ON ACCOUNT OF SEX: HOW MASSACHUSETTS'S EQUAL RIGHTS AMENDMENT CAN PROTECT CHOICE

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I. INTRODUCTION

With the death of Supreme Court Justice Antonin Scalia in 2016 and the inauguration of President Donald Trump in 2017, the composition of the U.S. Supreme Court has become an increasingly contentious political issue.[1] Additionally, Justice Anthony Kennedy announced his retirement in

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[1] Jeff Greenfield, *How the Supreme Court Became a Hot-Button Issue*, POLITICO MAG.: HIST. DEP'T. (Feb. 14, 2016), https://www.politico.com/magazine/story/2016/02/antonin-

June 2018, and Justice Ruth Bader Ginsburg is expected to leave the Court in the near future.[2] As a result, the issue of protecting a woman's right to choose an abortion is once again in the national spotlight.[3] Throughout his 2016 presidential campaign, then-candidate Donald Trump promised that he would nominate Justices to the Supreme Court who fit Justice Scalia's "mold."[4] On January 10, 2017, President Trump nominated Judge Neil Gorsuch from the U.S. Court of Appeals for the Tenth Circuit to fill the Supreme Court seat left vacant after Justice Scalia's death in 2016.[5] While

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scalia-supreme-court-history-politics-213634 (arguing that Justice Scalia's death raised the stakes for the 2016 election); Jennifer Haberkorn, *Abortion foes seize on chance to overturn Roe*, POLITICO (Apr. 15, 2018, 6:59 AM), https://www.politico.com/story/2018/04/15/abortion-trump-supreme-court-roe-wade-473601 ("From Iowa to South Carolina, lawmakers are proposing some of the most far-reaching abortion restrictions in a generation, hoping their legislation triggers the lawsuit that eventually makes it to the high court."); Doug McKelway, *Rumors of possible Supreme Court vacancy could fire up Republican base, experts say*, FOX NEWS (Mar. 12, 2018), http://www.foxnews.com/politics/2018/03/12/rumors-possible-supreme-court-vacancy-could-fire-up-republican-base-experts-say.html.

[2] Joan Biskupic, *Supreme Court still feeling the impact of Antonin Scalia's death*, CNN: POL. (Feb. 13, 2018, 10:46 AM), https://www.cnn.com/2018/02/13/politics/scalia-gorsuch-supreme-court/index.html; Chris Kirk & Stephen Laniel, *Grim Math: Calculating the odds that another Supreme Court justice will die by 2012*, SLATE (Feb. 26, 2016, 3:13 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/the_odds_of_another_supreme_court_ justicedying.html; Adam Liptak, *Will Anthony Kennedy Retire? What Influences a Justice's Decision*, N.Y. TIMES: SIDEBAR (Feb. 19, 2018, 3:13 PM), https://www.nytimes.com/2018/02/19/us/politics/anthony-kennedy-retirement.html; Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire,* N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html.

[3] Anna North, *How Trump helped inspire a wave of strict new abortion laws*, VOX (Mar. 22, 2018, 5:09 PM), https://www.vox.com/2018/3/22/17143454/trump-abortion-ban-mississippi-clinic-roe-v-wade.

[4] Andrew Chung, *Trump Supreme Court nominee Gorsuch seen in the mold of Scalia*, REUTERS (Jan. 31, 2017, 10:16 PM), https://www.reuters.com/article/us-usa-court-trump-gorsuch-newsmaker/trump-supreme-court-nominee-gorsuch-seen-in-the-mold-of-scalia-idUSKBN15G381; Barry Friedman, *How Did Justice Scalia Shape American Policing?*, ATLANTIC: POL. (Aug. 20, 2016), https://www.theatlantic.com/politics/archive/2016/08/scalia-and-american-policing/496604/; James Hohmann, *The Daily 202: Thwarted in Washington, the Koch network racks up conservative victories in the states*, WASH. POST: POWERPOST (June 27, 2017), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/06/27/daily-202-thwarted-in-washington-the-koch-network-racks-up-conservative-victories-in-the-states/5951647ce9b69b2fb981de5d/?utm_term=.6b75699b4921.

[5] Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html.

he has never ruled directly on an abortion rights case, Justice Gorsuch is an originalist—meaning that his reading of the Constitution, like Justice Scalia's, does not include the constitutional right to an abortion.[6] With Justice Kennedy's June 2018 retirement announcement, President Trump had the chance to nominate a second Supreme Court Justice, leading many to fear that *Roe v. Wade*, the case most recognized for protecting choice, could be in jeopardy.[7] President Trump's second nominee, U.S. Court of Appeals for the District of Columbia Circuit Judge Brett Kavanaugh, is arguably more controversial than Justice Gorsuch.[8] Since his nomination was announced, there has been considerable media coverage and speculation regarding how Justice Kavanaugh may rule on a number of contentious issues, including abortion and *Roe v. Wade*.[9] While Justice Gorsuch had a relatively light paper trail regarding the abortion issue, then-Judge Kavanaugh had a fairly heavy record, pointing largely to an anti-abortion agenda that could weaken *Roe* and its progeny.[10]

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[6] Carter Sherman, *Neil Gorsuch just gave the first glimpse of how he might rule on abortion issues*, VICE NEWS (Mar. 20, 2018), https://news.vice.com/en_us/article/gymp4b/how-will-neil-gorsuch-rule-on-abortion-issues-in-national-institute-of-family-and-life-advocates-v-becerra; Ariane de Vogue, *Neil Gorsuch on the issues*, CNN: POL. (Mar. 20, 2017, 7:11 AM), https://www.cnn.com/2017/03/20/politics/neil-gorsuch-abortion-religious-liberty-environment-gun-control/index.html.

[7] Daniel K. Williams, *Could Trump End the Culture Wars?*, N.Y. TIMES: OPINION (Nov. 8, 2016, 9:30 PM), https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/could-trump-end-the-culture-wars ("And while Mr. Trump stumbled over abortion during his campaign, the policy that he ultimately reverted to was to leave abortion legalization up to the states—an outcome that he would try to ensure by nominating conservative Supreme Court justices who might overturn Roe v. Wade.").

[8] *See* Domenico Montanaro, *Who Is Brett Kavanaugh, President Trump's Pick For The Supreme Court?*, NPR (Jul. 9, 2018, 9:06 PM), https://www.npr.org/2018/07/09/626164904/who-is-brett-kavanaugh-president-trumps-pick-for-the-supreme-court; Nathaniel Rakich, *Brett Kavanaugh Is Polling Like Robert Bork And Harriet Miers*, FIVETHIRTYEIGHT (July 18, 2018, 1:15 PM), https://fivethirtyeight.com/features/brett-kavanaugh-is-polling-like-robert-bork-and-harriet-miers/amp (showing that early polls indicated Brett Kavanaugh as one of the most unpopular Supreme Court nominees in recent history).

[9] *See, e.g.*, Carole Joffe, *With the appointment of Brett Kavanaugh,* Roe v. Wade *is likely dead*, WASH. POST (July 10, 2018), https://www.washingtonpost.com/news/made-by-history/wp/2018/07/10/with-the-appointment-of-brett-kavanaugh-roe-v-wade-is-likely-dead/?utm_term=.bf051b8f5a60; Mark Joseph Stern, *How Brett Kavanaugh Will Gut* Roe v. Wade, SLATE.COM: JURIS. (July 9, 2018, 9:56 PM), https://slate.com/news-and-politics/2018/07/how-brett-kavanaugh-will-gut-roe-v-wade.html.

[10] Tessa Stuart, *Here's What Brett Kavanaugh Has Said About* Roe v. Wade, ROLLING STONE: POL. (July 13, 2018, 8:00 AM), https://www.rollingstone.com/politics/politics-features/brett-kavanaugh-roe-v-wade-697634/. For example, in 2017, Judge Kavanaugh voted against the majority in a case involving an undocumented seventeen-year-old who was

As a sovereign state, Massachusetts has the authority to be more protective of individual liberties and more restrictive of state power in making gender-based classifications than the federal government.[11] The Massachusetts Supreme Judicial Court ("SJC") has asserted this prerogative in several areas, including its conception of fundamental rights and equal protection.[12] Massachusetts considers abortion a fundamental right included under the umbrella of bodily integrity, which is covered by state rights to personal privacy.[13] To this end, Massachusetts adopted an Equal Rights Amendment ("ERA") in 1976 that identified sex as a suspect class for equal protection purposes.[14]

This article addresses if and how Massachusetts's ERA can protect a woman's right to choose an abortion when the federal Constitution cannot. First, this article will discuss the history of abortion access over the past 150 years, including abortion access in the United States generally, and then specifically at the federal level and at the Massachusetts state level. Second, this article will contrast failed efforts to ratify the ERA at the federal level with the success of the ERA in Massachusetts and discuss how Massachusetts's SJC has ruled on women's rights since adopting its own ERA in the 1970s. This article will also explain the level of judicial scrutiny typically applied to gender discrimination cases in both Massachusetts and federal courts. Finally, this article will argue that Massachusetts can protect a woman's right to seek an abortion under its ERA, as federal protections are the floor, not the ceiling, for gender-based discrimination.

II. LEGAL BACKGROUND

A. *History of Abortion Access*

Since the 1980s, attacks on abortion access have become increasingly effective, with many state legislatures and courts severely restricting and, in some cases, eliminating access to women's health clinics.[15] While efforts

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arrested while crossing the U.S.-Mexico border, discovered she was pregnant, and decided to seek an abortion. *See* Garza v. Hargan, 304 F. Supp. 3d 145 (D.C. Cir. 2018).

