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The states, the Supreme Court, and social change : an analysis of Roe v. Wade and Obergefell v. Hodges

Kaitlyn Gradecki

ABSTRACT

THE STATES, THE SUPREME COURT AND SOCIAL CHANGE: AN ANALYSIS OF *ROE V. WADE* AND *OBERGEFELL V. HODGES*

Kaitlyn Gradecki, MA
Department of Political Science
Northern Illinois University, 2017
J. Mitch Pickerill, Director

This study analyzes when and under what conditions the Supreme Court can produce lasting social change. By re-examine Gerald Rosenberg's theory and finding that the Court is too constitutionally constrained to produce change, I argue that the Supreme Court can establish lasting social change. Lasting social change is established through landmark rulings on substantive rights when those issues first have the time to percolate in the states and build the public support necessary to implement the Court's ruling. To test this theory, I analyze two landmark Court rulings. First, I examine the right to abortion in *Roe v. Wade* (1973) where the Supreme Court lead the constitutional debate, and second the right to same-sex marriage in *Obergefell v. Hodges* (2015) as a counterfactual, as the Supreme Court ruling followed the constitutional debate. These cases are analyzed in conjunction with public opinion trends to understand how state constitutional debate contributes to public approval of the right at issue. Based on the analysis, the Supreme Court can establish lasting social change when handing down landmark rulings after the constitutional and political debate has already occurred at the state level.

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THE STATES, THE SUPREME COURT, AND SOCIAL CHANGE: AN ANALYSIS OF *ROE V. WADE* AND *OBERGEFELL V. HODGES*

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KAITLYN GRADECKI

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J. Mitch Pickerill

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CHAPTER 1

INTRODUCTION

The American political climate in the wake of the 2016 presidential election is one of both political and ideological polarization. In both the government and the electorate, liberals are severely to the left of the ideological scale while the conservatives stand far to the right. During this political time, issues concerning substantive rights, many of which include a moral component such as abortion and same-sex marriage, are focal points of American political dialogue and debate. Yet, the political and ideological divide leaves little gray area for compromise regarding these issues as one side is campaigning for a limit on restrictions and regulations while the other desires the outlaw of these rights altogether. With a country so focused on the protection of constitutional rights, one must question what is the most effective way to produce lasting social change in America?

Americans expect their rights to be protected under the safeguards of the Constitution. The democratic process at the state level has traditionally played an important role in determining what rights deserve such constitutional protection (Fornieri 2014, 31). However, an option being used more frequently in current American politics is to turn to the federal government and the Supreme Court to settle debates regarding the constitutional interpretation of substantive rights. Overlooked is that the United States Constitution is not merely a legal document open to interpretation by legal institutions. More importantly, the Constitution is also a governing document that structures

politics and political debates (Whittington 1999, 1). Thanks to our federal structure of government democratic debate at both the state and federal levels. While the Court has previously been successful in securing new substantive rights through activist rulings, when is the Court most effective at establishing lasting social change? Does first turning to the Supreme Court for its power of judicial review and constitutional interpretation produce lasting social change? Or, is social change more likely to be secured when the states participate in the political and constitutional debate before it reaches the Supreme Court?

In the first section of this paper I review the relevant literature for this study. I theorize that the Supreme Court can be effective in establishing lasting social change through the nationalization of new constitutional rights after the democratic process has run its course through the states. In the second section I examine the cases of *Roe v. Wade* (1973) and *Obergefell v. Hodges* (2015). The issue of abortion through *Roe* is used as the baseline, where the Court became involved early in the democratic process, and the issue of same-sex marriage in *Obergefell* is used as a counterfactual. Comparing these two cases, along with public opinion trends, help build an understanding of when the Court can most effectively produce lasting social change without backlash. I argue that ultimately, the Court entering the constitutional debate at a later time in the democratic process enable the individual states to build the political and social support necessary for a decision to be implemented effectively, and thus decisions such as *Obergefell* create more durable precedent.

CHAPTER 2

LITERATURE REVIEW

Scholarship on when and under what conditions the Supreme Court can be an effective agent of lasting social change is varied. Gerald Rosenberg argues that the judicial impact of Supreme Court decisions is limited in its scope due to the constitutional constraints of the Court. Yet, others view the Supreme Court as a vehicle for social justice due to its historical willingness to overturn legislation at both the state and federal level. This approach to understanding judicial activism has been driven by the legitimizing effect that Court decisions have had on the acceptance of rights. However, the Supreme Court is not the final arbiter of constitutional interpretation and enhancing the protection of rights and liberties (Fisher 1985). This is especially true when those issues are morally contentious in nature. If the Court acts too quickly in deciding matters of important social change and substantive rights, the Court and its decision can become susceptible to backlash from more political branches of government. Our federal structure of government becomes important because it enables the states to become pivotal players, along with the Supreme Court, in the constitutional deliberation of new rights.

Judicial Impact

Law and courts scholars "have long been interested in the judicial impact" of the courts on social policy (Keck and Strother 2016, 2). Specifically, scholars want to understand when the court is effective in altering policy and politics in a significant way to illicit social change (Keck and Strother 2016, 2). Court decisions shape political and public behavior as well as "induce responses" from those political actors and the public in response to those decisions (Becker 1969; Keck and Strother 2016, 2). Research on the role played by the courts in our governing system aids in creating a better understanding of how judicial decisions not only shape law but further affect the public and the democratic process (Keck and Strother 2016, 2). Judicial impact studies help to explain how the courts can affect political and social change.

The implementation of Supreme Court decisions which nationalize new constitutional rights can impact society and induce social change. For that social change to be lasting it must have the effect of significantly altering public behaviors, morals, and values in relation to the newly interpreted right. Another factor attributing to enduring social change is a lack of political backlash in response to the Court's ruling, which allows for effective implementation of the decision. Scholars, however, question whether this type of social change can be produced by the Court alone.

Gerald Rosenberg, in his book *The Hollow Hope*, questions whether the court can actually produce political and social change. Rosenberg states that Americans look to courts "as fulfilling an important role in the American scheme" (Rosenberg 2008, 2). The judicial branch of government is expected to defer to the elected branches while also being "the guardian of fundamental rights" and the protectors of liberty (Scheingold 1974; Rosenberg 2008, 3). If the

court is constrained by the political branches of government, the people, and the Constitution, "when and under what conditions will U.S. courts be effective producers of significant social reform?" (Rosenberg 2008, 9).

As Alexander Hamilton stated in *Federalist* 78, the judicial branch is the weakest branch of government as it only has the power to judge the constitutionality of acts, and lacks the ability to act in order to implement its decisions. Rosenberg lays out three institutional constraints placed upon the Court: "the limited nature of constitutional rights, the lack of judicial independence, the judiciary's lack of powers of implementation" (Rosenberg 2008, 35). The Court is constrained by precedent, isolated from politics, and beholden to others for implementation of its decisions. Based on these institutional constraints, Rosenberg theorizes two different types of courts; the Constrained Court and the Dynamic Court. The Constrained Court is most restricted by its institutional deficiencies and consequently unable to produce political or social change. Conversely, the Dynamic Court is not hindered by its institutional constraints and has the capacity to produce political and social change better than the other branches of government. Rosenberg theorizes that unless courts can overcome their institutional constraints, they "will generally not be effective producers of significant social reform" (Rosenberg 2008, 10). However, if courts find legal support in precedent, gain the support of the federal government, and have the support to mobilize implementation, they may produce political and social reform.

By looking at litigation and the use of the courts at the national level by civil rights, women's rights, criminal law reformers, and same-sex marriage, Rosenberg found that neither the Constrained nor Dynamic Court view could fully capture or explain the use of the Court in these situations. Rather, the Court's decisions were not the sole factor of the produced social change, merely a response to social change already in progress. He finds that the Dynamic Court view does

not exist and that any policy impact, resulting in social change, is produced by the legislature and confirmed by the Court when necessary. Additionally, though there may have been legal victories, the Court could not bring about the desired social change as a solitary actor due to the lack of elite political and public support necessary to implement the decision. Rosenberg ultimately argues that "the constraints derived from the Constrained Court view best capture the capacity of the courts to produce significant social reform" (Rosenberg 2008, 420). Due to the Court's institutional constraints, and lack of implementation power, the Court will be incapable of producing political or social change.

Rosenberg states that the Supreme Court has seemingly become an important producer of political and social change because "Americans look to activist courts" as fulfilling their desire for a new interpretation of constitutional rights (Rosenberg 2008, 2). Rosenberg notes that in most cases where court decisions are perceived to have been successful in producing social change, a closer look shows that change is often the result of political efforts already in progress. What Rosenberg's theory does not account for is exactly where these political campaigns initially began and why they resulted in a successful implementation of the Court's ruling. Instead, Rosenberg's theory focuses specifically on the effect Supreme Court decisions have in producing social change. While Rosenberg's theory does account for the states' role in identifying backlash against court decisions, he does not go very far into understanding the role of the states in constitutional dialogue surrounding new constitutional rights. Rosenberg does not consider, to a great extent, the role of state politics and constitutional deliberation which build the political and public support necessary for successful implementation of court decisions. Therefore, understanding the relative role of the states may help in building a theory of the role of the Supreme Court in establishing social change and provide insight into the relationship between states and the Court in doing so.

