

WHY THE EQUAL PROTECTION CLAUSE CANNOT “FIX” ABORTION LAW

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INTRODUCTION

Thirty-five years after *Roe v. Wade*¹ was decided, it continues to face tremendous opposition from the general public.² The Supreme Court has acknowledged the “intensively divisive controversy” *Roe* engendered,³ yet the Court has deprived the people of the ability to reach a consensus on the abortion issue through democratic means.⁴ Legal scholars continue to criticize the decision for lacking support in the language and history of the Constitution.⁵ Even some supporters

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1. 410 U.S. 113 (1973).

2. See *Abortion Foes Protest 35th Year of ‘Roe,’* USA TODAY, Jan. 23, 2008, at 3A; Press Release, Harris Interactive, Support for *Roe vs. Wade* Declines to Lowest Level Ever (May 4, 2006), available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=659 (concluding from a 2006 poll that only forty-nine percent of the population supports *Roe v. Wade*). Public opinion of *Roe* may very well be lower than the poll results show, because the poll misrepresented *Roe* by stating that it legalized abortion only in the first three months of pregnancy. In actuality, *Roe*, when read in conjunction with its companion case, *Doe v. Bolton*, made abortion legal through all nine months of pregnancy. Dave Andrusko, *Harris Poll Shows Lowest Support for Roe v. Wade in Decades*, NAT’L RIGHT TO LIFE NEWS, June 2006, <http://www.nrlc.org/news/2006/NRL06/PDF/June06HarrisPollPage12.pdf>.

3. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992).

4. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 115–16 (1990) (“[T]he [*Roe v. Wade*] decision was the assumption of illegitimate judicial power and a usurpation of the democratic authority of the American people.”).

5. *E.g.*, Andrew A. Adams, *Aborting Roe: Jane Roe Questions the Viability of Roe v. Wade*, 9 TEX. REV. L. & POL. 325, 339–40 (2005); Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 306–20 (2006); Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 137–41 (2005); Philip A. Rafferty, *Roe v. Wade: A Scandal upon the Court*, 7 RUTGERS J.L. & RELIGION ¶¶ 42–46 (2005).

of abortion rights do not believe *Roe* provided a sufficient constitutional basis for the right to abortion.⁶ Facing the prospect of *Roe*'s demise, abortion advocates are desperate to base the right to abortion in a constitutional provision other than the Due Process Clause.⁷ They have offered the Equal Protection Clause⁸ as an alternative, which they claim would provide a solid constitutional foundation for the right to abortion.⁹ Justice Ruth Bader Ginsburg's dissent in *Gonzales v. Carhart*,¹⁰ which argued that women need access to abortion to be equal citizens,¹¹ has brought this argument to the forefront of the legal debate over abortion. Given Justice Ginsburg's dissent in *Gonzales* and recent legal works arguing for an equal protection analysis of abortion statutes,¹² the trend toward making equal protection arguments to strike down abortion regulations is evident. This Note proves that such attempts cannot and will not be successful in the courts.

Part I discusses the inherent weaknesses in *Roe*'s substantive due process analysis. Legal scholars, dissenting Justices, and the Supreme

6. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (“[*Roe*] is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be.”).

7. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”); see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 262–63 (1992).

8. U.S. CONST. amend. XIV, § 1 (“[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws.”).

9. See Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in WHAT *ROE V. WADE* SHOULD HAVE SAID 3, 18–19 (Jack M. Balkin ed., 2005); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–59 (1977); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016–17 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991); Frances Olsen, Comment, *Unraveling Compromise*, 103 HARV. L. REV. 105, 118 (1989); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569–71 (1979); Siegel, *supra* note 7, at 262–65.

10. 127 S. Ct. 1610 (2007).

11. *Id.* at 1641 (Ginsburg, J., dissenting).

12. See, e.g., Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1290–92 (2007); David H. Gans, *The Unitary Fourteenth Amendment*, 56 EMORY L.J. 907, 934, 937 (2007); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 125, 127–28 (2007); Eileen McDonagh, *The Next Step After Roe: Using Fundamental Rights, Equal Protection Analysis to Nullify Restrictive State-Level Abortion Legislation*, 56 EMORY L.J. 1173, 1174–75, 1180–81 (2007); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 896–97 (2007); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 833–34 (2007).

Court have effectively criticized earlier cases, such as *Lochner v. New York*,¹³ that invoked substantive due process to strike down state statutes. As a consequence, abortion advocates have argued to base the right to abortion in the Equal Protection Clause. Part II depicts the evolution of abortion advocates' arguments to strike down post-*Roe* statutes regulating abortion, from invoking the liberty interest of the Due Process Clause to making equal protection arguments to support legalized abortion. The courts have never used the Equal Protection Clause to strike down statutes regulating abortion, but Justice Ginsburg's dissent in *Gonzales v. Carhart* shows that abortion advocates have not abandoned this argument. Part III demonstrates that the Equal Protection Clause does not provide for a right to abortion. Arguments that the Clause protects the right to abortion lack precedential support. Part IV proves that, contrary to the claims of abortion advocates, women do not need legal abortion to have the equal protection of the law.

I. SUBSTANTIVE DUE PROCESS: A WEAK FOUNDATION FOR ABORTION LAW

On January 22, 1973, the U.S. Supreme Court handed down *Roe v. Wade*, overriding century-old statutes that criminalized abortion in a majority of states.¹⁴ The decision immediately spawned public opposition and extensive legal criticism from scholars on both sides of the abortion issue.¹⁵ There are three main arguments that demonstrate that *Roe's* substantive due process analysis is unconstitutional. First, the Court's selection of substantive due process as the source of the right of privacy violates the principles of stare decisis and separation of powers.¹⁶ Prior to *Roe*, the Court had

13. 198 U.S. 45, 62, 64 (1905).

14. *Roe v. Wade*, 410 U.S. 113, 116, 166 (1973). The following states had criminal abortion statutes similar to the Texas statute at issue in *Roe*: Arizona, Connecticut, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *Id.* at 118 n.2.

15. See Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 814 (1973); Joseph W. Dellapenna, *Nor Piety Nor Wit: The Supreme Court on Abortion*, 6 *COLUM. HUM. RTS. L. REV.* 379, 384 (1975); Charles E. Rice, *The Dred Scott Case of the Twentieth Century*, 10 *HOUS. L. REV.* 1059, 1059, 1062–63 (1973); *supra* note 6 and accompanying text.

16. James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 *BYU J. PUB. L.* 181, 194–202, 221 (1989).

rejected using substantive due process to strike down laws that did not comport with the Justices' particular economic or social philosophies.¹⁷ The Court declared:

[A] state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution . . . and . . . Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.¹⁸

What is more, legal scholars have decried the Court for *Lochner* in *Roe*.¹⁹ Indeed, there are striking similarities between the two decisions.²⁰ Perhaps some have refused to compare *Roe* to *Lochner* on the basis that "the 'right to abortion,' or noneconomic rights generally, accord more closely with 'this generation's idealization of America' than the 'rights' asserted in . . . *Lochner*."²¹ In response to this argument, Professor John Hart Ely pointed out that this attitude is actually the embodiment of the *Lochner* philosophy, which grants protection to rights the Constitution does not guarantee.²² The Court's substantive due process reasoning also mirrors the Court's faulty reasoning in *Dred Scott v. Sandford*.²³ Thus, *Roe* departed

17. *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963).

18. *Id.* at 729 (internal quotation marks omitted) (quoting *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting)). The Court further noted that "[t]he doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely [had] . . . been discarded," and the Court had "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730.

19. Ely, *supra* note 6, at 937–43; Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 168 (1973).

20. Bopp & Coleson, *supra* note 16, at 198–99.

Both *Roe* and *Lochner* appear result-oriented, unjustified by the Constitution, and designed to protect a certain profession, rather than all interested parties. The reasoning process behind both sets of cases is analogous. Both reflect the clear biases of the justices. Both dealt with issues that seemed especially pressing and important at the time (less so in a broader historical perspective), but were not mentioned by the framers.

Id. at 198 (footnote omitted).

21. Ely, *supra* note 6, at 939 (footnote omitted) (quoting Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 57–58 (1967)). Ely himself discredits those who attempt to distinguish *Roe* from *Lochner*. *Id.*

22. *Id.*

23. 60 U.S. (19 How.) 393 (1857); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011–13 (2003) ("[N]ot only do *Dred Scott* and

from precedent and the Constitution in using substantive due process to find a constitutional right of privacy.

