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CONSTITUTIONAL LAW/REPRODUCTIVE JUSTICE—BREAKING THE TRAP: HOW WHOLE WOMAN'S HEALTH PROTECTS ABORTION ACCESS, AND THE SUBSTANTIVE DUE PROCESS CLAUSE'S REBUKE OF ANTI-ABORTION REGULATIONS

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CONSTITUTIONAL LAW/REPRODUCTIVE JUSTICE—BREAKING THE TRAP: HOW *WHOLE WOMAN'S HEALTH* PROTECTS ABORTION ACCESS, AND THE SUBSTANTIVE DUE PROCESS CLAUSE'S REBUKE OF ANTI-ABORTION REGULATIONS

Chelsea M. Donaldson∗

The Fourteenth Amendment's Substantive Due Process Clause is a powerful sword that protects certain rights and liberties. Most of these non-fundamental rights are examined underneath the "rational basis" standard of constitutional review. Despite being a right protected underneath the Substantive Due Process Clause, abortion stands alone in using a unique form of constitutional review: Planned Parenthood v. Casey*'s "undue burden" standard.*

The striking down of Roe v. Wade*'s trimester analysis, and the subsequent creation of the "undue burden" standard, resulted in a catastrophic tidal wave of targeted regulations against abortion providers (TRAP laws). One such TRAP law, House Bill 2 (H.B. 2), was challenged. The resulting lawsuit,* Whole Woman's Health v. Hellerstedt, *declared that H.B. 2 was unconstitutional, using an analysis that diverged from standard abortion jurisprudence.*

This Note examines the Court's history of Substantive Due Process jurisprudence, contrasting abortion with other non-fundamental rights and liberties. It posits that the Substantive Due Process Clause not only should have been used all along to defend the constitutional right to access safe and legal abortion, but the Court's latest examination of abortion in access provides a strengthened form of review to judge abortion restriction: "undue burden with 'bite.'"

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> So long as this Court adheres to *Roe v. Wade* . . . and *Planned Parenthood of Southeastern Pennsylvania v. Casey* . . ., Targeted Regulation of Abortion Providers laws like H.B. 2 that 'do little or nothing for health, but rather strew impediments to abortion,' . . . cannot survive judicial inspection.[1]

INTRODUCTION

Despite being utilized since the beginning of ancient civilizations, abortion[2] has always been *different*.[3] A variety of ancient Greco-Roman texts mention the procedure,[4] yet it is continually debated throughout the political sphere as to the legitimacy of the practice as a constitutional right. It is a rare sight to go through a single political election without hearing about the future of *Roe v. Wade* or attempts to galvanize respective political bases utilizing reproductive justice as a tool for success or failure.[5] Most political platforms have some sort of position on the nature of abortion or reproductive justice as a whole,[6] and quite a few constituents vote with the politician's position on abortion in mind.[7]

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1. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring) (citations omitted).

2. "An artificially induced termination of a pregnancy for the purpose of destroying an embryo or fetus." *Abortion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

3. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992). "Abortion is a unique act. It is an act fraught with consequences for others . . . ." *Id.*

4. It is impossible to peg down exactly where abortion began as a procedure, but there are a variety of mentions of the procedures held within ancient Greco-Roman texts—including Plato's *Theaetetus*. *See* TIMOTHY D. J. CHAPPELL, READING PLATO'S THEAETETUS 42–45 (2005).

5. The rise of the "Tea Party" movement (a far-right section of the Republican Party) within the United States has led to a resurgence of anti-abortion policies across the country and has driven the Democratic Party to become more left-leaning in response. *See* Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 969–71 (2016) [hereinafter *Judicial Minimalism*]. This extreme resurgence of partisan politics left abortion in the dark as a protected constitutional right, as there was absolutely no middle ground to be found throughout the majority of both the Bush and Obama Administrations. *Id.*

6. President Trump, in the third Presidential debate of the 2016 Election, declared abortion to be an act of murder: "If you go with what [Secretary Hillary Clinton] is saying, in the ninth month, you can take the baby and rip the baby out of the womb of the mother just prior to the birth of the baby." *See* Danielle Paquette, *'Rip the Baby out of the Womb': What Donald Trump Got Wrong About Abortion in America*, WASH. POST (Oct. 20, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/10/20/rip-the-baby-out-of-the-womb-what-donald-trump-got-wrong-about-abortion-in-america [https://perma.cc/Z7Z2-NKR9].

7. For Americans, the feelings regarding abortion remain split—as they have for quite some time. For an updated and expansive survey on how abortion affects voting choices and

It is unrealistic, then, to expect that this political divisiveness would not leak into the court system.

The decision of *Planned Parenthood v. Casey*,[8] combined with the newfound deference toward the state legislators in regard to abortion, has led to an alarming rate of anti-abortion regulations passing through state legislature.[9] These targeted regulations of abortion providers (TRAP laws) are passed under the guise of protecting the health and safety of women, but in actuality do nothing except place a burden upon women who seek a safe and legal abortion.[10]

Many factors contribute to these laws. The political divisiveness of abortion, in addition to pseudoscience[11] offered as legitimate medical fact, has caused the worst attack on abortion providers since before *Roe v. Wade*.[12] Plenty of misinformation pervades the country concerning the practice of abortion; the problem is that much of this pseudoscience has leaked into the courts.[13] This pseudoscience (ranging from the effectiveness of abortion medication to the near-constant debate of

how Americans view abortion as a whole, see *Abortion*, GALLUP, http://www.gallup.com/poll/1576/abortion.aspx [https://perma.cc/U6PS-A5FL].

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

9. *See* Michael A. Althouse, Note, *The Creation of an Undue Burden: Arizona House Bill 2036 and State Abortion Regulations Post*-Casey, 20 WM. & MARY J. WOMEN & L. 173, 178 (2013).

10. *See id.* at 181 ("While facially neutral, the laws have likely the intent, and often effect, of forcing medical facilities to stop providing abortions.").

11. "A system of theories, assumptions, and methods erroneously regarded as scientific." *Pseudoscience*, MERRIAM-WEBSTER (11th ed. 2003). While pseudoscience is not the core subject of this Note, its presence is seen numerous times within both Congress and the court system in order to justify restrictions of abortion. For example, in October 2017, the Republican-controlled House of Representatives passed the Pain-Capable Unborn Child Protection Act, a federal ban on abortion after twenty weeks under the supposed knowledge that fetuses feel pain, despite the fact that, according to the American Congress of Obstetricians and Gynecologists (ACOG), fetuses do not feel pain until well into the third trimester of pregnancy. *See* Pain-Capable Unborn Child Protection Act, H.R. 36, 115th Cong. (2017) (as passed by H. Rep., Oct. 3, 2017) (a proposed bill to ban abortion after twenty weeks, utilizing pseudoscience as the basis of reasoning); *cf.* Am. Cong. of Obstetricians & Gynecologists, *Facts Are Important: Fetal Pain*, AM. CONG. OBSTETRICIANS & GYNECOLOGISTS (July 2013), https://www.acog.org/-/media/Departments/Government-Relations-and-Outreach/FactAreImportFetalPain.pdf [https://perma.cc/H2MF-TX4M] (stating that "fetal pain" is an anti-abortion tactic and is scientifically proven to not exist until much later in the pregnancy).

12. *See generally* Roe v. Wade, 410 U.S. 113 (1972).

13. *See* Stenberg v. Carhart, 530 U.S. 914, 932 (2000) (commenting upon the State's failure to counteract established medical findings with a legitimate state interest); *cf.* Gonzales v. Carhart, 550 U.S. 124, 175–76 (2007) (Ginsburg, J., dissenting) (referencing the inaccurate medical findings that Congress relied upon when passing the Partial Birth Abortion Ban Act of 2003).

whether viability is a legitimate measure by which to judge termination limits) has led to the creation of many TRAP laws which (until very recently) were considered constitutional.[14]

The emotional and difficult decision that is obtaining an abortion will not go undiscussed in this Note. An abortion can provide life-changing opportunities for a woman, or mean death for a woman who desperately requires medical assistance.[15] But, too often, abortion providers or clinics are nearly impossible to find depending on what state the woman lives in.[16] Attacks against abortion over the past forty years have dealt a significant blow to an essential medical procedure that is not only protected by the Constitution, but necessary to promote the health and wellbeing of women.[17]

In contrast to other fundamental rights, abortion is constantly debated and forced to justify itself each election cycle. This undermines a hard-fought right that, in truth, has yet to be properly won. However, victories—though few—are well-earned. One of those victories, *Whole Woman's Health v. Hellerstedt*,[18] is the central topic of this Note. This Note will argue that *Whole Woman's Health* not only provides a stronger constitutional basis for protecting abortion access, but places abortion access within standard Fourteenth Amendment jurisprudence, thereby unifying the Substantive Due Process Clause and its approach to rational basis review.

Part I of this Note will examine the historical underpinnings of the

14. Althouse, *supra* note 9, at 174. For more information on the debate of pseudoscience in abortion, see Kelly Kasulis, *#TheyFeelPain: Doctors Say the GOP's Anti-Abortion Campaign is Based on Pseudoscience*, MIC (Oct. 4, 2017), https://mic.com/articles/184990/theyfeelpain-doctors-say-the-gops-anti-abortion-campaign-is-based-on-pseudoscience [https://perma.cc/79HD-9A8W].

15. Planned Parenthood (the largest abortion provider in the United States) has a helpful guide to determining whether an abortion is the right choice for you. Within it, Planned Parenthood lists off multiple reasons why women obtain abortions, ranging from not being able to be a parent to not being physically able to carry the child to term. *See Considering Abortion*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/abortion/considering-abortion [https://perma.cc/HL9L-F7WD].

16. "Abortion clinics in the U.S. have closed at a record pace. In five states—Mississippi, Missouri, North Dakota, South Dakota and Wyoming—just one remains." Esmé E. Deprez, *U.S. Abortion Rights Fight*, BLOOMBERG QUICKTAKE (updated July 7, 2016, 10:18 AM), https://www.bloomberg.com/quicktake/abortion-and-the-decline-of-clinics.

17. Planned Parenthood estimates that out of the millions of unplanned pregnancies every year, four out of ten end in abortion. *Considering Abortion*, *supra* note 15. Overall, three out of ten women by the age of forty-five will have an abortion. *Id.*

18. *See generally* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

Substantive Due Process Clause of the Fourteenth Amendment.[19] Part II of this Note will examine the history of abortion access within the United States, with a specific focus on the interpretation of the Substantive Due Process Clause and how it applies to different standards of scrutiny within the sphere of abortion. Part III of this Note will then examine *Whole Woman's Health v. Hellerstedt*[20] in its entirety. Part IV of this Note will argue that *Whole Woman's Health* has taken a step away from *Planned Parenthood v. Casey*'s undue burden standard,[21] and has instead implemented a heightened standard of review by which the court system can judge TRAP laws. Finally, this Note will conclude that (1) *Whole Woman's Health*'s "undue burden with teeth" standard provides more protection for abortion access than *Casey*, requiring a greater scrutiny of the relationship between a state's legitimate interest and the burden placed upon a woman seeking an abortion; (2) *Whole Woman's Health* is the new standard against which the court system must judge TRAP laws; and (3) that the Supreme Court's jurisprudence surrounding the Fourteenth Amendment's Substantive Due Process Clause bolsters *Whole Woman's Health* into a more protective, less deferential test to protect abortion access.

I. THE SUBSTANTIVE DUE PROCESS CLAUSE

The Fourteenth Amendment was ratified in 1868,[22] grouped with the other "Civil War" Amendments[23] to the United States Constitution. The Fourteenth Amendment acted as an order to the states; it required compliance with the Bill of Rights and added protections for former slaves, holding state actors accountable for constitutional violations.[24]

19. U.S. CONST. amend. XIV, § 1.

20. *See generally Whole Woman's Health*, 136 S. Ct. 2292.

21. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

22. U.S. CONST. amend. XIV; *see also* Joint Resolution Proposing an Amendment to the Constitution of the United States, Article XIV (July 21, 1868), LIBRARY CONG., https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=742 [https://perma.cc/AM78-WZQM].

23. The "Civil War" or "Reconstruction" Amendments are the colloquial terms for Amendments Thirteen through Fifteen of the United States Constitution. *See The Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm [https://perma.cc/MVT7-CLFL]. They concern the abolishment of slavery, equal protection, due process, and the right to vote irrespective of race, respectively. *See* U.S. CONST. amends. XIII–XV.