Judicial Activism

In recent history, the Supreme Court has been criticized by both liberals and conservatives for interpreting precedent or striking it down in an effort for legal policy to reflect their own ideologies and policy preferences.[1] When justices make these types of value laden decisions, which add a political nature to the independent judicial power, they are partaking in judicial activism. In contemporary American politics, scholars are particularly interested in judicial activism as elite political polarization has led to judicial rulings suspected of going against the rule of law. These court decisions based on the personal and political considerations of the justices rather than precedent have the effect of shaping not only law but politics as well.

Considering the role of activist court decisions and the asserted notion of judicial supremacy, it is understandable why people often look to the courts in hopes of eliciting some type of change. Article III of the United States Constitution states that the "judicial Power of the United States, shall be vested in one supreme Court" (Epstein and Walker 2014). John Marshall, in the landmark decision of *Marbury v. Madison* (1803), further clarified that the judicial power is the power to interpret the Constitution and strike down legislation that is in violation of it. How far of a reach does this power of judicial review extend in matters of constitutional interpretation? American government rests upon the normative foundation of the rule of law; government of law, not people. This normative goal attempts to protect the people from arbitrary rule by holding governing actors accountable under the law. Law and politics, however, often overlap in

[1] For scholarship on judicial activism see: Bickel 1955 and 1986, Dworkin 1977, Howard and Segal 2004, Keck 2004, Sunstein 1999.

complicated ways. This is not altogether surprising considering that political actors construct and implement the law and judicial decision making is often based upon both legal and extralegal factors (George and Epstein 1992, 324).

Both sides of the political spectrum critique, but also rely upon, judicial activism as a method of entrenching competing rights claims within society. Liberal activism focuses on the protection of civil rights and liberties while conservative activism focuses on restraint and limited government. By considering the progression of the Warren Court activism to the 'modern' activism of the Rehnquist Court, one can understand the different objectives of judicial activist rulings and the effect such rulings had upon democracy.

The Warren Court (1953-1969) is considered one of the most activist courts in history, where the "legislative alterations of the Constitution" are thick and "organized by the theme of equality and rights" (Bork 1990, 72). The Warren Court was the first to recognize a right to privacy in the Bill of Rights along with the penumbras of later constitutional amendments in the landmark decision of *Griswold v. Connecticut* (1965). Robert Bork criticizes the activism of the Warren Court decisions by saying that "it is not the function of a judge to decide what is good" for society by interpreting their own values into the Constitution and obliterating state and federal policies (1990 81, 129). Rather, alterations in policy are the duty of the democratic process. Thomas Keck, on the other hand, argues that the Court has more often than not shown great deference to state governments and Congress and that to ignore such judicial restraint is short sighted (2004, 81). The objective of the Warren Court was simply "to police the democratic process" (Keck 2004, 72). The Warren Court activist decisions transformed the role of the Court and cast it into an affirmatively political role (Devins 1996, 19).

Many consider the Warren Court to be the most activist in judicial history, though others argue this understanding downplays the activism of the Rehnquist Court. While the Warren Court struck down 23 congressional acts, the Rehnquist Court struck down a total of 40 congressional acts (Keck 2004, 40). One objective of the Rehnquist Court (1986-2005) was to promote new federalism to shift power from the federal government back to the states (Pickerill and Clayton 2004). Federalism is deemed to be an important constitutional value, as American government is predicated on a balance of power between the many state governments and one federal government. Traditionally, the Court has given Congress great deference and leeway when enacting regulatory legislation over the states. However, Congress at times has overstepped its constitutional boundaries in regulating areas of law traditionally controlled by the states. This has led the Court to return its focus to their duty of maintaining the institutional structure of federalism and the important role state governments and courts play.

The framers of the Constitution entrusted the federal courts with the duty to maintain the balance between the states and the federal government. The Constitution provides the framework for determining the allocation of powers, while "politics provides the details, as Congress passes specific laws" and "the judicial system decides whether Congress has constitutionally exceeded its authority" (Lens 2001, 321). Scholars have argued, however, that the political process is a more suitable safeguard of federalism than the Court. Herbert Wechsler argues that the republican form of American government, derived and maintained by the people, is the most prominent safeguard of federalism (1954, 546). The "composition and selection" of the legislature inherently represents state interests and translates them into national objectives (Wechsler 1954, 546). Further, Larry Kramer argues that the bureaucratic structure of the federal government creates a dependence upon the states to implement programs, and in turn allows for the states to control their interests in

Washington (2000, 285). John Yoo, however, argues that that the "founding generation believed judicial review would apply to questions of federal and state power in case the normal political checks on Congress might fail" (1997, 1314). The Court's role in maintaining the balance of power between the state and federal governments is to protect individual and states' rights from federal encroachment when the political system has failed.

The Rehnquist Court rejected the political safeguards approach and through its rulings allowed "state and local governments the flexibility to administer policy at their discretion" (Pickerill and Clayton 2004, 237). Most notably, the Rehnquist Court gave states greater ability to regulate abortion policy in its landmark decision of *Planned Parenthood v. Casey* (1992) and limited the extension of Congress's commerce power over the states in *United States v. Lopez* (1995) and *U.S. v. Morrison* (2000). By the Court striking down congressional legislation for unconstitutionally extending the reach of the commerce power to the states, the Rehnquist Court gave birth to a new form of judicial activism. This new judicial activism had the effect of reinvigorating the concept of federalism as an important constitutional value, specifically regarding the protection of the state's role (Lens 2001, 320).

Federalism and the Role of the States

Federalism "requires fluidity" to work properly, where the states and the federal government decide together which "level of government can best address a particular problem at a particular time" (Lens 2001, 330). The increase in "federal judicial activism in civil liberties cases" between the 1930s and 1970s, however, made states and their respective courts

underestimate their own capacity to guarantee rights and liberties for their constituents (Tarr 1994, 65). The federal government was viewed as more capable than the states of ensuring the well-being of the country and its citizens. Yet, state governments and the advancement in states' rights are an improvement on government responsiveness to local interests and policies (Yoo 1998; Lens 2001, 329). The protections provided to state governments through federalism allow for the states to "act to extend individual liberties beyond those provided by the national government" (Yoo 1998; Lens 2001, 329). Such innovative thinking has given birth to a new judicial federalism. State courts have recovered the "neglected tradition in state constitutional law" of increasingly relying upon state constitutions and "state declarations of rights to secure rights unavailable under the U.S. Constitution" instead of reaching out to the Supreme Court (Tarr 1994, 63). This rationale was not lost on the Court. In his dissenting opinion in *Michigan v. Long* (1983), Justice Brennan, the "godfather of the new judicial federalism," advised the states that in matters of state constitutional interpretation, that if they are to rely on federal precedent, they should stipulate that its purpose is advisory in nature, and that such law is not the sole basis for the state courts decision (Tarr 1994, 73). By doing so, the state courts may then protect individual rights at an increased level, void of intervention.

Ironically, "the activism of the Warren Court, which was often portrayed as detrimental to federalism" was a necessary catalyst to produce "vigorous state involvement in protecting civil liberties" (Tarr 1994, 73). "Ambition must be made to counteract ambition" and the states have headed the call to counteract the federal governments monopoly over constitutional interpretation (*Federalist* 51; Pickerill 2004, 30). Throughout the states there has been an emergence of civil liberties and constitutional jurisprudence, with a softened reliance upon the tradition of judicial restraint in order to protect new interpretation of individual rights. Some may contend that

federalism is obsolete and nothing more than a means to an end. The Supreme Court, however, in redefining the concept of federalism as a division of power "among the national government, the states, and individual citizen," provides a reminder that federalism is still a valuable and important component of the American political structure (Lens 2001, 319).

Who Should Interpret the Constitution?

It is widely assumed that the judicial branch, specifically the Supreme Court, is the only institution with the power to interpret the Constitution. The "myth of judicial finality has deep power" (Ginsburg 1997, 752). This is the result of not only the Court's blunt statements of their own supremacy in interpreting the Constitution, but also due to the power of legitimacy in the Court's decisions. Both the Warren and Rehnquist Court have explicitly stated in landmark decisions that the judicial power to interpret the Constitution is supreme. The foundation of judicial supremacy rests upon the words of John Marshall. Found in the opinion of the landmark decision of *Marbury v. Madison* (1803), Marshall stated that the courts "say what the law is" (Devins 1996, 11). The Warren Court in *Cooper v. Aaron* (1958) declared for itself, citing the words of John Marshall, that it should be accepted that "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system" (*Cooper v. Aaron* (1958), 358 U.S. 1, 18; Devins 1996, 5). During the Rehnquist Court, Justice Kennedy stated in the majority opinion of *City of Boerne v. Flores* (1997), that Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" (*City of Boerne v. Flores* (1997), 521 U.S. 507, 519). Though the Court may cling to

this idealized notion of judicial supremacy, that Supreme Court decisions are the last word in matters of constitutional controversy and interpretation, such a principle is unfounded in the Constitution. In all actuality, claims of judicial supremacy are nothing more than a judicial defense mechanism against backlash by political institutions when activist decisions are made (Devins 1996, 22). Though it may be common to assume that all other forms of democratic government must defer to the decisions of the Supreme Court, "constitutional interpretation is an interactive, ongoing political process, in which the Supreme Court plays an important but not definitive role" (Ginsburg 1997, 749). Courts are not the final voice, but merely a single chapter in the book.

