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The Evolution of Substantive Due Process Throughout Time

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THE EVOLUTION OF SUBSTANTIVE DUE PROCESS THROUGHOUT TIME

by

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ABSTRACT

Substantive due process has been of great importance to the decision of many Supreme Court cases since its beginning. Since its inception in *Lochner v. New York*,[1] the Supreme Court has used the theory of substantive due process in order to grant numerous rights to individuals and this theory has been interpreted differently by each Justice that has crossed its path.

This thesis will explain how recent changes in the composition of the United States Supreme Court make it likely that judicial opinions involving substantive due process will be decided differently. The United States Supreme Court's future substantive due process jurisprudence will narrow the reach of Substantive Due Process. Justices and their past opinions as well as statements on their analysis of substantive due process will be scrutinized in order to come to this conclusion.

This thesis will examine the evolution of substantive due process as well as how each Justice's distinct views affect it within the Supreme Court's composition. By determining how the Supreme Court is most likely to proceed and examining the rights already granted through substantive due process this thesis will come to a determination on whether the protection of the rights granted to individuals would be maintained.

[1] *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

DEDICATION

To all the dreamers. If you can dream it, you can do it.

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INTRODUCTION

Substantive due process finds its roots within the Due Process Clauses of both the Fifth Amendment[2] and Fourteenth Amendment[3] of the United States Constitution, which guarantees that no individual will be "deprived of life, liberty, or property, without due process of the law." Substantive due process protects rights from government interference as constitutionally granted rights even if they are not specifically enumerated within the Constitution, no matter how much process is provided. Some of these rights include the right to contraception,[4] the right to marital privacy,[5] the right to refuse medical treatment,[6] as well as the right to abortion.[7]

The Ninth Amendment[8] sets out that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This has also been used to argue substantive due process. In the Ninth Amendment the Constitution states that there may be rights the Constitution does not specifically spell out, however that they may not be disparaged. This being used as proof that the framers believed that these unenumerated substantive rights did in fact exist.

Substantive due process has changed since its introduction in the case of *Lochner v. New York*[9] and continued changing with each addition or alteration of a Justice on the Supreme Court.

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[2] U.S. Const. amend. V.
[3] U.S. Const. amend. XIV.
[4] *Poe v. Ullman*, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961).
[5] *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
[6] *Cruzan v. Director, Missouri Dep't of Health*, 492 U.S. 917, 109 S. Ct. 3240, 106 L. Ed. 2d 587 (1989).
[7] *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).
[8] U.S. Const. amend. IX.
[9] *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).
** There is argument made by scholars (See Joshua D. Hawley*, THE INTELLECTUAL ORIGINS OF (MODERN) SUBSTANTIVE DUE PROCESS, 93 Tex. L. Rev. 275, (December, 2014) at 296.) as to whether the true beginnings of

Each alteration on the Court has impacted the application of substantive due process in its own way. The most notable modern impacts coming from the alterations on the bench are from the decisions in *Washington v. Glucksberg*[10] to the decision in *Obergefell v. Hodges*.[11] Changes also may occur in the Court's analysis due to the recent addition of Justices Gorsuch and Kavanaugh. These potential changes to the analysis of substantive due process will also be analyzed in order to determine if the United States Supreme Court within its future substantive due process jurisprudence will narrow the reach of substantive due process.

substantive due process really were in *Lochner* and not in the case of *Scott v. Sandford*. The case of *Lochner* differs from *Dred Scott* as it relates directly to the Fourteenth Amendment. Furthermore, the Court in *Dred Scott* dismissed the case on procedural grounds saying that diversity of citizenship did not exist, but Justice Taney went on to write majority opinion where there were many concepts that allude to substantive due process. *Lochner*, however, is the first case in which the concept of substantive due process is fully introduced and utilized by the Supreme Court.

[10] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).

[11] *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).

SIGNIFICANCE

The study of substantive due process and its effects on the rights protected States is extremely significant to the world and political climate that we live in. Millions of people within the United States are affected by the rights that are granted through substantive due process. The rights protected by substantive due process range from those protecting young women,[12] individuals seeking to marry anyone of their choosing,[13] even to those who seek to use contraception in their sexual lives.[14]

Substantive due process is an area of constitutional law that affects many individuals and by analyzing how the Supreme Court plans to act within that area of law we are able to determine what will likely happen to individual's rights. The discussion regarding whether individuals maintain their rights under substantive due process, or whether the analysis should be conducted under a different facet of the Constitution,[15] is also of importance.

The way the Supreme Court alters the status of protected rights individual's rights is extremely significant. A right's protected status may change when the Court changes their judicial approach to certain doctrines, as they affect future judicial decisions throughout the entire country. The decision as to what will be the new standard for approaching substantive due process may affect many rights already protected.

[12] *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).
[13] *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).
[14] *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
[15] Megan M. Walls, OBERGEFELL V. HODGES: RIGHT IDEA, WRONG ANALYSIS, 52 Gonz. L. Rev. 133 (2016).

EXISTING LITERATURE

The bulk of the literature that exists regarding substantive due process is tied to prior court opinions, both from the United States Supreme Court, as well as scholarly research articles.

The Supreme Court

Supreme Court opinions are indispensable upon analyzing substantive due process and its evolution. At first glance, these judicial opinions may not seem like they may give guidance to how substantive due process will evolve, however looking at the dissents to landmark cases, that changes. Within their dissents, each Justice makes clear their opinions on the decision at hand and gives clear instruction as to how they believe substantive due process should be used.

Law Review Articles

The majority of the existing scholarly research articles which relate to substantive due process focus on the application of substantive due process to past cases. There is an analysis conducted within the articles on how that application was conducted and how it will affect other cases. These articles are of great importance, they have been able to encapsulate the history of substantive due process. Law review articles also provide essential information regarding different approaches the Supreme Court has taken upon their past substantive due process analysis.

These articles provide insight as to how some scholars have reacted to past analysis of substantive due process applied by the Supreme Court. They go on to elaborate on whether these approaches are consistent with past jurisprudence, and how the changes in application have

affected the individuals. These articles are further able to provide insight as to each individual justice and their interpretation on the concept of substantive due process and how it has been and should be applied.

METHODOLOGY

Extensive research of past jurisprudence is required in order to determine what route the Supreme Court is most likely to take in its future applications of substantive due process. The qualitative data within this study is gathered in the form of legal research. The research will examine scholars' ideas, Supreme Court justices' opinions, and those justices themselves.

Law review articles will be used in order to determine the scholar's opinions regarding the progression of substantive due process rights, Supreme Court Justices and their opinions on substantive due process, current day occurrences which may affect Justices opinions within a substantive due process case.

The focus of this research will be primarily to study past Supreme Court jurisprudence. The focus of the Supreme Court cases analyzed turned to the Fourteenth Amendment cases involving substantive due process. This provides the foundation in order to determine the Supreme Court's past history with substantive due process cases and an outline as to Justices opinions on the matter.