24. The notion that the Fourteenth Amendment forces the Bill of Rights upon the States is one that the Supreme Court has grappled with since the ratification of the Amendment. *See* Griswold v. Connecticut, 381 U.S. 479, 486–88 (1965) (Goldberg, J., concurring). Some

Located within the Fourteenth Amendment is the Due Process Clause, which prohibits states from denying a person their life, liberty, or property without due process of the law.[25] Further, the Court has referenced that the Due Process Clause of the Fourteenth Amendment includes a "'substantive' component that protects certain liberty interests against state deprivation 'no matter what process is provided.'"[26] The differentiation between substantive due process and procedural due process was crafted with the understanding that some liberties and rights are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[27] With this in mind, the Substantive Due Process Clause of the Fourteenth Amendment provides a powerful tool to protect civil liberties, including abortion access.[28]

As the United States moved into the Reconstruction Era, the Court was faced with the reality of a torn nation coming to terms with the aftermath of a brutal Civil War.[29] A denial of liberty or property without due process of the law contradicts an essential cornerstone of American ideology.[30] However, the Court had to face the stark reality of the state-level constitutional violations in a rapidly emerging Jim Crow world, and what that meant for forging a new area of jurisprudence.[31]

Supreme Court Justices have viewed the Fourteenth Amendment as embracing the Bill of Rights within its definition of "liberty;" others viewed it as a stand-alone Amendment. *Id.*

25. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law*.") (emphasis added).

26. Obergefell v. Hodges, 135 S. Ct. 2584, 2616 (2015) (Roberts, C.J., dissenting) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

27. Synder v. Massachusetts, 291 U.S. 97, 105 (1934).

28. The most recent achievements of the Substantive Due Process Clause can be found within *Obergefell* and the right to marry. *See Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting). While marriage has been considered a constitutionally protected right, the *redefinition* of marriage to include same-sex couples was considered, by some, to be revolutionary—and perhaps even unconstitutional in and of itself. *Id.*

29. The Reconstruction Era refers to the period of time immediately following the Civil War. *See* Edward L. Ayers, *Reconstruction*, GILDER LEHRMAN INST. AM. HIST., https://www.gilderlehrman.org/history-by-era/reconstruction/essays/reconstruction (last visited Jan. 3, 2017). The United States faced the end of slavery, the creation of new civil liberties, and the daunting prospect of unifying a once divided nation. *Id.*

30. Within the twenty-seven Amendments to the United States Constitution, the denial of due process is referenced in two of them—the Fifth and Fourteenth Amendment, both which rule that a denial of due process by the Federal or State Government is unconstitutional. U.S. CONST. amend. V, XIV.

31. The term "Jim Crow" refers to American *de jure* segregation. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 30–35 (rev. ed. 2012). Despite the Union's victory in the Civil War, Black Americans faced

As applied to abortion, constitutional standards of review have a complex history that will be discussed in Part II of this Note. Initially, a discussion of constitutional standards of review as applied to the Substantive Due Process Clause is needed in order to fully understand the impact of *Whole Woman's Health* upon abortion rights and Substantive Due Process jurisprudence.

A. *Standards of Constitutional Review*

The Supreme Court has two primary standards of review when examining substantive due process cases: strict scrutiny, for fundamental rights; and rational basis review, for those rights deemed non-fundamental.[32] Depending on which protected class or conduct the Court is examining in any given case, the standard of review may vary.

Strict scrutiny is a skeptical standard of review, requiring that the legislation enacted be "narrowly tailored"[33] to suit the state's compelling interest by the least restrictive means possible.[34] Strict scrutiny is the highest burden upon the state and is usually applied when the challenged legislation specifically targets classes of people based on race, national origin,[35] or when a law infringes upon a fundamental right.[36]

Rational basis is the least imposing standard of review, typically granting great deference to the legislature.[37] The Court's test for rational basis holds that "legislation is presumed to be valid and will be sustained

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further discrimination and violence underneath the State despite the constitutional protections enacted following the War. *Id.*

32. "There may be narrower scope for operation of the presumption of constitutionality *when legislation appears on its face to be within a specific prohibition of the Constitution*, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (citations omitted) (emphasis added).

33. Reno v. Flores, 507 U.S. 292, 301 (1993).

34. Bernal v. Fainter, 467 U.S. 216, 219 (1984).

35. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."). Ultimately, Korematsu's detention during the Second World War was deemed reasonably justified due to the wartime necessity of keeping track of potential enemy combatants, most of whom were of Japanese descent. *Id.* at 219–24.

36. *See Carolene Prods.*, 304 U.S. at 152 n.4 ("[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment.") (citations omitted).

37. "Unlike under heightened scrutiny, in a rational basis equal protection analysis courts look to any 'conceivable basis' for the challenged law, not limited to those articulated by or even consistent with the rationales offered by the legislature." Windsor v. United States, 699 F.3d 169, 196 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013).

if the classification drawn by the statute is rationally related to a legitimate state interest."[38] The standard of review by which abortion was judged, before the advent of *Whole Woman's Health*, is placed within this area of constitutional review, though the "undue burden" standard is not identical.[39]

While rational basis review is, arguably, the least stringent of the three standards, the standard still requires a certain "nexus" of a logical conclusion between the regulation and the legitimate state interest at hand.[40] Most rational basis standards compel state actors to provide at least some level of evidence beyond "compelling state interest" in order to pass a rational basis review of a specific act of legislation.[41] The *Lawrence* Court did not find morality a compelling-enough state interest to warrant criminalizing sexual intimacy between same-sex partners by enacting an anti-sodomy statute, thereby resulting in a constitutional violation.[42]

B. *Is "Rational Basis" Rational?*

While the rational basis standard of review is the most deferential of the constitutional standards of review used by the Court, it has also taken on a new life of its own in recent Court decisions.[43] The Substantive

38. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

39. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874–75 (1992). The undue burden standard is exclusive to abortion jurisprudence and departs from traditional tiered standards of review utilized in other substantive due process jurisprudence. *See infra* Part II (discussing the *Casey* doctrine and the evolution of abortion jurisprudence prior to *Whole Woman's Health*); *cf. infra* Subpart I.B (exploring substantive due process jurisprudence with other fundamental rights, such as marriage and privacy within the home).

40. Emma Freeman, Note, *Giving* Casey *Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 279–80 (2013). Despite this, the Court has remained exceedingly deferential to the legislature underneath rational basis review, even going so far as supplying *hypothetical* state interests in lieu of the purported failed interest. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955).

41. It should be noted that the standard utilized in *Lawrence* is what many scholars refer to as "rational basis with bite" or *rational basis plus*, as it held Texas to a greater standard than usually required under the Supreme Court's past interpretations of the rational basis standard. For a more in-depth analysis of "rational basis with bite," see generally Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

42. *See Lawrence*, 539 U.S. at 579 (holding that anti-sodomy laws violated the Substantive Due Process Clause of the Fourteenth Amendment).

43. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016) (Ginsburg, J., concurring) (citations omitted) (holding that Texas did not meet their burden when passing two TRAP laws that shut down over half of the abortion clinics within the

Due Process Clause cannot be swept aside every time a state has a rational basis for legislating against a protected class or right, but state legislatures must also be free to regulate when necessary.[44] A middle ground must be met.

The Court's discretionary application of rational basis review has been discussed by countless legal scholars.[45] However, the problem with rational basis review is exceptionally apparent in substantive due process cases.[46] The Court has created a multitude of pathways to rational basis review, but has yet to define it into a unitary standard.[47] While rational basis review is supposed to be the most deferential of standards, the Supreme Court uses it with much discretion and little cohesion.[48]

Rational basis is the standard of review that was utilized to determine a violation of the Substantive Due Process and Equal Protection Clauses of the Fourteenth Amendment in a number of Supreme Court cases concerning sexual orientation[49] and sexual

state); Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (striking down same-sex marriage bans as a violation of the Substantive Due Process Clause, as the states did not meet their burden); United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (invalidating the Defense of Marriage Act as a violation of the Substantive Due Process Clause, as the legitimate government interest of the sanctity of marriage was not enough to meet the burden of proof).

44. The Tenth Amendment grants all powers to the States that are not specifically mentioned within the Constitution. U.S. CONST. amend. X. However, the Court, while stating that the Tenth Amendment does protect state sovereignty in some respects, has soundly refuted the notion that the Tenth Amendment trumps the Fourteenth Amendment. *See* Hunter v. Underwood, 471 U.S. 222, 232 (1985).

45. For a more nuanced discussion of standards of review and the argument against the Supreme Court's discretionary application of rational basis review, see generally Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004). *See also Judicial Minimalism*, *supra* note 5 (prompting an examination of partisan politics and the Supreme Court's weak approach to abortion jurisprudence).

46. *See infra* Sections I.B.1–3 (examining the history of the Substantive Due Process Clause); *cf. infra* Part II (examining the *Casey* doctrine and subsequent abortion jurisprudence).

47. *See* Goldberg, *supra* note 45, at 490 ("Yet, while the Court regularly explains its approach to rational basis review, it has not offered a theory for making collective sense of its variable lot of decisions.").

48. *Id.* at 490–91.

49. Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (holding that bans against same-sex marriage violated both the Substantive Due Process and Equal Protection Clauses of the Fourteenth Amendment); United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (holding that the discriminatory tax exemptions of the Defense of Marriage Act for heterosexual peoples violated both the Substantive Due Process and Equal Protection Clauses of the Fourteenth Amendment); Romer v. Evans, 517 U.S. 620, 635–36 (1996) (holding that the repeal of protective legislation for same-sex citizens violated the Equal Protection Clauses of the Fourteenth Amendment).

conduct.[50] However, the Court's application of the rational basis standard in each of the cases leaves much to be desired when used to protect certain rights and liberties, especially in terms of consistency. With extraordinary division amongst the members of the Court, the Supreme Court's application of rational basis review, and the navigation of the Substantive Due Process Clause, tends to be far stricter than initially meets the eye—depending on what right the Court is examining.

1. The *Lochner* Era

Lochner v. New York launched a three-decades-long era of the Court participating in "judicial activism," utilizing the Fourteenth Amendment's Substantive Due Process Clause to read a fundamental right to contract into the Constitution as a method of striking down labor laws to protect workers, as well as portions of President Roosevelt's "New Deal" legislation to restore the economy from the disastrous effects of the Great Depression.[51] The *Lochner* era is widely understood as a cautionary tale of what can happen when the Supreme Court does not adequately defer to the legislature, at least with respect to economic legislation and decisions.[52] For better or for worse, it has also shaped Substantive Due Process jurisprudence for the past one hundred years.[53]

Lochner struck down a New York statute meant to protect bakery workers from unsafe working conditions,[54] citing "freedom of contract" between employer and employee as a fundamental right protected by the Substantive Due Process Clause of the Fourteenth Amendment.[55] While the freedom to form a contract was not a newly created right at the time of *Lochner*,[56] the Supreme Court's intervention with the legislature created a very real problem with the public's perception of the purpose

50. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding that anti-sodomy laws violated the Substantive Due Process Clause of the Fourteenth Amendment).

51. The *Lochner* decision has often been hailed as an example of "judicial activism" and is frequently cited by the Court as a warning to err on the side of legislative deference. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

52. Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 1 (1991) ("Legal scholars and historians have generally depicted the *Lochner* era as a deviant period during which the Supreme Court broke from the constitutionalism that the Marshall Court established and the New Deal Court restored.").

53. *See id.* at 6–7.

54. Lochner v. New York, 198 U.S. 45, 64 (1905).

55. *Id.* at 53; *see also* U.S. CONST. amend. XIV, § 1.

56. *See* Allgeyer v. Louisiana, 165 U.S. 578, 587–88 (1897) (striking down a Louisiana statute on the grounds of violating a person's free right to contract underneath the Fourteenth Amendment).

of the Court: when is it appropriate for the Supreme Court to impose its own theories upon the legislature and, by correlation, the people?[57]

Since its founding, the Court's role has been to interpret the Constitution, not to be involved in the executive or legislative branches of government.[58] When the Court acts as a "super-legislature," it undermines the power of the legislature itself.[59] Since *Lochner*, the Court has attempted to stay the course in terms of legislative deference and wield a rational basis standard in order to determine whether or not the legislature has overstepped its boundaries.[60] Unfortunately, the judiciary does not do so with an even hand—particularly in the area of law known as reproductive justice.[61] Despite an attempt to solidify the approach to the doctrine with a narrowed scope of review for lower courts to utilize, the judiciary has made a muddied history of the Substantive Due Process Clause ever since.[62] As this Note discusses, the Supreme Court's almost reactionary aversion to becoming a "super-legislative" body has caused a rift in reproductive justice jurisprudence, particularly in the realm of abortion.

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57. Justice Holmes' dissent within *Lochner* warns of the Supreme Court imposing their opinions regarding economics onto a legislature that clearly felt otherwise. *See Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting).

58. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

> The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id.

59. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

60. *See* Malmed v. Thornburgh, 621 F.2d 565, 575–76 (3d Cir. 1980). Further, the Supreme Court has since shelved the discussion of economics into the realm of the political question doctrine: matters of *how* to run the government have been left to the politicians—not the Supreme Court. *See* Baker v. Carr, 369 U.S. 186, 210–12 (1962) (offering a variety of governmental actions that the Supreme Court will not delve into, including Native American sovereignty and foreign relations). On the other hand, instances of government infraction that tread into constitutional matters are within the Court's purview. *Id.*

61. Despite the fact that abortion is now considered a protected right underneath the Fourteenth Amendment, it did not start that way. Reproductive justice jurisprudence began with *Griswold v. Connecticut*, where the right to privacy was found within the first Amendment—not the Fourteenth. *See Griswold*, 381 U.S at 484–85.

62. "As with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test, or in appropriate cases, strict scrutiny. Otherwise, the courts would be resorting to blatant 'Lochnerism,' a concept that has been administered suitable last rites and mercifully interred." *Malmed*, 621 F.2d at 575–76 (citation omitted).

2. Contraception: The Rejection of *Lochner* and the Establishment of Privacy

In 1965, the Supreme Court decided *Griswold v. Connecticut*, a case that established the fundamental right to contraception and privacy within the home.[63] The *Griswold* Court, in analyzing a challenge to Connecticut's then anti-contraception statute that penalized both medical professionals and married couples alike, circumnavigated the resurgence of *Lochner* by plainly stating that *Lochner* did not guide their decision-making.[64] An interest in the sanctity of the marital bedroom and the "penumbras of rights" encompassed by the Bill of Rights[65] and the Fourteenth Amendment[66] drove the Court to strike down the anti-contraception law, expanding the definition of "fundamental rights" to include the right to privacy in deciding whether to bear or beget a child.[67]

Griswold opened the door for both abortion access and the convolution of abortion access jurisprudence. While *Griswold* had the opportunity to strike down the Connecticut statute utilizing the Substantive Due Process Clause of the Fourteenth Amendment, the Court chose instead to utilize established First Amendment jurisprudence—an equally important amendment to the Constitution, but one that provides shaky-at-best protection.[68] Justice Harlan, in his concurrence, warns against the Court's insistence on utilizing a "penumbra of rights" rather than the Fourteenth Amendment, stating that "[t]he Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."[69] By not incorporating the right to privacy and the right to marital contraception within the Substantive Due Process Clause out of fear of "Lochnerizing," Justice Harlan argues that the Court has unwittingly imposed "an artificial and largely illusory restriction on the content of the Due Process Clause."[70]

63. *See Griswold*, 381 U.S. at 485–86.

64. *Id.* at 481–82.

65. The majority of *Griswold* made the determination that the First Amendment, held within a penumbra of rights, established the right to privacy, thereby striking down the Connecticut statute. *See id.* at 484–85.

66. Justice Goldberg's concurrence provides a compelling argument that the concept of "liberty" held within the Fourteenth Amendment protects such fundamental rights alone, without absorbing the Bill of Rights. *See id.* at 486–88 (Goldberg, J., concurring).

67. *Id.* at 485–86.

68. *See id.* at 500 (Harlan, J., concurring).

69. *Id.*

70. *See id.* at 502 (Harlan, J., concurring).

The Court's convoluted jurisprudence regarding contraception continued with *Eisenstadt v. Baird*, which expanded the holding of *Griswold* to include the right of contraception to unmarried couples.[71] Again, *Eisenstadt* does not rely on the Substantive Due Process Clause to determine that Massachusetts violated the Constitution; instead, *Eisenstadt* grants unmarried couples the right to utilize contraception by means of the Equal Protection Clause of the Fourteenth Amendment.[72]

In later jurisprudence, the Court pointed out the close relationship between the Substantive Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[73] In *Eisenstadt*, the clear divide between two separate classes of people—married and unmarried—made the determination of which clause to use relatively simple, when the Court determined to apply the Equal Protection Clause.[74] However, the continued avoidance of utilizing the Substantive Due Process Clause out of fear of judicial activism has created a divide within the Court's Fourteenth Amendment jurisprudence.[75] For some fundamental rights, the Substantive Due Process Clause will gladly do most of the work, (and will sometimes do so hand-in-hand with the Equal Protection Clause).[76] For others—namely, reproductive justice, and more specifically, abortion—the standard is lessened and not granted the same weight of constitutional authority.[77]

3. *Romer* vs. *Lawrence*: Equal Protection vs. Substantive Due Process

The aversion of the Supreme Court to utilize the Substantive Due Process Clause within the realm of reproductive justice is highlighted when examining other areas of the law that the Due Process Clause encompasses, such as private, adult, consensual sexual conduct.[78] In

71. *See* Eisenstadt v. Baird, 405 U.S. 438, 443, 446–47 (1972).

72. *See id.* at 446–47.

73. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015).

74. *See Eisenstadt*, 405 U.S. at 443.

75. *See Obergefell*, 135 S. Ct. at 2602 (striking down same-sex marriage bans, and rejecting the state's historical "sanctity of marriage" argument); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992) (overturning *Roe*'s strict scrutiny standard in favor of the "undue burden" standard, a lessened form of rational basis review).

76. *See Obergefell*, 135 S. Ct. at 2602–03.

77. The standard by which abortion is judged was originally a strict scrutiny standard, protected underneath *Roe v. Wade*. *See* 410 U.S. 113, 163–64 (1973). It was lessened in 1992, with the decision in *Casey* and the invention of the "undue burden" standard. *See Casey*, 505 U.S. at 874.

78. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down an anti-

Lawrence v. Texas, the Court examined the prosecution of a gay man, John Geddes Lawrence, for engaging in sodomy within the privacy of his home.[79] He was arrested for this act.[80] On appeal, the Court struck down the anti-sodomy statute Lawrence was prosecuted under, citing the Substantive Due Process Clause as the protective piece of constitutional law that Texas violated.[81]

Interestingly, the majority in *Lawrence* utilized both *Griswold* and *Eistenstadt*[82] as the foundation for establishing a right to privacy in one's home, even though neither of those cases utilizes the Fourteenth Amendment's Due Process Clause.[83] Justice Kennedy rejected the argument that the Equal Protection Clause of the Fourteenth Amendment should take paramount importance when examining the Texan statute.[84] Instead, Justice Kennedy chose to invalidate the statute under the Substantive Due Process Clause to eradicate any opportunity for states to re-draw statutes to allow for equal opportunity discrimination between homosexual and heterosexual couples alike.[85] This lack of deference to the legislature, even when there is a purported state interest, has commonly been labeled as "rational basis with bite."[86] In *Lawrence*, the Court not only soundly rejected Texas's state interest, but invalidated it completely under the Substantive Due Process Clause without the possibility of an alternate theory.[87]

To make matters even more complicated, Justice Kennedy cited the Founding Fathers' inability to "know[] the components of liberty in its manifold possibilities" of the Fifth and Fourteenth Amendments' Due Process Clauses when striking down the Texan anti-sodomy statute.[88]

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sodomy statute as a violation of the Substantive Due Process Clause). In a prior case, the Court utilized the Equal Protection Clause as the basis for protection. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996).

79. *Lawrence*, 539 U.S. at 562–63.

80. *Id.* at 563.

81. *See id.* at 578–79.

82. *See id.* at 564–65.

83. Justice Kennedy also made copious references to *Roe v. Wade* and *Planned Parenthood v. Casey*, both of which rely on the Substantive Due Process Clause of the Fourteenth Amendment. *See id.* at 565–74; *see also infra* Part II.

84. *Lawrence*, 539 U.S. at 574–75, 578.

85. *Id.*

86. *See id.* at 580 (O'Connor, J., concurring) (stating that the Court has "applied a more searching form of rational basis review" when the legislature treads into personal relationships).

87. *See id.* at 578–79.

88. *Id.* at 578.

Indeed, Justice Kennedy views the future as a wealth of possibilities in examining the Substantive Due Process Clause, the potential of fundamental rights expanding into the future as society's awareness of fundamental rights develops.[89] This limitless area of possibilities stands for the notion that the area of fundamental rights is constantly evolving and argues for a more expansive approach to the Substantive Due Process Clause, rather than a restrictive one.[90]

The decision to utilize the Substantive Due Process Clause in lieu of the Equal Protection Clause is another confusing choice, as seven years prior, Justice Kennedy struck down a targeted repeal of anti-discrimination protections against LGBTQ[91] citizens primarily under the Equal Protection Clause.[92] In *Romer v. Evans*, Colorado amended its constitution "in . . . a state-wide referendum."[93] The amendment (Amendment 2) repealed ordinances across Colorado "to the extent they prohibit discrimination on the basis of 'homosexual . . . orientation, conduct, practices, or relationships.'"[94] The Colorado Supreme Court struck down Amendment 2 by subjecting it to strict scrutiny, citing the Fourteenth Amendment's Equal Protection Clause.[95] The Supreme Court affirmed, but under a different rationale[96]: Amendment 2 violated the Constitution, but the Court applied a rational basis standard of review rather than strict scrutiny.[97]

The dissenting opinions of both *Romer* and *Lawrence* cite similar criticisms—specifically that the Court's majority is forcing its respective opinions onto the people.[98] In *Lawrence*, the focus on "judicially

89. "[The Founding Fathers] knew that 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." *Id.* at 579.

90. *See id.*

91. LGBTQ is a common acronym that stands for "lesbian, gay, bisexual, transgender, queer." *Glossary of Terms*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/glossary-of-terms [https://perma.cc/9D2P-JJG4]. It is an umbrella term to generally encompass the queer community. *See id.*

92. *See* Romer v. Evans, 517 U.S. 620, 624, 635 (1996).

93. *Id.* at 623.

94. *Id.* at 624 (quoting COLO. CONST., Art. II, § 30b (1993).

95. *Romer*, 517 U.S. at 625.

96. *Id.* at 626.

97. *See id.* at 631–32 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

98. *See* Lawrence v. Texas, 539 U.S. 558, 587–88 (2003) (Scalia, J., dissenting); *see also Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

invented . . . rights"[99] and the criticism of expanding further into *Lochner*-esque territory weighed on the minds of the dissenting authors who accused the majority of protecting some controversial opinions (namely, abortion rights) and striking down others (here, anti-sodomy laws).[100] For Justice Scalia, the notion of placing homosexuality on the same level of scrutiny as race or religion was something to be left to the legislatures and the people, not to the Supreme Court of the United States.[101] Both *Lawrence* and *Romer*, ultimately, granted protections to LGBTQ citizens by extending a rational basis standard in the face of a newly created protected class; but the reliance (or lack thereof) upon the Substantive Due Process Clause further complicates the jurisprudence on which abortion access, as will be discussed in Part II, relies.[102]

4. Sexual Orientation: *Obergefell* and the Expansion of Substantive Due Process

In *Obergefell v. Hodges*, the Supreme Court rejected the States' arguments for same-sex marriage bans, concluding that the historical nuances of marriage being solely between one man and one woman was not a legitimate state interest in the face of the discrimination imposed upon LGBTQ couples seeking marriage rights.[103] Additionally, Justice Kennedy stated that the Fourteenth Amendment's "liberties extend to certain personal choices central to individual dignity and autonomy."[104] This groups *Obergefell*'s central holding—the constitutional right to marriage, regardless of sexual orientation—with other non-fundamental rights, such as obtaining birth control.[105] Even further, the declaration of same-sex marriage as a constitutionally protected activity was done by utilizing the rational basis standard: weighing the state's legitimate interest in protecting the sanctity of marriage against Jim Obergefell's

99. *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

100. *See id.* at 588 (Scalia, J., dissenting).

101. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

102. *See* Amelia Craig Cramer, *The Freedom to Marry Must Not Be Denied*, ARIZ. ATT'Y 14, 18–19 (Mar. 2004), https://www.myazbar.org/AZAttorney/PDF_Articles/0304SameSexPRO.pdf [https://perma.cc/ZU8R-BBT6] (citing *Lawrence* and *Romer* as an expansion of civil protections for LGBTQ couples and a rejection of bias as a legitimate state interest).

103. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015) (granting same-sex couples the right to marry while refuting the historical "one man and one woman" argument the States provide as a legitimate interest).

104. *Id.* at 2597.