In reality no governing entity, not even the judiciary, has a monopoly over the finality of constitutional interpretation (Fisher 1985, 746). Rather, "Congress, the White House, governmental agencies, and the states all play critical, interdependent roles in interpreting Supreme Court decisions and the Constitution itself" (Devins 1996, 23). When political debate arises regarding a new right or policy, a dialogue begins between the political and legal branches of the government. At both the state and federal levels, each institution is responding to the others' opinion on the constitutionality of the issue.

Thus, constitutional interpretation is a dynamic process. In recognizing the importance of non-judicial actors participating in constitutional dialogues, it is important to recognize that constitutional doctrine is developed in "all branches of government, state as well as federal" (Whittington 1999, 1; Pickerill 2004, 18). State governments are often overlooked in constitutional dialogues as over time Americans have traded in regional identities for a single national identity. State judges and officials, just like their federal counterparts, "take an oath 'to support and defend the Constitution,' and put this oath into effect through interpretations of both the U.S. Constitution and their state constitutions" (Devins 1996, 38). Constitutional issues do not always fall on

"technical legal points but on a balancing of competing political and social values" (Fisher 1985, 743). Therefore, state actors are situated in the more favorable position to respond to public sentiments. State interpretation of their own constitutions gives them the capacity to "provide broader individual rights protections than those mandated by the Supreme Court" (Devins 1996, 38). The unique position of some state judges makes them susceptible to public will if unfavorable decisions are handed down. For this reason, state courts are an "important part of the constitutional dialogue that takes place between the Supreme Court and elected officials" (Devins 1996, 39). The fact that state governments and courts play a vital role in constitutional interpretation is evidence that their place in our federal structure and government is still important.

How is Social Change Constructed?

Rosenberg's measure of the Court's success in bringing about political or social change seems to be all or nothing. Either the Court was successful in producing the desired change on their own institutional merits or was entirely unsuccessful. Normatively speaking, however, the success of the Dynamic Court view would equate to a totalitarian rule by the Supreme Court. The judicial duty of the Court is to rule on matters of constitutionality through legal means to decide whether the government's denial of a right is just or unjust pursuant to the Constitution. While the Court may at times make activist decisions, the judicial duty is not to politically debate the merits of an individual right based on the personal ideologies and policy preferences of justices. That duty belongs to the people and the political branches of government.

The Supreme Court's inability to produce political and social change on its own institutional merits does not necessarily capture the entire picture. Rosenberg is correct in stating

that the Court is ineffective at producing change, without the aid of other branches of government, due to their lack of implementation power. This institutional constraint placed upon the Court should not be viewed as an issue but rather viewed as the success of our federal structure of government and the separation of powers. It takes incremental steps and grassroots political efforts to establish the support necessary for Court decisions to be implemented effectively. While the Court is an important player in establishing new constitutional rights, activist decisions and decrees of judicial supremacy can only go so far. The Court must work with and rely on the other branches and levels of government in order to have any type of successful impact on society. This is not to say that the Court is weaker than the other political branches of government by the reliance on others to bring about social change. Rather, the Court is only part of a larger political system. Therefore, establishing social change is a dynamic process requiring the work of all the branches of government at both the state and federal level.

The Court may lack the power to implement their own decisions but the Court is even less effective in contributing to change when there exists no apparent political consensus. When considering how Court decisions are implemented the focus is often on the Executive, having the power of the sword, and/or Congress, which has the power of the purse. By focusing on these federal branches of government, however, the states are often overlooked. This is an issue because the Court's ability to effectively produce social change begins at the state level, as the states are instrumental in building political and social support that even the most powerful rights claims would fail without (Rosenberg 2008, 418). States have the autonomy to define their own regional identities and policies which "generally reflect the ideologies and beliefs of the state's citizens" (Lewis and Soo Oh 2008, 42). States legislatures are laboratories of democracy and state courts are laboratories of law. As such, these state governing institutions have the capacity to protect

individual rights at a higher level than the federal government. As states start adopting policy and establishing court doctrine, overtime the public within that state will become more accepting of affording legal protection to newly desired rights. Only after such a time, when a few outlier states remain in opposition to protecting the new right, will the states turn to the Court for their stamp of constitutional approval

CHAPTER 3

THEORY

The Supreme Court, as Rosenberg stated, is institutionally constrained by its lack of implementation power. However, this does not mean that the Court cannot effectively nationalize social change by providing a right with the Court's stamp of constitutional approval. Drawing on Rosenberg, I posit two types of Courts: the Pre-Court and the Post-Court. The Pre-Court leads the political discussion when there exists a controversy over a newly desired right and its constitutionality. While prior dialogue may have existed between and amongst the states regarding the right at issue, the Pre-Court will act in an activist manner and rule on the constitutionality of the right prior to a majority consensus amongst the states. The Pre-Court will have provided the contested right with their stamp of constitutional approval. However, these decisions are made before the states have had the opportunity to establish the political and public support necessary for the effective implementation of the Court's decision. As a result, the states will push back against the Courts ruling. This will hinder the effective implementation of the Court's decision and create further conflict over the right at issue. Though the Court has nationalized a new right, the Pre-Court is not effective in contributing to lasting social change as it is unable to sort out the complexity of the issue and build enough support at the state level.

The Post-Court, on the other hand, follows the political discussion and trends of the states when disagreement over a new interpretation of a specific right and its constitutionality. While constitutional questions may be presented to the Court regarding the right at issue, the Court

restrains itself and leaves the issue with the states. The states then, through political grassroots efforts and state court rulings, debate the constitutionality of the right. This constitutional dialogue within and amongst the states overtime results in higher levels of political and public support of the contested right. Only once a majority of the states have afforded the right at issue legal recognition and protection, with only a few outlier states not recognizing the right, will the Post-Court rule on the rights constitutionality. By the Court restraining the use of its judicial power until after a majority of the states adopts the right, and only then providing the contested right with the Court's stamp of constitutional approval will the decision be effectively implemented. This is because the issue percolating in the states will have garnered the political and public support necessary for a Court decision to result in enduring social change.

This study is not interested with whether or not the Supreme Court can produce social change better than the political institutions. Rather, this study is concerned with how the Court can ensure that their rulings will most effectively be implemented so as to contribute to enduring social change. Therefore, I theorize that as issues percolate in the states through the democratic process and overtime trends develop indicating widespread support for the issue, Supreme Court decisions made following the establishment of these trends will be more likely to contribute to lasting social change. Based on this theory, I derive two hypotheses: *Hypothesis 1*: When the Court establishes a new nation-wide constitutional right after a critical mass of states have passed laws protecting the same right, the Court's decision will be more likely to influence social change; and conversely, less likely to result in backlash. *Hypothesis 2*: When the Court establishes a new nation-wide constitutional right after a long-term trend of shifting public opinion to support that right has been established, the Court's decision will be more likely to influence social change; and conversely, less likely to result in backlash.

CHAPTER 4

RESEARCH DESIGN

I argue that the Supreme Court will be most effective in handing down landmark constitutional decisions which result in lasting social change when they are responding to the constitutional debate rather than leading it. Constitutional debate is a fluid process and occurs at each level of government, in both political and judicial institutions. Therefore, it is necessary to look beyond specific variables which explicitly shape constitutional values and interpretation of specific government actors and take a look at the larger picture of constitutional deliberation. In order to fully understand this dynamic process, it is necessary to understand the actual constitutional debate that occurs at both the state and federal levels as well as the dialogue between the different levels of government. Constitutional decision-making is then "most vividly seen through case studies" (Devins 1996, 41).

The theory I am presenting can be best understood through *Roe v. Wade* (1973) and *Obergefell v. Hodges* (2015). The central issue in both cases is related to substantive rights and each issue was involved in constitutional debate either before or after the ruling was handed down. These two cases help create an explanation regarding the importance of federalism and constitutional debate between the states and the federal government in order to establish lasting social change when dealing with substantive rights issues. Both are landmark Supreme Court cases regarding the constitutionality of a substantive right and each had the effect of producing quick

social change by nationalizing that right. *Roe* and *Obergefell* differ, however, in regards to the progress of constitutional debates prior to the Supreme Court decision.

I chose the cases of *Roe* and *Obergefell* for three specific reasons. First, these cases are meant to control for Rosenberg's existing theory where he posits that the Dynamic Court does not exist as the Court is too constitutionally constrained to produce social change. Second, these cases satisfy the necessary condition that, at some point in the constitutional debate, political and constitutional dialogues existed between and amongst the states, as well as, between the states and the Supreme Court. Third, these cases provide the best fit for demonstrating the phenomenon which is the central concern of this study; under what conditions the Court can produce lasting social change.

To test his theories of the Dynamic and Constrained Court view Rosenberg made use of the Court's decision on abortion rights through *Roe*. Rosenberg found that at first glance the decision in *Roe* could support a Dynamic Court view, however, his initial finding came to be unwarranted (Rosenberg 2008, 177). It became clear that the Court's ruling "did not end efforts to limit the ease and availability of abortion" (Rosenberg 2008, 177). The Court's ruling was not able to produce lasting social change and thus confirmed for Rosenberg that Court decisions are not dynamic in nature. Instead the Court's decision resulted in political backlash and continued constitutional debate on the issue of abortion.