Second, *Roe* failed to demonstrate how a right to abortion could be established from the right of privacy.²⁴ None of the cases cited by the Supreme Court to support the right of privacy even address abortion in the slightest sense.²⁵ The Court merely stated that “[t]his right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”²⁶ Furthermore, the Court failed to prove how the right to abortion could be established from its substantive due process analysis.²⁷ Instead of providing legal reasoning for its holding, the Court made a policy argument, listing all the problems women face during pregnancy.²⁸ In regard to the Court’s policy arguments for legal abortion, Professor Ely commented, “All of this is true and ought to be taken very seriously. But it has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests.”²⁹ Thus, *Roe* failed to sufficiently connect the right of privacy to the right to abortion through case law and legal analysis.

Third, the Court used an improper method of analysis to find that the right to abortion was fundamental, and thus, protected by substantive due process.³⁰ Substantive due process analysis requires the finding of a fundamental right, which is weighed against the state’s interest in regulation. The Court employed *Palko v. Connecticut*’s³¹ test for fundamental rights in its analysis, which requires that “only [those] personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ . . . [can be] included in this

Roe share the same linguistically nonsensical constitutional theory of ‘substantive due process,’ they apply it in much the same mischievous way, extrapolating from specific provisions a new, general right.”).

24. Bopp & Coleson, *supra* note 16, at 221.

25. BORK, *supra* note 4, at 114; cf. John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 11 n.40 (1978) (“The Court has offered little assistance to one’s understanding of what it is that makes [the sex-marriage-childbearing-childrearing cases] a unit. Instead it has generally contented itself with lengthy and undifferentiated string cites You can say a bunch of words, but a constitutional connection . . . should require something more than this.”); Epstein, *supra* note 19, at 170 (“[I]t is difficult to see how the concept of privacy linked the cases cited by the Court, much less . . . explain[ed] the result in the abortion cases.”).

26. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

27. Bopp & Coleson, *supra* note 16, at 221.

28. *Roe*, 410 U.S. at 153.

29. Ely, *supra* note 6, at 932.

30. Bopp & Coleson, *supra* note 16, at 236–40.

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

guarantee of personal privacy.”³² The use of the *Palko* test as opposed to more recent tests used to identify fundamental rights enabled the Court to examine the history of abortion dating back to ancient Greece and Rome, rather than limiting the scope of historical analysis to American history and traditions.³³ In this way, the Court was able to give the impression that the states’ century-old abortion statutes were “freak developments in the history of ordered liberty,”³⁴ rather than evidence of “deeply-rooted American traditions which represented a break from Old World traditions.”³⁵ The fact that academic scholars have since thoroughly refuted the Court’s historical account of abortion³⁶ supports the position that, even under the *Palko* test, the Court improperly concluded that a fundamental right to abortion existed in the Due Process Clause.³⁷

To this day, no one, not even the Supreme Court, has been able to justify *Roe*’s creation of a right to abortion out of the right of privacy, which the Court found to exist in substantive due process.³⁸ The Court has merely reaffirmed the right to abortion through the doctrine of *stare decisis*, and not simply on the basis of substantive due process.³⁹ Recognizing the failings of *Roe* and its weak precedential and constitutional foundation, abortion advocates have resorted to equal protection arguments to strike down statutes regulating abortion.⁴⁰

32. *Roe*, 410 U.S. at 152 (quoting *Palko*, 302 U.S. at 325).

33. Bopp & Coleson, *supra* note 16, at 235–40.

34. *Id.* at 240.

35. *Id.* at 237–38.

36. JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006) 13–15, 31, 126, 134, 143–49; John Keown, *Back to the Future of Abortion Law: Roe’s Rejection of America’s History and Traditions*, 22 ISSUES L. & MED. 3, 3–12 (2006).

37. Bopp & Coleson, *supra* note 16, at 239.

38. Paulsen, *supra* note 23, at 1008; BORK, *supra* note 4, at 115.

39. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 982 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“The authors of the joint opinion, of course, do not squarely contend that *Roe v. Wade* was a *correct* application of ‘reasoned judgment’; merely that it must be followed, because of *stare decisis*.”).

40. *E.g.*, Ginsburg, *supra* note 9, at 376 (“[T]he [*Roe*] Court ventured too far in the change it ordered and presented an incomplete justification for its action.”).

II. THE TREND TOWARD EQUAL PROTECTION ARGUMENTS FOR A CONSTITUTIONAL RIGHT TO ABORTION

Roe never mentioned equal protection, although it described the burdens pregnancy imposes on women.⁴¹ Rather, the Court focused on a woman's private decision between herself and her physician.⁴² This rationale is much to the dismay of abortion advocates who seek to anchor the right to abortion in the Equal Protection Clause.⁴³ Although most abortion cases have focused on the constitutionality of abortion statutes through the lens of the Due Process Clause, equal protection arguments began to emerge in cases challenging abortion-funding restrictions and abortion clinic regulations. Eventually, the Court began to implicate women's equality in abortion cases, and abortion advocates' equal protection arguments evolved into claims of gender-based discrimination. To date, the Court has neither applied the Equal Protection Clause to strike down an abortion statute nor acknowledged that the Clause could protect the right to abortion.

A. *Restrictions on Public Abortion Funding and Abortion Clinic Regulations*

The Court has refused to apply intermediate scrutiny in cases of restrictions on public funding of abortion and abortion clinic regulations, repeatedly holding that such restrictions and regulations do not violate the Equal Protection Clause. In the early years following *Roe*, abortion advocates began to invoke the Equal Protection Clause to challenge restrictions on government funding of abortion. In general, they argued that states must treat abortion and childbirth equally, and may not indicate a policy preference by funding only medical expenses related to childbirth.⁴⁴ The Supreme Court has repeatedly rejected this argument, holding that women who are indigent do not constitute a suspect class and that abortion is

41. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

42. *Id.* at 165 ("The decision vindicates the right of the physician to administer medical treatment according to his professional judgment . . ."); *cf. Ginsburg, supra* note 9, at 382 ("Academic criticism of *Roe*, charging the Court with reading its own values into the due process clause, might have been less pointed had the Court placed the woman alone, rather than the woman tied to her physician, at the center of its attention.").

43. *See supra* note 9 and accompanying text.

44. *Harris v. McRae*, 448 U.S. 297, 303 (1980); *Maher v. Roe*, 432 U.S. 464, 470, 473-74 (1977).

not a fundamental right for equal protection purposes.⁴⁵ Because indigent women do not constitute a suspect class, the Court applies the rational basis test to test the constitutionality of abortion funding restrictions.⁴⁶

In *Harris v. McRae*,⁴⁷ the Court refused to apply the Equal Protection Clause to strike down the Hyde Amendment, which prohibited Medicaid funding of abortion “except where the life of the mother would be endangered if the fetus were carried to term, or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.”⁴⁸ The Court, noting that it has repeatedly held that poverty alone does not constitute a suspect classification, subjected the Hyde Amendment to the rational basis test.⁴⁹ The Court found that this amendment was rationally related to a legitimate state objective, and thus, held it to be constitutional.⁵⁰

After the Court established that indigent women were not a suspect class for purposes of equal protection analysis, abortion advocates next argued that the state had an affirmative duty to provide funding for abortion under the Equal Protection Clause. The Court also rejected this argument. In *Webster v. Reproductive Health Services*,⁵¹ the plaintiffs challenged provisions of a Missouri abortion statute that forbade “any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother,” and made it “unlawful for any public facility to be used for the purpose of performing or assisting an abortion not

45. *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (holding that a city’s refusal to provide publicly financed hospital services for nontherapeutic abortions, while it simultaneously provided such services for childbirth, did not violate the Equal Protection Clause); *Maher*, 432 U.S. at 480 (holding that the Equal Protection Clause did not require a state participating in the Medicaid program to pay the expenses incident to nontherapeutic abortions for indigent women simply because it paid expenses incident to childbirth); *Beal v. Doe*, 432 U.S. 438, 447 (1977) (same holding in relation to Title XIX of the Social Security Act).

46. *See Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984) (applying rational basis review where the plaintiffs failed to demonstrate “reason to invoke heightened scrutiny”).

47. 448 U.S. 297 (1980).

48. *Id.* at 302 (quoting Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979)).

49. *Id.* at 322–26.

50. *Id.* at 324. In a similar case, *Williams v. Zbaraz*, the Court reached the same conclusion. *Williams v. Zbaraz*, 448 U.S. 358, 369 (1980) (holding that an Illinois statute prohibiting state medical assistance payments for all abortions except those necessary for the preservation of the mother’s life did not violate the Equal Protection Clause).

