mar. 1, 2020) (stating that Louisiana passed laws restricting abortion access); *Index Utah Code*, UTAH STATE LEGIS., <https://le.utah.gov/xcode/Title76/Chapter776-7-P3.html> (last visited Mar. 1, 2020) (stating Utah law that restricts abortion); *Kentucky Abortion Law*, FINDLAW, <https://statelaws.findlaw.com/kentucky-law/kentucky-abortion-laws.html> (last visited Mar. 1, 2020) (listing Kentucky laws that have restricted abortions); Timothy Williams & Alan Blinder, *Lawmakers Vote to Effectively Ban Abortion in Alabama*, N.Y. TIMES (May 14, 2019), <https://www.nytimes.com/2019/05/14/us/abortion-law-alabama.html> (explaining Alabama's Human Life Protection Act and its near total ban on abortion); *see also* Abortion Control Act, N.D. CENT. CODE ANN. § 14-02.1 (2019), <https://www.legis.nd.gov/cencode/t14c02-1.pdf> (describing North Dakota law that restricts abortion); Chris Boyette & Susannah Cullinane, *Iowa Governor Says State Will Not Appeal Ruling Striking Down 'Fetal Heartbeat' Abortion Law*, CNN, <https://www.cnn.com/2019/02/19/us/iowa-fetal-heartbeat-abortion/index.html> (last updated Feb. 19, 2019, 4:23 PM) (discussing Iowa governor will not appeal federal court's decision that struck "Fetal Heartbeat law" unconstitutional); Niraj Chokshi & Derrick Bryson Taylor, *Federal Judge Blocks Arkansas Anti-Abortion Laws for Now*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/abortion-arkansas-laws.html> (asserting Arkansas federal court judge blocked anti-abortion law that banned abortions after eighteen weeks); Mitch Smith, *Missouri's Eight-Week Abortion Ban Is Blocked by Federal Judge*, N.Y. TIMES (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/us/missouri-abortion-law.html> (stating that Missouri federal judge overturned law that banned abortion after eight weeks as unconstitutional); Jonathan Stempel, *U.S. Judge Blocks Ohio 'Heartbeat' Law to End Most Abortions*, REUTERS (July 3, 2019, 3:27 PM), <https://www.reuters.com/article/us-usa-abortion-ohio/u-s-judge-blocks-ohio-heartbeat-law-to-end-most-abortions-idUSKCN1TY2PK?feedType=RSS&> (describing how Ohio federal judge overturned restrictive abortion law, declaring it unconstitutional); Mark Joseph Stern, *Federal Court Says North Dakota Can't Force Doctors to Promote the "Abortion Reversal" Myth*, SLATE (Sept. 10, 2019, 2:54 PM), <https://slate.com/news-and-politics/2019/09/north-dakota-judge-blocks-abortion-reversal-law.html> (concluding that federal judge said doctors cannot lie about ability to reverse prescription abortion). The ability to reverse prescription abortion is also known as reverse abortion. *See* Stern, *supra* note 24; Mihir Zaveri, *U.S. Judge Temporarily Blocks Georgia Abortion Law*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/us/Georgia-abortion-law.html> (explaining Georgia judge ruled anti-abortion law banning abortion after heartbeat detected unconstitutional, to twenty-four weeks).

²⁵ *See supra* note 24 and accompanying text.

²⁶ *See* Stempel, *supra* note 24 (noting Ohio federal judge overturned abortion law but conservative Supreme Court majority likely overturn *Roe*).

after a fetal heartbeat is detected—which can occur as early as six weeks into pregnancy.²⁷ These laws make it extremely difficult for women to get abortions and severely restrict their access to medical contraceptive options.²⁸ Since eleven states adopted these restrictive bills—commonly referred to as “heartbeat bills”—women in over one-fifth of the states in the United States are extremely limited in how they may exercise their fundamental right to choose an abortion.²⁹

If a state has the authority to restrict a woman’s right to choose, a state also has the power to affirmatively protect that right.³⁰ In New York, for example, the state legislature preemptively passed the Reproductive Health Act to protect a woman’s right to assert control over her reproductive health at the state level.³¹ Lawmakers suggested passing the Reproductive Health Act to address the gap in New York law, which did not ensure

²⁷ See Reis Thebault, *GOP Governor Signs Law That Bans Abortion Before Some Women Even Know They’re Pregnant*, WASH. POST (Mar. 22, 2019, 9:55 AM), <https://www.washingtonpost.com/health/2019/03/22/mississippi-fetal-heartbeat-law-bans-abortions-after-weeks/> (defining fetal heartbeat for purposes of abortion). “The bill . . . bans abortions after a doctor can detect a fetal heartbeat during an ultrasound, unless the mother’s health is at extreme risk. Heartbeats can be found just six weeks into pregnancy — before some women even know they are pregnant.” *Id.*

²⁸ See *id.* (describing difficulties restrictive bans on abortion would create for women).

²⁹ See *id.* (listing states that passed fetal heartbeat bills within last year); *What if Roe Fell?*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/what-if-roe-fell> (last visited Apr. 11, 2020) (mapping states that would uphold women’s right to choose if *Roe* was overturned) (defining fetal heartbeat bills and listing states that passed these laws).

Between January 1, 2019, and November 15, 2019, eighteen states have enacted forty-six laws that prohibit or restrict abortion. Nine states enacted unconstitutional pre-viability bans in 2019, including Alabama’s total ban; the six-week bans enacted in Georgia, Kentucky, Louisiana, Mississippi, and Ohio; Missouri’s eight-week ban; and the eighteen-week bans enacted in Arkansas and Utah. On the other hand, states such as Illinois, Maine, Nevada, New York, Rhode Island, and Vermont have enacted laws that create a state right to abortion.

What if Roe Fell?, *supra* note 29. This post suggests that in twenty-six states the right to abortion would not only be legally revoked, but criminalized once again if *Roe* fell. *What if Roe Fell?*, *supra* note 29. These states are considered “hostile” because they already passed legislation that would severely limit the right to an abortion, whether or not the law is currently enforceable. *What if Roe Fell?*, *supra* note 29.

³⁰ See N.Y. PUB. HEALTH LAW § 2599-aa (Consol. 2019) (protecting women’s right to choose abortion by passing Reproductive Health Act in New York).