Based on his findings in *Roe,* Rosenberg theorized that continued litigation in favor of same-sex marriage would likely produce both state and federal backlash. Yet, I argue that in the case of *Obergefell*, states were able to participate in the constitutional debate and experiment with policy through diverse legal means to match regional values prior to the intervention of the Court. This resulted in the increased public support for same-sex marriage overtime. Advocates for the

legal recognition and equality of same-sex marriage made strategic use of the courts in order to secure lasting social change. Once the issue reached the Supreme Court for their constitutional interpretation, the majority of the country had been given sufficient time to grapple with the notion of a right to same-sex marriage.

The difference between the Court leading the constitutional dialogue in *Roe* and responding to it in *Obergefell* are relevant to this analysis by highlighting the importance of the state's role in constitutional debates and effective implementation of Court decisions. Ultimately, *Roe* was unsuccessful at ending constitutional debates as it attempted to intervene before a majority of the public supported liberalized abortion rights. *Obergefell*, however, was decided after a majority of states and public opinion polls were in favor of adopting same-sex marriage rights, which I argue will result in a more enduring social change.

The dependent variable of interest in this study is lasting social change. Lasting social change is produced when a constitutional decision is handed down by the United States Supreme Court with minimal to no backlash. For the purpose of this study, backlash is defined by any continued political debate or state constitutional dialogue aimed at obstructing the implementation of the Court's decision or aimed at overturning the Court's decision.

The main independent variable of interest in this study is issue percolation through the democratic process in the states and across the country. When issues pertaining to rights percolate in the states through the democratic process, the issue gains traction and over time trends develop with growing public support and contribute to social change. State level change is an incremental process where political change is aimed at shifting public sentiment to drive social change. Issue percolation is then operationalized through state legislative change corresponding with shifts in public opinion and majority state adoption of policy. This study is specifically concerned with the

issue percolation regarding two iterations of substantive rights, abortion and same-sex marriage. The issue of abortion did not have enough time to percolate in the states to develop favorable trends when the Court ruled in *Roe* and got out in front of the issue leading policy change. The issue of same-sex marriage, on the other hand, was seemingly given enough time to percolate and develop favorable trends so that when the Court ruled in *Obergefell* it was jumping on the trend and bring the outlier states along with it.

Along with issue percolation, this study will consider its interacting effect with public opinion in producing lasting social change. When considering public opinion in this case I will consider the public's position in favor of or in opposition to the substantive right at issue. Here, I will use data on the percentage of the public favorable to allowing for a right to abortion or same-sex marriage compared to the percentage of the public opposed to either right. This may not be an exhaustive explanation of social change, and there may be additional explanatory variables likely to cause lasting social change. However, I am confident that those variables do not correlate with the dependent variable in such a significant way to make the independent variables of interest in this case the result of a spurious relationship. This understanding of social change is at least a significant factor in the durability of Supreme Court precedent.

Based on Rosenberg's findings, the Court is ineffective at producing social change. In the case of *Roe v. Wade* (1973), the Court was counterproductive at contributing to lasting social change because of decades of political backlash following the Court's ruling. However, the case of same-sex marriage and the decision in *Obergefell v. Hodges* (2015) may provide a counterfactual. Comparing the two cases might help build a better understanding of how the Court can play a role in creating lasting social change without creating such a backlash. In his study of *Roe* and other cases, Rosenberg did not consider the role that constitutional debates outside of the

Court, and especially in the states, might have played in helping an issue percolate and build consensus in and amongst the states. When the Court took up the issue of abortion and decided *Roe*, there hadn't really been such developments in the states. The states have since continued to pass legislation in an effort to further regulate abortion while pro-life groups have mobilized to overturn the decision altogether. Yet, when the Court took up the issue of same-sex marriage and decided *Obergefell,* the states had taken a significant amount of time to constitutionally debate the legality of extending the right of marriage to same-sex couples and build a majority consensus favorable of doing so. Ultimately, *Roe* was unsuccessful at ending constitutional debates as it attempted to intervene before a majority of the public supported liberalized abortion rights.

CHAPTER 5

ANALYSIS

Roe v. Wade

The issue of abortion through the landmark Supreme Court decision in *Roe v. Wade* (1973) is the starting point of this study. The states began their political and constitutional debate regarding abortion in the late 1960s. When the Court decided *Roe* and nationalized a right to abortion a majority of the states had not yet liberalized their abortion laws. The Court halted the political and constitutional deliberation in the states before there existed a majority consensus regarding the issue of abortion. Had the Supreme Court not decided on the issue of abortion so early and the states ensured the time to deal with the complex issues relating to a right to abortion, a Court ruling on abortion would not have resulted in the same political backlash as *Roe*.

In 1973, the Burger Court handed down the landmark decision of *Roe v. Wade*. Jane Roe petitioned the Court to challenge the constitutionality of a Texas criminal abortion statute. The statute in question was enacted in 1854 and only allowed for abortion to save "the life of the mother" (410 U.S. 113, 1973 at 119). Roe challenged the constitutionality of the statute for not allowing her to receive a legal abortion because her life was not at risk as a violation to her right to privacy, "protected by the First, Fourth, Ninth and Fourteenth Amendments" (410 U.S. 113, 1973 at 120). Jane Roe went a step further by adding an amendment to her complaint stating that her lawsuit was not only for herself but on behalf of "all other women" (410 U.S. 113, 197

120). The Supreme Court was faced with the legal question: does the constitutional right to privacy protect a woman's choice to have an abortion?

Writing for the majority, Justice Blackmun found that Roe had standing to sue in this case because though she was not pregnant at the time, she was unable to secure a legal abortion in Texas and pregnancy is a condition "capable of repetition" (410 U.S. 113, 1973 at 125). The Court's decision began with a review of the then history of abortion regulation. Pursuant to common law, abortion before "quickening" or "the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy" was viewed as less objectionable than abortion after (410 U.S. 113, 1973 at 132). Additionally, three reasons were historically accepted for the enactment of criminal abortion laws, and continue to justify legal bans on abortion: to discourage illicit sex, the protection of women, and the protection of paternal life (410 U.S. 113, 1973 at 147-150). The first reason given was not disputed in *Roe*, the second interest had been altered by modern medical practices, specifically relating to early pregnancy before the end of the first trimester, and the third interest becomes more compelling as the pregnancy progresses.

Justice Blackmun then moved on to deal with the issue of privacy. The Court recognized that the Constitution does not explicitly mention a fundamental right to privacy, but nonetheless found that one exists. The Court further found that that right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (410 U.S. 113, 1973 at 153). Abortion rights, however, are not absolute. The state may continue to assert an interest in protecting the health of the mother and the fetus, the interest becoming more compelling with the progression of the pregnancy. The state's interest regarding the health of the mother becomes compelling "at approximately the end of the first trimester" (410 U.S. 113, 1973 at 163). The state may not regulate an abortion decision prior to that point. The state's interest regarding the potential

life becomes compelling at the point of viability, or when the fetus has the capability of meaningful life outside the mother's womb (410 U.S. 113, 1973 at 163). At the point of viability, the state may go so far as to ban abortion altogether except in cases where it is necessary to protect the life or health of the mother. Therefore, the Supreme Court struck down the Texas statute for violating the Due Process Clause of the Fourteenth Amendment.

Before *Roe*

Prior to the decision in *Roe*, the issue of abortion received some state and limited national attention, for it was the Supreme Court's action that made abortion a national public issue (Devins 1996, 56; Rosenberg 2008, 229). Connecticut was the first state to enact an antiabortion statute and by 1880, with the aid of the American Medical Association (AMA), abortion became illegal nationwide (Devins 1996, 57-58). The policy enacted by most states "banned abortion in all circumstances, except when necessary to save the life of the mother" (Devins 1996, 58). Yet, the decade before *Roe*, state activists and women's rights groups began to call for the liberalization of criminal abortion statutes. These political grassroots efforts began as a response to the 1962 Model Penal Code which authorized "abortions when the health of the mother was endangered, when the infant might be born with incapacitation physical or mental deformities, and when the pregnancy was a result of rape or incest" (Devins 1996, 58). The AMA approved the Penal Code's "limited approval of abortion" and by the time *Roe* would be decided in 1973, "fourteen states had adopted some version of the Model Penal Code's abortion law, and four others had completely decriminalized abortion" (Devins 1996,59). Public sentiments regarding a women's ability to obtain a legal abortion were subtly beginning to shift.

In 1969, the California Supreme Court was the first Court to declare an abortion statute unconstitutional in *People v. Belous* (Morgan 1979, 1748). In *Belous*, the California Court was presented with the challenged constitutionality of a state criminal abortion law. The law was originally enacted in 1850 and only allowed for abortions when necessary to "preserve" the life of the mother (71 Cal.2d 954, 1969 at 959). The California Court rejected the interpretation of "necessary to preserve" as "certainty or immediacy of death" in favor of the necessity that the "dangerous condition be potentially present" (71 Cal.2d 954, 1969 at 963). Further, the California Court stated that in following the path of the Supreme Court in *Griswold v. Connecticut* (1965), it is a woman's choice whether or not to bear a child. The Court ruled that though the law was lawful when it was enacted in 1850, "constitutional concepts are not static" and the law is no longer valid (71 Cal.2d 954, 1969 at 967). This ruling set the stage for nonrestrictive abortions before "quickening" and by 1971, "the National Conference of Commissioners of Uniform State Laws drafted a Uniform Abortion Act that would have placed no limitations on abortion during the first twenty weeks of pregnancy" (Devins 1996, 58).