51. 492 U.S. 490 (1989).

necessary to save the life of the mother."⁵² The Court found no merit to the equal protection argument because the state may use public facilities and employees to encourage childbirth over abortion.⁵³

Similarly, in *Rust v. Sullivan*,⁵⁴ the plaintiffs challenged regulations promulgated to clarify Title X of the Public Health Service Act, which appropriated federal funds for family planning, but prevented those funds from being used for abortion-related purposes.⁵⁵ They argued that the regulations effectively precluded indigent "Title X clients" from obtaining an abortion because they could not receive funding for the procedure.⁵⁶ In upholding the regulations, the Court held that a pregnant woman is in no worse position than she would be had Congress not provided family planning funding at all.⁵⁷ Furthermore, the Court added, the government has no affirmative duty to fund an activity merely because it is constitutionally protected, and may choose to favor childbirth over abortion by means of unequal funding.⁵⁸

In more recent years, abortion advocates have sought to strike down abortion clinic regulations on equal protection grounds. Two federal cases have explicitly rejected claims that health and safety regulations relating to abortion clinics violate the Equal Protection Clause. In *Greenville Women's Clinic v. Bryant*,⁵⁹ abortion advocates unsuccessfully invoked the Equal Protection Clause in a challenge to a South Carolina health regulation relating to abortion clinics.⁶⁰ The court applied a rational basis test to determine that the regulation did not violate the Equal Protection Clause.⁶¹

Similarly, in *Tucson Woman's Clinic v. Eden*,⁶² abortion advocates argued that an Arizona abortion clinic regulation violated the equal

52. *Id.* at 507 (internal quotation marks omitted) (quoting Mo. Rev. Stat. §§ 188.210, 188.215 (1986)).

53. *Id.* at 509–10.

54. 500 U.S. 173 (1991).

55. *Id.* at 177–79.

56. *Id.* at 203.

57. *Id.*

58. *Id.* at 201; cf. Judith C. Gallagher, *Protecting the Other Right to Choose: The Hyde-Weldon Amendment*, 5 AVE MARIA L. REV. 527, 540 (2007) ("The Court has consistently held that the government is obliged not to interfere in an abortion decision, but it is not required to facilitate abortion or to fund it.").

59. 222 F.3d 157 (4th Cir. 2000).

60. *Id.* at 160, 162, 174.

61. *Id.* at 174.

62. 379 F.3d 531 (9th Cir. 2004).

protection rights of physicians and their patients by distinguishing between abortion providers and those doctors who provide other comparably risky medical services.⁶³ The court disagreed, reasoning that the regulation passed rational basis review because it was facially related to health and safety issues and there was no evidence that it had a “stigmatizing or animus based purpose.”⁶⁴ Further, abortion advocates argued that the regulation violated the equal protection rights of physicians by distinguishing between those who provide fewer than five first-trimester abortions and those who provide five or more first-trimester abortions or any second- or third-trimester abortions.⁶⁵ The court, however, found that the regulation survived rational basis review because it legitimately excluded smaller private practices from the regulation, which would have imposed unduly burdensome requirements on such practices.⁶⁶

The abortion advocates’ third argument was that the regulation violated the equal protection rights of women by distinguishing between abortion—a medical service sought only by women—and comparably risky procedures sought by men.⁶⁷ The court responded by holding that the regulation satisfied the undue burden standard set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁶⁸ because the State asserted maternal health as its interest in promulgating the regulation and there was no material issue of fact regarding an invidious purpose behind the regulation.⁶⁹ In upholding Arizona’s regulatory scheme for regulating abortion clinics, the court expressly denied the validity of all three of the plaintiffs’ equal protection claims.⁷⁰ Equal protection claims to strike down abortion restrictions in the context of clinic regulations have completely failed in court.

These cases demonstrate that the Supreme Court has conclusively established—and lower courts understand—that policies disfavoring abortion are not ipso facto sex discrimination,⁷¹ and do not

63. *Id.* at 543.

64. *Id.* at 546.

65. *Id.* at 536, 543.

66. *Id.* at 547.

67. *Id.* at 543.

68. 505 U.S. 833, 846 (1992).

69. *Eden*, 379 F.3d at 549.

70. *Id.* at 546–47, 549.

71. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 272–73 (1993).

discriminate against a suspect class.⁷² Thus, a rational basis test is applied to these restrictions rather than the intermediate scrutiny standard used for gender-based classifications.⁷³

B. *Sex Equality and Abortion*

In abortion cases, the Court has merely mentioned concerns about discrimination against women, but has never invalidated a law on equal protection grounds. Abortion advocates assert that *Thornburgh v. American College of Obstetricians & Gynecologists*⁷⁴ was the first case to suggest that abortion restrictions implicate equal protection concerns.⁷⁵ At the conclusion of the *Thornburgh* opinion, the Court noted that “[a] woman’s right to make [the abortion] choice freely is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.”⁷⁶ At issue in *Thornburgh* was a Pennsylvania statute that required doctors, before performing an abortion, to obtain the informed consent of their patients and to provide their patients with information about help that is available to them should they choose to carry their child to term.⁷⁷ The statute also required physicians to report basic information about the abortion transaction, use an abortion technique in post-viability abortions that would give the unborn child the best opportunity to be born alive, and have a second physician present during an abortion when viability is possible.⁷⁸ The Court based its decision to invalidate these statutes on their infringement of constitutional privacy interests.⁷⁹ The Equal Protection Clause was never mentioned in the Court’s decision to reaffirm the right to abortion.⁸⁰

Equal protection arguments to protect the right to abortion were before the Court in *Webster v. Reproductive Health Services*,⁸¹ yet the

72. *Harris v. McRae*, 448 U.S. 297, 323 (1980).

73. *Bray*, 506 U.S. at 273.

74. 476 U.S. 747 (1986).

75. Siegel, *supra* note 7, at 349.

76. *Thornburgh*, 476 U.S. at 772.

77. *Id.* at 758–61.

78. *Id.* at 765–70.

79. *Id.* at 762–72.

80. *Id.* at 759.

81. Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees at 5–10, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605).

Court declined to reevaluate the constitutionality of *Roe* in its decision.⁸² Justice Blackmun, in his opinion concurring in part and dissenting in part, hinted at an equality argument for maintaining *Roe*: "I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided."⁸³ The Missouri statute at issue in *Webster* contained, among other provisions, findings that life begins at conception and that the lives of unborn children are protectable; required that Missouri law be construed to provide unborn children with the same rights as other persons, subject to the Constitution and Supreme Court precedent; and required abortion doctors to determine the viability of the unborn child if the mother is believed to be twenty or more weeks pregnant.⁸⁴ The Court upheld all of these requirements.⁸⁵ A plurality of the Court expressly rebuked Justice Blackmun's arguments:

Justice Blackmun's suggestion that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the Dark Ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them.⁸⁶

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, abortion advocates asked the Court to use the Equal Protection Clause to strike down a Pennsylvania statute that required mandatory spousal notification.⁸⁷ Though the Court struck down the spousal notification provision, it employed the undue burden test and did not invoke the Equal Protection Clause in its decision.⁸⁸ The push to reaffirm *Roe* on equal protection grounds reveals that abortion advocates recognized the weak constitutional foundations of *Roe* and sought shelter for the right to abortion in the Equal Protection Clause.⁸⁹ The Court, however, implicitly rejected their argument by

82. *Webster*, 492 U.S. at 521.

83. *Id.* at 538 (Blackmun, J., concurring in part and dissenting in part).

84. *Id.* at 501 (majority opinion).

85. *Id.* at 499, 522.

86. *Id.* at 521 (opinion of Rehnquist, C.J.) (citation omitted).

87. Brief for Petitioners and Cross-Respondents at 15–16, 19 n.27, 33, 39, 40, 46–48, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

88. *Casey*, 505 U.S. at 895.

89. See Brief for Petitioners and Cross-Respondents, *supra* note 87, at 16, 19 n.27, 39, 40, 46–48.

not using the Equal Protection Clause as a basis for reaffirming the right to abortion. Instead, the Court based its decision on "individual liberty . . . combined with the force of *stare decisis*."⁹⁰ In its *stare decisis* analysis, the Court referenced women's equality, stating that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."⁹¹ However, this assertion was part of the Court's analysis of the reliance issue;⁹² it has no bearing on the Court's equal protection analysis.