[11] *See* Michigan v. Long, 463 U.S. 1032, 1044 (1983) (finding state courts are free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions in the United States Constitution).

[12] *See* Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 401-04 (Mass. 1981).

[13] *Id.* at 400-01.

[14] MASS. CONST. amend. art. CVI.

[15] *See* Erick Eckholm, *Access to Abortion Falling as States Pass Restrictions*, N.Y. TIMES (Jan. 3, 2014), https://www.nytimes.com/2014/01/04/us/women-losing-access-to-abortion-as-opponents-gain-ground-in-state-legislatures.html ("A three-year surge in anti-abortion measures in more than half the states has altered the landscape for abortion access, with supporters and opponents agreeing that the new restrictions are shutting some clinics,

to limit access are not new, the election of President Donald Trump in 2016 has renewed the possibility that a conservative Supreme Court may overturn the landmark *Roe v. Wade* decision.[16] As such, state lawmakers and activists throughout the country have been grappling with how they can protect a woman's right to choose.[17]

1. From the Nineteenth Century to *Roe v. Wade*

When the United States was founded, abortion was not regulated in the United States. At that time, abortions were legal until the point of "quickening."[18] The popular view regarding increased access to abortion was "grounded in the female experience of their own bodies."[19] In the 1820s and 1830s, states began passing legislation regulating the sale and consumption of abortifacients, drugs which caused abortions or miscarriages.[20] These legislative regulations were likely passed in response

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threatening others and making it far more difficult in many regions to obtain the procedure."); Anita Kumar, *Virginia Senate approves contentious ultrasound bill*, WASH. POST: D.C. POL. (Feb. 28, 2012), https://www.washingtonpost.com/local/dc-politics/va-senate-approves-contentious-ultrasound-bill/2012/02/27/gIQAvhiVgR_story.html?utm_term=.48d1173e74ec; Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INSTITUTE (2013), https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-2013-state-policy-review (providing that in 2013, 70 restrictions in 22 states sought to limit access to abortion services); Julie Rovner, *Texas Abortion Fight Is Just One of More This Year*, NPR (July 12, 2013, 3:57 PM), https://www.npr.org/sections/health-shots/2013/07/12/201540563/texas-abortion-fight-is-just-one-of-many-this-year; Julie Rovner, *Restrictions on Abortion Multiply This Year*, NPR (July 14, 2011, 12:23 PM), https://www.npr.org/sections/health-shots/2011/07/14/137848984/restrictions-on-abortions-multiply-this-year.

[16] Roe v. Wade, 410 U.S. 113 (1973); Claire Suddath, *Beyond* Roe v. Wade*: Here's What Gorsuch Means for Abortion*, BLOOMBERG (Mar. 20, 2017, 5:00 AM), https://www.bloomberg.com/news/features/2017-03-20/beyond-roe-v-wade-here-s-what-gorsuch-means-for-abortion; Amelia Thomas-DeVeaux, *How Trump's Supreme Court Could Overturn* Roe. v. Wade *Without Overturning It*, FIVETHIRTYEIGHT: POL. (Feb. 2, 2017, 6:00 AM), http://fivethirtyeight.com/features/how-trumps-supreme-court-could-overturn-roe-v-wade-without-overturning-it/.

[17] *See* Olga Khazan, *How Activists Are Protecting Reproductive Rights Under Trump*, ATLANTIC: HEALTH (Jan. 25, 2017), https://www.theatlantic.com/health/archive/2017/01/protecting-reproductive-rights-state-by-state/514364/; Paris Schutz, *Illinois Lawmakers Look to Expand, Protect Abortion Rights*, CHICAGO TONIGHT: POL. (Dec. 12, 2016, 1:01 PM), http://chicagotonight.wttw.com/2016/12/12/illinois-lawmakers-look-expand-protect-abortion-rights.

[18] *Id.* at 8 (defining quickening as "the point at which a pregnant woman could feel the movements of the fetus").

[19] *Id.*

[20] *Id.* at 9.

to a proliferation of the abortifacient market and in resulting accidental fatalities for the women taking the drugs.[21]

By the end of the nineteenth century, however, individual states began to strictly limit abortion access, and most states banned abortion, except in instances where the practice was necessary to save the mother's life.[22] While laws regulating the use of abortifacients and the time period in which a woman could have an abortion operation were not initially passed to punish women, by the 1880s, in opposition to national suffrage movements, states enacted legislation criminalizing or blocking access to abortion.[23] In 1821, Connecticut became the first state to criminalize abortion, with New York joining soon thereafter.[24] Although these statutes had the effect of restricting women's access to abortions, the regulations originally targeted "those who performed abortions rather than the pregnant women who sought to have them" and were purportedly purposed to protect women and their fetuses.[25] One major problem with these restrictions was that the criminalization of abortion did not eliminate a woman's need or desire to have an abortion.[26] According to the Guttmacher Institute, in the 1950s and 1960s, as many as 1.2 million women per year had illegal abortions.[27] Poor women were even more disproportionately impacted by the criminalization of abortion.[28] Some women "with financial means had access to a safe procedure, [while] less affluent women often had few options aside from a potentially dangerous clandestine abortion."[29] As abortion was regulated more heavily, the demand for abortions remained, and women had to seek abortions illegally from the few ill-trained doctors who were willing to risk the strong legal ramifications if caught performing such procedures.[30] As a result, the number of women who suffered from complications or death due

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[21] *Id.*

[22] *See History of Abortion in the U.S.*, OUR BODIES OURSELVES: INFORMATION INSPIRES ACTION (Mar. 28, 2014), http://www.ourbodiesourselves.org/health-info/u-s-abortion-history/ (last revised May 18, 2016).

[23] REAGAN, *supra* note 18, at 14 ("Periods of antiabortion activity mark moments of hostility to female independence").

[24] Roe v. Wade, 410 U.S. 113, 138 (1973).

[25] *From Roe to Stenberg: A History of Key Abortion Rulings by the Supreme Court*, PEW RESEARCH CTR. (Jan. 17, 2008), http://www.pewforum.org/2008/01/17/from-roe-to-stenberg-a-history-of-key-abortion-rulings-by-the-supreme-court/.

[26] Heather D. Boonstra, et al., *Abortion in Women's Lives*, GUTTMACHER INST. 11-14 (May 4, 2006), https://www.guttmacher.org/sites/default/files/pdfs/pubs/2006/05/04/AiWL.pdf.

[27] *Id.* at 13.

[28] *Id.* at 4.

[29] *Id.*

[30] *Id.* at 13.

to poorly-performed abortions also increased.[31]

When women began to demand more sexual and political freedom in the 1960s and 1970s, anti-abortionists used other avenues to limit women's abortion access.[32] Similar to the response in the 1880s, the threat of women having sexual autonomy inspired lawmakers, doctors, and activists to fight hard against women's sexual liberation.[33] In the 1960s, "many feminists began to view challenging policies concerning childbearing as essential to [defending] women's equality."[34] Meanwhile, conservative politicians began targeting abortion and contraceptives as issues of concern along with "the sexual revolution, feminism, draft evasion, and drugs."[35]

Roe v. Wade joined a series of cases determining privacy interests in terms of children and childrearing.[36] For example, in *Meyer v. Nebraska*, the Court held that a statute forbidding schools to teach German language courses violated the Fourteenth Amendment.[37] The statute, according to the Court, interfered with "the power of the parents to control the education of their [children]."[38] Similarly, in 1925, the Court held that state statutes cannot "unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing . . . of children."[39] Lastly in *Skinner v. Oklahoma*, a 1942 decision, Skinner challenged a statute which allowed the state to sterilize "habitual criminals."[40] The Court found the statute unconstitutional because "[m]arriage and procreation are fundamental" constitutional rights, and under the Oklahoma statute, the "habitual criminal" is "forever deprived" of these basic liberties.[41]

In 1965, the Supreme Court yet again considered the constitutionality of a state law concerning fundamental privacy interests, in reviewing one of its

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[31] *Id.*

[32] REAGAN, *supra* note 18, at 25.

[33] Linda Greenhouse & Reva B. Siegel, *Before (and after)* Roe v. Wade*: New Questions about Backlash*, 120 YALE L. J. 2028, 2035 (2011).

[34] *Id.* at 2042.

[35] *Id.* at 2056.

[36] *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating the right to procreate is fundamental, and the state must have a compelling interest before it can interfere with that right); Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925) (providing no circumstances justify such extraordinary measures that interfered with parents' right to direct their children's education); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (providing the state may not restrict liberty interests when it is not reasonably related to an acceptable state objective).

[37] *Meyer*, 262 U.S. at 403.

[38] *Id.* at 401.

[39] *Society of the Sisters*, 268 U.S. at 534-35.

[40] *Skinner*, 316 U.S. at 536.