³¹ See *id.* (defining New York’s Reproductive Health Act); see also Katharine Bodde, *Legislative Memo: Reproductive Health Act*, N.Y. C.L. UNION, <https://www.nyclu.org/en/legislation/legislative-memo-reproductive-health-act> (last updated Jan. 23, 2019) (summarizing Reproductive Health Act and reasoning behind it); *Governor Cuomo Signs Legislation Protecting Women’s Reproductive Rights*, N.Y. ST. GOVERNOR ANDREW M. CUOMO (Jan. 22, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protecting-womens-reproductive-rights> (promoting Governor Cuomo’s support and signing of Reproductive Health Act which codified *Roe*).

that health care providers would give the best health advice they could—potentially because there was still a risk they could be criminally prosecuted for giving abortion advice.³²

III. HISTORY

A. *History of Right to Abortion*

Throughout history—as early as ancient Rome—various cultures utilized different abortion methods to prevent unwanted pregnancies.³³ It was not until the early nineteenth century, however, that morality and legality issues arose regarding abortion and states began to pass some form of restrictive abortion law.³⁴ Every state enacted laws that criminalized abortion and focused heavily on shutting down the facilities that performed such procedures.³⁵ As a result of the criminalization of abortion, a woman

³² See Bodde, *supra* note 31 (describing need to codify *Roe* in state law to protect women’s rights and physicians); Bodde articulates that:

Although rare . . . a fear of criminal prosecution offer deters health care providers in New York from offering medically necessary abortion care . . . [w]hen a doctor in New York is reluctant, or unwilling, to provide abortion care in these circumstances, a woman may be forced to travel to another state to get the care she needs – and if she can’t afford to travel, she must forego care altogether.

Bodde, *supra* note 31; see also N.Y. PENAL LAW §125.05 (granting right to abortion up until twenty-four weeks of pregnancy).

³³ See *Roe v. Wade*, 410 U.S. 113, 130-32 (1973) (establishing origin of abortion rituals throughout history). In *Roe*, many sources are cited to establish the credibility and history of abortion, including articles from medical journals like, “*A History of Medicine*” by Arturo Castiglioni, and “*The Hippocratic Oath*” by Ludwig Edelstein. See *id.* at 130-32. *Roe* also cites articles and sources that reference the legal history of abortion, including “*Medical Abortion Practices in the United States, in Abortion and the Law*” by Kenneth R. Niswander, “*Justifiable Abortion-Medical and Legal Foundations, (pt. 2)*” by Eugene Quay, and “*The Sanctity of Life and the Criminal Law*” by Glanville L. Williams. *Id.* Finally, *Roe* cites philosophical articles that focus on the abortion morality argument that has plagued medical professionals, conservatives and lawmakers throughout history: “*The Genealogy of Gynaecology*” by James V. Ricci, “*Abortion*” by Lawrence Lader, and “*An Almost Absolute Value in History, in The Morality of Abortion*” by John T. Noonan, Jr. *Id.*

³⁴ See *id.* at 129, 132-36, 143 (“Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman’s life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.”); GEORGE F. COLE & STANISLAW J. FRANKOWSKI, *ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE* 20 (Kluwer Academic Publishers, 1987) (“By 1900 every state in the Union had an anti-abortion prohibition.”)

³⁵ See Lynn M. Paltrow, *Roe v Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. OF PUB. HEALTH 17, 17-21 (2013) (describing legal consequences of getting abortion through historical lens).

was held criminally responsible for manslaughter after receiving an abortion in 1971—two years before *Roe v. Wade*.³⁶ However, as women's rights to reproductive freedom diminished throughout the nineteenth and twentieth centuries, other fundamental rights granted under the Fourteenth Amendment expanded.³⁷

The origin of an individual's right to choose can be found in the Supreme Court's Fourteenth Amendment jurisprudence, where the Court set apart the right to abortion as a fundamental right that warranted protection.³⁸ The Court in *Roe* held that some liberties are so important that they are deemed "fundamental rights", and the government cannot infringe upon them unless a strict scrutiny analysis is met; that is, the government's action must be necessary to achieve a compelling purpose and there is no less restrictive alternative that could accomplish those same goals.³⁹ Over the past sixty years, the Supreme Court analyzed the nuances of the fundamental right to choose by assessing whether this right originated from the Equal

³⁶ See Paltrow, *supra* note 35, at 17 ("In 1971, before *Roe v. Wade* [*sic*] was decided, Shirley Wheeler was arrested and prosecuted for the crime of manslaughter after hospital staff in Florida discovered her illegal abortion and reported her to the police. After . . . trial she was convicted of manslaughter . . . [with] possible penalty of 20 years' imprisonment."); Jon Nordheimer, *She's Fighting Conviction For Aborting Her Child*, N.Y. TIMES (Dec. 4, 1971), <https://www.nytimes.com/1971/12/04/archives/shes-fighting-conviction-for-aborting-her-child.html> (describing story of Shirley Wheeler, who was convicted of manslaughter after aborting child). Wheeler provided a heartbreaking statement regarding her conviction: "I'm a convicted felon now because I chose not to bring another child into this world that I couldn't afford to take care of. . . I was afraid of having an abortion, but I was even more afraid of having another baby." Nordheimer, *supra* note 36.

³⁷ See *Roe v. Wade: Its History and Impact*, *supra* note 5, at 1-3 (describing development of women's rights prior to abortion).

³⁸ See *Roe*, 410 U.S. at 122-23, 152-53 (establishing right to choose as fundamental right). The Court articulated:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153. Also, the Court stated that the "[f]undamental right of single women and married persons to choose where to have children is protected by the Ninth Amendment, through the Fourteenth Amendment." *Id.* at 122.

³⁹ See *id.* at 155 ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'") The Supreme Court determined that there are several questions one should ask to determine if a right is fundamental and whether it has been violated: (1) is there a fundamental right, constitutionally speaking (either codified or incorporated); (2) has the right been infringed or violated; (3) is there a compelling government interest to sufficiently justify for the infringement?; (4) are the means undertaken sufficiently related to interest?; (5) finally, are these the least restrictive means to protect or further the government's interest? *Id.* at 153-56.

Protection Clause or the Due Process Clause under the Fourteenth Amendment.⁴⁰ In *Meyer v. Nebraska*, the Court held that the unenumerated fundamental rights provided under the Fourteenth Amendment included the liberty interests of a family, such as marriage and child rearing.⁴¹ Subsequently, the Supreme Court further expanded upon the protections afforded under the Fourteenth Amendment, specifically regarding child rearing.⁴² The Supreme Court subsequently held in *Skinner v. Oklahoma* that it was unconstitutional to force an individual twice convicted of a felony to be sterilized because “marriage and procreation are fundamental to the very existence and survival of the race.”⁴³ By the mid-nineteenth century, it became evident that the Court recognized the right to procreate under the Constitution.⁴⁴

The Court first analyzed the use of the strict scrutiny standard for contraceptive rights in *Griswold v. Connecticut*.⁴⁵ In *Griswold*, the Court held that, because individuals possess a constitutional right to marital privacy granted to them under the “penumbra of the Bill of Rights[,]” state statutes cannot prohibit marital couples from obtaining contraceptives.⁴⁶ In *Eisenstadt v. Baird*, the Court furthered this point and stated that “[i]f the right to privacy means anything, it is the right of the individual, married or

⁴⁰ See *id.* at 156-59 (explaining fundamental right hinged on concepts of personhood as understood in Constitution).