105. *See* Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

right to have his marriage validated by the state of Ohio.[106]

Interestingly, *Obergefell* utilizes both the Equal Protection Clause and the Substantive Due Process Clause in harmony to strike down numerous same-sex marriage bans.[107] Again, as with the sexual intimacy cases, *Obergefell* cited the contraception cases *Griswold* and *Eisenstadt* in order to define the concept of liberty protected by the Due Process Clause (in addition to most of the rights held within the Bill of Rights) as "personal choices central to individual dignity and autonomy," when neither case utilized the Due Process Clause directly in their determination of reproductive justice as a fundamental right.[108] And, again, Justice Kennedy remarked upon the potential of the future, defining fundamental rights by reminding states that the very definition of "rights" must be malleable.[109]

The dissenting opinions in *Obergefell* call attention to the Court's arguably *Lochner*-esque approach to the Substantive Due Process Clause.[110] The dissents accuse the majority of applying their own vision of what a fundamental right is,[111] arguing that this supplants rational basis review by simply declaring what the law should be, rather than what the law is.[112] Justice Scalia's dissent argues that the majority overstepped its boundaries into the legislative branch, overturning gay marriage bans because they interpreted the right to same-sex marriage as one protected by the Fourteenth Amendment.[113] The Fourteenth Amendment's Substantive Due Process Clause has, after *Obergefell*, molded rational basis into a standard that can, in conjunction with the Equal Protection Clause, encompass groups of people that have been stigmatized or targeted, regardless of the historical or legislative

106. The state interest in preserving the "sanctity of marriage" is an argument that the Court rejected in *Obergefell*, citing a long history of expanding constitutional rights to groups that were previously unable to access them due to historical bias or prejudice at the time. *Obergefell*, 135 S. Ct. at 2602 ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").

107. *See id.* at 2602–04 (exploring the connection of the Substantive Due Process Clause and the Equal Protection Clause, particularly in regard to marriage jurisprudence).

108. *Id.* at 2597–98.

109. *Id.* at 2602.

110. *See id.* at 2616 (Roberts, C.J., dissenting). "[T]he majority's approach has no basis in principle or tradition, except for the un-principled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*." *Id.*

111. *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting) ("The Court today not only overlooks our country's entire history and tradition but actively repudiates it . . . .").

112. *Id.* at 2611.

113. *See id.* at 2629 (Scalia, J., dissenting).

reasoning that states have relied on for hundreds of years.[114]

5. Judicial Activism and Fundamental Rights: Rational Basis Review Resolved?

The notion of judicial activism is pervasive in many dissenting opinions surrounding the Substantive Due Process Clause of the Fourteenth Amendment. This only bolsters the argument that the Supreme Court's method in approaching the Substantive Due Process Clause—especially when rational basis scrutiny is involved—seems to be a "flavor of the day" approach.[115] The Court's selective usage of the Substantive Due Process Clause is not a novel legal conclusion—if anything, it is a frequently discussed and debated one.[116] That said, rational basis review and the determination of what constitutes a fundamental right holds significant strength in determining whether or not a state has overstepped its boundaries in regard to a deprivation of life, liberty, or property.[117] In addition, the Court has combined the Equal Protection Clause, the Substantive Due Process Clause, and their respective tests in recent jurisprudence, leading to even more confusion—and debate—on which test and which clause meets which standard.[118] Thus, the standard of review is rational basis when determining whether the person's conduct is protected by the states' intrusion; it is then simply a question of whether or not the Court deems *that* specific right, as applied, worth protecting.[119]

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114. *See id.* at 2629–30 (Scalia, J., dissenting).

115. *See supra* Sections I.B.1–4.

116. For a more nuanced discussion on the fallout of judicial activism and *Lochner*, see Sunstein, *supra* note 51. *See generally* Goldberg, *supra* note 45 (arguing for a single-tiered approach to the Equal Protection Clause, rather than the multi-tiered, flawed approach that the Court currently utilizes).

117. *See* Malmed v. Thornburgh, 621 F.2d 565, 575–77 (3d Cir. 1980).

118. *See* Romer v. Evans, 517 U.S. 620, 640 n.1 (1996) (Scalia, J., dissenting). "The Court evidently agrees that 'rational basis'—the normal test for compliance with the Equal Protection Clause—is the governing standard." *Id.*; *cf.* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015). "The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles." *Id.* "Each concept—liberty and equal protection—leads to a stronger understanding of the other." *Id.* at 2603.

119. There is a great divide among multiple Court benches on the issue of whether the right to seek an abortion should be protected by the Constitution. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., dissenting); *id.* at 981–82 (Scalia, J., dissenting); Roe v. Wade, 410 U.S. 113, 172–73 (1972) (Rehnquist, J., dissenting). This is not a settled issue by any means; the dissents of *Whole Woman's Health* are rife with suggestions to overturn *Roe v. Wade*. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting).

So what, exactly, is a right worth protecting? Fundamental rights, outside of the legal context, seem to be easily defined by the layman, but even legal scholars and wordsmiths shroud the definition in vague and confusing language.[120] It is easy to be thrilled when the Court makes a determination that you feel benefits your specific cause of action,[121] but an examination of the Court's Fourteenth Amendment jurisprudence (a willingness to err on the side of the legislature for some fundamental rights over others) leaves much room for a revocation of the same rights the Court had eagerly defended just the case before.[122] It is this lack of consistency—combined with the political vagaries of constituting a majority—that created the *Casey* predicament with abortion. Specifically, how can something be a fundamental right when the Court is so deferential to the legislature in restricting access to said fundamental right?[123]

Ultimately, the Court's heavy hand when examining the Substantive Due Process Clause seems to hinge on what the Court believes to be a fundamental right and whether the State has offered a compelling *enough* reason to infringe upon it.[124] The Court's fear of appearing *Lochner*-esque and allowing the legislature a large amount of deference has proven dangerous in the past—*Dred Scott*[125] is not ancient history.

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120. *Fundamental right*, BLACK'S LAW DICTIONARY, (10th ed. 2014).

> *A significant component of liberty*, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications. A fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the 14th Amendment. *As enunciated by the Supreme Court*, fundamental rights include voting, interstate travel, and various aspects of privacy (such as marriage and *contraception rights*).

Id. (emphasis added).

121. *See Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting) ("Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.").

122. *See Roe*, 410 U.S. at 164 (striking down abortion bans as unconstitutional underneath the Substantive Due Process Clause); *cf. Casey*, 505 U.S. at 874 (striking down *Roe*'s standard of review to replace it with a more legislature-friendly "undue burden" standard).

123. *See Casey*, 505 U.S. at 874.

124. *See Obergefell*, 135 S. Ct. at 2615–16 (Roberts, C.J., dissenting) (exploring the notion that the Court upended the power from the legislature and utilized the Substantive Due Process Clause to expand the definition of marriage to include same-sex couples with no legal basis).

125. *See* Scott v. Sanford, 60 U.S. (19 How.) 393, 406 (1857) (declaring Dred Scott, a Black man, not a citizen of the United States and therefore incapable of suing for his or his family's freedom in court), *superseded by* U.S. CONST. amend. XIII.

But for the protection of abortion access, the muddiness of the rational basis standard and the Supreme Court's willingness to curtail certain fundamental freedoms while expanding others has done more harm than good.[126]

II. THE BEGINNINGS OF ABORTION ACCESS

Abortion access is considered a fundamental right under the United States Constitution.[127] Despite this, abortion remains a divisive issue among the American public. The political atmosphere that often surrounds the procedure of abortion cannot, and will not, be ignored in this Note. Abortion is a crux within each election cycle that is frequently debated and argued as a fundamental right that should or should not exist.[128] The jurisprudence surrounding abortion is equally controversial and dramatic, due to frequent rehashing by legal scholars upon each dispositive abortion-related Supreme Court decision.[129] *Whole Woman's Health* is no exception.[130]

This Note examines the history of abortion access with the purpose of extracting the legal language surrounding the Fourteenth Amendment's Substantive Due Process Clause in order to parse through the standard of review utilized in the Court's most recent decision to protect abortion access in Texas.[131] Before that discussion can take place, however, this Note must discuss a prior Texas abortion case first: *Roe v. Wade*.[132]

A. Roe v. Wade *and Strict Scrutiny*

In 1973, the Supreme Court decriminalized abortion in the seminal

126. *See infra* Part II.

127. *See Roe*, 410 U.S. at 164.

128. *See supra* Introduction.

129. The conversation surrounding *Casey*, the Supreme Court case upon which the "undue burden" standard emerged, continues to develop, even after twenty years. *See* Freeman, *supra* note 40. *See generally* R. Randall Kelso, *The Structure of* Planned Parenthood v. Casey *Abortion Rights Law: Strict Scrutiny for Substantial Obstacles on Abortion Choice and Otherwise Reasonableness Balancing*, 34 QUINNIPIAC L. REV. 75 (2015).

130. *See* Scott Skinner-Thompson et al., *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 138–42 (2016); *see also* Elizabeth Price Foley, Whole Woman's Health *and the Supreme Court's Kaleidoscopic Review of Constitutional Rights*, 2015 CATO SUP. CT. REV. 153, 169–75 (2016).

131. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2320 (2016); *see also* U.S. CONST. amend. XIV, § 1.

132. *See generally Roe*, 410 U.S. 113.

case, *Roe v. Wade*.[133] In decriminalizing abortion, the Court examined the standard of review to be utilized in assessing the power of the State in regulating the procedure.[134] While the Court declared a ban on abortion as a violation of the Substantive Due Process Clause of the Fourteenth Amendment,[135] the Court also determined that a state had a legitimate interest "in protecting the potentiality of human life" after the first trimester.[136] By declaring that states have some power to regulate abortion, the Court crafted a standard of review by which to evaluate states' legislative attempts to restrict both the practice of and access to abortion procedures.[137] Per the decision in *Roe*, a state's ability to restrict a woman's right to an abortion became more suspect the less viable the fetus was, and more tolerable the farther along a woman's pregnancy progressed,[138] because a state had a legitimate interest in both women's health and protecting the potentiality of life.[139] Miraculously, the Court handed down a strict scrutiny standard to protect abortion access in a time where the prospects of seeking a legal abortion in some areas of the country was practically impossible.[140]

This strict scrutiny standard was an exemplary depiction of the art of compromise. Abortion was protected by the Substantive Due Process Clause of the Fourteenth Amendment, but a state was also able to regulate within a (relatively) bright line rule of law that the Court enacted.[141] Toeing the line of the *Roe* standard involved forcing a state to make a compelling argument for protecting both the safety of women and fetal welfare, and to provide a cut-off point where the states could not regulate.[142] In other words, there was no *carte blanche* handed to

133. *See id.* at 164 ("A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.") (emphasis removed).

134. *See* Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992).

135. U.S. CONST. amend. XIV, § 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law* . . . ." *Id.* (emphasis added).

136. *Roe*, 410 U.S. at 162.

137. *See id.* at 162–63.

138. *Id.* at 163.

139. *Id.* at 162.

140. *See* David A. Grimes, *The Bad Old Days: Abortion in America Before* Roe v. Wade, HUFFINGTON POST BLOG (Jan. 15, 2015, 12:27 PM), http://www.huffingtonpost.com/david-a-grimes/the-bad-old-days-abortion_b_6324610.html [https://perma.cc/WWA6-NEPZ].

141. *See Roe*, 410 U.S. at 162–63.

142. This standard was overturned with the *Casey* Court, who believed that *Roe*'s

legislators when it came to abortion-related regulations.[143] During the first trimester (or pre-viability), the state must take a step back because strict scrutiny applies.[144] After the first trimester (or post-viability), the courts are willing to be more lenient with the legislatures' attempts at regulating or restricting abortion access, and rational basis review became the acceptable standard of review.[145]

Though the *Roe* Court utilized both *Griswold* and *Eisenstadt* to establish the right to privacy and personal autonomy,[146] Justice Blackmun cites more often than not to the concurring opinions in *Griswold*, which warned of the devaluation of the Fourteenth Amendment if it were placed second to the "penumbra of rights" doctrine that was utilized by the majority.[147] However, Justice Stewart's concurring opinion in *Roe* states what the concurring opinions of *Griswold* had stated all along, that *Griswold* is an exercise of the Substantive Due Process Clause of the Fourteenth Amendment, and should remain as such.[148]

While *Roe* provides a solid beginning for abortion as a fundamental right with a bright-line rule on when a state could regulate the procedure, it rests on shaky foundation.[149] In direct contrast to Fourteenth Amendment jurisprudence (both before *Roe* and after), *Roe*'s abortion protection is akin to a stone house standing on wooden stilts: it was built

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bright line rule ran contrary to its own logic. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) ("Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.").

143. With *Casey*'s looser standard (and *Roe*'s overturn in part) came greater freedom for legislatures to enact TRAP laws. *See* Nina Martin, *The Supreme Court Case That Made a Mess of Abortion Rights*, MOTHER JONES (Feb. 29, 2016, 11:00 AM), http://www.motherjones.com/politics/2016/02/supreme-court-decision-mess-abortion-rights [https://perma.cc/M8VL-MRJQ] ("After *Roe* established abortion rights, *Planned Parenthood v. Casey* reined them in, creating a new legal standard that gave states greater leeway to regulate the procedure.").

144. *See Casey*, 505 U.S. at 876.

145. *See id.* at 870.

146. *See Roe*, 410 U.S. at 129.

147. *See id.* at 219.

148. *Id.* at 167–68 (Stewart, J., concurring).