[41] *Id.* at 541.

first contraception cases.[42] *Griswold v. Connecticut* held that the Constitution protects a married couple's right to privacy because this right to privacy predates the Bill of Rights and is considered fundamental.[43] *Griswold* considered a Connecticut statute which made it illegal for someone to use "any drug, medicinal article or instrument for the purpose of preventing conception" or for someone to assist another in committing the offense.[44] The Court found that the relationship implicated (the marriage relationship), the space at issue (the marital bedroom), and the marital decisions (such as procreation) were all covered by the "peripheral rights" which help give the Bill of Rights "life and substance."[45] In the 1972 case *Eisenstadt v. Baird,* the Court held that the right to privacy is a right of the individual "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[46]

In *Roe*, an unmarried woman wished to have an abortion.[47] At the time, Texas statutes prohibited abortion except when the procedure was necessary to save the life of the mother, thus preventing Roe from getting an abortion.[48] She sued the state, claiming that those statutes were unconstitutional on their face and that they "abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments," on "'behalf of herself and all other women' similarly situated."[49] The Court held that "the right of privacy . . . is broad enough to cover the abortion decision," but that the right was not absolute because of Texas's real interest in protecting potential life.[50] While the Court did not hold that women have an absolute right to have an abortion, the Court followed the *Meyer* and *Griswold* line of cases by holding the right to privacy extends to marriage activities, thereby protecting women's decisions regarding procreation, contraception, family relationships, child rearing, and, under *Roe*, the right to choose an abortion.[51]

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[42] Griswold v. Connecticut, 381 U.S. 479 (1965).

[43] *Id.*

[44] *Id.* at 480.

[45] *Id.* at 483-84.

[46] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (finding that a Massachusetts law providing dissimilar treatment for married couples and single people violated Equal Protection).

[47] Roe v. Wade, 410 U.S. 113, 113 (1973).

[48] *Id.* at 120; *id.* at 119 (citing TEX. REV. CRIM. STAT. arts. 1191-1194, 1196 (1961)).

[49] *Roe*, 410 U.S. at 120.

[50] *Id.* at 157 (holding neither Texas's interest in protecting health or potential life "justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion").

[51] *Id.* at 152 ("The Constitution does not explicitly mention any right of privacy. In a

In order to clearly establish the point at which state interest in potential or actual life becomes significant in the abortion decision-making process, the Court laid out the landmark "trimester framework."[52] Under the "trimester framework," in the first trimester of pregnancy, "the abortion decision and its effectuation [is] left to the medical judgment of the pregnant woman's attending physician."[53] In the second trimester, the state can regulate the abortion decision "in ways . . . reasonably related to maternal health."[54] Finally, in the third trimester, the state can regulate, "and even proscribe, abortion except where . . . necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[55] The Court's theory behind this framework was that at some point in the pregnancy, state interests become sufficiently compelling to justify certain restrictions on abortion rights.[56] It is important to note that *Roe* was not decided on the basis of sex equality.[57] Instead, the decision rested on the Fourteenth Amendment, affirming that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[58]

2. Beyond *Roe v. Wade*

While social and legislative rules around abortion access have fluctuated significantly in the decades since *Roe v. Wade*, so have judicial decisions.[59] Contraception and abortion have been heavily litigated, and a number of key Supreme Court opinions have substantially impacted the right to abortion access initially recognized in *Roe*.[60] After *Roe*, the Court decided a number of cases related to abortion access, and while several of them

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line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

[52] *Id.* at 163.

[53] *Id.* at 164.

[54] *Id.*

[55] *Id.* at 164-65.

[56] *Id.* at 162-63 ("[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life.") (emphasis in original).

[57] *Id.* at 164 ("A state criminal abortion statute of the current Texas type . . . is violative of the Due Process Clause of the Fourteenth Amendment.").

[58] *Id.* at 169 (Stewart, J., concurring).

[59] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992); Rust v. Sullivan, 500 U.S. 173 (1991); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983); Harris v. McRae, 488 U.S. 297, 317-318 (1980).

[60] *See, e.g.*, *Casey*, 505 U.S. at 877; *Rust*, 500 U.S. 173; *McRae*, 488 U.S. at 317-18; Maher v. Roe, 432 U.S. 464 (1977).

affirmed the holding in *Roe*, many also upheld state restrictions on access to abortion.[61] For example, in *Harris v. McRae*, the Court held that freedom of choice does not include "an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[62] And in *Rust v. Sullivan*, the Court, facing a similar challenge, found that "the [g]overnment can . . . selectively fund a program to encourage [childbirth] . . . without at the same time funding [abortion] which seeks to deal with the problem in another way" if it believes the first option to be in the public interest.[63] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court applied an "undue burden" test to determine whether a state regulation had "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[64] The undue burden test originated in *Maher v. Roe*, in which indigent women challenged the prohibition of funding for abortions that were not medically necessary.[65] In that case, the Court held that the regulation did not "impinge upon the fundamental right of privacy recognized in *Roe,* that protects a woman from unduly burdensome interference with her freedom to decide whether or not to terminate her pregnancy."[66] The joint opinion in *Casey*, authored by Justices Kennedy, O'Connor, and Souter, explained that the "undue burden" test "protect[s] the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life."[67]

The *Casey* Court found that statutory requirements for informed consent, a 24-hour waiting period and parental consent, did not constitute undue burdens on a woman's right to seek an abortion.[68] Regarding the informed consent requirement, the joint opinion considered the State's legitimate purpose furthered by the statute: "in attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that

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[61] *See City of Akron*, 462 U.S. 416.

[62] 488 U.S. at 317-18.

[63] 500 U.S. at 193.

[64] 505 U.S. at 877.

[65] 432 U.S. 464.

[66] *Id.*

[67] *Casey*, 505 U.S. at 878.

[68] *Id.* at 882; *id.* at 885 ("In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden."); *id.* at 899 ("a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass").

her decision was not fully informed."[69] However, the Court did strike down a spousal notification requirement, reasoning that it gave husbands "an effective veto" on their wives' decision to get an abortion.[70] Though the *Casey* Court rested its decision on the Due Process Clause, as it did in *Roe v. Wade*, Justice Blackmun's concurrence appealed to the Equal Protection Clause.[71] Justice Blackmun wrote,

> By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service . . . . This assumption—that women can simply be forced to accept the 'natural' status and incidents of motherhood—appears to rest upon a conception of women's roles that has triggered the protection of the Equal Protection Clause.[72]

In dissenting to the joint opinion's decision to uphold the waiting period and parental consent requirements as constitutional, Justice Stevens explained that a woman's "authority to make such traumatic and yet empowering decisions is an element of basic human dignity," and the purported state interest did not justify those restrictions on the woman's constitutional liberties.[73]

Following *Casey*, the Court applied the undue burden test in *Gonzales v. Carhart*, in which the Court held that the government may ban one form of abortion without imposing an undue burden on women seeking abortions. It also applied the undue burden test in its most recent decision on the topic, *Whole Women's Health v. Hellerstedt*.[74] In 2016 in *Hellerstedt*, the Court found certain Texas statutory regulations placed a substantial obstacle in the path of a woman seeking a previability abortion.[75] The statute in question placed a number of onerous restrictions on Texas abortion clinics.[76] For example, the statute required all abortion providers to upgrade their facilities to meet the same standards of ambulatory surgical centers.[77] Many then-operating clinics claimed these unnecessary and extremely

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[69] *Id.* at 882.

[70] *Id.* at 897.

[71] *Id.* at 922 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[72] *Id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[73] *Id.* at 916, 920-21 (Stevens, J., concurring in the judgment in part, and dissenting in part).

[74] Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Gonzales v. Carhart, 550 U.S. 124 (2007). *See also*, Stenberg v. Carhart, 530 U.S. 914 (2000) (holding a Nebraska statute unconstitutional for not providing an exception for preserving the health of the mother and proscribing multiple procedures, constituting an undue burden).

[75] *Hellerstedt*, 136 S. Ct. at 2300.

[76] *See id.* at 2314.

[77] *Id.*

expensive requirements were effectively drafted as a poorly designed attempt to limit women's access to abortion clinics while purporting concerns for women's safety.[78] Writing for the majority, Justice Breyer wrote, "in *Casey* we discarded the trimester framework, and we now use 'viability' as the relevant point at which a State may begin limiting women's access to abortion . . . ."[79] Further, Justice Breyer introduced a balancing test, weighing the health benefits of the challenged regulations against the burdens imposed on the mother: "We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion . . . and each violates the Federal Constitution."[80]

In summary, the Court's most recent disposition is to apply a balancing test to abortion regulations, weighing the burden of a given regulation on the pregnant woman with the state's interest in life. Abortion has traditionally been decided at the federal level on the privacy right found in the Due Process Clause of the Fourteenth Amendment.

B. *Legal Status of Gender in Federal Courts*

In recent years, there has been a resurgence in discussion regarding the proposed Equal Rights Amendment, which failed at the federal level in 1982, but has been adopted in a number of states, including Massachusetts.[81]

1. The Equal Rights Amendment

The Equal Rights Amendment ("ERA") was a proposed constitutional amendment guaranteeing equal rights for women.[82] Originally drafted by Alice Paul and Crystal Eastman after the passage of the Nineteenth Amendment, the ERA was first introduced to Congress in 1923.[83] The ERA would have provided:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by

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[78] *Id.* at 2315.

[79] *Id.* at 2320.

[80] *Id.* at 2300 (citing Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992)).

[81] MASS. CONST. amend. art. CVI.

[82] THOMAS H. NEALE, CONG. RESEARCH SERV., R42979, THE PROPOSED EQUAL RIGHTS AMENDMENT: CONTEMPORARY RATIFICATION ISSUES 1 (2013).