⁴¹ See *Meyer v. Nebraska*, 262 U.S. 390, 398-99, 401 (1923) (stating that parents have right to raise their children as they see fit).

⁴² See *Skinner v. Oklahoma*, 316 U.S. 535, 541(1965) (determining right to procreate is fundamental and government-imposed involuntary sterilization must meet strict scrutiny). The Supreme Court in *Skinner v. Oklahoma* overruled the holding of *Buck v. Bell* and recognized that there was a fundamental right to procreate under the Equal Protection Clause of the Fourteenth Amendment. at 538. Given the permanent and irreversible nature of sterilization, the Supreme Court reasoned that the government should protect, and not restrict, this fundamental right. *Id.* at 538. But see *Buck v. Bell*, 274 U.S. 200, 207-08 (1927) (holding “those who are manifestly unfit” not allowed to reproduce as it “is better for all the world”).

⁴³ See *Skinner*, 316 U.S. at 538, 541 (outlining Court’s reasoning behind holding for establishing fundamental right).

⁴⁴ See *id.* at 538 (demonstrating Court’s interest in protecting procreation rights).

⁴⁵ See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“We deal with a right of privacy older than the Bill of Rights . . . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, no causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”) The sanctity and privacy between married couples and their right to choose to have a baby initiated the conversation regarding the fundamental right to control one’s reproductive rights. See *id.* at 486.

⁴⁶ See *id.* at 484-85, 99 (holding that physicians can prescribe marital couples contraceptives to prevent pregnancy). In this case, the Supreme Court relied on the unenumerated marital right to privacy, which originated from the First Amendment. *Id.* Since *Griswold*, courts have used an interpretive approach which postulates that an individual has the right to make his or her own decisions, free from influence or control by the government. *Id.*

single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁴⁷ The Court consequently adopted reproductive autonomy for all individuals, regardless of their marital status, and established a fundamental right protected under the Equal Protection Clause of the Fourteenth Amendment.⁴⁸ Despite the Court’s commitment to protecting a woman’s right to prevent unwanted pregnancy and society’s advancements in science and medicine, the Court still had not addressed whether an abortion was considered a constitutionally protected fundamental right at the time.⁴⁹

Roe v. Wade is the first, and perhaps most influential, case in the history of women’s reproductive right to choose.⁵⁰ The Court evaluated this issue of first impression after a pregnant woman challenged a Texas state criminal abortion statute that only permitted abortions when the continuation of the pregnancy would place the mother’s life in jeopardy.⁵¹ Undergoing a strict scrutiny analysis, the government argued there were two state interests met by prohibiting abortions: (1) a health interest to protect the mother’s safety after the first trimester ends, and (2) an interest to protect the viability of the unborn fetus.⁵² After determining that a woman’s decision to terminate constitutes a fundamental right to privacy protected under the Fourteenth and Ninth Amendments, the Court declared that any criminal abortion statute that permitted the termination of a pregnancy only when the mother’s life is in danger, was unconstitutional.⁵³ *Roe*

⁴⁷ See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (granting unmarried individuals right to possess contraceptives under same rationale as married individuals). The Supreme Court dismissed the government’s assertion that it was protecting a legitimate interest in preventing premarital sex. *Id.* Instead, the Court articulated that individuals, married or otherwise, should be subjected to the same strict standard. *Id.*

⁴⁸ See *id.* at 453 (stating reproductive autonomy is fundamental right). “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Id.*

⁴⁹ See *id.* (recognizing individual right to choose); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685-86 (1977) (announcing right to prevent procreation denotes right to use contraception). “[I]n a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive.” *Carey*, 431 U.S. at 686.

⁵⁰ See *Roe v. Wade*, 410 U.S. 113, 152-54 (1973) (granting women right to choose and declaring right to abortion pre-viability fundamental right). See generally ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 887 (Rachel E. Barkow, et al. eds., 5th ed. 2017) (establishing background and emphasizing *Roe*’s importance).

⁵¹ See *Roe*, 410 U.S. at 117-22 (summarizing facts of case).

⁵² See *id.* at 155 (articulating government’s interests tested using strict scrutiny analysis under compelling interest test).

⁵³ See *id.* at 152-54 (establishing women’s right to choose if she wishes to terminate pregnancy).

v. Wade opened the door for women's fundamental right to choose—a right the Court has since evaluated and expanded upon over the last forty-five years.⁵⁴

The Supreme Court attempted to balance the rights protected under *Roe v. Wade* with the states' interests.⁵⁵ In 1973, only one year after *Roe v. Wade*, the Court was tasked with determining whether laws that restrict access to abortion were constitutional in *Doe v. Bolton*.⁵⁶ This issue was distinct from *Roe v. Wade* because the *Roe* Court only evaluated the constitutionality of criminal statutes that punished those seeking abortions.⁵⁷ In 1976, the Court analyzed another nuance of the reproductive right to choose in *Planned Parenthood of Central Missouri v. Danforth*.⁵⁸ In this case, the Court declared a Missouri state statute that required individuals to obtain parental or spousal consent for abortions unconstitutional.⁵⁹ Pro-life activist groups continuously brought abortion-restriction cases to the Supreme Court for the next fifteen years, until the seminal case of *Planned*

[T]he Constitution does not explicitly mention any right to privacy, [and] the right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153-54. The Supreme Court, however, held that this fundamental right was not absolute and subjected to limits, largely because there was a valid state interest in protecting the life of the fetus and mother. *Id.* For example, a state must assert a compelling interest in protecting a potential life and that an abortion conducted after the first trimester would increase the danger for the mother's safety. *Id.* at 154. Additionally, if a physician determined that a fetus could survive outside of the womb during the pregnancy term, a state had the authority to limit the woman's right to choose. *Id.* at 163-64. Subsequent case law, however, resolved this issue by giving women more time to decide whether to abort during the duration of her pregnancy. See *Planned Parenthood v. Casey*, 505 U.S. 833, 844, 846 (1992) (addressing issues that arose following legalization of abortion and further defining right to choose).

⁵⁴ See *Casey*, 505 U.S. at 846 (discussing, upholding, and refining rights granted in *Roe*); see also Amy S. Cleghorn, *Justice Harry A. Blackmun: A Retrospective Consideration of the Justice's Role in the Emancipation of Women*, 25 SETON HALL L. REV. 1176, 1176 (1995) (reviewing Justice Blackmun's decisions that advocated women's rights throughout his tenure on Supreme Court).