Even with these small victories, "many states rejected the Model Penal Code reform" (Devins 1996, 59). In reforming their abortion legislation, some states went so far as to impose "so many restrictions that the number of legal abortions actually decreased" (Devins 1996, 59). Due to a lack of response from state legislatures being unresponsive to abortion reform and from "relying on the civil rights movement as an example of a successful use of the court to produce significant social reform," abortion advocates turned to the Supreme Court for a resolution (Keck 2014, 173; Lemieux 2004; Rosenberg 2008, 173). To be effective, Court reforms require public support. When the abortion issue reached the Supreme Court in 1973, many were under the illusion that popular support was in favor of liberalizing abortion law (Rosenberg 2008, 182). In fact, at the

time *Roe* was decided, abortion did have large scale support from professional elites, activists and the public with 86 percent favoring a maternal health exception to abortion, 79 percent favoring a rape exception and 57 percent favoring to decriminalizing abortion altogether (Keck 2014, 173; Rosenberg 2008, 182). Public litigation of the abortion issue had the effect of placing the issue of abortion on the nation's political agenda (Rosenberg 2008, 174). However, publicity also altered the public perception of the issue, giving rise to the pro-life movement and its efforts to overturn the Court's decision, which persists even today, some 44 years later.

After *Roe*

In deciding *Roe v. Wade* (1973), the Court did not necessarily stop the democratic debate on the abortion issue. Rather, the Court handed down a less than enduring decision that has continually been revisited and revised due to the constitutional debate to which it facilitated. In 1973, "the political process in many states had yet to decide on abortion" (Morgan 1979, 1726). Following the Court's decision in *Roe*, those opposed to abortion turned to the political institutions and relied upon legislative strategies to regulate and restrict abortions, while pro-choice advocates turned to the courts to veto these new and unwanted restrictions on their right to seek an abortion (Keck 2014, 68, 81). The Court unknowingly started a constitutional dialogue between state legislative institutions and the Court itself. In the year following *Roe*, the pro-life movement began to grow and chip away the Court's ruling by introducing 260 bills in state legislatures, thirty-one of which were eventually enacted with the sole purpose of "restricting abortion rights" (Devins 1996, 60). State political action, post-*Roe*, was more concerned with undermining the Court's

ruling than it was concerned with enhancing the protection of an individual liberty and a woman's right to abortion.

After sixteen years of constitutional volleying between state legislators and the Supreme Court, states were recognized to have broad authority to regulate abortion through the allocation of state funds (Devins 1996, 63). In the case of *Webster v. Reproductive Health Services* (1989), the Court was confronted with a Missouri law restricting "the use of public funds, employees, or facilities for the purpose of 'encouraging or counseling' a woman to have an abortion not necessary to save her life" (492 U.S. 490, 1989 at 501). The law further contained the requirement that doctors perform tests to determine fetal viability after 20 weeks. The Court stated in its majority opinion that the Missouri law did not burden a woman's ability to obtain an abortion in its restrictions of public funds, employees, and facilities. The Court also found that the viability test requirement served as a legitimate state interest "sufficient to sustain its constitutionality" which in future cases would require the Court to "modify and narrow *Roe*" (492 U.S. 490, 1989 at 520, 521). The Court's decision in *Webster* signified the Court's willingness to "shake the doctrinal foundation of *Roe*" but further "encouraged state legislative responses to its decision" (Devins 1996, 66). While some viewed the decision in *Webster* as the beginning of the end for *Roe*, polls showed increased support for abortion rights with 57 percent of Americans opposed to *Webster*, 61 percent in agreement with *Roe v. Wade*, and 70 percent being opposed to a constitutional amendment banning abortions altogether (Devins 1996, 68).

With the decision in *Webster*, the Court transferred the constitutional debate back upon the states, which required state legislatures to meet pro-life and pro-choice organizations head-on. For the short term, state legislatures realized that any kind of abortion victory would be a result of policy reform at the state legislative level (Devins 1996, 71). Nearly two decades following the

Courts ruling in *Roe*, the Court would be provided with its first opportunity to overturn *Roe*. At issue in *Planned Parenthood v. Casey* (1992) were five provisions of the Pennsylvania Abortion Control Act of 1982. The provisions at issue included informed consent, spousal notification, parental consent, a medical emergency exception and reporting requirements upon facilities providing abortions. The Court upheld the central holding in *Roe*, reiterating that women have a right to receive an abortion prior to fetal viability, that the state may regulate abortion post-viability except when a mother's life or health are at risk, and the state maintains an interest in protecting the life and health of the mother and unborn fetus.

The Court did, however, reject the rigid trimester framework, which was not considered to be part of the central holding of *Roe*. The Court stated that the trimester framework was rejected because it suffered from the basic flaws of misconceiving "the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*" (505 U.S. 833, 1992 873). In justifying the rejection of the trimester framework, the Court further stated that "not every law which makes a right more difficult to exercise is, *ipso facto,* an infringement of that right" (505 U.S. 833, 1992 873). With this statement, the Court afforded the states substantial flexibility in protecting its interest when regulating abortion, but warned that state regulation is not limitless. Once "state regulation imposes an undue burden on a woman's ability to make this decision" does the state infringe upon the "liberty protected by the Due Process Clause" (505 U.S. 833, 1992 874). The Court clarified that an undue burden is shorthand for the government "placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" (505 U.S. 833, 1992 877). Applying the new standard of review, the Court struck down the spousal notification provision of the Pennsylvania Act as a substantial obstacle for a woman seeking an abortion, upholding the remaining provisions of the Act.

The decision in *Casey* was an unsatisfying win for the pro-life movement. Though the Court ruled in favor of the state's broad interest in regulating abortion for the health and safety of both the mother and fetus, the Court also reaffirmed the central holding in *Roe*. The Court's intermediate ruling in *Casey* even matched public sentiment, with sixty percent of voters supporting the Pennsylvania law (Devins 1996, 74). For two years after *Casey*, "no legislation was introduced to outlaw abortion," one-third of state abortion legislation guaranteed the right to abortion and any state regulation on abortion passed the Courts standard for approval (Devins 1996, 74). However, these victories for the pro-choice movement following *Casey* did not end the political struggle by the pro-life movement in their continued attempt to overturn *Roe*.

The Supreme Court was again confronted with the issue of abortion rights in *Stenberg v. Carhart* (2000). At issue in the case was a Nebraska law criminalizing partial-birth abortions. The Court struck down the law for violating the Due Process Clause of the Constitution. Writing for the majority, Justice Breyer first struck down the law for unconstitutionally denying a health exception, post-viability, for the mother. Justice Breyer further stated, citing *Casey*, that the Nebraska law placed an undue burden on a women's right to choose abortion for the fear of "prosecution, conviction and imprisonment" (530 U.S. 914, 2000 at 946). The Court later upheld the Partial-Birth Abortion Ban Act of 2003 in *Gonzales v. Carhart* (2007). The Court rejected the claim that the Act's purpose was "to place a substantial obstacle in the path of a woman seeking an abortion" (550 U.S. 124, 2007). Rather, the Court found that the "Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives" (550 U.S. 124, 2007). The Court further distinguished its decision in *Gonzales* from its decision in *Sternberg* by stating that the Nebraska law was vague in relation to its federal predecessor.

In a further response to the viability issue, 26 states enacted compulsory ultrasound laws, requiring women to undergo an ultrasound before receiving an abortion. Such a law was upheld in *Texas Medical Providers Performing Abortion Services v. Lakey* (2012) while conversely struck down in *Pruitt v. Nova Health Systems* (2012). With the states as laboratories of democracy experimenting with policy and lower-courts establishing their own case law on this issue, it would seem only a matter of time before the constitutional debate again reached the Supreme Court.

After 44 years of state and Supreme Court constitutional dialogue regarding the issue of abortion, the Court was again faced with the issue in *Whole Woman's Health v. Hellerstedt* (2016). The Court had to "decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*" (136 S.Ct. 2292, 2016 at 2300). The two provisions at issue were an admitting-privileges requirement and a surgical-center requirement, both of which the Court struck down for placing an undue burden on a women's ability to obtain an abortion. According to the respondent's briefs, "the purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure" (136 S.Ct. 2292, 2016 at 2311). Yet, following the passage of the state requirement, a total of nineteen abortion clinics closed and doctors were unable "to obtain admitting privileges at nearby hospitals" as there had never before been a need (136 S.Ct. 2292, 2016 at 2312). The surgical-center requirement placed an additional need to meet the "minimum standards ... for ambulatory surgical centers" upon abortion facilities (136 S.Ct. 2292, 2016 at 2314). These requirements ranged from the size of the medical staff to that of the building requirements. It was found, however, that such requirements added no further benefit to the safety and health of those women seeking an abortion. Therefore, the Court concluded that each

requirement of the Texas law posed a "substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so" (136 S.Ct. 2292, 2016 at 2318).

The decision in *Hellerstedt* might be considered the most significant in abortion rights cases since *Casey*. The Court once again reaffirmed the central holding in *Roe*, and also continued to uphold the undue burden standard in *Casey*. *Roe v. Wade* has been criticized as one of the Court's most activist rulings regarding a substantive right, and has resulted in substantial backlash. While it is true that the Court's decision did not produce rapid change in favor of abortion, public opinion has remained consistent over time supporting abortion when a mother's life is at risk, there is risk of "serious fetal defect" or the result of rape (Rosenberg 2008, 188). Following *Roe*, the states played a prominent role in shaping the debate on abortion rights, along with the courts. "Consistent with the expectations of federalism, diverse policies were developed after *Roe*, that reflected local political and cultural factors," while the Court in turn responded to state efforts to regulate abortion (Devins 1996, 76). By the Court reaching out to decide on the issue of abortion, "it is undeniable that *Roe* transformed the states and that the states transformed *Roe*" (Devins 1996, 77). The Court began a constitutional debate that continues to persist decades later and should serve as a reminder that quick resolutions are not always the most effective path to produce lasting social change (Morgan 1979, 1748).

