

[The excerpt and Introduction to this set of Supreme Court opinions comes from Professor Mark Graber of U. of Maryland Law School. –L.F. Goldstein]

Dobbs v. Jackson Women’s Health Organization, ___ U.S. ___ (2022).

Jackson Women’s Health Organization operated the only clinic that provided abortion services in Mississippi. The state legislature in 2018 passed the Mississippi Gestational Age Act forbidding all abortions after the first fifteenth weeks of pregnancy, unless a medical emergency or severe fetal abnormality existed. The Jackson Women’s Health Organization immediately filed a lawsuit against Thomas Dobbs, the State Health Officer of the Mississippi Department of Health, asking that the law be enjoined as an violation of the constitutional right an abortion protected by the due process clause of the Fourteenth Amendment. The local federal district court granted the injunction and that decision was sustained by the Court of Appeals for the Fifth Circuit. Dobbs/Mississippi appealed to the Supreme Court of the United States.

The Supreme Court by a 6-3 vote reversed the lower federal court. Justices Samuel Alito writing for the judicial majority overruled the constitutional protections for abortion provided by Roe v. Wade (1973) and Planned Parenthood of Southeastern Pennsylvania v. Casey (1992). Chief Justice Roberts’s concurring opinion would sustain the Mississippi law as providing women with a reasonable opportunity to obtain an abortion. The joint opinion by Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan insisted that Roe and Casey were correctly decided and should be maintained as a matter of stare decisis. Does the majority opinion or the dissent break any new ground or do they merely repeat arguments made in Roe and Casey (with a different majority)? Do the majority opinion and dissent dispute the factors a court should consider when overruling a decision or the application of the factors. Who has the better of that argument? Alito and Justice Brett Kavanaugh insist Dobbs has no implication for constitutional rights to same-sex marriage and contraception? Why do they make that assertion? Why does the dissent disagree? Who has the better of that argument? Compare Alito’s method for determining constitutional rights with Justice Clarence Thomas’s method for determining constitutional rights in New York State Rifle & Pistol Association, Inc. v. Bruen (2022)? Do conservatives agree on a method for finding constitutional rights? Is the best explanation for the rights analysis in these cases and, for that matter, Carson v. Makim (2022), originalism, some other legal method, or the policy preferences of American conservatives?

JUSTICE ALITO delivered the opinion of the Court.

Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman’s right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common

law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.*, its discussion of abortion in antiquity) to the plainly incorrect (*e.g.*, its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

....

We hold that *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” *Washington v. Glucksberg* (1997).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment’s protection of “liberty.” *Roe*’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called “fetal life” and what the law now before us describes as an “unborn human being.”

Stare decisis, the doctrine on which *Casey*’s controlling opinion was based, does not compel unending adherence to *Roe*’s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives. “The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”

....

Constitutional analysis must begin with “the language of the instrument,” which offers a “fixed standard” for ascertaining what our founding document means. The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.

Roe, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. . . . We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents’ *amici* have now offered as yet another potential home for the abortion right: the Fourteenth Amendment’s Equal Protection Clause. Neither *Roe* nor *Casey* saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State’s regulation of abortion is not a sex-based classification and is thus not subject to the “heightened scrutiny” that applies to such

classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a “mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.” *Geduldig v. Aiello*,\ (1974).

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. . . . [O]ur decisions have held that the Due Process Clause protects two categories of substantive rights. The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government. . . . The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the Court has long asked whether the right is “deeply rooted in [our] history and tradition” and whether it is essential to our Nation’s “scheme of ordered liberty.” . . .

. . . . *Timbs* and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution. Thus, in *Glucksberg*, which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of “Anglo-American common law tradition,” and made clear that a fundamental right must be “objectively, deeply rooted in this Nation’s history and tradition.”

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the “liberty” protected by the Due Process Clause because the term “liberty” alone provides little guidance. . . . In interpreting what is meant by the Fourteenth Amendment’s reference to “liberty,” we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been “reluctant” to recognize rights that are not mentioned in the Constitution. . . . On occasion, when the Court has ignored the “[a]ppropriate limits” imposed by “ ‘respect for the teachings of history,’ ” it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* (1905). . . .