⁵⁵ See Cleghorn, *supra* note 54, at 1176 (examining *Roe* and subsequent decisions to determine what state's interests may be upheld).

⁵⁶ 410 U.S. 179, 186, 188-89 (1973) (narrowing scope of *Roe*).

⁵⁷ See *id.* at 186, 188-89 (holding policies created to restrict abortion violated right to choose and physicians' right to practice); see also *Roe*, 410 U.S. at 126 (recounting physician prosecuted for performing abortions, even though patient consented).

⁵⁸ 428 U.S. 52, 75 (1976) (narrowing and analyzing elements of *Roe*).

⁵⁹ See *id.* at 75 (holding spousal or parental-consent requirement for abortion is unconstitutional). "The fault with § 3(4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination of her pregnancy and does so without a sufficient justification for the restriction." *Id.*

Parenthood of Southeastern Pennsylvania v. Casey; this case set forth the standard that courts still follow today for evaluating state abortion restrictions.⁶⁰ The Court in *Casey* upheld the central holding of *Roe v. Wade*, but overruled *Roe*'s trimester distinctions; instead, the Court used strict scrutiny to evaluate whether the state had a compelling interest to restrict abortion.⁶¹ The Court created a new standard that considered whether the purpose or effect of the state abortion regulation imposed an undue burden on women seeking an abortion.⁶² The Court defined "undue burden" as a "substantial obstacle in path of woman seeking abortion before fetus attains viability."⁶³ *Casey* refined and reaffirmed the essential holdings in *Roe v. Wade*—making it the primary case law that is still followed today.⁶⁴ Supreme Court jurisprudence since *Casey* relies on the basic holding of *Roe v. Wade*, and for the most part, the judicial-system culture in America favors preserving a woman's voice and right to choose.⁶⁵

⁶⁰ See *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992) (stating essential holding in *Roe* should be affirmed). The *Casey* Court upheld and affirmed *Roe*'s right to choose pre-viability. *Id.* However, in *Casey*, the states were also given the power to restrict pre-viability abortions to protect the health of the mother or the fetus. *Id.* Further, *Casey* also gave states the power to restrict post-viability abortions for maternal health reasons. *Id.* at 837; see also *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 521-22 (1989) (striking down law that required doctors to test fetal viability before any abortion). Three Supreme Court justices at that time said they would allow abortion restrictions if those restrictions had a rational basis. *Webster*, 492 U.S. at 520. Yet, even with that lower standard of scrutiny, these restrictions announced in *Webster* did not even pass the rational basis test. *Webster*, 492 U.S. at 520; *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444 (1983) (declaring law that required women to receive all information before undergoing abortion unconstitutional). In *Akron v. Akron Center for Reproductive Health*, the Supreme Court declared an Ohio law unconstitutional because it required all doctors to perform abortions after the first trimester in a hospital, following a twenty-four-hour waiting period, and with parental consent for girls younger than fifteen. *Akron*, 462 U.S. at 434. The Supreme Court found that the undue burden the ordinance placed on women outweighed the state's interest. *Akron*, 462 U.S. at 434.

⁶¹ See *Casey*, 505 U.S. at 897 ("In keeping with our rejection of the common-law understanding of a woman's role within the family, the Court held in *Danforth* that the Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion. The principles that guided the Court in *Danforth* should be our guides today.")

⁶² See *id.* at 900-01 (establishing undue burden test as new standard for determining whether states can restrict abortions).

⁶³ See *id.* at 901 (defining when restriction becomes undue burden).

⁶⁴ See *id.* (holding women have right to choose pre-viability). The Court used a Due Process argument to evaluate these fundamental rights, as well as the privacy notions and personal autonomy used by the *Roe* Court. *Id.* at 874. The Court has not fully defined the term "undue burden," and consequently, the definition remains vague. *Id.*

⁶⁵ See *id.* at 901 (addressing and maintaining holding from *Roe*). But see *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (upholding federal partial abortion ban). In 2007, after evaluating President Bush's *Partial Birth Abortion Ban Act of 2003*, which restricted certain late-term abortions, the Supreme Court upheld the Act as the first federal restriction placed on a particular abortion method since *Roe*. *Gonzales*, 550 U.S. at 167-68. In *Gonzales*, the Court imposed the first federal restriction on abortion and held a compelling government interest existed: protecting the

B. *History of Right to Physician-Assisted Suicide*

The origin of the right to physician-assisted suicide began with the Supreme Court's evaluation of the fundamental rights created under the Due Process Clause.⁶⁶ One such fundamental right is an individual's power to control their own medical care decisions.⁶⁷ The Supreme Court previously considered whether individuals possess the right to refuse life-saving medical treatment by balancing an individual's personal right against the state's interest in protecting their citizens.⁶⁸ In 1905, in *Jacobson v. Massachusetts*, the Court determined that a Massachusetts law requiring all of its citizens to get vaccinations was constitutional because there was a compelling state interest to preserve the health and safety of all of its citizens.⁶⁹ The question remained though: could individuals refuse medical treatment to the point of ending their life?⁷⁰

In *Cruzan v. Director, Missouri Department of Health*, the Court held that a state may require a guardian to show, by clear and convincing evidence, that an incompetent person would have wanted to discontinue lifesaving nutrition, hydration, or other medical treatment to terminate their life.⁷¹ The strict scrutiny test used balanced the patient's right to terminate

safety of the mother was more important than the right to choose a potentially life-threatening abortion method. *Gonzales*, 550 U.S. at 167-68; *President Bush Signs Partial Birth Abortion Ban Act of 2003*, THE WHITE HOUSE PRESIDENT GEORGE W. BUSH (Nov. 5, 2003, 1:40 PM), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031105-1.html> (explaining bill that banned partial-birth abortion).

⁶⁶ See U.S. CONST. amend. V (stating individual's right to privacy defined in Constitution); U.S. CONST. amend. XVI (identifying where fundamental rights to Due Process and Equal Protection are enumerated in Constitution).

⁶⁷ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990) ("It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.") The dissent also further emphasized that the Court explicitly states that the right to decide one's own medical decisions is fundamental right and is subjected to strict scrutiny. *Id.* at 302-04 (1990) (J. Brennan, J., dissenting); *Jacobson v. Massachusetts*, 197 U.S. 11, 23-24 (1905) (questioning whether compelling state interest defeats individual's right to refuse medical treatment).

⁶⁸ See *Jacobson*, 197 U.S. at 35 (deciding issue by balancing individual's personal right against state's interest in protecting their citizens). The Court held that an individual's right to refuse medical treatment, specifically vaccines, does not surpass the state's interest. *Id.*

⁶⁹ See *id.* at 35 (holding compelling state interest defeats individual's right to choose medical treatment).