Abortion advocates in *Stenberg v. Carhart*⁹³ argued that abortion restrictions constitute gender discrimination because they only affect women and women alone bear the burden of pregnancy and childbirth.⁹⁴ Although the Court acknowledged that there are people who hold these views, the Court also acknowledged that "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child."⁹⁵ Equal protection concerns were not taken into consideration in the Court's decision to strike down the Nebraska ban on partial-birth abortion.⁹⁶ Instead, the Court measured the statute against the undue burden standard set in place by *Casey*.⁹⁷

In *Gonzales v. Carhart*, the Court held that a federal statute regulating a particular partial-birth abortion procedure did not impose an undue burden on a woman's decision whether or not to have an abortion.⁹⁸ The Court's analysis centered on the Due Process Clause and made no mention of the Equal Protection Clause. Justice Ginsburg, however, brought up a sex equality argument in her dissenting opinion.⁹⁹ She discussed *Casey*'s references to female

90. *Casey*, 505 U.S. at 853.

91. *Id.* at 856. This is not an accurate statement, however, as women were already progressing in society prior to *Roe*. Teresa Stanton Collett, *Teresa Stanton Collett (dissenting)*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 9, at 187, 189.

92. *Cf.* Bradley Aron Cooper, Essay, *The Definition of "Person": Applying the Casey Decision to Roe v. Wade*, 19 REGENT U. L. REV. 235, 245 (2006) (arguing that the Court evaluated women's economic dependence on the availability of abortion as a "type of future reliance" on the "future availability of abortion").

93. 530 U.S. 914 (2000).

94. Brief Amici Curiae of Seventy-Five Organizations Committed to Women's Equality in Support of Respondent at 16, *Stenberg*, 530 U.S. 914 (No. 99-830).

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

96. *Id.* at 930.

97. *Id.*

98. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1632 (2007).

99. *Id.* at 1641 (Ginsburg, J., dissenting).

equality, concluding that the right to abortion concerns the equality of women rather than privacy rights: "Legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."¹⁰⁰ *Gonzales* is an example of how the Due Process Clause cannot be used to strike down all statutes regulating abortion. Justice Ginsburg's response demonstrates the abortion advocates' recognition of this reality and their continued efforts to make equal protection arguments to protect the right to abortion created by *Roe*.

III. THE EQUAL PROTECTION CLAUSE AND ABORTION

Abortion advocates have argued that the right to abortion is weakened by the Court's exclusion of a "constitutionally based sex-equality perspective" in *Roe*.¹⁰¹ They contend that restrictions on abortion constitute discrimination against women in violation of the Equal Protection Clause.¹⁰² While abortion advocates claim that the Equal Protection Clause can protect the right to abortion, this argument fails for the same reasons scholars have criticized *Roe*'s substantive due process analysis.¹⁰³ Like the privacy cases *Roe* cited as encompassing a right to abortion under the Due Process Clause,¹⁰⁴ the cases striking down invidious gender-based classifications under the Equal Protection Clause do not provide a precedent for a right to abortion because they have nothing to do with abortion.¹⁰⁵ In addition, there is established legal precedent that a classification on the basis of pregnancy is not a classification on the basis of gender, and thus the Equal Protection Clause cannot be used to strike down

100. *Id.*

101. Ginsburg, *supra* note 9, at 386.

102. *See* Law, *supra* note 9, at 963–65 (arguing that sex equality should be used to analyze abortion restrictions); MacKinnon, *supra* note 9, at 1311 (arguing that regulations that prohibit or limit a woman's reproductive rights are better analyzed with respect to sex equality principles than privacy principles, because the "private is a distinctive sphere of women's inequality to men"); Laurence H. Tribe, Commentary, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335–38 (1985) (arguing that unwanted pregnancies enslave women who cannot afford an abortion, depriving them of the equal protection of the law).

103. *See supra* Part I.

104. *See supra* notes 24–29 and accompanying text.

105. *See infra* Part III.A.

abortion statutes on the basis that they discriminate against women as a class.¹⁰⁶

A. *Women's Equality in Constitutional Law*

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws."¹⁰⁷ Under the Equal Protection Clause, "men and women [who are] similarly situated must be treated equally under the law. . . . On the other hand, the Equal Protection Clause does not require equal treatment for men and women under all circumstances."¹⁰⁸ To prove a claim of gender discrimination, a plaintiff is ordinarily required to show that he or she suffered "purposeful or intentional discrimination" on the basis of gender.¹⁰⁹ Generally, gender-based discrimination that is unsupported by reasonable justifications violates the Equal Protection Clause.¹¹⁰ Legislative classifications on the basis of gender are subject to a heightened level of scrutiny.¹¹¹ To survive judicial scrutiny, gender-based classifications must serve important governmental objectives and be substantially related to the achievement of those objectives.¹¹² However, the Constitution does not prevent the state from making a gender-based classification where men and women are not similarly situated if the classification is not invidious.¹¹³

In the 1970s, the Court began to strike down statutes containing overt gender-based classifications.¹¹⁴ These cases established precedent for the Court's treatment of gender-based classifications, but none of them involved an abortion restriction. In 1971, *Reed v. Reed*¹¹⁵ made history by striking down a law that preferred men over similarly situated women for estate administration purposes.¹¹⁶ Two years later, the Court invalidated a federal statute requiring women, but not men, to prove the dependency of their spouses in order to receive

106. *See infra* Part III.B.

107. U.S. CONST. amend. XIV, § 1.

108. 16B C.J.S. *Constitutional Law* § 1139 (2005).

109. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004).

110. *Lyon v. Temple Univ.*, 543 F. Supp. 1372, 1378 (E.D. Pa. 1982).

111. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

112. *Id.* at 441.

113. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981).

114. Ginsburg, *supra* note 9, at 377–78.

115. 404 U.S. 71 (1971).

116. *Id.* at 76–77.

increased quarters allowances and medical benefits.¹¹⁷ During the latter half of the 1970s, the Court decided several cases that collectively held that social security benefits,¹¹⁸ welfare assistance,¹¹⁹ and workers' compensation benefits provided to male employees must also be provided to female employees.¹²⁰ The Court also held that a statute setting a higher age of minority for males than females for child support purposes was invidiously discriminatory.¹²¹

None of the cases in which the Court struck down a gender-based classification even remotely involved a restriction on abortion. They solely involved gender-based classifications, to which the Court applied an intermediate level of scrutiny and found that the classifications invidiously discriminated against women who were similarly situated to men, or vice versa.

The Court has upheld gender-based classifications that were not invidious, but rather reflected the fact that the sexes are not similarly situated in certain circumstances.¹²² Abortion restrictions fit into this category for three reasons. First, they are predicated on differences in reproductive capacities between men and women. Second, because "[a]bortion is a unique act,"¹²³ abortion restrictions do not affect

117. *Frontiero v. Richardson*, 411 U.S. 677, 688, 690–91 (1973).

118. *Califano v. Goldfarb*, 430 U.S. 199, 206–07 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975).

119. *Califano v. Westcott*, 443 U.S. 76, 78, 89 (1979).

120. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151–52 (1980).

121. *Stanton v. Stanton*, 421 U.S. 7, 13, 15, 17 (1975). Furthermore, the Court demonstrated that the Equal Protection Clause protected men as well. In *Craig v. Boren*, the Court invalidated a statute that enabled women to buy 3.2% beer at a younger age than men. *Craig v. Boren*, 429 U.S. 190, 210 & n.24 (1976). Similarly, in *Orr v. Orr*, the Court struck down a statute that potentially required men, but not women, to pay alimony to a divorced spouse. *Orr v. Orr*, 440 U.S. 268, 278, 283 (1979).

In 1981, the Court found that a Louisiana statute naming the husband "head and master" of property jointly owned with his wife violated the Equal Protection Clause. *Kirchberg v. Feenstra*, 450 U.S. 455, 456, 459–61 (1981). A year later, the Court granted male students the right to attend a publicly funded, all-female nursing school. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727, 731 (1982). Most recently, the Court held that Virginia's exclusion of women from the Virginia Military Institute denied them equal protection of the laws. *United States v. Virginia*, 518 U.S. 515, 539–40 (1996).

122. *Rostker v. Goldberg*, 453 U.S. 57, 78–79 (1981) (upholding draft registration requirements imposed on males only); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 472–73 (1981) (upholding a state statutory rape law punishing males but not females); *Schlesinger v. Ballard*, 419 U.S. 498, 504–05, 508 (1975) (upholding a promotion policy of the United States Navy which allowed women a longer period of time for promotion prior to mandatory discharge); *Kahn v. Shevin*, 416 U.S. 351, 352, 355–56 (1974) (upholding a state property tax exemption for widows only).

123. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

women as a class. They merely affect a subset of women who are not classified on the basis of their gender, but on the basis of the presence of life within their wombs.¹²⁴ Lastly, abortion restrictions do not “mask a discriminatory animus for disparate treatment unrelated to any genuine objective.”¹²⁵ The Court has held that abortion restrictions have the goal of preventing abortion—and not of unjustly discriminating—and therefore abortion restrictions are not invidiously discriminatory.¹²⁶ In short, there is simply no precedent in sex equality cases to support the abortion advocates’ claim that abortion restrictions could be struck down as invidious gender-based classifications.

B. *Classifications on the Basis of Pregnancy*

Despite a lack of precedent for their arguments, abortion advocates claim that because only women can become pregnant, restrictions on abortion are really a form of discrimination against women.¹²⁷ As a consequence, they argue abortion restrictions should be struck down on equal protection grounds.¹²⁸ The Court has never characterized laws governing pregnancy as sex-based state action for purposes of equal protection review. In fact, the Court has firmly established over the past three decades that classifications on the basis of pregnancy are not gender-based classifications, and thus, they are only subject to a rational basis standard of review.¹²⁹

124. Paulsen, *supra* note 23, at 1009 n.35.

125. *Id.*

126. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274 (1993); *see infra* notes 152–53 and accompanying text.

127. *E.g.*, Law, *supra* note 9, at 1007–08.

128. *E.g.*, *id.* at 1016–17.

129. Although Congress has stated that a classification based on pregnancy is a classification based on sex under Title VII of the Civil Rights Act of 1964, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e (2000)), this congressional definition has no bearing on the Supreme Court’s abortion jurisprudence. Justice Ginsburg has acknowledged that the congressional definition is “not controlling in constitutional adjudication,” but has nevertheless indicated that it could “stimulate” the Court to reverse course on this issue. Ginsburg, *supra* note 9, at 379. The question of employment discrimination on the basis of pregnancy (the subject that Congress addressed in the Pregnancy Discrimination Act) has little, if anything, to do with the question of whether, and to what extent, life in the womb should be protected. Similarly, as Professor Michael Stokes Paulsen has correctly pointed out, equal protection claims in the context of abortion regulation that focus on the disparate treatment of similarly situated men and women are “quite aside from the question of whether . . . there nonetheless exists a sufficiently

In *Geduldig v. Aiello*,¹³⁰ the Court considered the constitutionality of a California disability insurance program that excluded payments for disability accompanying normal pregnancy.¹³¹ In upholding the constitutionality of the disability restriction, the Court rejected the argument that the case involved discrimination on the basis of gender in violation of the Equal Protection Clause.¹³² The Court explained:

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.¹³³

Geduldig held that state-based benefits programs are permitted to exclude pregnancy benefits without violating the Equal Protection Clause, even though “only women can become pregnant.”¹³⁴ Similarly, abortion regulations do not constitute sex discrimination, even though “abortions are procured only by women.”¹³⁵

More recently, in *Bray v. Alexandria Women’s Health Clinic*,¹³⁶ the Court held that attempts by anti-abortion activists to restrict access to abortion clinics did not constitute discrimination against women as a class.¹³⁷ Relying on, inter alia, *Geduldig*, the Court expressly refuted the argument that “since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class.”¹³⁸

compelling (or ‘important’) state interest in protecting embryonic and fetal human life.” Paulsen, *supra* note 23, at 1009 n.35.

130. 417 U.S. 484 (1974).

131. *Id.* at 488–89.

132. *Id.* at 494.

133. *Id.* at 496 n.20.

134. *Id.*

135. James Bopp, Jr., *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. CONTEMP. L. 131, 140 (1989).

136. 506 U.S. 263 (1993).

137. *Id.* at 266–74.

138. *Id.* at 271–74 (footnote omitted).

In these cases, the Court reasoned that even though only women may become pregnant or undergo an abortion, real reproductive differences between the sexes may justify laws and regulations that directly impact pregnant women.¹³⁹ Abortion restrictions are not gender-based classifications because they do not regulate women as a class, but only women who are pregnant.¹⁴⁰ Women who are not pregnant are not affected by abortion restrictions. It is true that only women can become pregnant, but the target of abortion restrictions is pregnancy, "an objectively identifiable physical condition with unique characteristics."¹⁴¹ Thus, legislative classifications based on pregnancy are analyzed under rational basis review.¹⁴²

Cass Sunstein, a constitutional law scholar and abortion advocate, has acknowledged the impossibility of overcoming this reasoning: "A denial of equality means a refusal to treat the similarly situated similarly. With respect to the capacity to become pregnant, women and men are not similarly situated. An equality argument is therefore unavailable."¹⁴³ Sunstein has suggested that one way around this argument is for the Court to stop taking into consideration the physical differences between men and women.¹⁴⁴ He and other

[W]e have said that "a value judgment favoring childbirth over abortion" is proper and reasonable enough to be implemented by the allocation of public funds, and Congress itself has, with our approval, discriminated against abortion in its provision of financial support for medical procedures. This is not the stuff out of which a[n] . . . "invidiously discriminatory animus" is created.

Id. at 274 (citations omitted).

139. *Cf. Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring).

[W]hile detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot.

. . . Gender-based classifications may not be based . . . upon archaic assumptions about the proper roles of the sexes. But we have recognized that in certain narrow circumstances men and women are *not* similarly situated . . . and a legislative classification realistically based upon those differences is not unconstitutional.

Id. (citations omitted).

140. *See supra* note 135 and accompanying text.

141. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

142. *See id.* at 496 n.20.

143. Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 42 (1992).

144. *Id.* at 43–44.

abortion advocates have argued that pregnancy is a social disability¹⁴⁵ and that abortion restrictions are based on traditional, and constitutionally impermissible, views about women's role in society.¹⁴⁶

Such an argument, however, is essentially an illogical policy argument lacking any basis in the language and meaning of the Constitution.¹⁴⁷ First of all, it is impossible to reasonably argue that the right to abortion impacts women alone.¹⁴⁸ Regardless of whether the Court will treat an unborn child as a person for purposes of the Equal Protection Clause,¹⁴⁹ the unborn child is still a living human being¹⁵⁰ whose life is worthy of protection.¹⁵¹ The state has a compelling interest in protecting such human life, which would trump any liberty or equality interest of the unborn child's mother.¹⁵²

145. *Id.*

146. *See, e.g., id.*; Siegel, *supra* note 7, at 267–68.

147. Paulsen, *supra* note 23, at 1009 n.35 (describing equal protection arguments for abortion as “policy arguments dressed in quasi-constitutional clothing”).

148. John Hart Ely, a constitutional scholar and abortion advocate, recognized that “more than the mother's own body is involved in a decision to have an abortion; a fetus may not be a ‘person in the whole sense,’ but it is certainly not nothing.” Ely, *supra* note 6, at 931.

149. For a discussion of the personhood of the unborn under the Fourteenth Amendment, see generally Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119 (2007).

150. Science proves that human life begins at conception. RONAN O'RAHILLY & FABIOLA MÜLLER, *HUMAN EMBRYOLOGY AND TERATOLOGY* 8 (2d ed. 1996) (“Although [human] life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed.”). The Supreme Court itself has begun to acknowledge that the life of an unborn child is at stake in an abortion procedure. *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1633 (2007) (“[T]he State may use its regulatory power . . . in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, *including life of the unborn.*” (emphasis added)).

151. A plethora of law review articles prove this point. *See, e.g.,* Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 338, 341–44 (1993); Lugosi, *supra* note 149, at 122, 129–30, 133, 201, 273–75; Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death*, 48 ST. LOUIS U. L.J. 425, 470–74 (2004); Paulsen, *supra* note 23, at 1014–22; Mark Trapp, *Created Equal: How the Declaration of Independence Recognizes and Guarantees the Right to Life for the Unborn*, 28 PEPP. L. REV. 819, 823–31 (2001); Tracy Leigh Dodds, Note, *Defending America's Children: How the Current System Gets It Wrong*, 29 HARV. J.L. & PUB. POL'Y 719, 736–39 (2006); Paolo Torzilli, Note, *Reconciling the Sanctity of Human Life, the Declaration of Independence, and the Constitution*, 40 CATH. LAW. 197, 216–26 (2000).

152. Professor Michael Stokes Paulsen had this to say:

[S]urely there is a “compelling” or “subordinating” state interest in protecting human life, at all stages, from being killed by other human beings.