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. . . . Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

We begin with the common law, under which abortion was a crime at least after “quickening”—*i.e.*, the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy. The “eminent common-law authorities (Blackstone, Coke, Hale, and the like),” *all* describe abortion after quickening as criminal. . . . Although a pre-quickening abortion was not itself considered homicide, it does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. . . . That the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule. . . . Hale wrote that if a physician gave a woman “with child” a

“potion” to cause an abortion, and the woman died, it was “murder” because the potion was given “*unlawfully* to destroy her child within her.” . . . Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be “with quick child”—only that she be “with child.” . . . In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

In this country, the historical record is similar. The “most important early American edition of Blackstone’s Commentaries,” reported Blackstone’s statement that abortion of a quick child was at least “a heinous misdemeanor,” and that edition also included Blackstone’s discussion of the proto-felony-murder rule. . . . The few cases available from the early colonial period corroborate that abortion was a crime. . . . The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages. . . .

. . . . [T]he original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as “neither in accordance with the result of medical experience, nor with the principles of the common law.” In 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment. . . . In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy. By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910.

. . . . This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court’s own count, a substantial majority—30 States—still prohibited abortion at all stages except to save the life of the mother. The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation’s history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. . . .

. . . . Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy, and *Casey* described it as the freedom to make “intimate and personal choices” that are “central to personal dignity and autonomy.” . . .

. . . . Ordered liberty sets limits and defines the boundary between competing interests. *Roe* and *Casey* each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life.” But the people of the various States may evaluate those interests differently. . . . Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. *Casey* relied on cases involving the right to marry a person of a different race, the right to marry while in prison, the right to obtain contraceptives, the right to reside with relatives, the right to make decisions about the education of one's children, the right not to be sterilized without consent, and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures. . . . These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. None of these rights has any claim to being deeply rooted in history.

What sharply distinguishes the abortion right from the rights recognized in the cases on which *Roe* and *Casey* rely is something that both those decisions acknowledged: Abortion destroys what those decisions call "potential life" and what the law at issue in this case regards as the life of an "unborn human being." None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion. They are therefore inapposite. . . .

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The dissent suggests that we have focused only on "the legal status of abortion in the 19th century," but our review of this Nation's tradition extends well past that period. As explained, for more than a century after 1868—including "another half-century" after women gained the constitutional right to vote in 1920, it was firmly established that laws prohibiting abortion like the Texas law at issue in *Roe* were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule *Roe* and *Casey*. The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

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. . . . The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life. The dissent repeatedly praises the "balance," that the viability line strikes between a woman's liberty interest and the State's interest in prenatal life. But for reasons we discuss later, and given in the opinion of THE CHIEF JUSTICE, the viability line makes no sense. . . .

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. It "contributes to the actual and perceived integrity of the judicial process." And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges."

We have long recognized, however, that *stare decisis* is "not an inexorable command," and it "is at its weakest when we interpret the Constitution," . . . [W]hen it comes to the interpretation of the Constitution—the "great charter of our liberties," which was meant "to endure through a long lapse of ages," we place a high value on having the matter "settled right."

In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In *Brown v. Board of Education* (1954), the Court repudiated the “separate but equal” doctrine, which had allowed States to maintain racially segregated schools and other facilities. . . . In *West Coast Hotel Co. v. Parrish* (1937), the Court overruled *Adkins v. Children’s Hospital of D. C.* (1923), which had held that a law setting minimum wages for women violated the “liberty” protected by the Fifth Amendment’s Due Process Clause. . . . Finally, in *West Virginia Bd. of Ed. v. Barnette* (1943), after the lapse of only three years, the Court overruled *Minersville School Dist. v. Gobitis* (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court’s belated recognition that its earlier decision had been seriously wrong.

. . . . In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the “workability” of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

The nature of the Court’s error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

. . . . *Roe* was also egregiously wrong and deeply damaging. For reasons already explained, *Roe*’s constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

Roe was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but “raw judicial power,” the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side. Those on the losing side—those who sought to advance the State’s interest in fetal life—could no longer seek to persuade their elected representatives to adopt policies consistent with their views. . . .

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The weaknesses in *Roe*’s reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation. Dividing pregnancy into three trimesters, the Court imposed special rules for each. This elaborate scheme was the Court’s own brainchild. . . . Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources on which constitutional decisions are usually based. . . .

Roe’s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. . . . After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. . . . The Court did not explain why these sources shed light on the

meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional “right of personal privacy,” but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, and some of the cases in that category involved personal decisions that were obviously very, very far afield. What remained was a handful of cases having something to do with marriage, or procreation, But none of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed “potential life.”