149. While *Roe* utilizes the Substantive Due Process Clause of the Fourteenth Amendment in protecting abortion access, it relies upon the contraception cases for legal standing, which utilize the "penumbra of rights" doctrine held within the First Amendment. *See* Eisenstadt v. Baird, 405 U.S. 438, 443, 456–57 (1972); *see also* Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring).

with the best of intentions, but the foundation was not meant to last.[150] The Court's reluctance to grant the full protection of the Substantive Due Process Clause to reproductive justice with contraception provides a muddied and murky pathway of legal logic, particularly when you compare *Roe* to other areas of protection.[151] Placing abortion (during the first trimester) in the same protective categories as other fundamental rights had the best of intentions, but challenges began to rise almost immediately to protest the Court's presumed super-legislative exercise of power in creating a space for abortion in the hall of fundamental rights and liberties protected under the Constitution.[152]

B. Planned Parenthood v. Casey *and the Deconstruction of Strict Scrutiny*

Immediately following *Roe*, as states could no longer ban abortion, a number of measures were enacted across the country in order to restrict access rather than ban the procedure outright.[153] Due to this constant testing of the *Roe* standard, the stage was set for another discussion on how far a state could go in terms of regulating abortion access—particularly in the face of such a polarized nation that could not seem to agree on how it felt about abortion.[154] Ultimately, the Court determined *Roe* stretched too far, and the abortion access movement was dealt a harsh blow in 1992 with the holding of *Planned Parenthood v. Casey*.[155]

Casey examined the constitutionality of five Pennsylvania statutory provisions: (1) a woman must be given informed consent of the abortion procedure; (2) said informed consent must be provided to the woman seeking an abortion twenty-four hours before the procedure is performed; (3) a minor must obtain consent from her parents in order to have an abortion, though the statute provides a judicial option if consent

150. As this Note discusses, the recent interpretation of the *Casey* standard in *Whole Woman's Health* cements abortion access within standard Substantive Due Process jurisprudence, casting aside the "penumbra of rights" doctrine and using much stronger legal language. *See infra* Part IV; *see also supra* Part II.

151. *See Roe*, 410 U.S. at 172–73 (Rehnquist, J., dissenting).

152. *See id.* at 174 (Rehnquist, J., dissenting) (comparing the majority opinion of *Roe* to Justice Peckham's majority opinion in *Lochner*).

153. *See Targeted Regulations of Abortion Providers*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [https://perma.cc/H2FM-6WWM] (last updated May 1, 2018).

154. *See* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1436 (2016) [hereinafter *Clinic Closings*].

155. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873–74 (1992).

cannot be obtained; (4) a married woman must obtain consent from her spouse before obtaining an abortion; and (5) abortion clinics must comply with reporting requirements enacted by the state on all of the provisions listed above.[156]

However, instead of applying the strict scrutiny standard created in *Roe*, the Court struck down the trimester approach[157] and replaced the strict scrutiny standard with a new, undefined standard: the "undue burden" standard.[158] The "undue burden" standard, facially, is simple: a state is free to regulate abortion so long as it does not pose an "undue burden" upon a woman's right to seek an abortion.[159] In application, however, the *Casey* holding cast the country into the very "jurisprudence of doubt" that Justice O'Connor warned so strongly against in her majority opinion.[160]

The "undue burden" standard is one that has been difficult to peg down, in that it does not necessarily fit within any neat box of constitutional review. It has been labeled by legal scholars as something resembling a stronger rational basis standard, but that labeling has been struck down by Supreme Court Justices currently presiding from the bench.[161] Indeed, "undue burden" is an abortion-specific standard of review that is not utilized in any other examination of other named fundamental rights.[162] Regardless of what you label the "undue burden" standard (be it a new standard or a standard of rational basis variety), it is certainly a massive step away from the strict scrutiny standard provided in *Roe*, and casts a great deal of ambiguity into the jurisprudence that had previously governed both the Substantive Due Process Clause of the Fourteenth Amendment and the right to seek an abortion.

1. The Fallout of *Casey*

The holding in *Casey* opened the doors to an onslaught of TRAP laws enacted by state legislators claiming to protect the interests of women's health and safety. In actuality, those laws only placed

156. 18 PA. CONS. STAT. §§ 3204–08 (1990); *see also Casey*, 505 U.S. at 843.

157. *See Casey*, 505 U.S. at 873.

158. *Id.* at 874.

159. *Id.* at 875.

160. *Id.* at 844 ("Liberty finds no refuge in a jurisprudence of doubt.").

161. Transcript of Oral Argument at 18, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274).

162. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2321–23 (2016) (Thomas, J., dissenting).

obstacles in the paths of women seeking a safe and legal abortion.[163] No longer protected by the strict scrutiny that *Roe* required during the first trimester, abortion providers across the country were now faced with zoning requirements that no other medical professionals had to comply with. For example, abortion clinics had to comply with ambulatory surgical center provisions, forcing abortion clinics to purchase expensive equipment that they had no use for, or face sudden unemployment.[164]

The fallout of *Casey* was immense and immediate. The "abortion desert" that stretches from the Southeast to the Midwest of the United States[165] grew impossibly larger after the passage of *Casey* and the undue burden standard.[166] As the Court only struck down the spousal notification requirement of Pennsylvania's statute,[167] every other provision in the statute was ruled constitutional under the Court's newfound "undue burden" standard.[168] This deference to the Pennsylvania legislature did not go unnoticed by the rest of the country.[169] Indeed, many states began passing TRAP laws modeled after Pennsylvania's provisions, casting the nature of abortion access into an abyss of darkness and confusion.[170] This casts the nature of abortion access as a fundamental right into some amount of darkness and confusion.[171]

The sheer amount of deference given to legislatures across the country by the Court did not only go unnoticed, but was welcomed,

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163. Martin, *supra* note 143; *see also* Neal Devins, *How* Planned Parenthood v. Casey *(Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1336 (2009) [hereinafter *Abortion Wars*].

164. *See Targeted Regulation of Abortion Providers*, REWIRE NEWS (Mar. 19, 2016), https://rewire.news/legislative-tracker/law-topic/targeted-regulation-of-abortion-providers [https://perma.cc/2NJV-GXP5].

165. Molly Hennessy-Fiske, *Crossing the 'Abortion Desert': Women Increasingly Travel Out of Their States for the Procedure*, L.A. TIMES (June 2, 2016, 3:30 AM), http://www.latimes.com/nation/la-na-adv-abortion-traveler-20160530-snap-story.html [https://perma.cc/JDW3-XK5W].

166. Martin, *supra* note 143.

167. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 893–95 (1992).

168. *Id.* at 899–901.

169. Pro-life organizations quickly realized that while *Roe* was intact, *Casey* allowed for the easier passage of TRAP laws. *See* Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After* Whole Woman's Health, 126 YALE L.J. F. 149, 152 (2016) [hereinafter *Difference*] ("[Americans United For Life]'s recent past-President, Charmaine Yoest, was frank in describing AUL's state legislative strategy: 'As we're moving forward at the state level, we end up hollowing out *Roe*, even without the Supreme Court.'") (citation omitted).

170. *Abortion Wars*, *supra* note 163, at 1336.

171. *See* Martin, *supra* note 143.

particularly in the more conservative states where abortion access was already a bleak picture.[172] The effect of these TRAP laws, even post-*Whole Woman's Health*, remains devastating, leaving some women with only a single abortion clinic in the entire state.[173]

Ultimately, the Court had left the country, prior to *Whole Woman's Health*,[174] with a large swath of jurisprudence that seemed to leave abortion rights largely unprotected.[175] The "undue burden" standard does not fit neatly within any category previously discussed by the Supreme Court in regard to the Substantive Due Process Clause. Arguably, it is something more than a rational basis standard of review, but it is far too deferential to the legislature to be considered intermediate or strict scrutiny, and in most instances, seems to fail the "rational basis with bite" approach.[176]

This cloudiness surrounding the "undue burden" standard has led to many clashes of thought within the court system, allowing for legislatures to make the argument that any state interest (ranging from protecting women's health to the potentiality of life) is justifiable against the undue burden it places upon a woman's right to seek and obtain an abortion.[177] This bizarre test has led to the closure of hundreds of abortion clinics across the United States, particularly in the southern region of the country where conservative values run deep.[178]

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172. *See* Abby Johnston, *The Number of Abortion Clinics in the United States Gets Lower Every Single Year*, BUSTLE (Jan. 2, 2015), https://www.bustle.com/articles/56149-the-number-of-abortion-clinics-in-the-united-states-gets-lower-every-single-year [https://perma.cc/P4QD-LGH6].

173. Seven states have only one abortion clinic within their jurisdiction. *See* Allison McCann, *The Last Clinics*, VICE (May 23, 2017), https://news.vice.com/en_us/article/paz4bv/last-clinics-seven-states-one-abortion-clinic-left [https://perma.cc/72X6-7QD3]. These states are Kentucky, West Virginia, Missouri, Wyoming, South Dakota, North Dakota, and Mississippi. *Id.* An eighth state, Arkansas, only has one abortion clinic that can perform both surgical and medicinal abortions. *Id.*

174. *See generally* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (striking down two Texan TRAP laws as unconstitutional).

175. *See Clinic Closings*, *supra* note 154, at 1436.

176. *See* Freeman, *supra* note 40, at 292–94.

177. While the "potentiality of life" was discussed in *Roe* as a legitimate state interest, anti-abortion legislatures have shifted their language from the "potentiality of life" to "protecting women's health" in order to guise their true intentions when creating TRAP laws—to close abortion clinics. *See Clinic Closings*, *supra* note 154, at 1430.

178. In some states, prior to *Whole Woman's Health*, the only reason why TRAP laws failed was because it would have closed the only abortion clinic in the state—causing an undue burden upon women in that specific state. *See* Daniel J. Glass, *Not in My Hospital: The Future of State Statutes Requiring Abortion Providers to Maintain Admitting Privileges at Local Hospitals*, 49 AKRON L. REV. 249, 270–72 (2016).

C. *The Partial-Birth Abortion Act of 2003:* Stenberg *and* Gonzales

The manner in which the Supreme Court applied *Casey* only grew grimmer with the Court's holding in *Gonzales v. Carhart*, a decision that upheld a federal partial-birth abortion ban.[179] The decision sent the message to abortion rights activists across the country that abortion remains different.[180] However, in deciding *Gonzales*, the Court counteracted its own reproductive autonomy jurisprudence in order to craft a different standard by which to judge abortion.[181]

Just seven years before their decision in *Gonzales*, the Court struck down a Nebraska partial-birth abortion ban as a violation of *Casey*'s undue burden standard.[182] In *Stenberg v. Carhart*, the statute at issue had no exception for medical emergencies or risk to the mother's health and prevented a woman's right to choose a "dilation and extraction" (D&E)[183] or "dilation and excavation" (D&X) as abortion methods.[184] Both of these restrictions created an undue burden.[185]

In *Stenberg*, the Court references numerous pieces of evidence submitted by medical professionals in support of Dr. Carhart's usage of the D&E procedure, which the district court below relied on when making its determination that the D&E ban was a violation of the Constitution.[186] Nebraska's argument was that a health exception[187] was

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179. *See generally*, Gonzales v. Carhart, 550 U.S. 124 (2007). For a more nuanced discussion of the Partial-Birth Abortion Ban Act of 2003 and the problematic nature of banning late-term abortion, see generally Tamara F. Kushnir, Comment, *It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003*, 35 LOY. U. CHI. L.J. 1117 (2004).

180. *See Gonzales*, 550 U.S. at 170–71 (Ginsburg, J., dissenting).

> Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.

Id.

181. *See id.* at 170 (comparing the outcome in *Gonzales* with *Stenberg*).

182. *See generally* Stenberg v. Carhart, 530 U.S. 914 (2000).

183. For an explanation of a D&E procedure (the most commonly used method of post-first trimester abortion), see *id.* at 923–27 (2000).

184. For an explanation of a D&X procedure, see *id.* at 927–29.

185. *Id.* at 938.

186. *Id.* at 928–30.

187. Both *Roe* and *Casey* require an exception for all abortion procedures to allow the procedure if the life or health of the woman is in jeopardy, regardless of how far along she is into the pregnancy. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).

not necessary; they relied only on their belief that the evidence provided at the district court was incorrect, and thus failed to meet their burden.[188] *Stenberg*, in expressing the fact that abortion regulations must have a health exception for the mother, regardless of the viability of the fetus, had two important effects. It was a small step forward in terms of protecting abortion access, and a step toward a true rational basis standard when the Court rejected all of Nebraska's reasons for not having a health exception as insufficient on their face.[189] However, *Stenberg* still dances around the notion that a state's supposed legitimate interest in requiring a doctor to perform any procedure other than the procedure that a doctor believes is best for his or her own patient may be unconstitutional on its face.[190]

What made *Gonzales* different, according to the Court? The answer lies in the originator of the legislation: is the Court monitoring the fact-finding of a state when determining whether or not pseudoscience is being used in determining abortion legislation, or is the Court examining the fact-finding of the federal Congress doing precisely the same thing?[191]

In 2003, Congress passed the Partial-Birth Abortion Ban Act[192] in direct response to *Stenberg*.[193] Along with the passage of this law came

188. *See Stenberg*, 530 U.S. at 931–32.