. . . That interest trumps any claim of “liberty” to commit such a killing [of a preborn human being], under any sensible analysis.

Second, the Court has repeatedly emphasized that the state has a legitimate interest in protecting fetal life and promoting maternal health¹⁵³ and in ensuring that abortion restrictions do not aim to invidiously discriminate against women.¹⁵⁴ *Roe* itself asserts that statutes banning abortion were enacted in the nineteenth century largely because the medical profession recognized that life begins at conception.¹⁵⁵ Indeed, even the feminists who were fighting for women's equality when the majority of criminal abortion statutes were enacted opposed abortion.¹⁵⁶ Furthermore, *Roe* unequivocally states that two of the factors that motivated states to enact criminal abortion statutes in the nineteenth century were to protect women from a hazardous procedure and to protect prenatal life—precisely the two state interests the Court has, since *Roe*, time and again recognized as legitimate.¹⁵⁷

IV. A FEMINIST CASE *AGAINST* ABORTION

Without constitutional or precedential support for using the Equal Protection Clause as a safe haven for the right to abortion, the argument to analyze abortion restrictions under heightened scrutiny of the Equal Protection Clause is essentially an unreasonable policy

... One can torture the provisions of the Constitution for pages, desperately attempting to generate an argument that supplies a presumptive liberty or equality interest in avoiding pregnancy, but that interest must yield in almost every circumstance if what is in the mother's womb is an actual human life.

Michael Stokes Paulsen, *Michael Stokes Paulsen (dissenting)*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 9, at 196, 208.

153. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“[W]e reaffirm . . . the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.”); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (“[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.”).

154. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 n.4 (1993) (“The approach of equating opposition to an activity (abortion) that can be engaged in only by a certain class (women) with opposition to that class leads to absurd conclusions. On that analysis, men and women who regard rape with revulsion harbor an invidious antimale animus.”).

155. *Roe*, 410 U.S. at 141–42. In 1857, the American Medical Association adopted resolutions protesting “against such unwarrantable destruction of human life” and called on state legislatures to change their laws to protect the lives of the unborn. *Id.* at 142 (internal quotation marks omitted).

156. *See infra* notes 163–69 and accompanying text.

157. *Roe*, 410 U.S. at 148–50.

argument.¹⁵⁸ The main thrust of the “equality” argument for abortion is that abortion is necessary for women to “enjoy equal citizenship stature.”¹⁵⁹ Yet in the thirty-five years since *Roe* legalized abortion, it has become abundantly clear that legal abortion denigrates—not elevates—women’s status in society by physically and psychologically harming women who have abortions and by providing an excuse for society not to deal with the real reasons women feel they cannot keep their child.¹⁶⁰ The abortion advocates’ focus on pregnancy as a burden only women bear—rather than a miracle only women can experience—perverts the spirit of feminism and denies the reality of unborn life in the womb. It also excludes males from the equation, who must be held accountable for the child they helped to create. Furthermore, their argument is impossible to justify for the simple reason that many women do not consider abortion their right, and in fact, believe it is degrading to women.¹⁶¹ More and more women who have had abortions are speaking out about the physical, emotional, and psychological trauma they have experienced as a result of their abortion procedures.¹⁶²

Although modern abortion advocates contend that abortion is necessary for women’s equality, the original feminists viewed abortion as anti-woman. In her publication, *The Revolution*, Susan B. Anthony denounced abortion as detrimental to women:

158. Paulsen, *supra* note 23, at 1009 n.35. This section highlights feminist arguments *against* abortion. These arguments are policy arguments, not constitutional arguments. I include them in this Note, however, because abortion advocates use policy in attempt to change the Court’s constitutional analysis of legislative classifications based on pregnancy. Even if I were to agree that policy should be used to trump the Constitution, which I do not, these policy arguments are still inherently flawed.

159. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting).

160. One study found that the two most common reasons for deciding to have an abortion are financial constraints and lack of partner support. Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110, 112–13 (2005), available at <http://www.guttmacher.org/pubs/psrh/full/3711005.pdf>.

161. For example, Feminists for Life of America is one of many women’s organizations propounding the view that abortion is anti-woman: “[A]bortion is a reflection that our society has failed to meet the needs of women Women deserve better than abortion.” Feminists for Life of America, *Mission Statement*, AM. FEMINIST, Summer–Fall 2004, at 2, 2, available at <http://www.feministsforlife.org/taf/2005/PWA2005.pdf>.

162. For example, the Silent No More Awareness Campaign, an organization that seeks to expose and heal the physical and emotional pain of abortion, has collected hundreds of signatures of women who regret their abortions. Silent No More Awareness Campaign, *We Regret Our Abortions*, <http://www.silentnomoreawareness.org/signaturead/ad.pdf> (last visited Oct. 23, 2008).

Guilty? Yes, no matter what the motive, love of ease, or a desire to save from suffering the unborn innocent, the woman is awfully guilty who commits the deed. It will burden her conscience in life, it will burden her soul in death; but oh! thrice guilty is he who . . . drove her to the desperation which impelled her to the crime.¹⁶³

Elizabeth Cady Stanton considered abortion a form of "infanticide."¹⁶⁴ She adamantly opposed abortion, writing, "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit."¹⁶⁵ Most significantly, an editorial from the newspaper that she edited identified women's equality as a means of *ending* abortion: "There must be a remedy even for such a crying evil as [abortion]. But where shall it be found, at least where [shall it] begin, if not in the complete enfranchisement and elevation of women?"¹⁶⁶ Victoria Woodhull, the first female presidential candidate, was a strong advocate for the right to life of the unborn.¹⁶⁷ She, too, believed abortion hurt women's equality: "Every woman knows that if she were free she would never bear an unwished-for child, nor think of murdering one before its birth."¹⁶⁸ Finally, Alice Paul, the author of the original Equal Rights Amendment ("ERA"), opposed the later development linking the ERA and abortion.¹⁶⁹

163. Susan B. Anthony, *Marriage and Maternity*, REVOLUTION, July 8, 1869, at 4. Susan B. Anthony referred to abortion as "child-murder" and proclaimed, "We want *prevention*, not merely punishment. We must reach the *root* of the evil . . ." *Id.* She believed abortion was "practiced by those whose inmost souls revolt from the dreadful deed." *Id.*

164. Elizabeth Cady Stanton, *Infanticide and Prostitution*, REVOLUTION, Feb. 5, 1868, at 65.

165. Feminists for Life of America, *Feminist History: Voices of Our Feminist Foremothers*, <http://feministsforlife.org/history/foremoth.htm> (last visited Oct. 6, 2008) (quoting Letter from Elizabeth Cady Stanton to Julia Warde Howe (Oct. 16, 1873), recorded in Howe's diary at Harvard University Library).

166. Editorial, *Child Murder*, REVOLUTION, Mar. 12, 1868, at 146.

167. Feminists for Life of America, *The Voice of Our Feminist Foremothers*, AM. FEMINIST, Spring 2005, at 12, 12-13, available at <http://www.feministsforlife.org/taf/2005/PWA2005.pdf>. Woodhull insisted that "[t]he rights of children . . . as individuals begin while yet they remain the foetus." *Id.* (quoting Editorial, *Children—Their Rights, Privileges and True Relations to Society*, WOODHULL & CLAFLIN'S WKLY., Dec. 24, 1870, at 4). Editor's Note: The Woodhull quotation in the footnote text has been reproduced here precisely as it was originally published in 1870.

168. Editorial, EVENING STANDARD (Wheeling, W. Va.), Nov. 17, 1875, reprinted in THE HUMAN BODY: THE TEMPLE OF GOD, at 469, 470 (Victoria Claflin Woodhull & Tennessee C. Claflin eds., London 1890).

169. Feminists for Life of America, *supra* note 167, at 13. "A colleague recalls her saying, 'Abortion is the ultimate exploitation of women.'" *Id.*

As these women recognized, abortion is inherently anti-feminist because it violates the central tenets of feminism: nonviolence, nondiscrimination, and justice for all.¹⁷⁰ Early feminists fought against male oppression, yet pro-abortion feminists today are oppressing the unborn in the worst way. Abortion advocates' justifications for a woman's decision to place her interests above the life of her unborn child, such as her own superiority of size, intellect, need, or value as a person, are the same justifications men gave for denying women equal rights.¹⁷¹ There was a time when women were treated as men's property, and their value was determined by whether men wanted them.¹⁷² Thus, it is repulsive to feminist ideals to say that an unborn child is the property of his or her mother and to allow a child's life to depend on whether or not the mother wants her child.¹⁷³

Abortion advocates fail to take into account that abortion denies unborn females the equal protection of the law.¹⁷⁴ In an increasing trend of sex-selective abortion, female unborn children are aborted

170. Feminists for Life of America, *You're a Feminist?*, AM. FEMINIST, Spring 2005, at 11, 14, available at <http://www.feministsforlife.org/taf/2005/PWA2005.pdf>.