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An even more glaring deficiency was *Roe*’s failure to justify the critical distinction it drew between pre- and post-viability abortions. . . . The most obvious problem with any such argument is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. . . . Viability also depends on the “quality of the available medical facilities.” . . . In addition, as the Court once explained, viability is not really a hard-and-fast line. A physician determining a particular fetus’s odds of surviving outside the womb must consider “a number of variables,” including “gestational age,” “fetal weight,” a woman’s “general health and nutrition,” the “quality of the available medical facilities,” and other factors. . . .

....

Casey either refused to reaffirm or rejected important aspects of *Roe*’s analysis, failed to remedy glaring deficiencies in *Roe*’s reasoning, endorsed what it termed *Roe*’s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*’s status as precedent, and imposed a new and problematic test with no firm grounding in constitutional text, history, or precedent.

....

Casey’s “undue burden” test has scored poorly on the workability scale. Problems begin with the very concept of an “undue burden.” As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is “due” or “undue” is “inherently standardless.” . . . [W]hether a particular obstacle qualifies as “substantial” is often open to reasonable debate. . . . [“Undue burden calls] on courts to examine a law’s effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is “substantial.”

Casey provided no clear answer to these questions. . . .

. . . . The experience of the Courts of Appeals provides further evidence that *Casey*’s “line between” permissible and unconstitutional restrictions “has proved to be impossible to draw with precision.” *Casey* has generated a long list of Circuit conflicts. . . .

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Effect on other areas of law. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those

decisions. The Court's abortion cases have diluted the strict standard for facial constitutional challenges. They have ignored the Court's third-party standing doctrine. They have disregarded standard *res judicata* principles. They have flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality. And they have distorted First Amendment doctrines.

... [T]he controlling opinion in *Casey* perceived a more intangible form of reliance. It wrote that "people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail" and that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." But this Court is ill-equipped to assess "generalized assertions about the national psyche." *Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in "cases involving property and contract rights."

... The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality's speculations and weighing of the relative importance of the fetus and mother represent a departure from the "original constitutional proposition" that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies

Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. . . .

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Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." . . . [W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

... The *Casey* plurality "call[ed] the contending sides of a national controversy to end their national division," and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. . . . Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. *Ibid.* The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command.

The *Casey* plurality also misjudged the practical limits of this Court's influence. *Roe* certainly did not succeed in ending division on the issue of abortion. On the

contrary, *Roe* “inflamed” a national issue that has remained bitterly divisive for the past half century. And for the past 30 years, *Casey* has done the same.

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Finally, the dissent suggests that our decision calls into question *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell*. But we have stated unequivocally that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” . . . Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

We now turn to the concurrence in the judgment, which reproves us for deciding whether *Roe* and *Casey* should be retained or overruled. . . . There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. . . . The concurrence’s most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would “disca[r]d” “the rule from *Roe* and *Casey* that a woman’s right to terminate her pregnancy extends up to the point that the fetus is regarded as ‘viable’ outside the womb.” But this rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is “a doctrine of preservation, not transformation,” . . . *Roe*’s trimester rule was expressly tied to viability, and viability played a critical role in later abortion decisions. . . . When the Court reconsidered *Roe* in *Casey*, it left no doubt about the importance of the viability rule. It described the rule as *Roe*’s “central holding,” and repeatedly stated that the right it reaffirmed was “the right of the woman to choose to have an abortion *before viability*.” *Id.*, at 846 (emphasis added).

For all these reasons, *stare decisis* cannot justify the new “reasonable opportunity” rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is “‘deeply rooted in this Nation’s history and tradition’ ” and “‘implicit in the concept of ordered liberty.’ ” Nor does it propound any other theory that could show that the Constitution supports its new rule. . . .

The concurrence would “leave for another day whether to reject any right to an abortion at all,” *post*, at 7, but “another day” would not be long in coming. Some States have set deadlines for obtaining an abortion that are shorter than Mississippi’s. See, e.g., *Memphis Center for Reproductive Health v. Slatery*, 14 F. 4th, at 414 (If we held only that Mississippi’s 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The “measured course” charted by the concurrence would be fraught with turmoil until the Court answered the question that the concurrence seeks to defer.

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Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution’s text or in our Nation’s history. It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot “substitute their social and economic beliefs for the judgment of legislative bodies.” . . . A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state

interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development, the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

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JUSTICE THOMAS, concurring

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I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause. Considerable historical evidence indicates that "due process of law" merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. Other sources, by contrast, suggest that "due process of law" prohibited legislatures "from authorizing the deprivation of a person's life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England." Either way, the Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, "forbi[d] the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided."