Obergefell v. Hodges

This issue of same-sex marriage through the landmark Supreme Court decision in *Obergefell v. Hodges* (2015) is used as the counterfactual for this study. The states had roughly twenty years to experiment with laws and regulations prior to the Supreme Court nationalizing a

right to same-sex marriage. By the time of the decision in 2015, 36 states had legalized same-sex marriage and 55% of the public favored extending legal recognition of marriage to same-sex couples. This case is not the same as in the case of *Roe* and the right to abortion. The states had the time to politically and constitutionally debate the complex issues regarding a right to same-sex marriage before the Supreme Court ruled, which had not occurred in the case of *Roe*. By the issue of same-sex marriage having the time to percolate in the states, a majority consensus regarding the issue was developed and backlash to the Court's decision is unlikely to result.

The Constitution is explicitly silent regarding the issue of marriage.[1] Yet in 2015, the Roberts Court was presented with the issue of same-sex marriage and its constitutionality. The states of Michigan, Kentucky, Ohio and Tennessee defined marriage to be between one man and one woman. As a result, 14 same-sex couples from those states petitioned the Court to review their states denying them not only their right to marry but whether their marriage would be legally recognized outside their respective states. This class action lawsuit presented the Court with two constitutional questions: "whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex" (576 U.S. __ 2015, 3) and "whether the Fourteenth Amendment requires a State to recognize same-sex marriage licensed and performed in a State which does grant that right" (576 U.S. __ 2015, 4).

Authoring the majoring opinion for the Court, Justice Kennedy stated that "the history of marriage is one of both continuity and change" (576 U.S. __ 2015, 6). Therefore, pursuant to their institutional obligation to interpret the Constitution, it was the duty of the Court to identify and

[1] The Supreme Court ruled in *Loving v. Virginia* (1973) that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" (388 U.S. 1 1967, 12). The Court held unanimously that miscegenation statues unconstitutionally violate the Equal Protection Clause of the Fourteenth Amendment and deprive individuals of liberty without the due process of law. The decision in *Loving* set the precedent that marriage is a fundamental right.

further protect fundamental rights. The identification of such newfound rights, which had previously been overlooked in our history as a nation and construction of constitutional law, is achieved through reasoned judgement, as opposed to personal motives (576 U.S. __ 2015, 10-11). The states, having participated in extensive debate and litigation have enhanced the understanding of the issue. The states found themselves at a constitutional impasse and it was the Court's time to debate its constitutionality. Kennedy identified four distinct principles related to a fundamental right to same-sex marriage including individual autonomy, the importance of the commitment between two-individuals, safeguard for children and families, and marriage as a "keystone of social order" (576 U.S. ___ 2015, 16). These principles and the states' vested interest in protecting the institution of marriage establish the fact that the Constitution protects the individual's right to marry. Therefore, the Court recognized a right to marry for all same-sex couples, in all states, pursuant to the Due Process and Equal Protection Clause of the Fourteenth Amendment.

Before *Obergefell*

Unlike the abortion issue, which took a top-down approach in its constitutional dialogue, the same-sex marriage issue opted for a bottom-up approach relying on state governing institutions and state courts. Gay rights groups and activists relied on the state's ability to protect their rights and liberties at a higher level than that of the federal government "until the combination of public support and legal precedent marked out a clear path to victory" (Keck 2014, 19). Gay rights advocates began their political journey towards marriage equality in the 1970s, bringing suit in Minnesota, Kentucky and Washington (Rosenberg 2008, 342). The Minnesota Supreme Court in *Baker v. Nelson* (1971) upheld a state law limiting marriage to persons of the opposite sex, for it

was not in violation of the U.S. Constitution. The Kentucky Court of Appeals denied a same-sex couple the right to marry in *Jones v. Hallahan* (1973) because the dictionary defined marriage as being between a man and a woman, and the Washington Appellate Court affirmed a lower court's decision denying two men a marriage license, in *Singer v. Hara* (1974). These early legal defeats are a reminder that constitutional interpretation and dialogue is not a static process and requires time to shape and mold political opinion in a favorable direction when lasting social change is the desired end.

The earliest poll regarding public opinion and the right of same-sex couples right to marry completed "in 1988 by the National Opinion Research Center" (Rosenberg 2008, 400). Respondents were asked whether they agreed or disagreed with a right to same-sex marriage; 12 percent agreed and 73 percent disagreed (Rosenberg 2008, 400-401). In the years following, public opinion on same-sex marriages began to shift in a positive direction and same-sex marriage advocates finally achieved some success in 1993. The Hawaii State Supreme Court ruled in *Baehr v. Miller* (1993) that absent a compelling state interest in denying same-sex couples the right to marry, such action violated the state constitution's guarantee of equal protection. In 1993, several months before the ruling in *Baehr*, public support for same-sex marriage had increased to 27 percent, with 65 percent against extending the right (Rosenberg 2008, 401). While the Hawaii high court ruling appeared to be a success for states' rights advocates, the constitutional debate would soon shift to the federal government, placing an obstacle in the movements path.

In 1996, Congress passed the Defense of Marriage Act (DOMA) in response to the ruling in *Baehr*. DOMA defined marriage to be between one man and one woman. This federal law allowed states the ability to deny recognition of same-sex unions under other state laws. This interpretation of marriage further denied same-sex couples federal recognition interpreting

marriage in this manner, same-sex couple's marriage was further denied federal recognition and protection of marital unions while simultaneously advancing the heteronormative objective. Same-sex marriage advocates again turned back to state governing institutions to further their cause, for they were viewed as more hospitable than the federal government (Keck 2014, 36). Though numerous states followed the example of the federal government and enacted mini-DOMAs, even going so far as to amend state constitutions to define marriage as between a man and a woman, the California legislature "extended legal recognition to same-sex couples" in 1999 (Franklin 2014, 845; Keck 2014, 79). "Over the next fourteen years" 15 other state legislatures would go onto expand their marriage rights to include same-sex couples (Keck 2014, 79).

Seven years after DOMA was enacted at the federal level, the right to same-sex marriage moved forward as state high courts struck down legislation for unconstitutionally denying same-sex couples an equal right to marriage. In the case of *Goodridge v. Dept. of Public Health* (2003), the Massachusetts Supreme Judicial Court affirmed that denying same-sex couples the right to marry violated the Massachusetts Constitution right of equal protection. The majority opinion further recognized, as Justice Brennan previously had, that state constitutions are better at protecting individual liberty than that of the federal constitution. Massachusetts issued its first same-sex marriage license in 2004. Additionally, according to a poll conducted by the Pew Research Center, public support for same-sex marriage rose to 30 percent, with 62 percent opposed by November 2003 (Rosenberg 2008, 403). The Supreme Court of Connecticut ruled in *Kerrigan v. Commissioner of Public Health* (2008), that denying same-sex couples the right to marry violated the right to equality and liberty guaranteed in the Connecticut Constitution. The Iowa Supreme Court, in *Varnum v. Brien* (2009), found that the state limitation of marriage to opposite sex couples violated the equal protection clause of the state constitution. The Iowa court again

took Brennan's advice, relying upon the decisions in *Romar v. Evans* (1996)[2] and *Lawrence v. Texas* (2003)[3], to demonstrate orientation based discrimination but rested its decisions solely on the basis of state constitutional law.[4]

This is not to say that same-sex marriage rights advocates were not met with resistance from opponents, for some of "the most well-known antigay policies have been enacted directly by the voters" (Keck 2014, 38). Between 1995 and 2000, thirty-two states passed legislation banning same-sex marriage and in 2004, eleven states voted and approved constitutional amendments banning same-sex marriage (Rosenberg 2008, 357). Yet, by May 2006, according to a poll conducted by the Gallup organization, 39 percent of respondents favored legal recognition of same-sex marriages, opposed to 58 percent that did not; that is an increase of 27 percentage points since 1988 (Rosenberg 2008, 403). In 2008, the California Supreme Court "became the second state high court to order full marriage equality" and the first to afford strict scrutiny in cases regarding sexual orientation and the limiting of marriage to opposite sex couples (Keck 2014, 52). *In re Marriage Cases* (2008), the California high court found marriage to be a fundamental right, afforded to all persons regardless of sexual orientation, pursuant to Article 1, Section 7 of the California Constitution. However, this decision was rendered moot by the passage of Proposition

[2] *Romer v. Evans* (1996) was the first Supreme Court case to deal with the issue of gay civil rights since *Bowers v. Hardwick* (1986) which criminalized homosexual sodomy. At issue in *Evans* was a Colorado state constitutional amendment which prevented the state from recognizing sexual orientation as a protected class legally protected from discrimination. The Supreme Court struck down the Colorado Amendment for violating the Equal Protection Clause of the Fourteenth Amendment.

[3] The Supreme Court in *Lawrence v. Texas* (2003) struck down a Texas sodomy law for violating the Fourteenth Amendment. The holding not only struck down 13 state sodomy laws but also overturned *Bowers v. Hardwick* (1986).