The research will be applied in order to be able to render opinions and draw necessary conclusions regarding the following:

- Will the United States Supreme Court change its approach to substantive due process cases?
- In what way will the Supreme Court change its approach to substantive due process cases?

- How will these potential changes to the Court's analysis affect individuals' rights?
- Will the rights protected by substantive due process be maintained even if there is a change in application?

History of Substantive Due Process

The first appearance of substantive due process was in the case of *Lochner v. New York*.[16] The Supreme Court in *Lochner* expressed that the right to contract, when relating to an individual's business "is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[17] Up until substantive due process's appearance in recent cases such as *Whole Woman's Health v. Hellerstedt*[18] and *Obergefell v. Hodges*,[19] substantive due process has continued as one of the most controversial topics within constitutional law.[20]

The Fourteenth Amendment states that no state is able to deprive any person of life, liberty or property without due process of law,[21] that is what the Supreme Court expressed is the concept applied to the right to contracts. The Court in *Allgeyer v. Louisiana*[22] and in *Lochner*[23] relied on the idea that "the right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right." *Lochner*[24] was later challenged and questioned by the United States Supreme Court on numerous occasions and was eventually overturned by the Court's decision in *United States v. Darby*[25] where the Supreme Court upheld the Fair Labor Standards Act.[26] The end of the *Lochner* era was marked by *West*

[16] *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).
[17] *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).
[18] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).
[19] *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[20] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006).
[21] U.S. Const. amend. XIV.
[22] *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832 (1897).
[23] *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).
[24] *Id*.
[25] *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).
[26] *Imars v. Contractors Mfg. Servs.*, 1998 U.S. App. LEXIS 21073 (United States Court of Appeals for the Sixth Circuit 1998).

Coast Hotel Co. v. Parrish.[27] The application and use of substantive due process in *Lochner* has been questioned within *Meyer v. Nebraska*[28] spanning to *Whole Woman's Health v. Hellerstedt*.[29]

The Supreme Court began limiting substantive due process rights within the plurality decision of *Michael H. v. Gerald D,*[30] however before *Michael H,* the Supreme Court had already had vast experience with substantive due process cases. Between 1905 in the *Lochner* decision and 1990 in the *Michael H* decision the Supreme Court had decided numerous cases involving substantive due process.

[27] ** The "switch in time that saved nine." Arguably the political pressure on Justice Owen Roberts was what caused the change in his stance from *Lochner* to *West Coast Hotel*.
[28] *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).
[29] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).
[30] *Michael H. v. Gerald D.*, 492 U.S. 937, 110 S. Ct. 22, 106 L. Ed. 2d 634 (1989).

Timeline of Notable Substantive Due Process Cases Within the United States Supreme Court	
1905	Lochner v. New York
1923	Myers v. Nebraska
1923	Adkins v. Childrens Hospital of D.C.
1925	Pierce v. Society of Sisters
1927	Buck v. Bell
1937	West Coast Hotel Co. v. Parrish
1942	Skinner v.Oklahoma
1961	Poe v. Ullman
1970	Roe v. Wade
1977	Moore v. City of East Cleveland
1977	Maher v. Roe
1986	Bowers v. Hardwick
1990	Michael H. v. Gerard D.
1992	Cruzan by Cruzan v. Director, Missouri Department of Health
1997	Washington v. Glucksberg
2003	Lawrence v. Texas
2007	Gonzales v. Carhart
2013	United States v. Windsor
2015	Obergefell v. Hodges
2016	Whole Woman's Health v. Hellerstedt

Table 1: NOTABLE CASES INVOLVING SUBSTANTIVE DUE PROCESS

In *Michael H*, the Court attempted to restrain more liberal Justices from granting protection to whatever persons or rights arose, especially if those could not be explicitly backed by the Constitution. The principle of historical tradition and reasoned judgement was established by Justice Antonin Scalia in his plurality decision in *Michael H*. Justice Scalia in footnote 6 of his opinion explains how a right in order to be protected must be "rooted into the traditions and conscience our people as to be ranked as fundamental."[31] This concept has explicit and

[31] *Michael H. v. Gerald D.*, 492 U.S. 937, 110 S. Ct. 22, 106 L. Ed. 2d 634 (1989).

continuing support throughout many of the Court's subsequent decisions[32] notably in *Washington v. Glucksberg*.

The case of *Glucksberg*[33] demonstrates the continuing support from the Court. In this case the Supreme Court came to a determination about how substantive due process should be applied to individuals' rights. The Rehnquist Court set out a specific test that should be followed, one which had two prongs and granted protection only to liberties that are "deeply rooted in this Nation's history & tradition."[34]

The approach the Supreme Court took in *Glucksberg* is one important to understand. In the Glucksberg test, the determination of substantive due process cases is made through a historical tradition analysis. The Court set forth a two-pronged test. This was done not only in order to determine if the right meets the specification of the historical tradition, but also to ensure that the analysis be "applied and expanded sparingly,"[35] as Justice Gorsuch emphasized in a subsequent tenth circuit decision approximately eighteen years after Glucksberg.

The test set out in *Glucksberg* was meant to forbid "the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[36] It was meant to protect fundamental rights and liberties that are "deeply rooted in this Nation's history and tradition."[37] The Court

[32] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006) at 1.
[33] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[34] *Id.*
[35] *Browder v. City of Albuquerque*, 787 F.3d 1076, 2015 U.S. App. LEXIS 9183 (United States Court of Appeals for the Tenth Circuit, 2015).
[36] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[37] *Id.*

states that in order to meet the first prong of *Glucksberg* that the right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[38] and "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed."[39] The second prong of the test was that the asserted fundamental right, or as the Court stated "liberty interest,"[40] bust be described with a "careful description."[41] If a right meets these descriptions, they are protected under the Due Process Clause, unless the infringement meets the narrowly tailored level of scrutiny set out by the Court.

This analysis was initially altered in the landmark case of *Lawrence v. Texas*,[42] where the Court began using the evolving national values approach to substantive due process. Using this approach, the Court protects values that command widespread support, not only those values that are deeply rooted in the Nation's history and tradition.[43]

In *Obergefell v. Hodges*[44] the Court relied on the evolving national values approach to substantive due process. In 2015 in *Obergefell*, Justice Kennedy altered the analysis of substantive due process as applied to fundamental rights. Within this decision, the Court decided that in addition to the *Glucksberg* standard, a right may be fundamental if it passes the fundamental principles analysis that is applied by the Supreme Court.

[38] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).
[43] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006) at 1.
[44] *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).

The Court applied four principles in the *Obergefell* case in order to determine why a right could be fundamental, and in *Obergefell* Justice Kennedy explained why marriage is fundamental to society. Once this analysis is applied to the new articulation of the right if it passes the analysis, the right is considered fundamental. If the right fails it is not considered fundamental and receives no protection.