[83] *Id.*

> appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.[84]

For nearly fifty years, supporters of the ERA lobbied Congress to pass an amendment to the Constitution recognizing equal rights for women.[85] On August 10, 1970, Representative Martha Griffiths successfully brought the ERA to the House of Representatives.[86] In 1972, the 92nd Congress submitted the ERA for ratification by the states. It was immediately endorsed by President Richard Nixon and politicians from both the Democratic and Republican parties.[87] To demonstrate his strong endorsement of the proposed ERA, President Nixon wrote to Senate Minority Leader Hugh Scott, "throughout twenty-one years I have not altered my belief that equal rights for women warrant a Constitutional guarantee-and I therefore continue to favor the enactment of the Constitutional Amendment to achieve this goal."[88]

According to the Constitution, thirty-eight states had to ratify the ERA in order for it to become an amendment.[89] Congress set a 1979 deadline to get the requisite number of state ratifications.[90] By 1978, thirty-five states had ratified, but disagreement and opposition to the ERA stopped the ratification process before proponents could get the last three states' approval.[91] Mobilization by conservative groups against the ERA slowed the ratification process.[92] Congress voted to grant an extension, pushing the deadline for ratification to 1982.[93] However, after 1978, no other states ratified the proposed amendment, and "it was presumed to have expired in 1982."[94]

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[84] S.J. Res. 8, 92d Cong., 1st Sess., 117 CONG. REC. 271 (1971); S.J. Res. 9, 92d Cong., 1st Sess., 117 CONG. REC. 272 (1971); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 526 (1971); *see also* S. DOC. NO. 112-9, at 45 (2014).

[85] NEALE, *supra* note 83, at 4.

[86] *Id.* at 5.

[87] *Id.* at 7.

[88] Letter from Richard Nixon, President of the U.S., to Hugh Scott, Senate Minority Leader, on the Proposed Constitutional Amendment on Equal Rights for Men and Women (Mar. 18, 1972) (on file with the Government Publishing Office).

[89] NEALE, *supra* note 83, at 1.

[90] *Id.*

[91] *Id.*

[92] Donald T. Critchlow & Cynthia L. Stachecki, *The Equal Rights Amendment Reconsidered: Politics, Policy, and Social Mobilization in a Democracy*, 20 J. OF POL'Y HIST. 157, 160 (2008).

[93] NEALE, *supra* note 83, at 1.

[94] *Id.*

The issues hindering the ERA's ratification in 1982 were largely centered around the ideas of traditional gender roles and family values.[95] Phyllis Schlafly, a conservative activist and one of the most vocal opponents to the ERA, organized groups such as STOP ERA to convince women that the ERA would work against their interests.[96] STOP ERA and other similar opposition groups moralized on the fundamental differences between men and women and the benefits women received by virtue of their position in society, namely the right to be cared and provided for by men.[97] In her 1972 book, Schlafly wrote,

> Women's lib is a total assault on the role of the American woman as wife and mother and on the family as the basic unit of society. Women's libbers are trying to make wives and mothers unhappy with their career, make them feel that they are "second-class citizens" and "abject slaves." Women's libbers are promoting free sex instead of the "slavery" of marriage. They are promoting Federal "day-care centers" for babies instead of homes. They are promoting abortions instead of families.[98]

Schlafly and other "antifeminists" opposing the ERA made successful efforts to cast the proposed amendment as a burden, rather than a benefit to women.[99] As a result, by 1980, the Republican Party amended its platform to rescind its prior support for the ERA.[100] Political scientist Jane Mansbridge wrote, "Many people . . . believed—rightly in my view—that the Amendment would have been ratified by 1975 or 1976 had it not been for Phyllis Schlafly's early and effective effort to organize potential opponents."[101]

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[95] *Id.* at 2.

[96] ROSALIND ROSENBERG, DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY 225 (Eric Foner ed., 1st ed. 2008). Schlafly continued to fight against the ERA and the ideals it represented for decades. *See* Phyllis Schlafly, *'Equal rights' for women: wrong then, wrong now*, L.A. TIMES (Apr. 8, 2007), http://www.latimes.com/la-op-schafly8apr08-story.html.

[97] Susan E. Marshall, *Ladies Against Women: Mobilization Dilemmas of Antifeminist Movements*, 32 SOC. PROBS. 348, 355 (1984).

[98] Phyllis Schlafly, *Women's Libbers Do NOT Speak for Us, in* BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE 24, 24-25 (Linda Greenhouse & Reva B. Siegel eds., 2d ed. 2012).

[99] Marshall, *supra* note 98, at 355-56.

[100] Jane Perlez, *Plan to Omit Rights Amendment from Platform Brings Objections*, N.Y. TIMES (Mar. 17, 1984), http://www.nytimes.com/1984/05/17/us/plan-to-omit-rights-amendment-from-platform-brings-objections.html.

[101] JANE J. MANSBRIDGE, WHY WE LOST THE ERA 110 (1986); *see also* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 147 (1999) ("ERA was defeated when Schlafly turned it into a war among women

In the end, the ERA was not ratified.[102] The 1982 deadline came and went, and by that time, Nebraska, Tennessee, Idaho, and Kentucky had rescinded their ratification.[103] However, in recent years, particularly with the election of President Trump—a man whose presidential campaign included sexism and allegations of sexual harassment—there has been renewed vigor to ratify the ERA.[104] Justice Ginsburg recently stated that if she could choose one amendment to add to the Constitution, she would choose the ERA: "I would like my granddaughters, when they pick up the Constitution, to see that notion – that women and men are persons of equal stature – I'd like them to see that is a basic principle of our society."[105] In Virginia, the ERA's ratification was brought to a vote again, but unsuccessfully.[106] However, in many states, efforts to pass the ERA continue.[107] At the one-year anniversary of the Women's March, attorney Gloria Allred voiced her support for the ERA, pointing out that if it were ratified, ". . . it would officially eliminate legal distinctions between men and women in terms of employment, divorce, and property—and give equal rights to all citizens in the Constitution, regardless of sex."[108] The renewed interest in an ERA in multiple states indicates there is ongoing support for a federal ERA which ultimately would impact future federal abortion litigation.

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over gender roles.").

[102] NEALE, *supra* note 83, at 1.

[103] *Id.* at 9-11.

[104] Olivia Exstrum, *#MeToo Has Revived the Equal Rights Amendment*, MOTHER JONES (Mar. 5, 2018), https://www.motherjones.com/politics/2018/03/metoo-has-revived-the-equal-rights-amendment/ ("[Trump's election] reinforced support for [the ERA]"); Jessica Neuwirth & Molly Tormey, *The Time Is Now For The Equal Rights Amendment*, FORBES (Mar. 7, 2018), https://www.forbes.com/sites/break-the-future/2018/03/07/the-time-is-now-for-the-equal-rights-amendment/#40ef893c5e71; Jessica Ravitz, *The new women warriors: Reviving the fight for equal rights*, CNN.COM (Apr. 16, 2015), https://www.cnn.com/2015/04/02/us/new-womens-equal-rights-movement/index.html.

[105] Nikki Schwab, *Ginsburg: Make ERA Part of the Constitution*, U.S. NEWS (Apr. 18, 2014), https://www.usnews.com/news/blogs/washington-whispers/2014/04/18/justice-ginsburg-make-equal-rights-amendment-part-of-the-constitution.

[106] Patricia Sullivan, *Virginia's hopes of ERA ratification go down in flames this year*, WASH. POST (Feb. 9, 2018), https://www.washingtonpost.com/local/virginia-politics/virginias-hopes-of-era-ratification-go-down-in-flames-this-year/2018/02/09/7acfbf80-0dab-11e8-8890-372e2047c935_story.html?utm_term=.c6e0d436bf72.

[107] *Id.* ("Five times in the past seven years, the Virginia Senate passed the ERA, but each time it languished in the House.").

[108] Erin Reimel, *Gloria Allred Calls for the Equal Rights Amendment at Women's March Rally in Utah*, GLAMOUR (Jan. 21, 2018), https://www.glamour.com/story/gloria-allred-calls-for-the-equal-rights-amendment-at-womens-march-rally-in-utah.

2. Standards of Review

When the federal courts apply equal protection to sex discrimination claims, such discrimination is reviewed under intermediate scrutiny.[109] By contrast, cases involving race, alienage, religion, and national origin discrimination are evaluated under strict scrutiny.[110] Intermediate scrutiny requires that legislation demonstrating instances of sex discrimination furthers an important government interest by means specifically tied to furthering the purported interest.[111] The purported rationale behind this lower degree of scrutiny is that there are real differences between men and women.[112] For example, in *Reed v. Reed*, the Court explained that while states cannot "legislate that different treatment be accorded to persons placed by a statute into different classes," the Equal Protection Clause "does not deny to [s]tates the power to treat different classes of persons in different ways."[113] In theory, the goal is to treat similarly situated men and women the same, not to obtain a gender neutral Constitution.[114] This objective is evident in early sex discrimination cases such as *Bradwell v. State* and *Minor v. Happersett*.[115] Both of these cases relied on the fact that women and men are not similarly situated to uphold statutes preventing women from entering certain professions or voting in state elections.[116] While those cases have since been overturned or rejected as flatly discriminatory, the Court relied on differences between men and women in *Rostker v. Goldberg* in 1981.[117] In *Rostker*, several men challenged a

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[109] Craig v. Boren, 429 U.S. 190, 198 (1976).