[4] Historically, sexual orientation has not always been considered a suspect class likely to be discriminated against. Therefore, any cases presented before the Court were not afforded strict scrutiny, the most rigid level of judicial review. In order to demonstrate orientation based discrimination it must be established that the group "has suffered a history of discrimination…that those stereotypes no longer constitute legitimate ground for state action" (Franklin 2014, 851-52).

8; a state constitutional amendment, passed by popular vote, making same-sex marriage illegal by defining marriage to be only between a man and a woman. Though Proposition 8 was initially affirmed as constitutional by the California Supreme Court in *Strauss v. Horton* (2009), it would eventually be struck down. In the case of *Hollingsworth v. Perry* (2013), the Supreme Court upheld the ruling of the U.S. Court of Appeals for the Ninth Circuit and found Proposition 8 to be unconstitutional. The Court of Appeals ruling found that the state constitutional amendment had no relevant purpose other than to advance the position of heteronormativity as superior to that of homosexuality.

At the same time, the states experimented with different levels of legal recognition afforded to same-sex couples, ranging from domestic partnerships to civil unions, gay rights activists began to set their sights higher. Same-sex marriage and gay rights activists were strategic in their use of litigation, doing so mainly where they perceived a win possible. By 2013, according to the Pew Research Center, 50 percent of Americans favored a right to same-sex marriage and 43 percent opposed the right. No longer satisfied with second class government-sanctioned partnerships, same-sex marriage advocates sought a nationalized fundamental right to marriage. To achieve this, they were willing to transfer the constitutional debate from the states back to the federal courts. In the landmark decision of *United States v. Windsor* (2013), the Supreme Court struck down Section 3 of DOMA as unconstitutional. Section 3 of DOMA denied same-sex couples, legally married at the state level, to be recognized and protected by the federal government.

Authoring the majority opinion, Justice Kennedy stated that "by history and tradition the definition and regulation of marriage…has been treated as being within the authority and realm of the separate states" (570 U.S. ___ 2013, 2690). A federal definition of marriage as between one man and one woman therein violated the Due Process Clause of the Fifth Amendment. Kennedy

further stated that though marriage laws vary from state to state, it has long been the general rule that states are afforded with the privilege to regulate domestic relationships within their borders, with the capacity to incorporate new insights, without the watchful burden of the federal government. While federal courts refrain from adjudicating in the realm of marriage law out of respect to this traditional area of state regulation, Congress in enacting DOMA sought to regulate the definition of marriage in order to further some federal objective. Therefore, the Court struck down Section 3 as an unconstitutional deprivation of liberty protected by the Fifth Amendment (570 U.S. ___ 2013, 2695). Following the decision in *Windsor*, it was assumed only a matter of time before the Supreme Court made a ruling in favor of a national legal recognition of same-sex marriage.

By the time the constitutional question regarding a right to same-sex marriage reached the Supreme Court for review, the states had played a dominant role in the constitutional debate and shaping public opinion regarding the issue. When *Obergefell* was decided in 2015, 36 states and the District of Columbia had already legally recognized, in some form or another, same-sex partnerships; those 13 states remaining being the outliers. Also, according to the Pew Research Center, in 2015, 55 percent of the of Americans favored legal recognition of same-sex marriage and 39 percent opposed. Though *Obergefell* has been criticized as an activist judicial decision, for nationalizing an issue previously accepted as within the domain of the states, some state legislatures have responded to the decision by passing religious exception laws, it has not been met with the same backlash as *Roe*.[5]

[5] According to the National Conference of State Legislatures, as of 2015, 21 states had enacted Religious Freedom Restoration Acts (RFRAs) to protect the free exercise of religion void of government interference.

Trends in *Roe* and *Obergefell*

The states began their campaign against bans on abortion in the late 1960s. During this narrow span of time before the Court decided *Roe*, Hawaii, Alaska, Washington and New York repealed their state anti-abortion laws. 13 additional states liberalized their abortion laws to allow for abortions when the life or health of the mother was at risk. However, a majority of the states maintained their stance that abortion was illegal in all cases. Due to the Court's interception of the abortion issue in 1973, public support for the decision in *Roe v. Wade* and public opinion regarding abortion remained divided. Overtime, the Court has gradually allowed the states to impose further restrictions on abortion, in essence enhancing the polarized public views of abortion. This is likely the result of the Supreme Court positioning itself in front of the democratic process and nationalizing a right to abortion before the issue could properly permeate in and among the states.

Public support for the Court's ruling in *Roe* has varied over the years. According to the Harris Poll (Table 1), between 1973 when *Roe* was decided and 2006, support for this landmark Court ruling has ranged from 49% to 65%. There was an initial spike in public approval following the decision with 52% favorable towards the ruling and 42% opposed to it. Public support remained favorable towards *Roe* until 1992 when the Court reaffirmed *Roe's* central holding in *Casey*. At the time *Casey* was decided, 61% of the public supported the Court's ruling in *Roe* while 35% of the public were opposed to it. The ruling in *Casey*, however, signaled to the states that they could enact restrictions on the availability of abortions so long as they did not create an undue burden.

As a result, public approval for *Roe* declined steadily over the next 14 years. This resulted in public support for *Roe* being greatly divided in 2006, with approval at 49% and opposition at 47%.

Table 1

Public Opinion on *Roe v. Wade*: 1973-2006

Year	Favor *Roe*	Oppose *Roe*
1973	52%	42%
1976	59%	28%
1979	60%	37%
1981	56%	41%
1985	50%	47%
1989	59%	37%
1991	65%	33%
1992	61%	35%
1993	56%	42%
1996	52%	41%
1998	57%	41%
2005	52%	47%
2006	49%	47%

*Source: (The Harris Poll, 2006)

Public opinion regarding a women's legal right to abortion has remained divided since *Roe*. Based on a survey conducted by Pew Research Center, following the Court's landmark ruling in *Casey*, public opinion in favor of abortion has maintained a majority, though the exact rate of support has been somewhat inconsistent. Table 2 shows the results of the Pew survey. The rate of the public favoring a legal right to abortion in all or most cases has varied from 60% approval in 1995, falling to 47% approval in 2009 and then returning to 57% approval in 2016. This inconsistency in public support for abortion is due to the publics tendency to distinguish between "the right to abortion under one circumstance versus another" due to its underlying moral implications (Shaw 2003, 407). By distinguishing when and under what circumstances abortion is

appropriate, the public is both able "to support a right to abortion while also supporting limits on" a woman's access to it (Shaw 2003, 407). As a result, public opinion on abortion has not only continued to be divided but also inconsistent over the years.

Table 2

Public Opinion on Abortion Following *Casey*: 1995-2016

Year	Favor Legalized Abortion	Oppose Legalized Abortion
1995	60%	38%
1996	57%	40%
1998	54%	42%
1999	56%	42%
2000	53%	43%
2001	54%	43%
2003	57%	42%
2004	55%	43%
2005	57%	41%
2006	51%	43%
2007	52%	42%
2008	54%	40%
2009	47%	44%
2010	50%	44%
2011	53%	42%
2012	54%	39%
2013	54%	40%
2014	55%	40%
2015	51%	43%
2016	57%	39%

*Source: (Pew Research Center, 2017)

As the public continues to debate when abortion is most appropriate, the states have responded by enacting legislation with the purpose of restricting abortions. According to the Guttmacher Institute, states have enacted legislation placing bans on partial birth abortions, enacted compulsory ultrasound laws, as well as mandated both counseling and waiting periods. These findings are found in Table 3. Those states with bans on partial birth abortions ban the procedure under all circumstances in all states except Georgia, Montana, and New Mexico. These three states only ban the procedure post-viability. Most states have also begun to restrict abortions starting at 20 weeks, ranging until the third trimester. These restrictions on abortion, however, are not absolute. Most states allow for an exception in cases where the health and/or life of the mother is at risk. Yet, some states have gone so far as to enact legislation that is not enforceable under *Roe* standards. These states regulations further indicate the trend that the public at large continues to be divided regarding when a legal right to abortion is sufficient.

Since the late 1960s, up to present day, the number of legally induced abortions has fluctuated. According to Johnston's Archive, presented in Table 4, the number of legal abortions reported began to increase in the late 1960s and early 1970s as states began to liberalize their abortion laws. The number of legal abortions reported continued to increase following the Court's decision in *Roe*. However, the number of legal abortions leveled off in the 1980s and has continued to decrease in the 1990s and throughout the 2000s.

While public support for abortion remains divided decades after *Roe*, public support for same-sex marriage has increased overtime leading up to the decision in *Obergefell.* The states began their campaign for same-sex marriage in the mid-1990s. During this time the states were allowed the democratic freedom to experiment with policy and law before the Court decided *Obergefell* in 2015. The issue of same-sex marriage was left to percolate in the states for a longer

Table 3

State Abortion Laws

Ban on Partial Birth Abortion	**19 states:** Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia
Compulsory Ultrasound	**26 states:** Alabama, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, Wisconsin
Mandated Counseling	**17 states:** Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia
Waiting Period	**27 states:** Alabama, Arkansas, Arizona, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin

*Source: (Guttmacher Institute, 2017)

Table 4

Number of Legal Abortions Reported 1965-2016

Year	Abortions Reported
1965	749
1969	27,512
1973	744,610
1976	1,179,300
1979	1,497,670
1984	1,577,180
1989	1,566,870
1992	1,528,930
1997	1,335,000
2000	1,313,000
2005	1,206,200
2010	871,053
2016	77,983

*Source: (Johnston Archive, 2017)

period of time than in *Roe* which resulted in a steady trend of increased public support for same-sex marriage and an increase in the total number of same-sex marriages following the Court's decision. This is likely the result of the Court deciding the issue at a later point in the democratic debate and following the already established favorable opinion of the states.