If this right is deemed fundamental, further analysis is needed. The individuals' rights should be balanced against the government's interests, in order to determine if the government has "sufficient justification" for infringing on individual liberties. If the interest is not fundamental, the Court applies rational basis review to the asserted fundamental right. In *Washington v. Glucksberg* if a right is fundamental it would be analyzed under the narrowly tailored standard, and the government would only prevail if their purpose was to serve a compelling state interest and it was done in the most narrowly tailored manner.

The Supreme Court has received criticism on its application of the doctrine of substantive due process. It has been seen as "little more than a judicial charade" and an "excuse for selective and unprincipled legislating from the bench."[45] The theory of evolving national values only emphasizes this critique, as it allows the Court to grant rights as they wish without pointing to any specific clause or amendment within the Constitution where it would be attached to.

Recent judicial opinions[46] have not alleviated the concerns posed by the some scholars in relation to the use of substantive due process, but in reality, have only show exactly what these

[45] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006) at 2.
[46] *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
** Daniel O. Conkle was speaking as to the theory of evolving national values in 2006, the case of *Obergefell v. Hodges* in 2015 is a prime example of this theory put into practice after the writing of this article.

authors have been talking about being put into practice, especially in relation to doctrinal clarity and judicial consistency.[47] Due to the changes in how the Supreme Court chooses to approach the doctrine of substantive due process, many are left at a loss. The changes in the Court leave an uncertainty as to what will occur next in judicial policymaking, this goes back to the post-Lochner saying of the "switch in time that saved nine." This uncertainty is both in terms of what rights may and may not be protected in the future as well as what theory of substantive due process will be applied by the Court.

Lawrence v. Texas[48] initially suggested that the Supreme Court may now endorse simultaneously very different and inconsistent theories of substantive due process and *Obergefell v. Hodges*[49] pushes even further in that direction. The Supreme Court had not outright overturned its previous precedent at the time any of these opinions had been made. The Court had simply been using different analyses through time without ever doing away with any of them, therefore not showing any discontinued support for any of the other theories of substantive due process. There was pushback from some scholars and within the Supreme Court itself with the decision of *Obergefell*.[50]

The landmark case was a split 5-4 decision which left many questions unanswered, the primary question being, is this the final approach to substantive due process the Supreme Court is going to utilize? The dissents from the Justices, along with the change within the structure of the Court and backlash from the legal community suggest that it is not. Chief Justice Roberts,

[47] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006) at 2.
[48] *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).
[49] *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[50] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006).

and Justices Thomas, Scalia and Alito all wrote dissents criticizing the approach taken to reach a conclusion within this case.[51]

Many legal scholars have also scrutinized the approach taken by the Supreme Court in its ruling in *Obergefell*[52] as evidenced by the various articles[53] written. One scholar discussed that Justice Kennedy stepped outside the purview of the Court in denying the states the power to determine the definition of marriage and whether same sex couples have the right to marry.[54] The Court in *Obergefell*[55] concluded that due process and equal protection give same-sex couples the same rights to enjoy marriage as opposite sex couples, however, some legal scholars still stand by the idea that this case should have been decided on equal protection grounds alone and the Court would still have had ample grounds to arrive at the same result. There is also argument that decision to add the due process analysis to the *Obergefell*[56] case fundamentally altered the analysis and use of the theory of evolving national values within substantive due process.[57]

[51] See dissents in *Obergefell v. Hodges,* 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[52] *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[53] Megan M. Walls, OBERGEFELL V. HODGES: RIGHT IDEA, WRONG ANALYSIS, 52 Gonz. L. Rev. 133 (2016); Richard S. Myers, OBERGEFELL AND THE FUTURE OF SUBSTANTIVE DUE PROCESS, 14 Ave Maria L. Rev. 54 (2016).; Marc Spindelman, OBERGEFELL'S DREAMS, 77 Ohio St. L.J. 1039 (2016).; Matthew R. Grothouse, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY: HOW OBERGEFELL V. HODGES ILLUMINATES THE MODERN SUBSTANTIVE DUE PROCESS DEBATE, 49 J. Marshall L. Rev. 1021 (2016).
[54] Megan M. Walls, OBERGEFELL V. HODGES: RIGHT IDEA, WRONG ANALYSIS, 52 Gonz. L. Rev. 133 (2016).
[55] *Id.*
[56] *Id.*
[57] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006).

Abortion Cases Affected by Substantive Due Process

A woman's right to receive an abortion, as previously determined by the Court, is only one of many rights which are granted to individuals through the substantive due process analysis of the Fourteenth Amendment.[58] The debate regarding women's rights to their own body is one that has been under discussion for years, especially regarding terminating a pregnancy.[59]

Timeline of Notable Woman's Rights Related Cases	
1927	Buck v. Bell
1965	Griswold v. Connecticut
1970	Roe v. Wade
1977	Maher v. Roe
2016	Whole Woman's Health v. Hellerstedt

Table 2: SUPREME COURT CASES RELATING TO WOMAN'S RIGHTS

The first "win" for granting rights to woman was in 1965, in *Griswold v. Connecticut*.[60] In *Griswold* the Supreme Court decided that married couples' rights to use contraception was in fact protected. This was granted under a general right to privacy.

The argument as to whether or not a woman had the legal right to receive an abortion and whether that protection existed under the United States Constitution was first decided by the Supreme Court in 1970. In 1970 the Court decided the landmark case of *Roe v. Wade*.[61] In *Roe* the Supreme Court granted women their rights to an abortion. The Court argued that inherent in

[58] *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).
[59] Stephen Koff, Abortion Controversies, 29 CQ Researcher 1 (2019), http://library.cqpress.com/cqresearcher/cqresrre2019030100.
[60] *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
[61] *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).

the Fourteenth Amendment[62] is a fundamental right to privacy and embedded within that right is the woman's choice to have an abortion. This is balanced against the government's interest in protecting the potential for human life, which meant that the government had the right to restrict abortions when the fetus was viable, or when it was related to the mother's health. These restrictions could only be imposed upon the second and third trimesters of a pregnancy. Within the first trimester the state could not pass any law to regulate the decision of a woman as to whether or not she wanted to get an abortion.[63]

In 1977 the Court decided that the state need not fund a woman's abortion. In *Maher v. Roe*[64] the Supreme Court ruled on a case regarding the constitutionality of limitations of Medicaid benefits for first-trimester abortions. The Connecticut Welfare Department limited the benefits for only the first trimester abortions that were considered "medically necessary."

The Court held that there was no infringement upon the "fundamental right recognized in Roe."[65] They went further to say that there is a distinction between direct interference with a protected activity, and "state encouragement of an alternative activity consonant with legislative policy."[66] The law survived scrutiny under the Fourteenth Amendment.