⁷⁰ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 302-04 (1990) (explaining right to refuse medical treatment).

⁷¹ See *id.* at 265-69 (outlining facts of case). The parents of a long-term comatose patient sought the Court's permission to terminate their daughter's life when the hospital refused to discontinue life-saving treatment without a court order. *Id.* at 267-68. The Court stated that the parents did not meet the requisite clear and convincing evidence standard. *Id.* The parents failed to provide any evidence that their comatose daughter wanted to discontinue treatment or made any

their life against the State's compelling interest to obtain the correct, and irreversible, judgment.⁷² The Court then addressed the circumstances surrounding a competent person's decision to end their own life out of a need to end their own suffering.⁷³ In *Washington v. Glucksberg*, the Court determined that the right to physician-assisted suicide was not a fundamental right protected under the Constitution.⁷⁴ The Court stated that, because the Fourteenth Amendment did not create a constitutionally protected right to physician-assisted suicide, it also did not prohibit states from criminalizing people who aide others in committing suicide.⁷⁵ The Court determined that the State's interest in protecting the respect for human life and preventing euthanasia did pass the strict scrutiny standard, and therefore, could not be considered a constitutionally protected fundamental right.⁷⁶ Essentially, although there is no federal protection of this right, each State can decide whether to extend the right to physician-assisted suicide to their citizens.⁷⁷ After *Glucksberg*, many states passed laws that allowed their terminally ill citizens the right to choose to end their suffering via physician-assisted suicide.⁷⁸

indication before the accident that suggested she would not want to continue the life-saving measures. *Id.* at 268-69.

⁷² See *id.* at 273 (discussing tension between patient's due process clause interest and society's broader interest in protecting life).

On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death. Most of the cases that have held otherwise, unless they involved the interest in protecting innocent third parties, have concerned the patient's competency to make a rational and considered choice.

Id. at 353-54 (quoting *In re Conroy*, 486 A.2d 1209, 1225 (1985)).

⁷³ See *Washington v. Glucksberg*, 521 U.S. 702, 730 (1997) (addressing right to physician-assisted suicide).

⁷⁴ See *id.* at 728 (holding no constitutional fundamental right to physician-assisted suicide). "That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." *Id.* at 728.

⁷⁵ See *id.* at 716 (internal citations omitted) ("The interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another.")

⁷⁶ See *id.* at 728 (stating Court's determination that right to physician-assisted suicide is not fundamental right). The Court noted that, because physician-assisted suicide and euthanasia are closely linked, states may reasonably pass legislation that bans physician-assisted suicide to ensure that there is no risk of abuse. *Id.*

⁷⁷ See *id.* at 728 ("That being the case, our decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington's assisted-suicide ban be rationally related to legitimate government interests.")

⁷⁸ See California End of Life Option Act of 2015, CAL HEALTH & SAFETY CODE DIV. 1, Pt. 1.85 (West 2020) (codifying physician-assisted suicide in California); End of Life Options Act of

III. ANALYSIS

A. Constitutional Support for Right to Choose

If the Supreme Court overturns *Roe v. Wade*, there is a chance that many rights derived from the *Roe* decision, and its subsequent case law, will be revoked; however, federal law might uphold these rights under the protections and privileges enumerated in the Constitution.⁷⁹ The Supreme Court interpreted that all individuals are entitled fundamental privacy rights established by the Ninth and Fourteenth Amendments of the Constitution.⁸⁰ Case law established that the right to personal privacy includes decisions regarding one's marital relationship procreation, contraception, family rela-

2016, COLO. REV. STAT. § 25-48-101–123 (2016) (West 2020) (codifying right to physician-assisted suicide in Colorado); District of Columbia Death with Dignity Act of 2016, D.C. CODE § 7-661.02 (2020) (codifying right to physician-assisted suicide in Washington D.C.); Our Care, Our Choice Act, HAW. REV. STAT. § 327L-2 (2020) (codifying right to physician-assisted suicide in Hawaii); Maine Death with Dignity Act of 2019, ME. REV. STAT. ANN. tit. 22 § 2410 (West 2019) (codifying right to physician-assisted suicide in Maine); New Jersey Dignity In Dying Bill Of Rights Act of 2019, N.J. STAT. ANN. § 26:16-4 (West 2020) (codifying right to physician-assisted suicide in New Jersey); OR. REV. STAT. ANN. § 127.805 (West 2020) (codifying right to physician-assisted suicide in Oregon); Patient Choice and Control at End of Life Act of 2013, VT. STAT. ANN. tit. 18 § 5283 (West 2020) (codifying right to physician-assisted suicide in Vermont); WASH. REV. CODE ANN. § 70.245.020 (West 2020) (codifying right to physician-assisted suicide in Washington); *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1455 (W.D. Wash. 1994), *rev'd* 49 F.3d 586 (9th Circuit 1995), *reh'g en banc*, 79 F.3d 790 (9th Circuit) (describing arguments both in support and against right to physician-assisted suicide); *see also* See Jonathan R. MacBride, Comment, *A Death Without Dignity: How the Lower Courts Have Refused to Recognize that the Right of Privacy and the Fourteenth Amendment Liberty Interest Protect an Individual's Choice of Physician Assisted Suicide*, 68 TEMP. L. REV. 755, 792 (1995) (analyzing right to privacy that courts used to grant individual's right to physician-assisted suicide); Christopher N. Manning, Note, *Live And Let Die?: Physician-Assisted Suicide And The Right To Die*, 9 HARV. J. L. & TECH. 513, 520 (1996) (describing codification of physician-assisted suicide statutes).

⁷⁹ *See* U.S. CONST. amend. IX (granting individuals rights that are not specifically enumerated in Bill of Rights); U.S. CONST. amend. XIV (granting individuals rights and freedoms to control their bodies as unenumerated rights).