[110] *See* Graham v. Richardson, 403 U.S. 365, 371-72 (1971). *See also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (noting that all legal restrictions targeting a single racial group must be subjected to "rigid scrutiny"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that strict scrutiny must be applied to any invidious discriminations against groups of individuals, in violation of the Equal Protection Clause).

[111] *Craig*, 429 U.S. at 198; Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972) ("this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose."); Reed v. Reed, 404 U.S. 71, 76 (1971).

[112] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 139-40 n.11 (1994) (concluding that the potential that male jurors are more likely to sympathize with male defendants is not a real difference between men and women and does not survive strict scrutiny). *See also Reed*, 404 U.S. at 76.

[113] *Reed*, 404 U.S. at 75-76.

[114] *See, e.g.*, Minor v. Happersett, 88 U.S. 162, 170 (1874) (concluding that while women are citizens within the meaning of the Constitution, they are not constitutionally guaranteed the right to vote); Bradwell v. State, 83 U.S. 130, 141 (1872) (holding that women may be denied employment on the basis of sex due to differences in character and temperament).

[115] *Happersett*, 88 U.S. at 170; *Bradwell*, 83 U.S. at 141.

[116] *Happersett*, 88 U.S. at 170; *Bradwell*, 83 U.S. at 141.

[117] Rostker v. Goldberg, 453 U.S. 57, 78 (1981).

statute requiring men, but not women, to register for the military draft.[118] The Court held that because women could not serve in combat roles, women and men were not similarly situated for purposes of the draft, and therefore the statute did not constitute gender-based discrimination: "[t]he Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."[119]

In 1973, the Supreme Court came close to applying strict scrutiny in a sex discrimination case when, in *Frontiero v. Richardson,* the Court found that classifications based on sex, "like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[120] *Frontiero,* however, did not have enough Justices for a majority, so the Court settled on intermediate scrutiny in *Craig v. Boren.*[121] Dissenting in *Craig*, Justice Rehnquist explained,

> In *Frontiero v. Richardson*, the opinion for the plurality sets forth the reasons of four Justices for concluding that sex should be regarded as a suspect classification for purposes of equal protection analysis. These reasons center on our Nation's "long and unfortunate history of sex discrimination," which has been reflected in a whole range of restrictions on the legal rights of women . . . .[122]

In *United States v. Virginia*, the Court held that Virginia had to show that "the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[123] There, the United States argued that the Virginia Military Institute—an all-male military college—violated equal protection.[124] In her majority opinion, Justice Ginsburg employed "skeptical scrutiny," a standard for which she applied the analysis usually reserved for "intermediate scrutiny," noting that Virginia failed to show an

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[118] *Id.* at 61.

[119] *Id.* at 79.

[120] Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (holding that a challenged statutory scheme that drew a sharp line between female military personnel and their male counterparts solely for administrative convenience was impermissibly discriminatory between similarly situated men and women).

[121] Craig v. Boren, 429 U.S. 190, 197 (1976). *See also*, Miss. University for Women v. Hogan, 458 U.S. 718, 723 (1982); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135 (1994); United States v. Virginia, 518 U.S. 515, 555 (1996).

[122] *Craig*, 429 U.S. at 218 (Rehnquist, J., dissenting) (citing *Frontiero*, 411 U.S. at 684).

[123] *Virginia*, 518 U.S. at 531-32 ("The State must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'") (citing *Hogan*, 458 U.S. at 724) (internal quotations omitted).

[124] *Virginia*, 518 U.S. at 515.

"exceedingly persuasive justification" for excluding female students.[125] However, in his dissent, Justice Scalia argued that the Court inappropriately applied a more stringent standard.[126] Justice Scalia wrote of the Court's reasoning:

> Only the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves.[127]

The Court applied a similar logic in *Personnel Administrator of Massachusetts v. Feeney*.[128] In *Feeney*, a 1979 case, female plaintiffs brought suit alleging that Massachusetts's veterans preference statute unconstitutionally discriminated against women based on their sex because so few women were veterans.[129] The Court held that the statute did not constitute discrimination in violation of the Equal Protection Clause because the statute was intended to benefit "any person who was a veteran."[130] The means must be sufficiently narrowly tailored to accomplish a compelling state interest in order to withstand strict scrutiny.[131] At the federal level, gender classifications do not require a strict scrutiny review.[132]

3. State ERAs and Federalism

Federalism is the idea that the federal and state governments operate in separate, but legitimate spheres of authority.[133] In *New York v. United*

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[125] *Id.* at 531-32, 524. *See also Hogan*, 458 U.S. 718.

[126] *Virginia*, 518 U.S. at 566 (Scalia, J., dissenting).

[127] *Id.* at 573 (Scalia, J., dissenting).

[128] 442 U.S. 256, 259 (1979).

[129] *Id.* at 256-57.

[130] *Id.* at 279 (internal quotations omitted).

[131] *See* Korematsu v. United States, 323 U.S. 214, 234 (1944) ("[T]he military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.").

[132] *See* Minor v. Happersett, 88 U.S. 162 (1874); Bradwell v. States, 83 U.S. 130 (1872).

[133] *See* New York v. United States, 505 U.S. 144, 181 (1992); Gregory v. Ashcroft, 501 U.S. 452, 461 (1991); Taffin v. Levitt, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government."). *See also* Printz v. United States, 521 U.S. 898 (1997) (finding Congress may not compel a

States, the Supreme Court held that "[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'"[134] In recent years, federalism has been used as a justification for the Supreme Court to prevent Congress from restricting state powers such as gun control and the federal police power.[135]

States may interpret the language of their own constitutions more strictly than the Supreme Court has interpreted analogous language in the U.S. Constitution.[136] In *Minnesota v. National Tea Co.*, the Supreme Court recognized that "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions," except for when the Court is called upon to resolve ambiguities.[137] However, a state may not misconstrue federal law in accord with a more restrictive state interpretation.[138] A state court "has 'the inherent authority to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'"[139]

Broadly speaking, state constitutions can protect individual rights, such as the right to choose to have an abortion, more stringently than the federal Constitution.[140] Previously, this argument was used in the fight for same-

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state government to implement federal regulatory programs).

[134] *New York*, 505 U.S. at 181 (citing Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

[135] *See* United States v. Morrison, 529 U.S. 598 (2000) (stating the connection between violence against women and commercial transactions are too attenuated to allow Congress to regulate it); United States v. Lopez, 514 U.S. 549 (1995) (providing the power of Congress to regulate activities extends only to those activities that substantially affect interstate commerce, i.e. not bringing guns into school zones).

[136] *See* Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

[137] *Id. See* Danforth v. Minnesota, 552 U.S. 264, 288 (2008) (a State "may grant its citizens broader protection than the Federal Constitution requires by enacting appropriate legislation or by judicial interpretation of its own Constitution.") (citing Oregon v. Hass, 420 U.S. 714, 719 (1975)); Michigan v. Long, 463 U.S. 1032, 1041 (1983) (explaining that state courts are free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions in the United States Constitution).

[138] *Danforth*, 552 U.S. at 288.

[139] Diatchenko v. Dist. Atty., 1 N.E.3d 270, 282 (Mass. 2013) (quoting Libertarian Ass'n of Mass. v. Sec'y of the Commonwealth, 969 N.E.2d 1095, 1111 (Mass. 2012)); Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003) (quoting Arizona v. Evans, 514 U.S. 1, 8 (1995)). *See* Roman v. Tr. of Tufts College, 965 N.E.2d 331, 338 (Mass. 2012) ("[I]t is also well established that State Constitutions may protect individual liberties with rights that are more expansive than those conferred by the Federal Constitution.").

[140] *See* Michigan v. Long, 463 U.S. at 1040-41; Oregon v. Hass, 420 U.S. at 719 (holding Oregon court could interpret Oregon constitutional prohibition of unreasonable

sex marriage.[141] In *Baehr v. Lewin*, the Hawaii Supreme Court reasoned that Hawaii's constitution provided equal protection on the basis of sex where the federal Constitution did not, and that therefore, "the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex."[142] The *Baehr* court found that prohibiting same-sex marriage was a violation of equal protection on the basis of sex.[143] Six years later, the Vermont Supreme Court ruled similarly:

> the Common Benefits Clause of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development. While the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters.[144]

There, in a concurring opinion, Justice Denise Johnson stressed that the Vermont Constitution provided greater protection of individual rights than the federal Constitution, and emphasized the gender equality implications: "A woman is denied the right to marry another woman because her would-be partner is a woman . . ."[145]

C. *Abortion and Gender in Massachusetts*

1. Abortion

The Massachusetts Supreme Judicial Court has followed *Roe v. Wade* in finding that cases "dealing specifically with a woman's right to make the abortion decision privately express but one aspect of a far broader constitutional guarantee of privacy."[146] In 1981, in *Moe v. Secretary of Administration and Finance*, the SJC declared invalid a statutory provision restricting Medicaid funding of abortions, holding that such a restriction

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searches and seizures as being more restrictive than the Fourth Amendment of the Federal Constitution).

[141] *See* Baehr v. Lewin, 852 P.2d 44, 59-60 (Haw. 1993).

[142] *Id.* at 60.

[143] *Id.* at 68.

[144] Baker v. State, 744 A.2d 864, 870 (Vt. 1999).