The most recent case relating to women's rights to abortion was *Whole Woman's Health v. Hellerstedt*[67] which was decided in 2016. In *Hellerstedt* Texas legislature passed a bill which contained provisions regarding abortion. These provisions were argued to place a substantial

[62] U.S. Const. amend. XIV.
[63] *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).
[64] *Maher v. Roe*, 428 U.S. 908, 96 S. Ct. 3219, 49 L. Ed. 2d 1216 (1976).
[65] *Id* at 432.
[66] *Id*.
[67] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).

burden on an individual seeking to have an abortion. The Supreme Court applied the substantial burden test to the case in order to come to a conclusion.

The substantial burden test was first established in the plurality decision of *Planned Parenthood of Southeastern Pa. v. Casey*,[68] decided in 1994. The test states the Supreme Court should weigh to which extent the law or provision in question actually serve the stated government interest against the burden which they impose upon individuals. If the burden outweighs the government interest, the law or the provision would be constitutionally invalid.

In *Hellerstedt* the Court applied the substantial burden test for the court to determine if the provisions placed a substantial burden in the path of women seeking an abortion. The Supreme Court determined that the provisions unconstitutionally impose an undue burden.[69] The Court found that the provisions passed by Texas legislature provided no additional protections than those that were already in place, and it did not lower the risks for procedures that occurred in abortion clinics compared to other surgical centers.[70]

The Supreme Court in *Hellerstedt* was accused of bending the rules of judicial scrutiny and misinterpreting precedent to reach its conclusion.[71] There has been debate over whether granting the right to abortion was a valid decision for the Courts to have made in *Roe v. Wade*,[72] as witnessed by the slew of anti-abortion movements and even with the murder of some

[68] *Planned Parenthood v. Casey*, 503 U.S. 933, 112 S. Ct. 1468, 117 L. Ed. 2d 614 (1992).
[69] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) at 19.
[70] *Id* at 36.
[71] See Thomas dissent *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).
[72] *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).

prominent abortion doctors[73] this debate went on when the Court reaffirmed its decision in the case of *Hellerstedt*. There is a potential argument as to whether the Supreme Court should have granted these rights through the Fourteenth Amendment, and by using a substantive due process approach, or if it should have been granted through other avenues within the Constitution.

The right to abortion has become such a matter for debate, that many states have passed laws attempting to infringe on women's rights to have abortions and restrict how they may have such a procedure done.[74] It has become the leading cause of questioning for the approval of Supreme Court Justices as well as a major divider between political parties.

The attempted restrictions on abortions which are being conducted have led to the case of *June Medical Services L.L.C v. Gee*.[75] This case had until December 2nd, 2019 to file Amicus Curiae briefs and the case is expected to be heard by the Court in April 2020.

[73] (2014). After Tiller. Bullfrog Films. [Streaming Video]. Retrieved from video.alexanderstreet.com/watch/after-tiller database.
[74] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) ** Texas legislature passed laws in order to restrict abortions.
[75] *June Med. Servs. L.L.C. v. Gee*, 204 L. Ed. 2d 1193, 2019 U.S. LEXIS 4623, __ S.Ct. __, 2019 WL 4889929 (Supreme Court of the United States October 4, 2019, Decided).

The Justices

The Supreme Court faced several changes in its structure since the landmark cases regarding abortion. There have been changes to the Court since the 1965 decision of *Griswold v. Connecticut*,[76] the 1970 decision of *Roe v. Wade*[77] and the more recent case of *Woman's Health v. Hellerstedt*[78] decided in 2016. Since 2016 there have also been several changes to the composition of the Court.

In January 2006 Associate Justice Sandra Day O'Connor retired from the Court. She had been a sitting Justice since September 1981. In June 2009 Associate Justice David Souter retired. Justice Souter took his seat in October 1990. In July 2018 Justice Anthony M. Kennedy also retired from the Supreme Court. Justice Kennedy had taken his seat in February 1988.[79]

Justice Antonin Scalia took his Judicial oath in September 1988 and passed away in February 2016. Justice John Paul Stevens took his oath in December 1975 and passed away in July 2019.[80]

Since the retirement and passing away of these Justices, the Supreme Court has had to add new justices onto the Court in order to maintain the Court at nine sitting justices. The United States Constitution does not require a specific number of justices to be sitting on the bench[81] at

[76] *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
[77] *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973).
[78] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).
[79] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).
[80] SUPREME COURT OF THE UNITED STATES – Justices 1789 to Present, https://www.supremecourt.gov/about/members_text.aspx (last visited Mar. 1, 2020).
[81] ** Under the Judiciary Act of 1801, Congress limited the Supreme Court to having only five Justices, in 1863 the Court had a total of ten sitting Justices until it settled at nine justices in 1969.

any specific point in time,[82] only that the judicial power of the United States should be vested in such a singular "supreme Court."[83]

In *June Medical Services L.L.C v. Rebekah Gee*[84] the Justices sitting on the Supreme Court will be Chief Justice John Roberts, joined by Associate Justices Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, Samuel A. Alito, Sonia Sotomayor, Elena Kegan, Neil M. Gorsuch as well as Brett M Kavanaugh.[85] These Justices will have the opportunity to review the case of *June Medical Services* and several other cases that arise and are brought forth towards the Supreme Court.

Since the decisions of *Roe v. Wade* or even *Whole Woman's Health v. Hellerstedt* there have been several changes within the structure of the Court. Those most recent and most relevant are the addition of Associate Justices Gorsuch and Kavanaugh. Both Associate Justices were welcomed to the Court after the decision in *Hellerstedt* and were appointed by President Donald Trump. Justice Neil M. Gorsuch was appointed to the Supreme Court in April 2017. Justice Brett M. Kavanaugh was appointed to the Court in October 2018.[86]

The opinions of the conservative Justices currently sitting on the bench are imperative to determine what route the Court will take next. Of the Justices currently on the Court those who have most openly displayed their dislike for substantive due process and its prior uses are most

[82] U.S. Const. Article 3 Sections 1-3.
[83] U.S. Const. Article 3 Sections 1.
[84] *June Med. Servs. L.L.C. v. Gee*, 204 L. Ed. 2d 1193, 2019 U.S. LEXIS 4623, __ S.Ct. __, 2019 WL 4889929 (Supreme Court of the United States October 4, 2019, Decided).
[85] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).
[86] *Id*.

likely to change its future use. These Justices include Chief Justice John Roberts as well as Associate Justices Thomas, Alito, Gorsuch and Kavanaugh.