171. Natalie Nardelli, *Finding a Home in Today's Feminism*, AM. FEMINIST, Spring 2004, at 14, 15–16, available at <http://www.feministsforlife.org/taf/2004/spring/Spring04.pdf>.

172. Justice Ginsburg spoke to a similar point in her dissenting opinion in *Carhart. Gonzales v. Carhart*, 127 S. Ct. 1610, 1649 (2007) (Ginsburg, J., dissenting) (rehearsing language from two Supreme Court opinions to demonstrate that women were once viewed as unfit for many of life's occupations).

173. Nardelli, *supra* note 171, at 18.

174. Unborn female children are being killed at a higher rate than their male counterparts. The following is the story of one little girl, now grown to adulthood:

My name is Gianna Jessen

. . . I am 23 years old. I was aborted and I did not die. My biological mother was 7½ months pregnant when she went to Planned Parenthood in southern California and they advised her to have a late-term saline abortion.

A saline abortion is a saline salt solution that is injected into the mother's womb. The baby then gulps the solution, it burns the baby inside and out, and then she is to deliver a dead baby within 24 hours.

Ladies and gentlemen, this happened to me. . . .

I remained in the solution for approximately 18 hours and was delivered alive on April 6, 1977, at 6:00 a.m. in a southern California abortion clinic. There were young women in the room that had already been given their injections and were waiting to deliver dead babies. When they saw me, they experienced the horror of murder. . . .

. . . .

. . . Due to a lack of oxygen supply during the abortion, I live with cerebral palsy.

Born-Alive Infants Protection Act of 2000: Hearing on H.R. 4292 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. 23–24 (2000) (testimony of Gianna Jessen).

purely on the basis of their gender.¹⁷⁵ This reveals the inconsistency of pro-abortion feminism: condemning sex-selective abortion as an acknowledgement that there is a living female baby inside the mother's womb, while accepting that sex-selective abortion tolerates a preference for male children over female children.¹⁷⁶

Abortion is also a threat to women's equality because it facilitates pregnancy discrimination.¹⁷⁷ Pro-life feminist Daphne Clair de Jong equated abortion with the continued subjugation of women when she wrote, "To say that in order to be equal with men it must be possible for a pregnant woman to become un-pregnant at will is to say that being a woman precludes her from being a fully functioning person."¹⁷⁸ No other oppressed group has ever needed surgery to become un-oppressed.¹⁷⁹ The very idea suggests that women's bodies are inferior to men's, and must be fixed in order to enjoy the equal protection of the law. This is not a feminist argument. A truly feminist position recognizes the natural, physical differences between men and women, and seeks equality for women based on these differences, rather than by pretending they do not exist.

To garner support for legalizing abortion, abortion advocates falsely claimed that millions of women died from illegal back-alley abortions.¹⁸⁰ More than three decades after *Roe* legalized abortion, thousands of women are injured by abortion every year and some of them die.¹⁸¹ This is not surprising considering the substandard

175. For a discussion on sex-selective abortion in America, see William Saletan, *Sexual Satisfaction: Abortion and Your Right to Accurate Sex Selection*, SLATE, Feb. 25, 2008, <http://www.slate.com/id/2185090/>.

176. See Paulsen, *supra* note 152, at 206 (pointing out the irony and hypocrisy revealed by sex-selective abortion).

177. See Nardelli, *supra* note 171, at 16 ("Those who advocate legal abortion concede that pregnant women are intolerably handicapped; they cannot compete in a male world of wombless efficiency. Rather than changing the world to accommodate the needs of pregnant women and mothers, pro-abortion feminists encourage women to fit themselves neatly into a society designed by and for men." (quoting Rosemary Bottcher)).

178. *Id.* (quoting Daphne Clair de Jong).

179. *Id.* at 18.

180. Dr. Bernard Nathanson, one of the founders of the National Association for the Repeal of the Abortion Laws (NARAL), lied about the number of women dying from illegal abortions to gain support for legalized abortion. He later admitted, "The number of women dying [from illegal abortions was around 200–250 annually. The figure constantly fed to the media was 10,000." Bernard Nathanson, *Confessions of an Ex-Abortinist*, <http://www.catholiceducation.org/articles/abortion/ab0005.html> (last visited Oct. 23, 2008).

181. Denise M. Burke, *Abortion Clinic Regulation: Combating the True "Back Alley,"* in *THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION* 122, 126 (Erika Bachiochi ed., 2004) [hereinafter *THE COST OF "CHOICE"*]. One commentator added this insight:

conditions in America's abortion clinics.¹⁸² It is particularly outrageous that in some states, veterinary clinics are more regulated than abortion clinics.¹⁸³ Though many state legislators have worked to pass laws regulating abortion clinics to protect women's health, abortion advocates have stood in their way.¹⁸⁴ Such "restrictive" standards include: "maintaining a smoke-free and vermin-free environment, properly sterilizing instruments and having resuscitation equipment and drugs necessary to support cardiopulmonary function readily available in treatment and recovery rooms."¹⁸⁵ It is quite contradictory, considering that abortion advocates claim to be concerned with keeping abortion *safe* and legal, that they would oppose the minimum standards that the abortion industry itself developed.¹⁸⁶ Thus, it appears that abortion advocates are more concerned with women having access to abortion than ensuring that abortion is safe for women.

Even if abortion clinics met minimum health and safety standards, however, women would still be harmed by abortion because it is an inherently dangerous and invasive procedure. Long-term risks associated with abortion include breast cancer,¹⁸⁷ placenta previa, pre-term birth, suicide, and a higher mortality rate in the year following an abortion as compared with the mortality rate either of women in the year after childbirth or of the general non-pregnant population.¹⁸⁸ Other physical risks of abortion procedures are uterine perforation,

The number of women dying from legal abortions is probably several times what it was when abortion was illegal. For many compelling reasons, deaths resulting from illegal abortion were accurately reported on death certificates. Independent studies have confirmed this. But ever since 1973, whenever a legal abortion results in a maternal death the underlying cause is often, and perhaps usually, ignored or disguised on death certificates.

David C. Reardon, *Illegal Abortions: The Myth and the Cure*, POST-ABORTION REV., Oct.-Dec. 1999, at 1, 1.

182. Burke, *supra* note 181, at 123-24.

183. Denise M. Burke, *Abortion Clinic Regulations: Combating "Back Alley" Abortions*, AM. FEMINIST, Winter 2002-2003, at 4, 5, available at <http://www.feministsforlife.org/taf/2002/Winter%2002-03/Winter02-03.pdf>.

184. *Id.*

185. *Id.*

186. *Id.* at 6.

187. Angela Lanfranchi, *The Abortion-Breast Cancer Link: The Studies and the Science*, in THE COST OF "CHOICE," *supra* note 181, at 72, 73.

188. Elizabeth M. Shadigian, *Reviewing the Evidence, Breaking the Silence: Long-Term Physical and Psychological Health Consequences of Induced Abortion*, in THE COST OF "CHOICE," *supra* note 181, at 63, 70.

cervical lacerations, complications of labor, handicapped newborns in later pregnancies, ectopic pregnancy, pelvic inflammatory disease, endometritis, and a lower general health.¹⁸⁹ Serious complications that can immediately result from an abortion include infection, excessive bleeding, embolism, ripping or perforation of the uterus, anesthesia complications, convulsions, hemorrhage, cervical injury, and endotoxic shock.¹⁹⁰

Although women may initially feel a sense of relief following an abortion, these feelings are quickly replaced with feelings of guilt, nervous disorders, sleep disturbance, and regrets about the decision.¹⁹¹ Many women experience immense grief after an abortion, which leads to other serious mental health problems.¹⁹² Psychological risks of abortion include post-traumatic stress disorder, sexual dysfunction, suicidal ideation and suicide attempts, increased smoking, alcohol abuse, drug abuse, eating disorders, child neglect or abuse, divorce and chronic relationship problems, and repeat abortions.¹⁹³ Abortion advocates have consistently challenged informed consent laws that are meant to inform women of these risks.¹⁹⁴ The abortion advocates' argument against such laws is that their true purpose is to dissuade women from having an abortion.¹⁹⁵ By refusing to acknowledge that women have a right to know about the physical and psychological risks associated with abortion, abortion advocates reveal that they are truly pro-abortion, not pro-woman.