[145] *Id.* at 253 (Johnson, J., concurring). In *Goodridge v. Department of Public Health*, Justice Greaney applied similar reasoning to argue that the case should have been decided under equal protection. 798 N.E.2d 941, 971 (2003) (Greaney, J., concurring). *See infra* notes 164-65 and accompanying text.

[146] Moe v. Sec'y of Admin. and Fin., 417 N.E.2d 387, 398 (Mass. 1981). *Id.* at 398 ("[W]e have accepted the formulation of rights that [*Roe v. Wade*] announced as an integral part of our jurisprudence.").

"impermissibly burdens a right protected by our constitutional guarantee of due process."[147] Furthermore, in *Planned Parenthood League of Massachusetts v. Attorney General*, the SJC adopted a balancing test, weighing the burden on a woman's fundamental right against the state's interest in protecting potential human life.[148]

Article X of the Declaration of Rights in the Massachusetts Constitution provides that, "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."[149] This right to due process protects the privacy rights asserted in *Moe*, *Planned Parenthood League of Mass.* and the state's other abortion cases.[150] Abortion decisions rest within the zone of privacy that the SJC has recognized in a number of cases, all of which confirm an individual's right to bodily privacy and integrity.[151] Massachusetts considers abortion, as a method of controlling one's own bodily integrity, to be a fundamental right.[152]

In adopting the *Roe* framework, Massachusetts recognizes two justifications for its regulation of abortion as set forth in *Framingham Clinic, Inc. v. Selectmen of Southborough*: (1) the health of the pregnant woman, and (2) the protection of the unborn fetus.[153] In *Framingham Clinic, Inc.*, the SJC found that both of these interests grow over the term of the pregnancy.[154] These interests serve as the basis for a majority of state

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[147] *Id.* at 397. Prior to *Moe*, the SJC held in *Doe v. Doe*, 314 N.E.2d 128, 132 (Mass. 1974), not only that a woman's husband did not have the right to choose whether or not to abort the child, but that if it had the opportunity to create such a right, it would not do so. In *Doe*, the court noted that *Roe v. Wade* and subsequent cases gave "little support to the husband's claim" for injunctive relief against his wife, who intended to get an abortion over his objections. *Doe,* 314 N.E.2d at 132.

[148] 677 N.E.2d 101, 103-04 (Mass. 1997).

[149] MASS. CONST. art. X.

[150] *Planned Parenthood League of Mass.*, 677 N.E.2d at 104 ("Our prior decisions demonstrate that our Declaration of Rights affords the privacy rights asserted here no less protection than those guaranteed by the First or Fifth Amendments to the Federal Constitution.") (quoting *Moe*, 417 N.E.2d at 402).

[151] Commonwealth v. Carey, 974 N.E.2d 624, 631 (Mass. 2012) (identifying a presumption against regulation of consensual sexual conduct absent injury or abuse of a person or institution); Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 634 (Mass. 1986) ("A significant aspect of this right of privacy is the right to be free of nonconsensual invasion of one's bodily integrity."); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 423 (Mass. 1977) (refusing to impose life-prolonging treatment on a patient in a state mental health facility).

[152] Moe v. Sec'y of Admin. and Fin., 417 N.E.2d 387, 400 (Mass. 1981).

[153] Framingham Clinic, Inc. v. Selectmen of Southborough, 367 N.E.2d 606, 609 (Mass. 1977); Roe v. Wade, 410 U.S. 113, 162 (1973).

[154] 367 N.E.2d at 609 ("The State may evince an intensified interest in the health of the woman only after the first trimester, and in the potentiality of the life of the fetus, only after

abortion regulations and are generally insufficient to overcome a person's interest in protecting their fundamental rights.[155] "The state has an independent interest in assuring that the decision to have an abortion is free and considered," but this is typically viewed as a supplemental protection to ensure protection of an individual's fundamental right to choose to have an abortion.[156]

State restrictions on a woman's choice to have an abortion must be designed on a neutral basis.[157] Neutrality in this context means treating a woman's decision to have an abortion no differently, whether through approbation or discouragement, than any other medical procedure: "While the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right."[158]

2. Gender

The failure of the federal ERA inspired many states to pass their own versions of the amendment. In Massachusetts, the state ERA was passed in 1976, modifying Article I.[159] "All men are born free and equal" was changed to "all people," and an enumerated list of protected classes was added.[160] Thus, now Article I of the Massachusetts Constitution reads: "All *people* are born free and equal and have certain natural, essential and unalienable rights; . . . . Equality under the law shall not be denied or abridged because of *sex*, race, color, creed or national origin."[161] Among the categories included, sex is the only class that is not granted the same protection under the Fourteenth Amendment and, therefore, is not subject to strict scrutiny.[162]

In contrast to federal courts, which apply an intermediate level of scrutiny, the SJC has concluded that strict scrutiny should be applied to gender classifications: "[B]y adopting art. 106, the people of Massachusetts

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the fetus attains viability.").

[155] *Planned Parenthood League of Mass.*, 677 N.E.2d at 103.

[156] *Id.* at 106.

[157] *Moe*, 417 N.E.2d at 400.

[158] *Id.* at 401. *See* Mass. Pub. Interest Research Grp. v. Sec'y of the Commonwealth, 375 N.E.2d 1175, 1181 (Mass. 1978) (noting that more rigorous analysis is called for when a statute "impinges on a fundamental interest.").

[159] *See* MASS. CONST., pt. 1, art. I, (amended 1976).

[160] *Id.*

[161] *Id.* (emphasis added).

[162] *See* U.S. v. Virginia, 518 U.S. 515, 572 (1996) (applying intermediate scrutiny to gender classifications); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 741 n.9 (1982) (Powell, J. dissenting) (noting that strict scrutiny has never been adopted as the standard of review for sex discrimination); Craig v. Boren, 429 U.S. 190, 197 (1976).

have expressed their intention that the strict scrutiny required by the United States Constitution in discrimination cases involving other fundamental First Amendment rights should now be applied to distinctions based on sex."[163] The SJC first applied the strict scrutiny standard to gender in *Commonwealth v. King*.[164] At issue in *King* was the enforcement of a prostitution statute solely against female prostitutes.[165] The SJC held that the degree of judicial scrutiny for classifications based on sex "must be at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications."[166] The SJC explained, "the Commonwealth cannot enforce [the statute] against female prostitutes but not against male prostitutes unless it can demonstrate a compelling interest which requires such a policy."[167]

In *Goodridge v. Department of Public Health*, the SJC affirmed Article I's grant of "absolute equality" to the residents of the Commonwealth by explaining that the denial of marriage licenses to gay and lesbian couples infringed on their civil liberties.[168] The SJC made a special effort to acknowledge that while it did not apply strict scrutiny to the issue in *Goodridge*, it was only because the statute did not even pass the rational basis test, and, thus, it was unnecessary to apply strict scrutiny.[169] Cases like *Goodridge* and *King* demonstrate that the SJC has the discretionary latitude to find that gender-based classifications, resulting in a disproportionately negative impact on women, are unconstitutional in Massachusetts. Such unconstitutional gender-based classifications would encompass abortion restrictions.

III. ARGUMENT

During the 2016 presidential election, President Trump frequently expressed, that if given the chance, he would nominate justices to the Supreme Court who would overturn *Roe v. Wade*.[170] Now, he has placed noted conservatives, Justices Neil Gorsuch and Brett Kavanaugh, on the Court.[171] These two conservative additions to the Supreme Court pose a

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[163] Op. of the JJ. to the S., 373 Mass. 883, 887 (1977).

[164] Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977).

[165] *Id.* at 198-99.

[166] *Id.* at 206.

[167] *Id.* at 207.

[168] 798 N.E.2d 941, 957 (Mass. 2003) ("[O]ur laws assiduously protect the individual's right to marry against undue government incursion.").

[169] *Id.* at 960-61.

[170] Robert Costa, Robert Barnes, & Felicia Sonmez, *Brett Kavanaugh is Nominated by Trump to Succeed Supreme Court Justice Anthony M. Kennedy*, WASH. POST (July 10, 2018), https://wapo.st/2m8qOj8?tid=ss_mail&utm_term=.9d44dd4bf9f4.

[171] *Id.*

tangible threat that a future Supreme Court decision could roll back or curtail abortion rights. Reproductive rights groups have suggested that nearly twenty-five states would potentially criminalize abortion if given latitude by the Court.[172] On the other hand, some states, including Massachusetts, have equal rights amendments in their constitutions, affecting protections for choice.

Although federal courts have yet to decide abortion cases on the basis of equal protection, Massachusetts has the legal and statutory foundation to do so. Negative impact on a suspect class does not necessarily trigger strict scrutiny, but when the impact infringes on a fundamental right, as restrictions on access to abortion infringe on the fundamental right of privacy, strict scrutiny is triggered.[173] Unlike the federal courts, Massachusetts applies strict scrutiny to classifications based on sex.[174]

A. *Massachusetts Does Provide Greater Gender Protections*

There may be a renewed vigor in the fight for a federal ERA, but in the meantime, it is up to the states, that already provide stronger protections on the basis of sex, to enact their own ERAs. The Massachusetts Constitution has explicitly taken equal protection further than the federal Constitution.[175] In particular, Article I of the Massachusetts's Declaration of Rights has been interpreted throughout Massachusetts's history to extend civil liberties where the federal Constitution has not.[176] From the *Quock Walker* cases of 1783, where the SJC announced that slavery was inconsistent with Article I, to the SJC's decision in *Goodridge*, which guaranteed same-sex couples the right to marry, Massachusetts has consistently construed its Constitution to contain protective equal rights provisions.[177]

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[172] *What if* Roe *Fell?*, CENT. FOR REPROD. RTS. (2018), https://www.reproductiverights.org/what-if-roe-fell.