Chief Justice John Roberts

Chief Justice John Roberts is one of the most crucial votes regarding any decision the Supreme Court makes. The Chief Justice has historically made well thought out and calculated decisions with each case that comes up, this is shown with his precision of language as well as how eloquently Chief Justice Roberts opinions are written in order to attempt to avoid conflict from either side.[87]

The Chief Justice was born in 1955 and attended Harvard University for both his undergraduate and law school studies.[88] Chief Justice Roberts had a long history of clerking for several judges as well as working with the White House before being appointed to the Supreme Court. The two most notable clerkships the Chief Justice had were then-Associate Justice William H. Rehnquist, as well as Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit.[89] Judge Henry J. Friendly was both the Chief Justices judicial hero as well as his mentor. Judge Friendly's writing style greatly influenced the Chief Justice's. These influences are shown in the manner that Chief Justice Roberts takes careful measure of existing case law before approaching any new legal theories.[90] Other scholars such as Professor Douglas

[87] John F. Basiak, Jr., THE ROBERTS COURT AND THE FUTURE OF SUBSTANTIVE DUE PROCESS: THE DEMISE OF "SPLIT-THE DIFFERENCE" JURISPRUDENCE?, bepress Legal Series at 43.
[88] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).
[89] *Id.*
[90] John F. Basiak, Jr., THE ROBERTS COURT AND THE FUTURE OF SUBSTANTIVE DUE PROCESS: THE DEMISE OF "SPLIT-THE DIFFERENCE" JURISPRUDENCE?, bepress Legal Series at 43.

Kmiec have noted that the Chief Justice is bound to legal rather than ideological grounds in order to bring consensus to the Court, this approach.[91]

With the increased consensus brought to the Court this eases one of what seems to be the Chief Justice's great concerns, the legitimacy of the Court. Since joining the Court, the Chief Justice has masterfully crafted narrow but sound rulings that were able to draw support from all the Justices on the Court,[92] thus furthering the legitimacy of not only the decisions, but also of the Court as a whole. The Chief Justice is historically more likely to side with incremental change than he is to side with drastic changes in case law.[93] When he is the pivotal vote in a decision, it is likely he will side with what will garner more support in order for him to be able to craft an opinion in a narrow and succinct manner.

The Chief Justice asserted in *Obergefell* that the Court should not overstep and engage in judicial policymaking. The Chief Justice further argued that same-sex marriage may be fair policy, however that it is not addressed by the Constitution. Chief Justice Roberts goes onto say that since the Constitution does not address the issue, it is beyond the purview of the Court to decide the issue and it should be decided by individual states.

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[91] John F. Basiak, Jr., THE ROBERTS COURT AND THE FUTURE OF SUBSTANTIVE DUE PROCESS: THE DEMISE OF "SPLIT-THE DIFFERENCE" JURISPRUDENCE?, bepress Legal Series at 43.
[92] *Id* at 44.
[93] LAW & LIVERTY - *How the Roberts Court Will Actually Become the Roberts Court*, https://www.lawliberty.org/2017/10/12/how-the-roberts-court-will-actually-become-the-roberts-court/ (last visited Mar. 2, 2020).

Associate Justice Clarence Thomas

The most senior Justice on the bench, Justice Clarence Thomas took his seat in October of 1991.[94] His tenure on the Supreme Court expands over the course of twenty-eight years. Prior to his nomination Justice Thomas had an established career in working with appellate law cases, as well as working with the American Civil Rights movement. The Associate justice also served as a Judge on the United States Court of Appeals for the District of Columbia Circuit. Justice Thomas graduated from the College of the Holy Cross for his undergraduate degree, and from Yale Law school for his law degree.[95]

Justice Thomas is well known for being the most "process oriented as well as intellectually consistent Justice on the bench."[96] The Associate Justice has strongly rejected any evolution in his constitutional jurisprudence, as is evident in his prior opinions, he is often the sole dissenter in cases. Justice Thomas has been willing to defend doctrine over any result a case may render.[97] Staying true to his strong textualist nature, he writes dissents which clearly object to any change in doctrine.

Justice Thomas has continued to refute majority positions on substantive due process cases and does so plainly and simply. He has not authored any seminal substantive due process case throughout his entire tenure as a Justice.[98] Through his dissents throughout the years the

[94] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).
[95] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).
[96] John F. Basiak, Jr., THE ROBERTS COURT AND THE FUTURE OF SUBSTANTIVE DUE PROCESS: THE DEMISE OF "SPLIT-THE DIFFERENCE" JURISPRUDENCE?, bepress Legal Series at 30.
[97] *Id.*
[98] *Id.*

Associate Justice provides insight into what he desires the shift for the substantive due process analysis to be. It is shown that there is a desire for it to be turned into a more historical based analysis for those rights which are both unenumerated but fundamental.[99]

Justice Thomas' dissents provide great insight as to his opinions on substantive due process and how he believes the Supreme Court should proceed. He leaves this unambiguous within his opinions, especially his dissents.

In Justice Thomas' dissent in *Whole Woman's Health v Hellerstedt* he made abundantly clear how he felt about the Court's use of the "undue burden test." Justice Thomas stated that the Court's "jurisprudence has gone off the rails."[100] Justice Thomas went as far as to say that the Court bent the rules of judicial scrutiny, and that the Court's analysis misinterpreted precedent to reach the conclusions they wanted to. The Court expanded and created special rules, and they gave the enforcement of abortion to others, contrary to what their past jurisprudence had stated.[101]

Justice Thomas was also among the dissenters in *Obergefell v. Hodges*. Justice Thomas articulates how he had previously explained the dangers of "treating the Due Process Clause as a font of substantive rights."[102] Justice Thomas is firmly against the doctrine of substantive due process and has displayed this is evident in his dissent. Stating that the doctrine of substantive due process is not defensible, and that the majority stretched substantive due process too far.[103]

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[99] John F. Basiak, Jr., THE ROBERTS COURT AND THE FUTURE OF SUBSTANTIVE DUE PROCESS: THE DEMISE OF "SPLIT-THE DIFFERENCE" JURISPRUDENCE?, bepress Legal Series at 31.
[100] See Thomas dissent in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).
[101] *Id*.
[102] See Thomas dissent in *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[103] *Id*.

Justice Thomas goes a step further in his dissent as to criticize the Justices in the majority. Claiming that they are roaming "at large in the constitutional field guided only by their personal views."[104] Further stating that "by straying from the text of the Constitution, substantive due process exalts judges at the expense of the People from whom they derive their authority."[105] Thus showing his plain disagreement with the majority's holding, and dislike for the current theory in use for the application and analysis of substantive due process.

Associate Justice Samuel A. Alito

The Associate Justice was born in New Jersey in 1950. He attended Princeton for his undergraduate career and for his J.D. attended Yale Law School. Justice Alito prior to taking the bench had vast experience with working in appeals as well as in the White House, making him an attractive candidate to be nominated to the Supreme Court. He served on the United States Court of Appeals for the Third Circuit from 1990 until his nomination by President George W. Bush. The Justice eventually took his position on the Supreme Court in late January 2006.[106]

Justice Alito is distinguishable from the Justices on the Court. The Justice's conservative values and eloquently written opinions provide a clear guidance as to how he feels about each topic he writes about, and what his judicial philosophy is. This is seen clearly in his dissents, he makes it evident as to what he believes should have happened, and where the error he sees the holding of the majority is. This is seen especially in the dissent of *Obergefell v. Hodges*.