⁸⁰ *See* U.S. CONST. amend. IV (granting individuals freedom from arbitrary government intrusion); U.S. CONST. amend. IX (enumerating federal amendment and constitutional rights to states); U.S. CONST. amend. XIV (stating privacy rights are unenumerated fundamental rights); *see also* *Whisenhunt v. Spradlin*, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting) (stating fundamental rights include reproductive rights). “Without identifying the precise contours of this right, we have recognized that it includes a broad range of private choices involving family life and personal autonomy.” *Whisenhunt*, 464 U.S. at 971. “These and other cases reflect the view that constitutionally protected liberty includes freedom from governmental disclosure or interference with certain kinds of intensely personal decisions.” *Whisenhunt*, 464 U.S. at 971; *Roe v. Farwell*, 999 F. Supp. 174, 196 (D. Mass. 1998) (addressing importance of protecting privacy rights).

tionships, child rearing, and education.⁸¹ So long as these privacy rights are upheld in the court system, it will be difficult to overturn rights that protect a woman's reproductive choice.⁸² Therefore, Congress could protect women's rights to choose by codifying laws that fully define and enumerate the protections previously upheld by the Court to avoid the potentially catastrophic results of overturning *Roe*.⁸³

The Due Process Clause protects the fundamental rights granted under the Fourteenth Amendment of the Constitution—such as an individual's right to privacy—which inferentially protects a women's right to choose.⁸⁴ The current interpretation of the Due Process Clause is broad enough to encompass the right for a women to make decisions concerning her own reproductive affairs, even in the absence of *Roe v. Wade*.⁸⁵ This interpretation is based on balancing the compelling government's interest in protecting the fetal life versus the individual woman's right to choose.⁸⁶ The Due Process Clause has been used in a myriad of cases to establish the

⁸¹ See *Farwell*, 999 F. Supp. at 196 (evaluating nuances in right to privacy); *Whisenhunt*, 464 U.S. at 971 (Brennan, J., dissenting) (“Without identifying the precise contours of this right [to privacy], we have recognized that it includes a broad range of private choices involving family life and personal autonomy.”) “The intimate, consensual, and private relationship between petitioners involved both the ‘interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions,’ that our cases have recognized as fundamental.” *Whisenhunt*, 464 U.S. at 971 (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

⁸² See sources cited *supra* note 81 and accompanying text (highlighting Constitution may still protect women's rights even if *Roe* fell); see also *What if Roe Fell?*, *supra* note 29 (noting states have passed legislation protecting abortion rights to combat possibility of *Roe* overturning).

⁸³ See U.S. CONST. amend. IV (codifying right to privacy); U.S. CONST. amend. XIV (codifying right to Equal Protection and Due Process); see also, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) (refining holding from *Roe*); *Roe v. Wade*, 410 U.S. 113, 166-67 (1973) (establishing women's right to privacy and control over her reproductive rights); *Int'l Paper Co. v. Jay*, 736 F. Supp. 359, 363 (D. Me. 1990) (evaluating how to balance validity of state law against individual's fundamental right).

⁸⁴ See U.S. CONST. amend. XIV (establishing individual's fundamental right to due process and to privacy); *Fundamental Right*, LEGAL INFO. INST. https://www.law.cornell.edu/wex/fundamental_right (last visited Apr. 11, 2020) (defining fundamental rights in context of U.S. Constitution). If a right is safeguarded under due process, the constitutional issue lies in whether the government's interference is justified by a sufficient purpose. *Fundamental Right*, *supra* note 84.

⁸⁵ See *Casey*, 505 U.S. at 871 (using strict scrutiny standard and undue burden test to evaluate fundamental right of abortion); *Roe*, 410 U.S. at 154 (holding fundamental privacy right encompasses abortion decision); see also *Int'l Paper Co.*, 736 F. Supp. at 363 (discussing strict scrutiny standard and need for compelling state interest, especially in abortion cases). “Courts analyze with heightened scrutiny legislation that contains a suspect classification or that impinges on fundamental rights, requiring that the legislation provide the least restrictive means needed to support a compelling state interest.” *Int'l Paper Co.*, 736 F. Supp. at 363.

⁸⁶ See *Casey*, 505 U.S. at 844 (discussing undue burden and strict scrutiny standard applied by modern courts); *Roe*, 410 U.S. at 163-64 (emphasizing scrutiny standard that *Roe* was evaluated under).

right to privacy, beyond just reproductive case law, which demonstrates the value courts have placed on protecting an individual's right to privacy—a core tenant of American legal rights.⁸⁷ Courts may be able to uphold fundamental rights recognized under the Fourteenth Amendment Due Process Clause on a case-by-case basis.⁸⁸ In *Planned Parenthood v. Casey*, the Court held that prior to fetal viability, the state may regulate abortions so long as those regulations are not a substantial obstacle that place an undue burden on a woman's decision whether to abort.⁸⁹ If states have the ability to regulate abortions prior to fetal viability, states should also have the power to pass legislation that protects the right to abortion at any time.⁹⁰ The state's interest in protecting these rights would meet the strict scrutiny standard of review and would not burden any of the affected parties.⁹¹ The *Casey* Court emphasized the Due Process Clause's importance in not only establishing the right to choose under the Fourteenth Amendment but also preventing states from infringing on individuals' privacy and personal autonomy.⁹² Courts and lawmakers could use this argument to support future legislation that protects abortion rights from potential critics.⁹³ *Hodgson v. Minnesota* further expanded on the holding in *Casey* by stating that a compelling state interest does not overrule the burden it would place on the woman's right granted under the Fourteenth Amendment Due Process

⁸⁷ See generally *Terry v. Ohio*, 392 U.S. 1, 38 (1968) (upholding and refining right to privacy); *Katz v. United States*, 389 U.S. 347, 350 (1967) (establishing importance of individual right to privacy from governmental intrusion); *Griswold v. Connecticut*, 381 U.S. 479, 483-86 (1965) (establishing right to privacy as fundamental right in United States case law); *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961) (determining right to privacy).

⁸⁸ See *Roe*, 410 U.S. at 122-23 (stating abortion is fundamental right); see also *Casey*, 505 U.S. at 844 (affirming *Roe*'s holding).

⁸⁹ See *Roe*, 410 U.S. at 123 (establishing original standard that allowed women to get abortions); see also *Casey*, 505 U.S. at 844 (distinguishing itself from *Roe* by eliminating strict scrutiny test and establishing undue burden test). The new standard asks whether a state abortion regulation has the purpose or effect of imposing an "undue burden" on the woman, which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Casey*, 505 U.S. at 878 (emphasis added).

⁹⁰ See *What if Roe Fell?*, *supra* note 29 (mapping states that would uphold women's right to choose if *Roe* was overturned).

⁹¹ See *id.* (discussing burden of restrictive laws on women's reproductive rights); see also *Casey*, 505 U.S. at 846 (setting standard of review for abortion cases).