189. *See id.* at 937–38.

190. *See id.* at 946–47 (Stevens, J., concurring).

191. Indeed, the Supreme Court was willing to strike down Nebraska's presented evidence rife with pseudoscience that ran contrary to medical evidence, but would not do the same with the federal Congress. *See id.* at 931–32 (rejecting State arguments against medical evidence provided by Carhart); *cf.* Gonzales v. Carhart, 550 U.S. 124, 175–76 (2007) (Ginsburg, J., dissenting) (pointing out the Court's acceptance of pseudoscience in upholding the Partial-Birth Abortion Ban Act).

192. *See* 18 U.S.C. § 1531 (2016).

193. *Gonzales*, 550 U.S. at 141. After *Stenberg*, Congress took great issue with the Court's determination that "D&X" and "D&E" abortions were considered medically safe and passed the Partial-Birth Abortion Ban Act. Partial-Birth Abortion Ban Act of 2003, 108 Pub. L. No. 105, 117 Stat. 1201. The Congressional record in the passage of the bill is rife with discussion concerning the evidence the Court discussed in *Stenberg*, and the rejection of evidence presented by Nebraska at trial, particularly regarding the health and safety of the type of abortion Dr. Carhart performs.

> However, the great weight of evidence presented at the Stenberg trial and other trials challenging partial-birth abortion bans, as well as at extensive Congressional hearings, demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed, and is outside of the standard of medical care.

PARTIAL-BIRTH ABORTION BAN ACT OF 2003, 149 CONG. REC. H4922, 4922 (daily ed. June 4, 2003).

factual findings challenging the findings of the safety of D&E and D&X in *Stenberg*.[194] Ultimately, the Court determined that the Partial-Birth Abortion Act was neither vague nor unconstitutional on its face, and it did not pose an undue burden due to overbreadth.[195] For the purposes of undue burden, the Court determined that because the Act did not prohibit *all* forms of D&E, it did not violate the *Casey* standard.[196] While Nebraska's statute prohibited *all* forms of D&E, the Partial-Birth Abortion Act only bans *intact* D&E, thus differentiating the Act from the Nebraska statute.[197] Further, evidence offered by abortion providers who perform D&E on a daily basis was summarily rejected by the Court as being inadequate to prove the Act negatively impacted abortion providers who utilize the procedure.[198] Even more incredibly, the Court did not allow for a health and safety exception with the Partial-Birth Abortion Ban Act, in direct contrast with previous abortion jurisprudence.[199]

Justice Ginsburg's dissent in *Gonzales* also points to the prevalence of pseudoscience within the Congressional findings that led to the Partial-Birth Abortion Act, factual findings on which the majority opinion in *Gonzales* relied.[200] As the Supreme Court is bound to the findings of the court below,[201] the *carte blanche* nature of the "undue burden" standard, and the avoidance of the Court to utilize the full weight of the Substantive Due Process Clause when examining reproductive justice, is once again exposed.[202] How legitimate is a state interest that relies on faulty, often false, medical evidence which could potentially lead to the criminal prosecution of both medical professionals and women?[203]

The utilization of pseudoscience in order to make a state interest

194. *Gonzales*, 550 U.S. at 141.

195. *Id.* at 147.

196. *Id.* at 150.

197. *Id.* at 150–52.

198. *Id.* at 154.

199. *Id.* at 170–71 (Ginsburg, J., dissenting).

200. *See id.* at 175–76.

201. *See id.* at 174–75.

202. *See Clinic Closings*, *supra* note 154, at 1447 (discussing the distinction between the application of the "undue burden" standard depending on what TRAP law is before different circuit courts).

203. *See* Nicholas J. Little, *Meet Vincent Rue, the Man Behind the Pseudoscience of Abortion Restrictions*, SALON (Mar. 2, 2016), http://www.salon.com/2016/03/02/meet_vincent_rue_the_man_behind_the_pseudoscience_of_abortion_restrictions/ [https://perma.cc/SB9D-7UUD].

appear "legitimate" alone is enough material for an entirely separate Note topic. However, the utilization of false medical evidence rears its head in a large majority of TRAP law cases—including *Whole Woman's Health v. Hellerstedt*, the Court's most recent abortion decision.[204] The Court's previous reliance on legislative evidence, and its avoidance of affording abortion and reproductive justice the full protection of the Fourteenth Amendment, came to a head with a return to a Texan statute which negatively impacted millions of women across the state.[205]

III. THE ROAD TO WHOLE WOMAN'S HEALTH

Whole Woman's Health v. Hellerstedt began in a dramatic fashion, with an eleven-hour filibuster by a State Senator wearing bright pink sneakers and a back brace.[206] The scene within the Texas Capitol during the passage of the controversial statute that became the main character in *Whole Woman's Health* portrayed an accurate depiction of where abortion access stood across the country: women in the balconies screaming "let her speak" in support of the filibuster initiated by State Senator Wendy Davis, as the mostly male electorate attempted to pass the bill regardless of time having run out.[207] Eventually, the bill was passed, and abortion providers in Texas immediately sought an injunction.[208] This set the stage for a re-examination of *Casey* and, as this Note will argue, a clarification of a muddied standard.

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204. While "pseudoscience" is not specifically mentioned within the opinion of *Whole Woman's Health*, Justice Breyer is extraordinarily pointed in his declaration that Texas did not provide any evidence to support their claims of promoting the health and welfare of Texan women when enacting the statutes at hand in the case. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

205. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (2015) (requiring doctors that work at abortion clinics to have admitting privileges at nearby hospitals); TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (2015) (requiring abortion clinics to comply with the same standards as ambulatory surgical centers, regardless of whether abortion clinics perform on-site surgical abortions).

206. *See* Amanda Marcotte, *What the Hell Happened in Texas Last Night?*, SLATE (June 26, 2013, 10:02 AM), http://www.slate.com/blogs/xx_factor/2013/06/26/wendy_davis_and_pro_choice_protesters_win_the_night_in_texas.html [https://perma.cc/JT3R-NJEL].

207. For a video recording of the final five minutes of Senator Davis's eleven-hour filibuster of the omnibus bill at discussion in this Note, see The Texas Tribune, *Final Moments of Filibuster*, YOUTUBE (June 27, 2013), https://www.youtube.com/watch?v=NlEHJNTQeRs.

208. Laura Bassett, *Texas Sued Over Abortion Law Wendy Davis Tried to Block*, HUFFINGTON POST (Sept. 27, 2013), http://www.huffingtonpost.com/2013/09/27/texas-abortion-lawsuit_n_4002869.html [https://perma.cc/6KQR-MTLK].

A. *Showdown in Texas:* Whole Woman's Health v. Hellerstedt

In 2013, the Texas legislature introduced a piece of legislation labeled House Bill 2 (H.B. 2).[209] Though H.B. 2 included numerous anti-abortion provisions, the two most controversial (and arguably most devastating) required doctors who worked at abortion clinics to have admitting privileges,[210] and required that abortion clinics comply with the same standards as an ambulatory surgical center.[211] While, facially, these two provisions seem to be on-board with what is considered constitutional under *Casey*, the effects of H.B. 2 quickly became apparent soon after the bill was put into effect.[212]

In 2012, there were over forty abortion clinics in Texas; after H.B. 2 took effect, the number dropped by roughly half.[213] Immediately following the passage of H.B. 2, a group of abortion providers (including the named Plaintiff, Whole Woman's Health) sought an injunction from the district court, in addition to a declaratory judgment that H.B. 2 was

209. The Supreme Court, when deciding *Whole Woman's Health*, considered two Texan statutes. Colloquially, the two statutes have come to be known by the house bill by which they were introduced and will be known throughout this Note as "H.B. 2." Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2296 (2016).

210. TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1) (Oct. 29, 2013). Admitting privileges require that a doctor essentially be a staff member of a hospital, able to admit patients into that specific hospital for an overnight stay. Paul Waldman, *The 'Admitting Privileges' Sham, and the Future of Abortion in America*, WEEK (June 11, 2015), http://theweek.com/articles/559840/admitting-privileges-sham-future-abortion-america [https://perma.cc/NZZ7-G7WF]. For abortion providers, obtaining these privileges are not only an additional hurdle to practice, but often impossible in certain states. *See id.*

211. TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (Apr. 2, 2015). Ambulatory surgical center requirements force abortion clinics to purchase equipment that may not be needed in order to safely perform abortions. *Whole Woman's Health*, 136 S. Ct. at 2302–03. Additionally, H.B. 2 allowed *actual* ambulatory surgical centers to waive the requirements but did not allow such waivers for abortion clinics. *Id.*

212. *New Research Reveals Devastating Impact of Clinic Shutdown Laws on Texas Women*, CTR. FOR REPROD. RTS. (Oct. 5, 2015), https://www.reproductiverights.org/press-room/new-research-reveals-devastating-impact-of-clinic-shutdown-laws-on-texas-women [https://perma.cc/6E2F-LJ9U].

213. The numbers of how many clinics remained in Texas after H.B. 2's passage are in dispute. Generally speaking, the agreed statistic is about half of Texas' abortion clinics were closed due to the legislation. *See* Alexa Ura, et. al., *Here Are the Texas Abortion Clinics That Have Closed Since 2013*, TEXAS TRIBUNE (June 28, 2016, 6:00 AM), https://www.texastribune.org/2016/06/28/texas-abortion-clinics-have-closed-hb2-passed-2013/ [https://perma.cc/NLJ9-NSER]. The Supreme Court cites the numbers as "over forty" clinics existed prior to H.B. 2 and the "number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013." *Whole Woman's Health*, 136 S. Ct. at 2301 (quoting Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014)).

unconstitutional and a violation of the undue burden standard.[214] The injunction was granted and H.B. 2 was declared unconstitutional by the district court.[215]

The Fifth Circuit, however, vacated the district court's injunction.[216] Stating that the district court had misinterpreted the *Casey* standard and erred on the merits, the Fifth Circuit found Texas' legitimate state interest of regulating abortion clinics for the safety and wellbeing of women to be adequate. The Fifth Circuit's decision did not require Texas to provide evidence that H.B.2 actually addressed the safety and wellbeing of women.[217] The Fifth Circuit's refusal to examine the evidence offered by Whole Woman's Health as to the effect of H.B. 2[218] unveiled a problem within the undue burden standard: if a state is allowed a blank check to regulate abortion, what is available to review their powers on regulating abortion? How legitimate is a state interest when the interest is so vague as protecting the welfare of women?[219]

The crux of *Whole Woman's Health* is, ultimately, the legitimacy of Texas' state interest. Further, the unasked question of *Whole Woman's Health* was whether a state could continue to offer the health and safety of women as a legitimate state interest without offering proof established upon actual medical evidence.[220] The Fifth Circuit's interpretation of *Casey* allowed for the possibility that Texas, simply by stating that the intention of the legislation was to protect women's health, had fulfilled their burden of the undue burden test.[221] *Whole Woman's Health* pointed to the very problem the *Casey* standard allowed: the unfettered allowance of TRAP laws that have nothing to do with protecting women's health and everything to do with blocking access to a procedure that was guaranteed as a fundamental right in 1973.[222]

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214. *Whole Woman's Health*, 136 S. Ct. at 2301.

215. *Id.* at 2303.

216. *Id.*

217. *Id.* at 2303–04.

218. Incredibly, the Fifth Circuit stated that Texan "women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico" to alleviate their undue burden of not having an available abortion clinic within their own state. *Id.* at 2304.

219. Texas repeatedly stated, both within the record and at oral argument, that Texas' main objective with H.B. 2 was to protect the safety and welfare of women. Transcript of Oral Argument, *supra* note 161, at 52–53.

220. *See* Brief for Petitioners at 12–14, Whole Woman's Health v. Hellerstedt, 135 S. Ct. 2292 (2016) (No. 15-274).

221. *See id.* at 32–34.

222. *See Difference*, *supra* note 169, at 151.

B. *The Burden Is Undue:* Whole Woman's Health *Decided*

Ultimately, the Supreme Court (in a 5-3 decision, following the death of Justice Scalia) ruled in favor of Whole Woman's Health, determining that H.B. 2 had violated the Substantive Due Process Clause of the Fourteenth Amendment and the *Casey* standard.[223] Justice Breyer, writing for the majority, cited the evidence within the record that the district court examined, stating that the findings the district court made based on the record were not clearly erroneous.[224] Further, the Court held that the Fifth Circuit's interpretation of *Casey* was incorrect.[225] The Fifth Circuit stated that a state law is "constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest."[226] In other words, the Fifth Circuit required Whole Woman's Health to show *intent* of obstruction to the right of abortion, rather than the disparate impact, of H.B. 2.