[104] See Thomas dissent in *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[105] *Id*.
[106] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).

In *Obergefell v. Hodges* Justice Alito wrote a scathing dissent criticizing the majority for its ruling as well as discussing what the errors were in the application of jurisprudence. He claimed that it is clear that the "Constitution leaves that question to be decided by the people of each State"[107] and not by the Justices on the Court. Justice Alito asserts that it was an error to take on the case as the Court did.

The Justice cites back to the case of *Washington v. Glucksberg* in his dissent, in order to criticize the change in jurisprudence. He states that in order to "prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that 'liberty' under the Due Process Clause should be understood to protect only those rights that are 'deeply rooted in this Nation's history and tradition.'"[108] And that is ultimately the opposite of what happened in *Obergefell*. Justice Alito shows a clear preference for the judicial precedent set in *Glucksberg*.

Justice Alito states that the Supreme Court does not have the authority within the Constitution to protect rights through substantive due process. Further Justice Alito goes on to claim that the Justices in the majority are granting these rights to individuals because they believe they have this authority, and they believe it is a fundamental right.[109] He criticizes the Court in being guided by its own personal beliefs. "Today's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed"[110]

[107] See Alito dissent in *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[108] *Id*.
[109] *Id*.
[110] *Id*.

Associate Justice Neil M. Gorsuch

Justice Gorsuch was born in Denver, Colorado in August 1967. He is an extremely academically accomplished justice, receiving a Bachelor of Arts from Columbia University, a Juris Doctor from Harvard Law, and a Doctor of Philosophy (D.Phil.) from the University of Oxford. Justice Gorsuch clerked for several Supreme Court Justices prior to his nomination, he clerked for Justice Byron White and Justice Anthony M. Kennedy. He took his seat on the Supreme Court in April 2017.[111]

Justice Gorsuch has not been on the Supreme Court long enough for the opinions he has written in that time to be analyzed and to see his insight as to the evolution of substantive due process. However, the Justice was appointed to the United States Court of Appeals for the Tenth Circuit in 2006 and made some of his views clear then.[112] Within the opinions written in his tenure on the Court of Appeals, the Justice demonstrates his conservative nature and restrictive interpretation of substantive due process.

In *Browder v. City of Albuquerque,* the Justice stays true to the ideal that the doctrine of substantive due process "should be applied and expanded sparingly."[113] He goes on to cite *Washington v. Glucksberg* and says that the Supreme Court warned of the application of substantive due process "because guideposts for responsible decision-making in this unchartered

[111] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).
[112] *Id*.
[113] *Browder v. City of Albuquerque*, 787 F.3d 1076, 2015 U.S. App. LEXIS 9183 (United States Court of Appeals for the Tenth Circuit, 2015).

area are scarce and open-ended."[114] Justice Gorsuch heeds the Supreme Court's warning in his opinion, and applies the doctrine as the Court directed.

Justice Gorsuch's restrictive interpretation of substantive due process has had him question "both whether federal courts should hear such claims and whether the doctrine should exist at all."[115] The Associate Justice has implied that the Supreme Court should abolish the doctrine of substantive due process altogether[116] when the Justice suggested there is no constitutional foundation for the doctrine, "others question whether it should find a home anywhere in the Constitution"[117] Due to substantive due process not having a home within the Constitution's text, and Justice Gorsuch's restrained and conservative nature, this may translate to extreme results when it is applied to a case involving substantive due process.[118]

Associate Justice Brett M. Kavanaugh

Associate Justice Kavanaugh is the most recent addition to the Supreme Court. He was appointed by President Donald Trump and took his seat in 2018. The Associate Justice is among one of the most well accomplished Justices on the Supreme Court. Having received both a

[114] *Browder v. City of Albuquerque*, 787 F.3d 1076, 2015 U.S. App. LEXIS 9183 (United States Court of Appeals for the Tenth Circuit, 2015).
[115] Maria Buxton, Hannah Kieschnick & Robyn D. Levin, JUDGE GORSUCH AND CIVIL RIGHTS, A RESTRICTIVE READING, SLR Vol 69 (2017).
[116] *Id*.
[117] *Browder v. City of Albuquerque*, 787 F.3d 1076, 2015 U.S. App. LEXIS 9183 (United States Court of Appeals for the Tenth Circuit, 2015).
[118] Maria Buxton, Hannah Kieschnick & Robyn D. Levin, JUDGE GORSUCH AND CIVIL RIGHTS, A RESTRICTIVE READING, SLR Vol 69 (2017).

Bachelor of Arts and a Juris Doctor from Yale University. Justice Kavanaugh clerked for Justice Anthony Kennedy prior to his appointment to the Court.[119]

Justice Kavanaugh served as Associate Counsel and then Senior Associate Counsel to President George W. Bush from 2003 to 2006. In 2006 he was appointed a judge of United States Court of Appeals for the District of Columbia Circuit in 2006.[120] He served on the U.S. Court of Appeals from 2006 until his Supreme Court nomination in 2018.

During the confirmation hearing for Justice Kavanaugh's nomination, he made several comments which could demonstrate how he would act when on the Supreme Court. The Associate Justice implied that he pays more attention to the words of the Constitution than his interpretation of it. He said that "being a good judge means paying attention to the words that are written, the words of the constitution and the words of legislature"[121] He went on to say that he was a "pro-law judge"[122] not pro "defendant" or pro "plaintiff."

Justice Kavanaugh seems to show to his confirmation panel that he values the Constitution over most other things. When questioned about independence as a Justice, he emphasized how much he valued the independence of the Court from other branches of government, and how that allowed the Court to act how they believe is correct. When asked

[119] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).
[120] *Id*.
[121] Watch Live: Brett Kavanaugh's second confirmation hearing before the Senate Judiciary Committee, YOUTUBE (Sept 5, 2018) https://www.youtube.com/watch?v=et2jf-C6TkE.
[122] *Id*.

about how his personal beliefs would affect his decision-making the Justice was very clear in that his "personal beliefs are not melded into how I decide cases."[123]

Justice Kavanaugh places big emphasis on the importance of judicial precedent. He explains how its purpose is "to ensure stability in the law and predictability. It enforces impartiality and independence as a Justice."[124] However, when talking about substantive due process and Washington v. Glucksberg, he stated that "all roads lead to the Glucksberg test as the test that the Supreme Court has settled on as the proper test" in order to determine the protection of those unenumerated rights.[125]

In Justice Kavanaugh's pre-confirmation interview with Senator Susan Collins he re-emphasized his respect for stare decisis. He was asked whether he considered *Roe v. Wade* to be settled law, and in not so many words he said yes. Senator Collins told reporters that Justice Kavanaugh "said that he agreed with what [Chief] Justice [John] Roberts said at his nomination hearing in which he said that it was settled law."[126] Thus showing how it is possible that Justice Kavanaugh may lean towards a change in the doctrine of substantive due process, but his respect for stare decisis may prevent that. This makes him unpredictable.