[173] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (finding that a law targeting private, consensual conduct between adults of the same sex violated equal protection); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (holding that equal protection mandates single people have the same access to birth control as married couples); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (finding that there is a right of marital privacy); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925) (finding that parents have the right to choose schools for their children); Meyer v. Neb., 262 U.S. 390, 400 (1923) (granting parents the right to control the education of their own children).

[174] MASS. CONST. Amend. art. CVI.; Op. of the JJ. to the S., 366 N.E.2d 733, 736 (1977).

[175] MASS. CONST. Amend. art. CVI.

[176] Op. of the JJ. to the S., 366 N.E.2d 733, 736 (1977).

[177] *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d at 959; Walker v. Jennison (Mass. 1781, unreported); *see also* Commonwealth v. Jennison (Mass.1783, unreported); Robert M. Spector, *The Quock Walker Cases (1781-83) – Slavery, its Abolition, and Negro*

Article Amendment 106 added an enumerated list of protected classes to Article I, all of which are subject to strict scrutiny under the Fourteenth Amendment except one: sex.[178] Sex, under the Fourteenth Amendment, is only subject to intermediate scrutiny.[179] Conversely, the Massachusetts Supreme Judicial Court has found that gender classifications are subject to strict scrutiny, a higher level of scrutiny.[180] In 1977, the SJC wrote, "in adopting art. 106, the people of Massachusetts have expressed their intention that the strict scrutiny required by the United States Constitution in discrimination cases involving other fundamental First Amendment rights should now be applied to distinctions based on sex."[181]

Massachusetts courts have found that the legislature considers sex a protectible class and have expressly protected gender classifications ever since the adoption of art. 106.[182] Gender is treated as a suspect class in Massachusetts where it is not in federal courts.[183] In *King*, the SJC concluded: "that the people of Massachusetts view sex discrimination with the same vigorous disapproval as they view racial, ethnic, and religious discrimination. . . ."[184] In his concurring opinion in *Goodridge*, Justice Greaney argued that while he agreed with the result, which granted same-sex couples the right to marry, the case should have been resolved under an equal protection analysis.[185] According to Justice Greaney, the key issue at play in analyzing the case was that the plaintiff could not marry her partner because of her sex.[186] Similarly, in *Commonwealth v. Chou*, while the SJC did not explicitly rule on the issue of sex discrimination, it did add dicta that, if there were to be a facial challenge to a statute that criminalized stalking members of the opposite sex, the challenge would likely have been successful as a matter of equal protection.[187] In *Finch v. Commonwealth Health Insurance Connector Authority*, the SJC explained that,

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Citizenship in Early Massachusetts, 53 THE J. OF NEGRO HIST. 12, 13-17 (1968).

[178] MASS. CONST. Amend. art. CVI.

[179] *See* U.S. v. Virginia, 518 U.S. 515, 524 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976).

[180] Op. of the JJ. to the S., 366 N.E.2d 733, 736 (1977).

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Commonwealth v. King, 372 N.E.2d 196, 206 (Mass. 1977).

[185] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring).

[186] *Id.* at 971 (Greaney, J., concurring) (finding that "[a]s a factual matter, an individual's choice of marital partner is constrained because of his or her own sex. Stated in particular terms, Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman.").

[187] Commonwealth v. Chou, 741 N.E.2d 17, 25 (Mass. 2001).

> [a]t the time of its enactment, art. 106 was popularly known as the 'Equal Rights Amendment' . . . . By enacting art. 106 the voters demonstrated . . . their conclusion that rational basis review was not adequately addressing the problem of gender discrimination. The voters thus acted with respect to gender classifications and reaffirmed prior jurisprudence with respect to race, color, creed, and national origin classifications.[188]

While there are many criticisms surrounding the use of the intermediate scrutiny test, Catherine MacKinnon provides a relevant critique of the current standard of review that federal courts apply to gender. She writes,

> Even at its apex, rationality review with this content, at whatever level of scrutiny, inherently reflects the status quo because the operative meaning of "rational" is "reflects sex as it is." That is, to see if a law or policy is equal, this method looks around at "sex" as it socially exists to see if the distinction being challenged reflects present reality. Apart from the fact that "rational" is not in the Constitution and "equal protection" is, this approach does not grasp that reality may be systemically and systematically sex-biased. It is asking the wrong question. The "sex" this method finds is sex inequality, but it is legally considered the sex difference, essentializing sex discrimination. On this logic, the more sex- unequal social reality is, the more sex-unequal law can be, and be considered equal, because the law reflects the reality.[189]

MacKinnon's critique highlights the problems with applying a lenient standard of scrutiny to gender-based classifications that disproportionately impact women.[190] Massachusetts courts can avoid this problem because of the state's ERA.[191] Though state and federal constitutional provisions mirror each other in many ways, interpretations by the courts result in different degrees of protection and will play a role in the future of abortion rights in Massachusetts.

B. *Greater Gender Protections Can Be Used in the Abortion Context in States like Massachusetts*

Even if a federal ERA existed, it is not clear that it would protect

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[188] Finch v. Commonwealth Health Ins. Connector Auth., 946 N.E.2d 1262, 1272 (Mass. 2011).

[189] Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 HARV. J. L. & GENDER 569, 570 (2014).

[190] *Id.*

[191] Op. of the JJ. to the S., 366 N.E.2d 733, 736 (1977).

women's right to choose. By contrast, Massachusetts's ERA reviews gender-based statutes under strict scrutiny, finding that gender-based anti-abortion statutes with discriminatory impacts on women violate the state constitution. Massachusetts has demonstrated a resolution to protect abortion rights beyond the protections the federal government has extended.[192] For example, federal funding for abortions is expressly prohibited by the Hyde Amendment, which provides,

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.[193]

Massachusetts, however, has retained state funding for abortions.[194] The Alliance to Stop Taxpayer Funded Abortions, the Renew Massachusetts Coalition, and other Massachusetts advocacy groups that are against state funded abortions are leading efforts to pass a constitutional amendment to block state dollars from being used to fund abortions.[195] Although there is currently no such proposed amendment drafted, the goal of the ballot question is to confirm that the Massachusetts Constitution does not "require[] the public funding of abortion."[196]

1. Discriminatory Impact

Today, while progress has been made toward gender equality, the burden of parenthood still falls disproportionately on women.[197] In particular, poor women, women of color, and young women have higher rates of unintended pregnancy.[198] As a result, the burden of forced pregnancy goes far beyond the physical intrusion imposed on the woman by forcing her to carry a fetus

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[192] *See* Moe v. Sec'y of Admin. and Fin., 417 N.E.2d 387, 405 (1981) (finding that restrictions on access to abortion by women receiving Medicaid impermissibly burden poor women).

[193] Departments of Labor, Health and Human Servs., and Educ., and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, § 509, 107 Stat. 1082, 1113 (1993).

[194] *See* Moe v. Sec'y of Admin. and Fin., 417 N.E.2d 387, 405 (Mass. 1981) (finding that restrictions on access to abortion by women receiving Medicaid impermissibly burdened poor women).

[195] Stephanie Ebbert, *An Effort to Ban Public Funding of Abortion in Mass. is Underway*, BOSTON GLOBE (July 16, 2017), https://www.bostonglobe.com/metro/2017/07/16/mass-effort-ban-public-funding-abortion/xuXMFMC0SuC1Vlu1GpDsiI/story.html.

[196] *Id.*

[197] Boonstra et al., *supra* note 27, at 6.

[198] *Id.*

to term.[199] Restrictions on abortion access take from women "control over the timing of motherhood and so predictably exacerbate the inequalities in educational, economic, and political life engendered by childbearing and childrearing."[200]

In his dissenting opinion in *Geduldig*, Justice Brennan wrote,

> In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.[201]

Implicitly, Justice Brennan's dissent illustrates a problem with pretending that facially neutral legislation or statutory schemes are in fact neutral: the resistance to protecting choice—and reproductive health generally—is more insidious than is often recognized by legislatures. Instead, while statutes restricting abortion access are often justified by protecting the unborn, attitudes that produce this reasoning are fueled by outdated notions about the roles of women and sexuality.[202]

To take the argument that the state has an interest in potential life on its face would be to accept the conclusion that the state has an interest in forcing a pregnant woman to carry her pregnancy to term and bear the child.[203] Feminist scholar Reva B. Siegel writes,

> Should legislators protest that they wish to prohibit abortion out of concern for the unborn and entertain no thoughts about the women on whom they would impose motherhood, such a defense would reveal that the policy was premised on gendered assumptions . . . that the embryo/fetus is somehow "outside" women, like a kangaroo gestating

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[199] Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160, 163 (2013).

[200] *Id.*

[201] Geduldig v. Aiello, 417 U.S. 484, 501 (1974) (Brennan, J., dissenting). Congress rejected the majority position in *Geduldig* in passing the Pregnancy Discrimination Act, which covers discrimination on the basis of "pregnancy, childbirth, or related medical conditions." *See* Civil Rights Act of 1964, §701(k), 42 U.S.C.A. § 2000e(k) (amend. 1978).