The Fifth Circuit's interpretation of H.B. 2 is problematic for numerous reasons. Mainly, if a court required every abortion provider or woman to prove that the state legislature's intent behind every TRAP law was to dismantle the abortion clinic infrastructure, no case would proceed forward.[227] H.B. 2 was deliberately worded to target abortion clinics directly, but under the guise of protecting women's health and welfare.[228] Had Whole Woman's Health been required to prove the malicious intent of the Texan legislature, they almost certainly would have lost.[229]

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223. *Whole Woman's Health*, 136 S. Ct. at 2320.

224. *Id.* at 2316.

225. *Id.* at 2309.

226. Whole Woman's Health v. Cole, 790 F.3d 563, 572 (5th Cir. 2015), *rev'd*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

227. The undue burden standard requires that a state not pose a burden upon a woman's right to seek an abortion, indicating that a state could not pass a statute with the intent of creating obstacles in a woman's path. Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992). This is, as has been discussed, uncomfortably vague. *See supra* Subpart II.B. This was particularly apparent in *Gonzales v. Carhart*, where Justice Ginsburg commented upon the inaccuracies of pseudoscience relied upon by Congress in passing the Partial-Birth Abortion Act, which the Supreme Court ignored in favor of taking Congress' word that the statute was passed to protect both women and the potentiality of life. Gonzales v. Carhart, 550 U.S. 124, 174–77 (2007) (Ginsburg, J., dissenting).

228. *See Whole Woman's Health*, 136 S. Ct. at 2300 (explaining the two provisions of H.B. 2 that were under scrutiny within the case).

229. While the Court did not take evidence into account when determining *Casey*, Justice Breyer soundly rejected Texas' stated intention in *Whole Woman's Health*, as the state

Instead, Justice Breyer emphasized the importance of the district court's consideration of "the existence or nonexistence of medical benefits" when examining an abortion regulation.[230] Additionally, Justice Breyer voiced concern for the number of clinics that were closed as a result of H.B. 2.[231] Even if a few abortion clinics coincidentally closed around the time H.B. 2 was enacted for unrelated reasons, "common sense" dictates that the majority of these closures were because of the stringent requirements placed upon abortion clinics by H.B. 2, and that the closures would place an insurmountable burden upon the abortion clinics that managed to escape H.B. 2 regulations.[232]

The decision in *Whole Woman's Health* opened the door to the acceptance of an established constitutional standard by which to protect abortion providers and abortion access.[233] *Whole Woman's Health* also established the need for the state to *prove* that their legislation has a legitimate purpose.[234] Texas, when asked at oral argument, could not provide a single instance of a Texan woman who had been adversely affected by the existing abortion regulations in place.[235] Indeed, Texas could only point to an instance in Pennsylvania where abortion regulations were inadequate to prevent a tragedy.[236] That specific instance, the majority points out, was exceptionally horrific and, therefore, rare—and even if that scandal was a common occurrence,

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did not provide evidence supporting their intention. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 912–26 (1992) (Stevens, J., dissenting in part) (discussing the absence of evidence that the Pennsylvanian statute met the goals of the state in protecting women's health); *cf. Whole Woman's Health*, 136 S. Ct. at 2309 (commenting upon the absence of evidence in Texas' argument and stating it as a reason for the invalidity of the statute).

230. *Whole Woman's Health*, 136 S. Ct. at 2309.

231. *See id.* at 2301–03.

232. *Id.* at 2317.

233. *See* Dennis Pathroff, Comment, *Abortion and Birth Control—United States Supreme Court Declares Texas' Restrictions on Abortion Facilities Unconstitutional: Impact on States with Similar Abortion Restrictions*, 92 N.D. L. REV. 213, 228–29 (2016).

234. *See Whole Woman's Health*, 136 S. Ct. at 2309.

235. Transcript of Oral Argument, *supra* note 161, at 47–49.

236. Texas was one of many states that passed stricter abortion regulations after the Kermit Gosnell Scandal, which concerned an abortion doctor in Pennsylvania who was convicted of murder. *See* Jon Hurdle & Trip Gabriel, *Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/14/us/kermit-gosnell-abortion-doctor-found-guilty-of-murder.html. The details of the case are exceptionally gruesome and were seen as a rallying cry for anti-abortion activists to ban the procedure altogether, even though the atrocities that Dr. Gosnell committed were considered anything but abortion. *See id.* Texas, by their own admission, states that H.B. 2 was in reaction to said scandal in Pennsylvania. Transcript of Oral Argument, *supra* note 161, at 63–64.

Texas had been avoiding these atrocities before H.B. 2 without unnecessary additional regulations.[237]

This rejection of hysteria and pseudoscience is reinforced by Justice Ginsburg's two-page concurrence, which flatly labels H.B. 2 as a TRAP law and sends a clear message to legislatures about their TRAP laws: they likely will not survive judicial review under *Casey* and *Roe*.[238] This resounding rejection of unnecessary restrictions, while not the commanding opinion, sends a clear message to the lower courts that decorative language draping around oppressive legislation is not enough to meet the *Casey* burden.[239] If anything, the Court in *Whole Woman's Health* chose to utilize the *Casey* standard to *protect*, rather than *defer*.[240]

However clear-cut *Whole Woman's Health* is on its face, it is not without criticism; the dissenting opinions in *Whole Woman's Health*, much like the dissents in *Lawrence*, echo protestations that the majority exceeded the bounds of the Fourteenth Amendment.[241] Justices Thomas and Alito both penned separate dissenting opinions, each focusing on a different area of the law that they felt the majority had violated in striking down H.B. 2.[242] Justice Thomas, having been a vocal opponent of the Court's abortion jurisprudence since *Casey*,[243] accused the majority of scrapping the old standard in favor of something stronger without any precedent.[244] Justice Alito interpreted the statistics and

237. Justice Breyer, when inquiring about the Gosnell Scandal's place in Texas' legal argument, quite plainly asked: "So what is the benefit to the woman of a procedure that is going to cure a problem of which there is not one single instance in the nation, though perhaps there is one, but not in Texas." Transcript of Oral Argument, *supra* note 161, at 48.

238. *Whole Woman's Health*, 136 S. Ct. at 2321 (Ginsburg, J., concurring).

239. *Id.* ("Given [the safety of abortion as a medical procedure], it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law 'would simply make it more difficult for them to obtain abortions.'") (quoting Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 910 (7th Cir. 2015)).

240. *Whole Woman's Health* places a higher burden upon the state in order to restrict and regulate abortion, rather than deferring to the state's purported expertise concerning the medical procedure. *See id.* at 2326 (Thomas, J., dissenting) ("And the majority seriously burdens States, which must guess at how much more compelling their interests must be to pass muster and what 'commonsense inferences' of an undue burden this Court will identify next.").

241. *See id.* at 2326–27; *cf.* Lawrence v. Texas, 539 U.S. 558, 588 (1992) (Scalia, J., dissenting).

242. *See Whole Woman's Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting) (discussing the difference between *Casey* and *Whole Woman's Health*); *see also id.* at 2342–43 (Alito, J., dissenting) (discussing the majority's reliance on inference, rather than hard fact, in regard to abortion clinic closures in Texas).

243. *Id.* at 2324 (Thomas, J., dissenting).

244. *Id.* at 2321.

evidence provided in the record as not being an undue burden, claiming that the majority wrongly utilized inference without concrete conclusions as to why so many abortion clinics closed.[245] Justice Thomas also voiced his opinion that *Roe v. Wade* is based on faulty law,[246] and as previously discussed in this Note, Justice Thomas is not necessarily wrong.[247]

In examining the dissenting opinions of *Whole Woman's Health* and the supposed emergence of a new standard of review, one must look at Substantive Due Process jurisprudence as a whole.[248] With previous reproductive justice cases, the Court's avoidance of using the Substantive Due Process Clause during the *Lochner* era caused a rift in jurisprudence that allowed for claims of judicial intervention and activism.[249] *Whole Woman's Health* utilized the full weight of the rational basis standard, unlike its predecessors, and can be fairly and equitably compared with the previously discussed cases.[250]

IV. "UNDUE BURDEN WITH TEETH": A NEW STANDARD EMERGES

The determination that *Whole Woman's Health* posits a stronger standard by which to assess abortion regulations is not a novel conclusion.[251] However, this Note argues that *Whole Woman's Health* strengthens the *Casey* standard into something resembling "undue burden with teeth" and returns abortion to established Fourteenth Amendment jurisprudence in regard to (strengthened) rational basis scrutiny. As will be discussed, the Supreme Court's determination was not solely based on the *burden* that the statute placed upon women seeking an abortion, but the *benefit* such statutes had for the citizens who

245. The majority of Justice Alito's dissenting opinion focuses upon the res judicata issue within *Whole Woman's Health*, which is not at issue in this Note. *See id.* at 2342–43 (Alito, J., dissenting). However, Justice Alito also comments upon the majority's reliance upon inference, rather than established fact, that the ambulatory surgical center requirement forced abortion clinics to close. *See id.*

246. *See id.* at 2324 (Thomas, J., dissenting). "I remain fundamentally opposed to the Court's abortion jurisprudence." *Id.*

247. *See supra* Section I.B.2 (exploring contraception); *cf. supra* Subpart II.A (examining Roe v. Wade, 410 U.S. 113 (1973)); *supra* Subpart II.B (examining Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

248. *See supra* Part I (discussing the Substantive Due Process Clause).

249. *See supra* Section I.B.2 (exploring contraception); *cf. supra* Subpart II.A (examining Roe v. Wade, 410 U.S. 113 (1973)); *supra* Subpart II.B (examining Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

250. *See supra* Part I (discussing Substantive Due Process jurisprudence); *cf. infra* Part IV (exploring the new *Whole Woman's Health* standard).

251. *See generally* Foley, *supra* note 130.

required abortions.[252] This standard—as Justice Thomas discusses at length in his dissenting opinion—is not only a departure from *Casey*, but is an entirely new standard of review.[253]

A. *Burdens v. Benefits: Justice Thomas' Dissent*

The Supreme Court's decision to utilize evidence that showed H.B. 2 was a catastrophe for women's health and welfare in its determination that Texas had violated the Substantive Due Process Clause is a massive departure from established *Casey* jurisprudence.[254] *Casey* specifically rejects the notion of utilizing the alleged *benefits* of a statute when determining the effect of a statute regulating abortion, only speaking to the burden of a statute upon a woman's right to choose.[255] The notion of *Casey*'s undue burden standard taking into account the *effect* a statute has upon the women it is supposed to protect is a concept that comes from Justice Stevens' concurrence within *Casey*—not binding law, but nonetheless compelling to the majority in *Whole Woman's Health* that decided the case.[256]

While Justice Thomas and his fellow dissenters vocalized their disapproval, they also provided a stronger argument toward the realization of a stronger standard for abortion access.[257] Indeed, as Justice Thomas writes: "Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in [*Casey*], and its successors."[258] He is correct; *Whole Woman's Health* changes the game entirely.

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

253. *See id.* at 2325 (Thomas, J., dissenting).

254. *Id.*; *see* Gonzales v. Carhart, 550 U.S. 124, 165–66 (2007); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 888–94 (1992) (showing that the majority of Casey relied on record evidence, not medical evidence, to make their determination in regard to the spousal notification requirement).

255. *See Whole Woman's Health*, 136 S. Ct. at 2325 (Thomas, J., dissenting); *see also Casey*, 505 U.S. at 901.

256. *Casey*, 505 U.S. at 920 ("A state-imposed burden on the exercise of a constitutional right is measured both *by its effects* and by its character: A burden may be 'undue' either because the burden is too severe or because it lacks a legitimate, rational justification.") (emphasis added). It is also worth noting that Justice Stevens, along with Justice Blackmun (the original author of *Roe*), voted to uphold *Roe*'s strict scrutiny standard of the 3-2-4 plurality, rather than supplant it with *Casey*'s undue burden standard. *Id.* at 912–26 (Stevens, J., concurring); *see also* Foley, *supra* note 130, at 157.

257. *See Whole Woman's Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting) (discussing the difference between *Casey*'s standard and the standard applied by the majority in *Whole Woman's Health*).

258. *Id.* (citation omitted).

In rejecting the Fifth Circuit's interpretation of *Casey*, the Court elevated the "undue burden" standard to a true balancing test—one that examines the ability of a woman to seek an abortion against a state's legitimate interest in regulating abortion.[259] As Justice Thomas points out numerous times in his dissent, this is not the standard created in *Casey* by the majority-plurality.[260] He, this Note argues, is correct.