[123] Watch Live: Brett Kavanaugh's second confirmation hearing before the Senate Judiciary Committee, YOUTUBE (Sept 5, 2018) https://www.youtube.com/watch?v=et2jf-C6TkE.
[124] *Id*.
[125] *Id*.
[126] Nolan D. McCaskill, *Collins: Kavanaugh sees Roe v. Wade as 'settled law'* POLITICO (2018), https://www.politico.com/story/2018/08/21/brett-kavanaugh-roe-v-wade-susan-collins-790632 (last visited Mar 6, 2020).

The Future of Substantive Due Process

June Medical Services L.L.C v. Rebekah Gee is expected to reach the Supreme Court's docket for oral argument in April, presenting the Court with two opportunities presented to them. The first, to decide the future of abortion rights. The second, to decide on the application of the doctrine of substantive due process. This case will be presented to a new panel of Justices, one which combined has never applied this doctrine.

The Supreme Court has several routes it could take when deciding cases involving substantive due process. The Court could choose to dispense of substantive due process as a whole, as some Justices have indicated that they believe is the correct choice,[127] they have the option to maintain the analysis of substantive due process as it is today, and lastly, they have the choice to narrow the scope of the doctrine.[128] The Justices in the majority on the Supreme Court currently are conservative[129] and show an inclination for wanting to return to a narrower approach to substantive due process. As there are Justices on the bench that still align themselves with a more progressive view on substantive due process, is more likely that there will be a split decision to take the Court to a narrower interpretation of substantive due process instead of getting rid of it altogether.

[127] Maria Buxton, Hannah Kieschnick & Robyn D. Levin, JUDGE GORSUCH AND CIVIL RIGHTS, A RESTRICTIVE READING, SLR Vol 69 (2017).
[128] Watch Live: Brett Kavanaugh's second confirmation hearing before the Senate Judiciary Committee, YOUTUBE (Sept 5, 2018) https://www.youtube.com/watch?v=et2jf-C6TkE.** Justice Kavanaugh believes the best option for the Supreme Court is to narrow the scope of substantive due process and return to the Glucksberg approach to the doctrine.
[129] SUPREME COURT OF THE UNITED STATES – About the Court, https://www.supremeCourt.gov/about/biographies.aspx (last visited Mar. 1, 2020).

Understanding the Court's Decision-Making Process

The majority of the Justices on the bench lean toward narrowing the reach of substantive due process, however, there are still Justices on the bench that are comfortable with a more expansive view of the doctrine. There is a possibility that the Supreme Court would stay consistent with its decision in *Obergefell v. Hodges*[130] as well as *Whole Women's Health v. Hellerstedt*.[131] The Justices in the majority for both those opinions were less conservative in their application as well as interpretation of the Constitution and legislation. This is seen in how expansive the approach was to substantive due process was as well as within the criticism they received from other Justices.[132]

There are other factors that could prevent the Supreme Court from making such a drastic change in its precedent. One of those is how recent of a decision *Obergefell* is. *Obergefell v. Hodges* was decided upon by the Supreme Court in 2015, and it has barely been five years since this drastic change in precedent from the *Glucksberg* analysis. *Washington v. Glucksberg* was decided in 1997, giving the Court eighteen years between that decision and the one in *Obergefell*. In order to protect its institutional legitimacy, it is possible the Justices wait prior to making such a drastic change in its approach to substantive due process.[133]

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[130] *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[131] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).
[132] ** This was seen in Justice Thomas' dissent in *Obergefell v. Hodges* where he claimed that the majority were "roaming "at large in the constitutional field' guided only by their personal views." ** See Thomas dissent in *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[133] Randy J. Kozel, *STARE DECISIS* AS JUDICIAL DOCTRINE, 67 WASH. & LEE L. REV. 411 (2010). ** The Supreme Court has repeatedly cautioned that stare decisis is a flexible "principle of policy" as opposed to "an inexorable command." Kozel argues that the Court should "construct a new framework for rigorous and systematic analysis" in order to determine if *stare decisis* trumps in a given case.

The chance of the Court staying consistent with the opinions in those cases is less likely. It is more probable that within the next few cases involving substantive due process, the Supreme Court returns to the approach to substantive due process found in *Washington v. Glucksberg*.[134] This is likely due to the change of the Justices currently sitting on the bench and their expressed dislike for the current approach taken to substantive due process in cases. The approach taken by the Court in *Glucksberg* in the application of the substantive due process doctrine is much narrower than what is currently used. The standard currently applied by the Court in their approach to substantive due process is that which was applied in *Obergefell v. Hodges*.[135]

In *Obergefell* the Court expanded upon the interpretation of substantive due process. The majority relied on the evolving national values[136] approach to substantive due process and altered the analysis of the doctrine as applied to fundamental rights. With that, the Court made it easier for a right to be considered fundamental, as they no longer needed to withstand the stringent analysis set forth by the Court in *Glucksberg*. The analysis for a right to be determined fundamental changed.

Some Justices currently on the Supreme Court have expressed their dissatisfaction with either the analysis, or with the doctrine of substantive due process as a whole. There are Justices on the bench that would be consistent with the ruling in *Obergefell*, such as Justices Ginsburg, Breyer, Sotomayor and Kagan. However, these Justices are in the minority. With that, it is more likely that the Supreme Court will either go back to the *Glucksberg* standard of analyzing

[134] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[135] *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[136] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006).

substantive due process claims, or an analysis that is more alike to it. As Justice Kavanaugh stated "all roads lead to the Glucksberg test as the test that the Supreme Court has settled on as the proper test."[137]

[137] Watch Live: Brett Kavanaugh's second confirmation hearing before the Senate Judiciary Committee, YOUTUBE (Sept 5, 2018) https://www.youtube.com/watch?v=et2jf-C6TkE.