[202] *See generally*, REVA B. SIEGEL, *Abortion as a Sex Equality Right: Its Basis in Feminist Theory*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 43, 45 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

[203] *Id.* at 55.

> in its mother's pouch—or that women are little more than reproductive organs.[204]

Further, Siegel points out that just as laws criminalizing contraception were justified as a method of "ensuring that women performed their duties as wives and mothers," today's anti-abortion regulations throughout the country have the effect of compelling motherhood and can be understood "as a form of gender status regulation."[205] Such justifications are counter to the purposes of the well-recognized 1976 Massachusetts ERA. In the words of Phyllis N. Segal, the federal ERA provides "a basis for prompting respect and concern for sexual equality . . . ."[206]

Some of the key reasons a sex-based analysis was not available in the 1970s when *Roe v. Wade* was decided were conscious, and perhaps subconscious, notions of womanhood.[207] When *Roe* was decided, abortion as a feminist issue was a novel idea—the Court's equal protection revolution still lay in the future.[208] As the Court understood *Roe*, it was an issue of "public health and doctors' professional autonomy, scarcely grasping the women's rights claim."[209] Reva B. Siegel argues that the Court's decision in *Casey* is much more aware of the women's rights issues involved in the abortion question than *Roe v. Wade*.[210] According to Siegel, the 1992 decision "reflects much more clearly than *Roe* the views of feminist and antiabortion antagonists in the abortion debate."[211] In fact, the *Casey* opinion directly deals with the issue of a pregnant woman's autonomy:

> Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[212]

In her critique of the privacy right in which the Court found the abortion right, feminist legal scholar Catharine MacKinnon makes the point that

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[204] *Id.*

[205] *Id.* at 58.

[206] Phyllis N. Segal, *Sexual Equality, the Equal Protection Clause, and the ERA*, 33 BUFF. L. REV. 85, 146 (1984).

[207] Reva B. Siegel, *Abortion and the Woman Question: Forty Years of Debate*, 89 IND. L.J. 1365, 1366 (2014).

[208] *Id.*

[209] *Id.* at 1377.

[210] *Id.*

[211] *Id.*

[212] Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).

Roe, while affirming a woman's right to choose, simply upheld the status quo.[213] She argues that "women are guaranteed by the public no more than what we can get in private—that is, what we can extract through our intimate associations with men. . . . So women got abortion as a private privilege, not as a public right."[214]

In Justice Ginsburg's dissent in *AT&T Corp. v. Hulteen*, a case involving a pregnant worker, she wrote, "certain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place . . . ."[215] These same attitudes likely informed the nine men who decided the earliest abortion and contraception cases. In her dissent in *Gonzales v. Carhart*, Justice Ginsburg invoked an equal protection analysis under the Fourteenth Amendment: "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."[216] Justice Ginsburg's minority view is that abortion should be decided on an equal protection basis. In the Court's most recent abortion decision, it applied the undue burden test and was able to avoid dealing with the issue of women's autonomy in the abortion context.[217] According to MacKinnon, the ERA as considered in the 1970s and 1980s is not enough: "Two major issues that were not central to the prior ERA discussion remain basic in women's second-class status: economic inequality and violence against women."[218]

2. Pre-existing Foundations

The Massachusetts SJC has explicitly imposed stricter limits on the state's authority to restrict abortion than the Supreme Court.[219] While the SJC's principal basis for its decision to permit state funding for abortion in *Moe* rested on due process, the decision also incorporated aspects of equal

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[213] CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 100 (1987).

[214] *Id.*

[215] AT&T Corp. v. Hulteen, 556 U.S. 701, 724 (2009) (Ginsburg, J., dissenting).

[216] Gonzales v. Carhart, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (citations omitted).

[217] Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016) (finding that two provisions of a Texas abortion bill were unconstitutional because they did not provide substantially compelling medical benefits to justify the burden imposed on women seeking abortion services).

[218] Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 HARV. J. L. & GENDER 569, 569 (2014).

[219] Moe v. Sec'y of Admin. and Fin., 417 N.E.2d 387, 400 (Mass. 1981). ("We think our Declaration of Rights affords a greater degree of protection to the right asserted here than does the Federal Constitution.").

protection law when finding that the state cannot burden the exercise of a fundamental right in a discriminatory manner.[220] The court in *Moe* explained, "the nine months of enforced pregnancy inherent in effectuating these regulations are only a prelude to the ultimate burden the State seeks to impose . . . we think the balance in this case to be decisively in favor of the individual right involved."[221] The recognition of gender as a suspect classification under the Massachusetts Declaration of Rights lends further support to the use of an equal protection rationale when assessing laws which impinge physically and psychologically on the pregnant woman.[222]

In *Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination*, the SJC found that the exclusion of pregnancy-related disabilities from a company's disability plan constituted sex-based discrimination.[223] This is contrary to several Supreme Court decisions that found policies and statutes relating to pregnancy to be simply distinctions between pregnant and non-pregnant people, not gender discrimination.[224] These decisions indicate the SJC's willingness to find that a statute's disproportionate impact on women can be a deciding factor in an equal protection analysis, where the Supreme Court has interpreted the Equal Protection Clause to require discriminatory intent.[225] A prime example is *Feeney*.[226] There, a federal district court found that "a veteran's hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences . . . were too inevitable to have been 'unintended.'"[227] The Supreme Court reversed, reasoning that the class at issue was nonveterans and that if a classification is "rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."[228] Under similar

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[220] *Id.* at 404.

[221] *Id.*

[222] *See generally, id.*; *cf. Hellerstedt*, 136 S. Ct. 2292, 2324 (holding the benefits of restrictions on abortion providers must outweigh the burden on women's right to seek an abortion); Planned Parenthood v. Casey, 505 U.S. 833, 893 (1992) (holding a woman has a right to choose to have a pre-viability abortion without undue interference from the state); Roe v. Wade, 410 U.S. 113, 164-65 (1973) (holding a woman has a fundamental right to seek an abortion).

[223] 375 N.E.2d 1192, 1199-1200 (Mass. 1978).

[224] *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993); Geduldig v. Aiello, 417 U.S. 484 (1974).

[225] *See Bray*, 506 U.S. 263; *Geduldig*, 417 U.S. 484.

[226] Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 259 (1979).

[227] *Id.* at 260-61 (citing Feeney v. Massachusetts, 451 F. Supp. 143, 151 (D. Mass. 1978)).

[228] *Feeney,* 442 U.S. at 272; *see also id.*at 275 ("Veteran status is not uniquely male. Although few women benefit from the preference the nonveteran class is not substantially all female.").

reasoning, the Supreme Court decided *Geduldig v. Aiello*, holding that a disability insurance program provision excluding benefits for a disability resulting from pregnancy did not violate equal protection because it did not differentiate between men and women, but between pregnant persons and nonpregnant persons.[229] Most recently, the Court held in *Bray v. Alexandria Women's Health Clinic* that attacks on abortion clinics did not constitute impermissible discrimination against women and that targeting "women seeking abortion" is not the same as targeting women generally.[230] There, again, the Court distinguished not between men and women, even though women exclusively seek abortions, but instead pointed out that the targeted group was people seeking abortions and any discrimination was not based on the sex of the person seeking the abortion, but on the fact that they were seeking the abortion at all.[231]

As abortion is undeniably a policy area in which the classes are made up of exclusively women on one side and a mix of men and women on the other, equal protection would require a constitutional interpretation that considers discriminatory impact as determinative.[232] Therefore, should the Commonwealth follow the SJC's combined logic in *Moe* and *Massachusetts Electric Company* that "the nine months of enforced pregnancy . . . are only a prelude to the ultimate burden" a woman will bear and that a disproportionate impact on pregnant people is sex discrimination, it will find an equal protection basis for guaranteeing choice to the women of Massachusetts.[233]

IV. CONCLUSION

As a sovereign state, Massachusetts can interpret its own constitution to be more protective of individual liberties and more restrictive of state power than the federal constitution. The SJC has demonstrated this prerogative in several areas, including in its conception of fundamental rights. Massachusetts considers abortion a fundamental right that is protected by due process. In evaluating any state restriction on abortion, a court must balance this fundamental right against the claimed state interest behind the restriction. Given the importance of bodily integrity as an aspect of personal liberty, the state would likely need a particularly strong rationale for limiting this right. As a result, even if the protections for the right to

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[229] *Geduldig*, 417 U.S. at 496 n.20.

[230] *Bray*, 506 U.S. at 270.

[231] *Id.* at 270-74.

[232] *Id.* at 263; *Geduldig*, 417 U.S. at 484.

[233] Moe v. Sec'y of Admin. and Fin., 417 N.E.2d 387, 404-05 (Mass. 1981); Mass. Elec. Co. v. Mass. Com'n Against Discrimination, 375 N.E.2d 1192, 1199-1200 (Mass. 1978).

choose an abortion under the Fourteenth Amendment of the federal Constitution were changed, the robust analysis required by Massachusetts courts when interpreting the Massachusetts Constitution would still operate to limit the range of restrictions that the state could impose.

In addition, Massachusetts's treatment of sex as a suspect class would likely result in any statute that attempted to regulate access to abortion being reviewed under strict scrutiny. Strict scrutiny requires a rationale stronger than what is required under the federal Constitution for sex or gender-based classifications, especially because the SJC has demonstrated that it is willing to classify legislation which disproportionately impacts women as sex discrimination. Under such a high standard, abortion rights can and should be protected as sex discrimination in Massachusetts.