According to Pew Research Center, as shown in Table 5, public opinion in favor of same-sex marriage grew steadily overtime. As seen in conjunction with Table 6, based on a survey conducted by Pew Research Center, by 2001 states had moved on from enacting statutory bans on same-sex marriage to enacting constitutional bans.[6] In 2001 only 35% of the public favored a legal recognition of same-sex marriages while 57% of the public continued to oppose it. Overtime, as the states began to experiment with policy, including some states adopting some form of legal

[6] Based on the hierarchy of laws constitutional provisions have supremacy over statutory laws. Additionally, the process for changing constitutional provisions is more difficult than statutory laws.

Table 5

Public Opinion on Same-Sex Marriage: 2001-2016

Year	Favor Legalization	Oppose Legalization
2001	35%	57%
2003	32%	59%
2004	31%	60%
2005	36%	53%
2006	35%	55%
2007	37%	54%
2008	39%	51%
2009	37%	54%
2010	42%	48%
2011	46%	45%
2012	48%	43%
2013	50%	43%
2014	52%	40%
2015	55%	39%
2016	55%	37%

*Source: (Pew Research Center, 2016)

recognition of their unions, public support steadily grew. By 2013, the same year the Supreme Court overturned DOMA, support for legally recognizing a right to same-sex marriage was up 15%. Public support for same-sex marriage was now at 50% and 43% of the public remained opposed. By the time the Court decided *Obergefell*, not only had 36 states and the District of Columbia legally recognize same-sex marriage but 55% of the public favored legalization with only 39% of the public opposed. Public support for the legal right to same-sex marriage remained consistent following the Court's decision in *Obergefell*. This is likely due to the fact that the Court joined the trend in terms of national sentiments regarding the issue rather than altering its direction.

When the Court nationalized a right to same-sex marriage in its landmark decision *Obergefell v. Hodges* in June 2015, only 13 states had yet to legally recognize a right to same-sex

Table 6

State Laws on Same-Sex Marriage 1995-2015

Statutory Ban 1995-2000	**40 states:** Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan Minnesota, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming
Constitutional Ban 1998-2008	**29 states:** Alabama, Alaska, Arkansas, Arizona, California, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin
Legalization of Same-Sex Marriage 2003-2015	**36 states:** Alabama Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin Wyoming

*Source: (Pew Research Center, 2015)

marriage. Since the Court's ruling the number of same-sex marriages has increased in those states that had not legally recognized same-sex marriage. The number of same-sex marriages has also increased in those states that had already legally recognized these unions. According to Gallup, as seen in Table 7, one year following the decision in *Obergefell*, same-sex marriages in those 13 states increased by 13% compared to the 10% increase in those states that had already legally recognized same-sex marriages. Nationally, same-sex marriages increased by 11% in the year following the ruling in *Obergefell*.

Table 7

Change in Percentage of Same-sex Marriage Pre and Post *Obergefell*

Legal status	pre-*Obergefell*	post-*Obergefell*
States where same-sex marriage was not legal	26%	39%
States where same-sex marriage was legal	42%	52%
Nationally	38%	49%

*Source: (Gallup, Inc., 2016)

Since the Court's ruling in *Roe v. Wade* (1973), a majority of the public supports the decision and the right to abortion in some or all cases. However, public approval has not been consistent overtime. The number of legally reported abortions has likewise varied and most recently decreased significantly. While this may partially be due to the advancements in preventative measures, it is also likely associated with the recent trend in the states enacting policy restricting abortion. The one thing that states have consistently shown consensus on regarding abortion has been that the procedure is necessary when the health and/or life of the mother is at risk. Trends regarding the right to same-sex marriage show a different picture. Public support for the right to same-sex marriage steadily increased over time. This resulted in not only the states

taking steps to legally recognize same-sex unions, but also the Supreme Court to nationalizing it. Following the Court's decision, public opinion on same-sex marriage has remained consistent and same-sex marriages have increased nationally.

Moving forward it is likely that these trends will continue. In the case of abortion, the majority will continue to favor a right to abortion in cases where the health and/or life of the mother is at risk. States, however, will also continue to enact policy to restrict the right to abortion which will likely result in a continued decrease in the number of legal abortions due to increases barriers to access of the procedure. On the other hand, support for same-sex marriage will likely continue to trend in the positive direction of favorability and the number of same-sex marriages will continue to grow.

CHAPTER 6
DISCUSSION/CONCLUSION

Gerald Rosenberg argued that the Courts ability to produce social change is limited in scope and found that due to the Court's institutional constrains, Courts are "virtually powerless to produce change" (Rosenberg 2008, 420). His theory, however, focuses on the national government and does not address state level politics. Even if the Courts are incapable of producing social change based on their own institutional merit, the focus for producing change should not center on the national government. Consideration should also be afforded to the states and the political developments made by grassroots efforts to produce social change.

The right to abortion and same-sex marriage are both issues that are traditionally regulated by the states. These cases also encompass complex issues requiring political and public debate to sort out their intricacies. In the case of abortion, the states had begun a political debate aimed at allowing a right to abortion under certain conditions. Between the late 1960s and early 1970s, the states began to unpack the medical and moral issues related to a right to abortion. The landmark Court decision of *Roe v. Wade* (1973), however, ended that political debate in the states not long after the discussion first began. This resulted in a battle over abortion regulation between the states and the Courts as new issues relating to abortion continued to arise. Such issues included relation to when and under what conditions abortion services are most appropriate, leaving the public divided. Medical advances related to abortion have also introduced the issues of partial-birth abortions and fetal imagining such as ultrasounds. As a result, states began enacting regulatory

legislation and have continued to push the issue of abortion upon the Court. The Court continues to review legislation to ensure that state regulation does not violate the standards set in *Roe* and *Casey*. Anti-abortion groups hope that cases brought before the Court may one day lead to the overturning of *Roe*.

In the case of same-sex marriage, the states also had complex issues to workout. Most of the states struggled with the level of legal recognition to afford same-sex couples. While many states had either enacted legislation or constitutional amendments banning same-sex marriage, they also experimented with other variations of legal recognition. Some states afforded same-sex couples domestic partnerships, which provided limited rights associated to marriage. Other states afforded these couples civil unions which provide a level of legal recognition similar to marriage and was viewed as a first step towards legalizing a right to same-sex marriage. Overtime, as the political debate regarding same-sex marriage evolved, states began to extend same-sex couples the legal recognition, right and benefits of marriage. The political debate in the states, as well as policy and legal experimentation, helped to sort out the issue of same-sex marriage. The states as active participants in this political debate also helped form a public consensus in favor of affording same-sex couples with the legal right to marry. By the time the Court handed down their landmark decision in *Obergefell v. Hodges* (2015), the Court was only joining that political and public consensus rather than altering its course.

When the Court hands down a landmark decision after the political discussion has already occurred, it has the capacity to create lasting change. When issues concerning new substantive rights arise and remain in the states to percolate, the evolution of the political debate over time aids in sorting out complex issues regarding the right and increases the level of public opinion in favor of it. In these cases, by the time the Court constitutionally rules upon the right at issue the

majority of the states and the public will already be behind the decision. The states would then effectively be working with the Court to produce the desired change rather than the states working in conflict with the Court. While I cannot say with absolute certainty that *Obergefell* will not be met with the same backlash as *Roe*, the findings suggest that there exists a stable consensus in favor of same-sex marriage, both at the state and individual level. The decision in *Roe* is still being contested 44 years later and the right to abortion continues to struggle in maintaining a stable majority of public favor. The decision in *Obergefell*, however, has largely been accepted as a settled issue and is unlikely to be contested.

Today's political climate is divided. American politics at both the state and national level are polarized. This has resulted in roughly half of the public wanting to return to the roots of limited government and state control of the protection of certain rights and liberties. The other segment of the public wants the federal government to continue to regulate and mandate upon the states the protection of certain rights and liberties. President Trump has stated that while he considers the issue of same-sex marriage to be settled, he considers abortion to still be a contested issue. Trump has stated that he would allow the states the ability to ban abortion in all cases except for rape, incest or when the health of the mother is at risk. In an effort to accomplish this objective, Trump has stated that he will aim to appoint justices to the Supreme Court that are pro-life and willing to overturn *Roe*. However, the Supreme Court is unlikely to overturn either the decision in *Roe* or *Obergefell* without an extreme ideological shift on the bench. Neil Gorsuch, Trump's Supreme Court nominee to fill the seat of Antonia Scalia, while ideologically conservative, will not have the effect of producing the necessary ideological shift on the bench. Rather, Gorsuch's appointment would simply maintain the ideological ratio of the Supreme Court. Additionally, Gorsuch has not explicitly stated a position on abortion or same-sex marriage. Until Gorsuch is

confirmed by Congress and takes his seat on the bench of the Supreme Court, it is unclear the fate of abortion or same-sex marriage. It is likely, however, that the right of abortion will likely remain a contested issue between the states and the Court, while same-sex marriage will endure as an established right

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