⁹² See *Casey*, 505 U.S. at 846 (stating *Roe*'s essential holding should be retained and reaffirmed). The *Casey* Court retained the following holdings from *Roe*: (1) the right to choose pre-viability; (2) states' power to restrict abortions after viability for health reasons; and (3) states' power to restrict abortions if a legitimate interest exists from the outset to protect health of mother and fetus. *Id.*

⁹³ See *id.* at 846 (discussing *Casey* argument used by Court to protect right to choose)

Clause.⁹⁴ Therefore, courts may consider using the *Hodgson* holding to protect a woman's superior interest to that of a burdensome state law under the Due Process Clause.⁹⁵

Furthermore, future lawmakers can preserve women's right to choose by supporting the Equal Protection argument.⁹⁶ As members of a protected class of citizens, women are granted additional protections under the Equal Protection Clause if rights that are specific to them are denied or violated.⁹⁷ If a law denies a right to everyone, then due process would be the best grounds for analysis; but, if a law denies a right to *some*, while allowing it to others, the discrimination can be challenged as offending equal protection.⁹⁸ The Equal Protection Clause should continue to protect women's rights as members of a protected class of citizens, even if *Roe* is overturned.⁹⁹ Additionally, if women cannot maintain their status as protected citizens under the Equal Protection Clause, it could potentially be viewed as lawmakers and judges favoring men's reproductive rights over women's.¹⁰⁰ The courts have discretion over the compelling interest test between males' and females' reproductive rights: a man controlling what a woman does to her body versus a woman controlling choices regarding her

⁹⁴ See *Hodgson v. Minnesota*, 497 U.S. 417, 461-62 (1990) (Marshall, J., concurring in part and dissenting in part) (distinguishing itself from *Roe* by stating burden on women is more significant than state's interest).

⁹⁵ See *id.* at 461-62 (discussing balance of state's interests versus women's rights).

⁹⁶ See U.S. CONST. amend. XIV (stating Equal Protection Clause of Fourteenth Amendment).

⁹⁷ See Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, THE NAT'L CONST. CENTER, <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702> (last visited Apr. 11, 2020) ("[T]he Court has also held that gender, immigration status, and wedlock status at birth qualify as suspect classifications."); Editors of Encyc. Britannica, *Equal Protection*, ENCYCLOPÆDIA BRITANNICA <https://www.britannica.com/topic/equal-protection> (last visited Apr. 11, 2020) (outlining history of Equal Protection Clause of Fourteenth Amendment).

⁹⁸ See *Equal Protection*, *supra* note 101 ("Equal protection, in United States law, the constitutional guarantee that no person or group will be denied the protection under the law that is enjoyed by similar persons or groups. In other words, persons similarly situated must be similarly treated."); Fitzpatrick & Shaw, *supra* note 97 (stating laws that potentially violate Equal Protection are not evaluated under rational-basis test). If the right to choose is protected under equal protection, the issue becomes whether the government's discrimination as to who can exercise the right is justified by a sufficient purpose. See Fitzpatrick & Shaw, *supra* note 97

⁹⁹ See *Craig v. Boren*, 429 U.S. 190, 218 (1976) (raising standard of scrutiny for sex-based discrimination under Equal Protection to intermediate scrutiny); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (establishing first time Equal Protection Clause applies to women, specifically regarding sex-based discrimination). "To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Reed*, 404 U.S. at 76.

¹⁰⁰ See Fitzpatrick & Shaw, *supra* note 97 (discussing nuances of equal protection); see also sources cited and accompanying text *supra* note 99.

own body.¹⁰¹ Evaluating the reproductive interests of both genders clearly demonstrates that a woman's interest exceeds the standard of review and should be protected under the Equal Protection Clause.¹⁰² The power to control reproductive decisions for one's own body is a right that should be protected for all citizens, not just for citizens of a certain gender.¹⁰³

B. Supporting the Right to Choose Using the Right to Physician-Assisted Suicide

Other liberal states may consider passing laws that keep a woman's right to choose.¹⁰⁴ Some of these states, like Massachusetts, have since passed laws that grant individual's the right to end their own lives—such rights may be recognized as parallel to the right to choose because of the power to terminate life in their own body.¹⁰⁵ The right to physician-assisted suicide is not a fundamental right under the current case law, but the right to choose is a fundamental right.¹⁰⁶ Given its heightened status as a fundamental right, states should feel more comfortable granting their citizens the right to choose, especially if legislators utilize the arguments that

¹⁰¹ See sources cited and accompanying text *supra* note 99.

¹⁰² See sources cited and accompanying text *supra* note 99. Under the intermediate standard of review today, the courts would evaluate whether the woman's reproductive interest would exceed that of a man's interest that essentially restricts that right. See sources cited and accompanying text *supra* note 99. The intermediate scrutiny standard does not have as high of a standard as strict scrutiny, which is the standard *Roe* and other abortion cases are analyzed under. See sources cited and accompanying text *supra* note 99. Therefore, courts today will likely find that a woman's interest meets the intermediate scrutiny standard; whereas, the restrictive state law that protects a man's rights will not meet such standard. See sources cited and accompanying text *supra* note 99; see also *Roe v. Wade* 410 U.S. 113, 154 (1973) (upholding fundamental right to privacy for women's healthcare decisions).

¹⁰³ See *Roe*, 410 U.S. at 154 (promoting and protecting reproductive interests of women).

¹⁰⁴ See *What if Roe Fell?*, *supra* note 29 (showing that some states have already passed laws to protect right to abortion).

¹⁰⁵ See *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997) (establishing case law that deemed physician-assisted suicide constitutional); see also Oregon Death with Dignity Act, OR. REV. STAT. ANN. § 127.805 (LexisNexis 2019) (codifying right to physician-assisted suicide in Oregon); Washington Death with Dignity Act of 2008, WASH. REV. CODE ANN. § 70.245.020 (LexisNexis 2020) (codifying right to physician-assisted suicide in Washington).

¹⁰⁶ See *Glucksberg*, 521 U.S. at 720-22 (describing constitutional question at issue). The Court in *Glucksberg* articulated that even though states are prohibited from making it illegal to assist another person in committing suicide, the Fourteenth Amendment does not create a constitutionally protected right to participate in physician-assisted suicide. *Id.* at 720-22. Therefore, that decision is left to the states. *Id.* The Court attempted to protect the state's interest in the protection of human life and the prevention of euthanasia. *Id.* at 722. Though it may be similar to denying medical treatment and the right to personal autonomy, physician-assisted suicide was historically never treated as such or even granted legal protection. *Id.*

helped pass the laws that granted the right to physician-assisted suicide.¹⁰⁷ If states are willing to pass laws that allow individuals to control whether they live or die, those states should also be willing to pass laws that allow women to control their bodies.¹⁰⁸ Currently, case law protects the liberty interests for both the right to abortion and right to physician-assisted suicide, given that they are similar and established in the right to personal privacy.¹⁰⁹ Not only has the Court addressed the right to privacy in their arguments supporting both rights, but the Court has also used the Due Process Clause to support their arguments as well.¹¹⁰ In upholding the right to choose if *Roe* is overturned, legislators can easily argue that the rationale under the Due Process Clause for the right to physician-assisted suicide is substantially similar to the right to choose.¹¹¹ Finally, because of the similar values and core tenants that these laws address, states that passed physician-assisted suicide laws may uphold women's rights by