Legal abortion has allowed society to neglect the real reasons women seek abortions. Most women, if they felt they had options, would choose to give life to their children, rather than abort them.¹⁹⁶ Accepting abortion as a short-term solution delays real reform for

189. David C. Reardon, *A List of Major Physical Sequelae Related to Abortion* (2000), <http://www.afterabortion.info/physica.html>.

190. *Id.*

191. David C. Reardon, *A List of Major Psychological Sequelae of Abortion* (1997), <http://www.afterabortion.info/psychol.html>.

192. E. Joanne Angelo, *Psychiatric Sequelae of Abortion: The Many Faces of Post-Abortion Grief*, *LINACRE Q.*, May 1992, at 69, 70–71.

193. Reardon, *supra* note 191.

194. Denise M. Burke, *Undermining Your Right to Know*, *AM. FEMINIST*, Winter 2002–2003, at 21, 22, available at <http://www.feministsforlife.org/taf/2002/Winter%2002-03/Winter02-03.pdf>.

195. *Id.*

196. See Frederica Mathewes-Green, *Seeking Abortion's Middle Ground: Why My Pro-Life Allies Should Revise Their Self-Defeating Rhetoric*, *WASH. POST*, July 28, 1996, at C1 ("No one wants an abortion as she wants an ice-cream cone or a Porsche. She wants an abortion as an animal, caught in a trap, wants to gnaw off its own leg.").

women, such as decent pay during maternity leave, improved job security, and quality childcare.¹⁹⁷ It also enables men to escape responsibility for their actions, leading some men to deny responsibility for helping women who decide not to abort.¹⁹⁸ Notably, prominent abortion activists Kate Michelman and Frances Kissling recently recognized that abortion advocates have failed to address tough questions such as “why women get pregnant when they don’t want to have babies.”¹⁹⁹ True equality for women will not require a choice between the life of a child and finishing an education or continuing a career.²⁰⁰ In the words of early feminist Sarah Norton, “Perhaps there will come a time when . . . an unmarried mother will not be despised because of her motherhood . . . and when the right of the unborn to be born will not be denied or interfered with.”²⁰¹

CONCLUSION

There is no question that *Roe v. Wade* stands on questionable constitutional and precedential grounds. Even abortion advocates have criticized *Roe* for failing to provide an adequate basis for the right to abortion. The lack of foundation for the right to abortion and continued public opposition to *Roe* will inevitably cause the decision to be overturned or, at the very least, ignored by the Court. The pressing issue is what happens to the right to abortion when the

197. Nardelli, *supra* note 171, at 16.

Abortion is the destruction of human life and energy that does nothing to eradicate the very real underlying problems of women. The pregnant welfare mother begs for decent housing, a decent job and child-care or respect for her child-nurturing work. Instead, she gets directions to the local abortion clinic and is told to take care of “her problem.” How convenient. Much less time and trouble than teaching her about authentic reproductive freedom and reproductive responsibility. Much cheaper than attending to her real problems: her poverty, her lack of skills, her illiteracy, her loneliness, her bitterness about her entrapment, her self-contempt, her vulnerability. After the abortion these problems will all be there

Id. (quoting Cecelia Voss Koch).

198. An example of this attitude is the so-called men’s *Roe v. Wade* case, where the National Center for Men claimed that men should be able to opt out of financial responsibility in the event of an unexpected pregnancy. See CBSNews.com, ‘*Roe v. Wade for Men’ Suit Filed*, Mar. 9, 2006, <http://www.cbsnews.com/stories/2006/03/09/national/main1385124.shtml>.

199. Frances Kissling & Kate Michelman, Editorial, *Abortion’s Battle of Messages*, L.A. TIMES, Jan. 22, 2008, at A19.

200. See Serrin M. Foster, *A Feminist Case Against Abortion, in THE COST OF “CHOICE,” supra* note 181, at 33, 38.

201. Sarah F. Norton, *Tragedy-Social and Domestic*, WOODHULL & CLAFLIN’S WKLY., Nov. 19, 1870, at 10.

abortion issue is finally returned to the people. Having anticipated this dilemma, abortion advocates have argued for the Equal Protection Clause to save the right to abortion.

Justice Ginsburg, for one, has championed the Equal Protection Clause as a means of constitutionally protecting the right to abortion, and her extreme pro-abortion agenda in the Supreme Court is evident. First, she wants to do away with the intermediate scrutiny standard for gender-based classifications and replace it with a strict scrutiny standard.²⁰² Furthermore, she wants restrictions on abortion to be considered gender-based classifications, despite the long-standing precedent that differential treatment of pregnant women is not a gender-based classification. Finally, she wants the Court to review abortion restrictions under a strict scrutiny standard—the least deferential treatment the Court affords to statutes—which would enable the Court to more easily strike down restrictive abortion statutes. This scheme would completely deny states the ability to regulate abortion to protect maternal health and promote prenatal life—rights that *Roe* recognized and *Casey* sought to preserve.²⁰³ In fact, *Roe* implicitly addressed Justice Ginsburg's argument and rejected the notion that concern for a woman's autonomy would make her right to an abortion absolute:

On the basis of elements such as these, [abortion advocates] argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. [Their] arguments that [the state] either has no valid interest at all in regulating the abortion decision, or no interest strong enough to

202. In *United States v. Virginia*, Justice Ginsburg, who authored the opinion, used "exceedingly persuasive" throughout the opinion to describe the intermediate scrutiny standard, which made it appear to be a stricter standard than what the Court had previously used in sex equality cases. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996). However, the Court has never held that laws discriminating on the basis of sex are subject to the same strict scrutiny standard as racial classifications. Jeffrey Rosen, *Jeffrey Rosen (dissenting)*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 9, at 170, 181. Constitutional scholars, such as Judge Bork, have pointed out that the framers of the Fourteenth Amendment never contemplated that "racial and sexual groups needed special protection to the same degree." BORK, *supra* note 4, at 66 n.*; see also Brief Amicus Curiae of Life Issues Institute Supporting Respondents/Cross-Petitioners at *3–4, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-774, 91-902), 1992 WL 12006426.

203. See *supra* note 153 and accompanying text.

support any limitation upon the woman's sole determination, are unpersuasive.²⁰⁴

Thus, Justice Ginsburg's plan would give the Court more power than even *Roe* and *Casey* could justify.

Despite the number of law review articles making arguments for using the Equal Protection Clause in this way, Justice Ginsburg's plan cannot and will not work. The Court has considered equal protection claims in abortion funding and clinic regulation cases and rejected such claims in every instance.²⁰⁵ On this front, the Court has merely acknowledged women's equality concerns, but it has never even mentioned the Equal Protection Clause as a possible constitutional protection for the right to abortion. Thus, there is no precedent in abortion law for using the Equal Protection Clause to analyze abortion restrictions.

As a result, abortion advocates have countered that the Court should bring abortion law into line with the sexual equality cases, which struck down invidious gender-based classifications of women similarly situated with men. But the sex equality cases provide no precedential basis for the Court to find a constitutional right to abortion in the Equal Protection Clause. Furthermore, the Court has already ruled that a classification based on pregnancy does not constitute a gender-based classification under the Equal Protection Clause.²⁰⁶ Thus, abortion restrictions cannot be analyzed in equal protection terms under anything more scrutinizing than rational basis review.

Without a constitutional or precedential basis for their arguments, the abortion advocates' only option is to make a policy argument for a departure from precedent. But as this Note proves, legal abortion has actually lowered the status of women in society, rather than elevating it as the abortion advocates claim. Legal abortion harms women and forces them to deny what is uniquely female: the ability to bring a new life into the world. Instead of focusing on turning women into men, that is, making women "un-pregnant" through an abortion procedure, the abortion movement should seek to make women truly equal by finding ways to elevate the status of pregnant women in society.

204. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

205. *See supra* Part II.A–B.

206. *See supra* Part III.B.

The abortion advocates' arguments for using the Equal Protection Clause as a basis for the right to abortion parallel the same shortcomings they have acknowledged regarding *Roe*: they lack analysis, precedent, and basis in the Constitution. The difference is that analyzing abortion statutes under strict or heightened scrutiny would afford the abortion movement greater power than *Roe* and *Casey* provided, envisioned, or justified. Eventually, *Roe v. Wade* will fall, and the abortion movement cannot, in a constitutionally sound and defensible way, "save" the right to abortion through the Equal Protection Clause.