The Application of Substantive Due Process

The implications of narrowing substantive due process are many. One of the main impacts of narrowing the doctrine would be that the Court would have a more rigid view on substantive due process. This would guarantee that all protected rights must go through analysis prior to being protected by the Court. Narrowing the doctrine would prevent the Court from protecting rights through that are not explicitly stated within the Constitution, it would prevent legislating from the bench and appease concerns from other Justices.[138] By maintaining one clear path for all substantive due process rights to be analyzed through it further maintains a clear judicial precedent for the Court. Without bouncing back and forth on which rights are protected or not, this allows those who rely the Court's precedent daily to understand where the Court is going and understand what is more or less likely to happen.[139]

By returning to the *Glucksberg* interpretation of substantive due process, the historical tradition theory, could potentially have implications on the rights granted to individuals through substantive due process. As is seen in prior jurisprudence the Court found many ways to grant individuals rights that were not directly through the step by step analysis the Court had previously provided. This is seen in cases such as *Obergefell v. Hodges,*[140] where the Court spoke to the principles of why a right may be fundamental or not, in order to grant it protected status. It is also seen in *Whole Woman's Health v Hellerstedt*[141] when the Court relied upon the

[138] See Thomas dissent in *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[139] **Justice Kavanaugh emphasized the importance of Judicial precedent not only for the Court but also for those who rely on it in his confirmation hearing ** Watch Live: Brett Kavanaugh's second confirmation hearing before the Senate Judiciary Committee, YOUTUBE (Sept 5, 2018) https://www.youtube.com/watch?v=et2jf-C6TkE
[140] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[141] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016).

substantial burden test to determine if the provisions were permissible or not. If analyzed strictly through the analysis set forth in the historical tradition theory found in *Glucksberg*, the analysis would be different, and would grant Justices less leeway in their opinion-making.

Even with the stricter analysis from *Glucksberg*, many rights granted to individuals would still be protected and would withstand the more rigid lens of this test. In *Roe v. Wade* the Supreme Court declared that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[142] finding the right to privacy "in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[143] At that point in time in 1970, the Supreme Court granted protection to a woman's right to terminate her own pregnancy.

Professor (now Judge) Michael W. McConnel has explained that it is only necessary in order to claim protection under the Fourteenth Amendment that the right "has enjoyed protection over the course of the years."[144] This is seen in part with the right to terminate one's pregnancy and would thus allow it to pass the *Glucksberg* analysis. It has enjoyed protection both before and after the Supreme Court's decision in *Roe*.

The first prong of *Glucksberg* stated that the right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[145] and "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed."[146] The

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[142] *Roe v. Wade*, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973) at 153.
[143] *Id*.
[144] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006) at 20.
[145] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[146] *Id*.

right to terminate a pregnancy has existed since before the Supreme Court stated it was protected under the Constitution. The National Abortion Federation shows how abortions have been happening within the United States since before the 1800s and have been performed for thousands of years "and in every society that has been studied."[147] Society has become accustomed with the right to receive an abortion, through time it has become embedded in the traditions of not only the American people but of individuals all over the world. The documentary about Dr. George Tiller portrayed how essential this right truly was, how women from all over the country and even from other countries travelled to these abortion centers to terminate their pregnancies, as it has become harder and harder to gain access to this form of care.[148]

The second prong of the *Glucksberg* test was that the asserted right, in order to be considered fundamental, had to be described in the form of a "careful description."[149] This meaning that the right that is seeking protection cannot be asserted in the most broad way, as this would make it easier for those rights to gain protected status. The right must be described carefully, in order to encompass what exactly is searching protection. In this case, the right to terminate one's pregnancy is a careful description of what exactly is seeking protection. It is not as broad as simply the right to control one's body, or the right to do what one wishes, but is not

[147] *History of Abortion*, National Abortion Federation (2015), https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/ (last visited Mar 8, 2020).
[148] (2014). *After Tiller*. Bullfrog Films. [Streaming Video]. Retrieved from video.alexanderstreet.com/watch/after-tiller database
[149] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).

as restricted to receive an abortion between specific dates. This right would receive protection from the Court under this analysis of substantive due process.

This analysis extends to many rights, including the right of gay men and women to marry whomever they choose. The right to same-sex marriage is one the Supreme Court has protected only recently.[150] However this right would be protected under the historical tradition analysis found in *Glucksberg*. The first prong of the test explains how the right must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[151] and "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed."[152] The right to same-sex marriage is one that has enjoyed protection for a long period of time, albeit not granted by the federal government.[153]

The history of same-sex marriage is long; this right has enjoyed limited protection for an extended period of time. In 1997 Hawaii became the first state to offer domestic partnership benefits to same-sex couples.[154] In March 2000, United States Rabbis approved and recognized the partnerships of same-sex marriage. That same year Vermont's governor signed legislation granting full benefits of marriage to same-sex couples.[155] In 2003 California passed a domestic partnership law and in 2004 many cities began marrying same-sex couples. [156]

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[150] See 2015 case - *Obergefell v. Hodges*, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908 (2015).
[151] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[152] *Id*.
[153] Gay Marriage Timeline - Gay Marriage - ProCon.org, Gay Marriage (2014), https://gaymarriage.procon.org/gay-marriage-timeline/ (last visited Apr 6, 2020).
[154] *Id*.
[155] *Id*.
[156] *Id*. ** Portland, Oregon; New Paltz, New York; New Mexico County; City of San Francisco.

As Judge McConnel explained, it is only necessary in order to claim protection under the Fourteenth Amendment that the right "has enjoyed protection over the course of the years."[157] Same-sex marriage has enjoyed protection and has been fought for over a long period of time and the protection over the last five years since the Supreme Court's decision in *Obergefell v. Hodges*.

The second prong of the *Glucksberg* test is that the asserted right must be described with a "careful description".[158] The right must be described carefully, in order to encompass what exactly is searching protection. In the case of same-sex marriage that is the right that is seeking protection, not as broad as the right to marry anyone or the right to marry a specific gender. Considering both the description of the right and the history revolving this right, it would warrant protection under the *Glucksberg* analysis.

The right to an abortion has been present in this country for much longer than the Supreme Court has been protecting it.[159] As is the case with many of the other rights which are provided through substantive due process, including the right to same-sex marriage. If the Supreme Court looks back to the history of those rights, it will be evident that many of those also maintain protection by the Court.

[157] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006) at 20.
[158] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[159] *History of Abortion*, National Abortion Federation (2015), https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/ (last visited Mar 8, 2020).

Conclusion

In conclusion, the United States Supreme Court will eventually transition back to a narrower approach to the theory of substantive due process within the next few cases regarding the issue they analyze. The transition to narrowing the scope of substantive to process will lead to an approach which most closely resembles that found within the case of *Washington v. Glucksberg*[160] and the theory of historical tradition.[161] This approach will make it harder for rights to be granted through this doctrine.

Even if this approach is narrowed, the majority of rights which are granted to individuals through substantive due process will not be affected. These rights are essential through the theory of historical tradition. If analyzed by the Court it is evident that these rights not only are essential to the American people today but always have been. As is seen demonstrated with the case of abortion rights. Regardless of the approach the Supreme Court decides to take, the results from *Obergefell* would be acquired under the standard derived from *Glucksberg*.

[160] *Wash. v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997).
[161] Daniel O. Conkle, THREE THEORIES OF SUBSTANTIVE DUE PROCESS, 85 N.C.L. Rev. 63 (2006).

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