¹⁰⁷ See sources cited and accompanying text *supra* note 78. In 1994, Oregon was the first state to codify the right for an individual to choose physician-assisted suicide, with Washington following suit in 2008. See sources cited and accompanying text *supra* note 78. Since then, seven states have passed similar laws that give individuals the right to choose to end their life utilizing physician-assisted suicide. See sources cited and accompanying text *supra* note 78. Currently, there are a total nine states and Washington D.C that grant individuals the right to physician-assisted suicide. See sources cited and accompanying text *supra* note 78; *Physician-Assisted Suicide Fast Facts*, CNN LIBRARY, <https://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/index.html> (last updated June 11, 2019, 2:59 PM). Moreover, the supreme courts of both Montana and California have granted and upheld the right to die, which shows the legislative and judicial backing of this individual decision. *Physician-Assisted Suicide Fast Facts*, *supra* note 107; see also MONT. CODE ANN. §50-9-10 (West 2019); *Baxter v. State*, 224 P.3d 1211, 1222 (Mont. 2009) (stating reasons why physician-assisted suicide is not against public policy).

¹⁰⁸ See Robert L. Kline, *The Right to Assisted Suicide In Washington and Oregon: The Courts Won't Allow a Northwest Passage*, 5 B.U. PUB. INT. L.J. 213, 234-35 (1996) (comparing right to physician-assisted suicide and right to abortion); Manning, *supra* note 78, at 518 (concluding that personal dignity questions are addressed in both physician-assisted suicide and abortion cases).

“Like the abortion decision, the decision of a terminally ill person to end his or her life ‘involv[es] the most intimate and personal choices a person may make in a lifetime’ and constitutes a ‘choice central to personal dignity and autonomy.’” Therefore, the terminally ill possess a liberty interest in physician-assisted suicide just as pregnant women possess a liberty interest in abortion.

Manning, *supra* note 78, at 518 (quoting *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1469-60 (W.D. Wash. 1994)); see also MacBride, *supra* note 78, at 793 (arguing right to privacy in *Roe* expanded to include physician-assisted suicide under similar liberty interests).

¹⁰⁹ See MacBride, *supra* note 78 at 793 (noting similar individual interest in abortion and physician-assisted suicide).

¹¹⁰ See *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997) (using Due Process Clause to support right to physician-assisted suicide); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (using Due Process Clause to support right to choose).

¹¹¹ See cases cited *supra* note 110; see Manning, *supra* note 78, at 518 (demonstrating similarities between two rights).

pointing to the similar nature of both acts.¹¹² This is important because it not only shows the cultural shift in the United States today, but also demonstrates the willingness of state legislatures to advocate for people's right to choose, even when it was not federally legal.¹¹³

Roe v. Wade changed American culture significantly over the past 50 years, embedding women's right to choose in modern culture today.¹¹⁴ Even if *Roe v. Wade* is overturned, the case precedent prior to it that allowed the Supreme Court justices in *Roe* to come to their decision would still stand as binding precedent.¹¹⁵ Some may argue that, if *Roe v. Wade* is overturned, there is nothing that legally entitles a woman to a say in her own reproductive rights.¹¹⁶ This argument holds no ground as the case precedent is still constitutional; therefore, women would still have some legal backing to advocate for themselves instead of reverting to a world where women have no say in personal and significant decisions involving her body.¹¹⁷

IV. CONCLUSION

The history of case law in the United States shows courts' willingness to give and expand upon the rights of its citizens. The development of the women's right to choose originated out of a century of case law and

¹¹² See generally Manning, *supra* note 78, at 518 (comparing right to physician-assisted suicide and right to abortion). Both acts relate control over one's body and permanent, life-altering decisions that an individual might make. *Id.*

¹¹³ See *id.* (analogizing abortion and physician-assisted suicide); see generally Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 1004-05 (Mass. 2003) (holding that individuals have fundamental right to same-sex marriage). The Massachusetts' Supreme Judicial Court determined that marriage was a privacy right so fundamental to the individual that it should not be limited to individuals of the same sex. *Goodridge*, 798 N.E.2d at 1004-05. Though Massachusetts was the first state to legalize same sex marriage, many states soon followed. *Goodridge*, 798 N.E.2d at 1004-05. This is important because it shows the changing tide in American culture and demonstrates that granting individuals more personal rights—which may not be protected at the federal level—can, and have been, protected by many states. *Goodridge*, 798 N.E.2d at 1004-05; Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding fundamental right to same-sex marriage is guaranteed under Due Process and Equal Protection Clause).

¹¹⁴ See generally *Roe*, 410 U.S. at 113 (demonstrating *Roe*'s significance as over 15,000 articles and 3,000 cases have cited it).

¹¹⁵ See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (expanding right to contraceptives to include unmarried individuals); Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965) (stating that right to marital privacy includes right to use contraceptives); Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942) (establishing fundamental right to procreate); Meyer v. Nebraska, 262 U.S. 390, 399, 403 (1923) (establishing fundamental rights include rights of family in marriage and child rearing).

¹¹⁶ See Scheindlin, *supra* note 6 (describing potential outcomes if *Roe* is overturned).

¹¹⁷ See *supra* note 115 and accompanying text.

demonstrates that individuals—specifically women—have the right to privacy and control over their bodies. Across the country, both at the state and federal level, courts and legislatures have upheld and refined this right through the nuances of the Due Process Clause. The Due Process Clause subsequently became the nexus for the right to procreation, the right to contraception, and the right to abortion. Courts in the United States have upheld the right to abortion for nearly fifty years, a right that allows all individuals, regardless of gender, the choice to control what happens to their own bodies and reproduction.

The right to control one's own body, and in turn one's own life, was further defined when states established the right to terminate one's own life via physician-assisted suicide.—This right originated in the Due Process Clause of the Fourteenth Amendment, which states that individuals should have control over what they do with their lives and bodies. Although not every state has the right to physician-assisted suicide, it is a power and a right that the Supreme Court determined belongs to the states. Perhaps individual states can rely on *Washington v. Glucksberg*, and additional physician-assisted suicide precedent, to grant their citizens the right to abortion. States can do this because the original arguments that established the right to abortion and the right to physician-assisted suicide are very similar. Both rights are similar enough that the parallels in the legal analysis should provide some authority for states to preserve these rights in the future.

If *Roe v. Wade* is overturned, where will it stop? Who will lose their rights next? What will be overturned? Will the nation continue moving forward to a period of greater rights, or revert to a time when the majority of the population was oppressed and controlled by a select few?

Jennifer McCoy