B. *The Fourteenth Amendment's Substantive Due Process Clause: "Undue Burden" Meets "Rational Basis Review"*

The "benefits-and-burdens balancing test"[261] is not only a departure from *Casey*, but also from previous Supreme Court jurisprudence regarding abortion.[262] While the majority in *Whole Woman's Health* states that the standard used is "undue burden," it is certainly not a stretch of the imagination to see that the language utilized in *Whole Woman's Health* provides a powerful tool with which to challenge TRAP laws.[263] Forcing states to provide evidence of their legislative intent without hiding behind the sham that is "women's health and welfare" is a massive step away from *Casey*'s vague deferential standard that had no real label. *Whole Woman's Health*, in holding Texas accountable for their legislative decisions regarding abortion, sent a loud message: legislatures cannot masquerade TRAP laws as protective legislation for women; the Supreme Court will not allow it.[264]

In examining past Fourteenth Amendment jurisprudence and comparing *Whole Woman's Health* with previously utilized balancing tests in substantive due process cases, it is evident that the Court has finally placed abortion and reproductive justice on the same level of importance and protection as the rights protected by what many call

259. *See id.* at 2324 (Thomas, J., dissenting) ("Finally, even if a law imposes no 'substantial obstacle' to women's access to abortions, *the law now must have more than a 'reasonabl[e] relat[ion] to . . . a legitimate state interest*.' These precepts are nowhere to be found in *Casey* or its successors.") (emphasis added) (alterations in original).

260. *Id.* at 2325 (Thomas, J., dissenting). Of the nine Justices who both heard and decided *Casey*, only two remained on the bench at the time *Whole Woman's Health* was argued and decided: Justice Kennedy (who was a member of the *Casey* plurality-majority) and Justice Thomas (who dissented in both *Casey* and *Whole Woman's Health*). Justice Kennedy did not write an opinion for *Whole Woman's Health*.

261. *Id.* at 2324.

262. *See generally* Mazurek v. Armstrong, 520 U.S. 968 (1997).

263. *See Whole Woman's Health*, 136 S. Ct. at 2309–10.

264. *See id.* at 2320–21 (Ginsburg, J., concurring).

"rational basis with bite."[265] *Lawrence*[266] and *Obergefell*[267] rejected the states' reasoning of "morality" for passing anti-LGBTQ-targeted discriminatory policies. *Casey*, too, emphasized that morality is never satisfactory to restrict the rights and liberties of a citizen.[268] However, while *Obergefell* and *Lawrence* utilized a true "rational basis with bite" balancing test in order to strike down discriminatory legislation, *Casey* applied an abortion-specific standard that was both vague and far too deferential to the legislature.[269] The language utilized in *Whole Woman's Health* and the navigation of the Fourteenth Amendment is far more comparable to prior Fourteenth Amendment jurisprudence and *Roe*, rather than the deferential standard set forth by *Casey*.[270] While the majority is careful to label the standard used as "undue burden," Justice Thomas' point is valid: this is different.[271] The question remains, though: how are lower courts handling like cases, and has this caused a massive amount of confusion like *Whole Woman's Health*'s older sister, *Casey*?

C. Whole Woman's Health*: The Impact*

Since the decision in *Whole Woman's Health*, lower courts have been striking down TRAP laws of similar quality and impact to H.B. 2.[272] In Alabama, a TRAP law focusing on school zones was struck down as unconstitutional under the "undue burden" standard, citing *Whole Woman's Health* as precedent to examine the benefits of such a

265. Lawrence v. Texas, 539 U.S. 558, 582 (2003) (rejecting Texas' argument for "morality" as a legitimate state interest); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2596–97 (2015) (rejecting the argument for immorality in restricting homosexual couples from being married); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992) (stating that morality is not a satisfactory state interest while incorporating the "undue burden" standard, rather than rational basis).

266. *Lawrence*, 539 U.S. at 582.

267. *See Obergefell*, 135 S. Ct. at 2596–97 (discussing the United States' history of considering homosexuality immoral, which the Court rejected as a legitimate state interest in outlawing same-sex marriage).

268. *Casey*, 505 U.S. at 850.

269. *See Obergefell*, 135 S. Ct. at 2596–97; *Lawrence*, 539 U.S. at 582; *Casey*, 505 U.S. at 850.

270. *See supra* Parts I–II.

271. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2325–26 (2016) (Thomas, J., dissenting).

272. *See* W. Ala. Women's Ctr. v. Miller, 217 F. Supp. 3d 1313, 1347 (M.D. Ala. 2016); Burns v. Cline, 382 P.3d 1048, 1054–55 (Okla. 2016) (Combs, V.C.J, concurring); Capital Care Network of Toledo v. State Dep't of Health, 58 N.E.3d 1207, 1211 (Ohio Ct. App. 2016); Planned Parenthood of Ind. & Ky. v. Comm'r, No. 1:16-cv-00763-TWP-DML, 2016 U.S. Dist. LEXIS 84917, at *25 (S.D. Ind. June 30, 2016).

statute in comparison to the burdens placed upon women seeking an abortion.[273] In Wisconsin, an admitting privileges requirement similar to H.B. 2 was deemed unconstitutional.[274] The Court denied certiorari on appeal[275] after deciding *Whole Woman's Health*.[276] Virginia scrapped ambulatory surgical center requirements for abortion clinics, citing *Whole Woman's Health* as the reasoning to be rid of its TRAP laws.[277] The Court also denied certiorari to Mississippi's appeal of a similarly struck TRAP law.[278] More TRAP laws have been struck down in Oklahoma,[279] Ohio,[280] and Indiana.[281] The impact of *Whole Woman's Health* has been felt the most, perhaps, by the named plaintiff of the case: post-victory, Whole Woman's Health successfully won another lawsuit against the state of Texas utilizing *Whole Woman's Health* as an argument against a new TRAP law imposing specific conditions upon second-term abortions.[282]

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273. *See W. Ala. Women's Ctr.*, 217 F. Supp. 3d at 1347 (striking down an Alabama school zoning ordinance that would have shut down numerous clinics).

274. While *Schimel* was decided before *Whole Woman's Health*, the Seventh Circuit utilized language strikingly similar to the majority opinion. *See* Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908, 916 (7th Cir. 2015) ("Until and unless *Roe v. Wade* is overruled by the Supreme Court, *a statute likely to restrict access to abortion with no offsetting medical benefit* cannot be held to be within the enacting state's constitutional authority.") (emphasis added). The Supreme Court denied Wisconsin's petition for writ of certiorari after *Whole Woman's Health* was announced. Schimel v. Planned Parenthood of Wis., Inc., 136 S. Ct. 2545, 2545 (2016).

275. *See Schimel*, 136 S. Ct. at 2545.

276. Molly Beck, *U.S. Supreme Court Rejects Wisconsin's Appeal of Abortion Restrictions Ruling*, WIS. ST. J. (June 29, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/u-s-supreme-court-rejects-wisconsin-s-appeal-of-abortion/article_ab0f94fd-aef7-5d89-9d7c-a61333857460.html [https://perma.cc/5G56-FBR6].

277. *See* Laura Vozzella, *Virginia Rolls Back Restrictions on Abortion Clinics*, WASH. POST (Oct. 24, 2016), https://www.washingtonpost.com/local/virginia-politics/virginia-rolls-back-restrictions-on-abortion-clinics/2016/10/24/9f3fb3e8-99fd-11e6-9980-50913d68eacb_story.html [https://perma.cc/5KMD-CXAG].

278. *See* Jess Bravin & Louise Radnofsky, *Supreme Court Denies Mississippi, Wisconsin Efforts to Reinstate Abortion Laws*, WALL ST. J. (June 28, 2016), https://www.wsj.com/articles/supreme-court-denies-mississippi-wisconsin-efforts-to-reinstate-abortion-laws-1467124416.

279. *See* Burns v. Cline, 382 P.3d 1048, 1051–53 (Okla. 2016).

280. *See* Capital Care Network of Toledo v. State Dep't of Health, 58 N.E.3d 1207, 1211 (Ohio Ct. App. 2016), *rev'd*, 2018-Ohio-440 (2018).

281. *See* Planned Parenthood of Ind. & Ky. v. Comm'r, 194 F. Supp. 3d 818, 830 (S.D. Ind. 2016).

282. The district court analyzed the new Texan TRAP law with a benefits-and-burdens analysis, as this Note argues. *See* Whole Woman's Health v. Paxton, No. A-17-CV-690-LY, 2017 U.S. Dist. LEXIS 195268, at *35 (W.D. Tex. Nov. 22, 2017) ("Indeed, the court finds the Act's burdens, by definition, exceed its benefits, those burdens are undue, and the

Overall, *Whole Woman's Health* (thus far) has provided clarification of a vague standard and protected abortion access, rather than grant new deference to the legislature. The future of abortion access is, by and large, not secure in the least.[283] Some jurisdictions are reluctant to expand the right to access underneath the proposed new standard. The Eighth Circuit, for example, stated that an admitting privileges requirement (albeit a requirement that differs from H.B. 2) promulgated by the state of Arkansas was constitutional.[284] This decision, however, is an outlier—the majority of decisions post-*Whole Woman's Health*, as discussed above, have been favorable to a woman's right to choose.

The rights of abortion access have typically hung in the hands of the legislature and have remained dependent upon a base that will protect them rather than strike them down. However, *Whole Woman's Health* has produced a new tool by which to remove total deference to the legislature that will, hopefully, exist for some time to come.

CONCLUSION

The standards applied to the Fourteenth Amendment have an extraordinary amount of variation depending on which fundamental right the Supreme Court is examining.[285] However, the Fourteenth Amendment has recently begun to take the shape of the amorphous "rational basis with bite" standard.[286] This is where *Whole Woman's Health* falls into place and abortion joins the rest of the fundamental rights and liberties protected by the Fourteenth Amendment's Substantive Due Process Clause.[287]

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obstacles they embody are, by definition, substantial.").

283. Recently, The United States went from a pro-choice to a pro-life executive office, thereby shifting the balance of power—and, potentially, the fate of abortion access. *See* Beth Reinhard, *Donald Trump's Victory Looks Set to Renew Battle Over Abortion Rights*, WALL ST. J. (Nov. 20, 2016), https://www.wsj.com/articles/donald-trumps-victory-looks-set-to-renew-battle-over-abortion-rights-1479671454.

284. The law requires a physician who wished to administer medicinal abortions to have a contract with another physician who has admitting privileges. *See* ARK. CODE ANN. § 20-16-1504 (2016). To reach this decision, the Eighth Circuit determined that "the district court was required to make a finding that the Act's contract-physician requirement is an undue burden for a large fraction of women seeking medication abortions in Arkansas." Planned Parenthood of Ark. & E. Okla. v. Jegley, 864 F.3d 953, 959 (8th Cir. 2017). The district court erred in its discretion, as the Eighth Circuit points out that there was no numerical evidence of how many women would be affected by the law, in contrast to *Whole Woman's Health v. Hellerstedt*. *Id.*

285. *See supra* Part I; *cf. supra* Part II.

286. *See* Pettinga, *supra* note 41, at 780; *supra* Subpart I.B.

287. *See supra* Part I; *cf. supra* Part III.

The "undue burden" standard has wrought more harm than good upon abortion access within the United States by creating uncertainty in substantive due process jurisprudence.[288] It is "abortion-specific,"[289] crafted specifically to deal with abortion regulations passed by legislatures that, more often than not, did more harm than good.[290] Abortion, a fundamental right, is the proverbial black sheep of the Fourteenth Amendment Substantive Due Process Clause family; *Whole Woman's Health* does not change that fact. What *has* changed with *Whole Woman's Health* is the emergence of "undue burden with teeth"—placing abortion (and, with it, reproductive justice) into the same tier as sexual orientation, sexual conduct, and other protected fundamental rights.[291] With *Whole Woman's Health*, TRAP laws can no longer hide behind the guise of a vague standard. Now, they are subject to a more searching scrutiny of the facts giving rise to the legislation, and abortion access can finally begin to rebuild what was lost for over twenty years.

The potential of *Whole Woman's Health* is vast, but the actuality of the impact of this newfound standard will be determined as legal scholars examine the full impact of the decision in the years to come. However, the immediate signs are positive for abortion access. While the impact of TRAP laws will take years to overcome, the future looks marginally brighter for abortion access underneath *Whole Woman's Health*, rather than *Casey*.

288. *See* Thomas J. Molony, *Fulfilling the Promise of* Roe*: A Pathway for Meaningful Pre-Abortion Consultation*, 65 CATH. U. L. REV. 713, 713 (2016).

289. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting).

290. *See State Policies on Abortion*, GUTTMACHER INST., https://www.guttmacher.org/united-states/abortion/state-policies-abortion [https://perma.cc/YD8L-QKK2] (citing that 288 abortion restrictions were adopted from 2011–2015).

291. *See supra* Section I.B.4 (discussing *Obergefell*).