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... [I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold v. Connecticut* (1965), *Lawrence v. Texas* (2003), and *Obergefell v. Hodges* (2015). Because any substantive due process decision is "demonstrably erroneous," we have a duty to "correct the error" established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court's substantive due process cases are "privileges or immunities of citizens of the United States" protected by the Fourteenth Amendment. . . .

...

... "[S]ubstantive due process exalts judges at the expense of the People from whom they derive their authority." . . . Nowhere is this exaltation of judicial policymaking clearer than this Court's abortion jurisprudence. . . . That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: The right to abortion is ultimately a policy goal in desperate search of a constitutional justification.

. . . . [S]ubstantive due process distorts other areas of constitutional law. For example, once this Court identifies a “fundamental” right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. . . .

. . . . [S]ubstantive due process is often wielded to “disastrous ends.” For instance, in *Dred Scott v. Sandford* (1857), the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories. . . . Now today, the Court rightly overrules *Roe* and *Casey*—two of this Court’s “most notoriously incorrect” substantive due process decisions, after more than 63 million abortions have been performed. The harm caused by this Court’s forays into substantive due process remains immeasurable.

. . . .
JUSTICE KAVANAUGH, concurring.

. . . .
On the question of abortion, the Constitution is . . . neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

. . . .
Instead of adhering to the Constitution’s neutrality, the Court in *Roe v. Wade* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability (about 24 weeks of pregnancy). The Court’s decision today properly returns the Court to a position of neutrality and restores the people’s authority to address the issue of abortion through the processes of democratic self-government established by the Constitution.

. . . .
To be clear, then, the Court’s decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court’s decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion. As Justice Scalia stated, the “States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so.”

. . . .
In arguing for a *constitutional* right to abortion that would override the people’s choices in the democratic process, the plaintiff Jackson Women’s Health Organization and its *amici* emphasize that the Constitution does not freeze the American people’s rights as of 1791 or 1868. I fully agree. To begin, I agree that constitutional rights apply to situations that were unforeseen in 1791 or 1868—such as applying the First Amendment to the Internet or the Fourth Amendment to cars. Moreover, the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments. The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views.

. . . .

Adherence to precedent is the norm, and *stare decisis* imposes a high bar before this Court may overrule a precedent. This Court’s history shows, however, that *stare decisis* is not absolute, and indeed cannot be absolute. Otherwise, as the Court today explains, many long-since-overruled cases such as *Plessy v. Ferguson*, (1896); *Lochner v. New York* (1905); *Minersville School Dist. v. Gobitis* (1940); and *Bowers v. Hardwick* (1986), would never have been overruled and would still be the law.

....

... The history of *stare decisis* in this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, and (iii) overruling the prior decision would not unduly upset legitimate reliance interests.

Applying those factors, I agree with the Court today that *Roe* should be overruled. The Court in *Roe* erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide. . . . *Roe* has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, *Roe* overreached and exceeded this Court’s constitutional authority; gravely distorted the Nation’s understanding of this Court’s proper constitutional role; and caused significant harm to what *Roe* itself recognized as the State’s “important and legitimate interest” in protecting fetal life. . . .

...

First is the question of how this decision will affect other precedents involving issues such as contraception and marriage—in particular, the decisions in *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972); *Loving v. Virginia* (1967); and *Obergefell v. Hodges* (2015). I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.

Second, as I see it, some of the other abortion-related legal questions raised by today’s decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel.

....

CHIEF JUSTICE ROBERTS, concurring in the judgment.

....

... I would take a more measured course. I agree with the Court that the viability line established by *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman’s right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further—certainly not all the way to viability. Mississippi’s law allows a woman three months to obtain an abortion, well beyond the point at which it is considered “late” to discover a pregnancy. I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. . . .

....

It is thus hardly surprising that neither *Roe* nor *Casey* made a persuasive or even colorable argument for why the time for terminating a pregnancy must extend to viability. . . . As has been often noted, *Roe*'s defense of the line boiled down to the circular assertion that the State's interest is compelling only when an unborn child can live outside the womb, because that is when the unborn child can live outside the womb. Twenty years later, the best defense of the viability line the *Casey* plurality could conjure up was workability. . . .

....

This Court's jurisprudence since *Casey*, moreover, has "eroded" the "underpinnings" of the viability line, such as they were. The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of "potential life." That changed with *Gonzales v. Carhart* (2007). There, we recognized a broader array of interests, such as drawing "a bright line that clearly distinguishes abortion and infanticide," maintaining societal ethics, and preserving the integrity of the medical profession. The viability line has nothing to do with advancing such permissible goals

Consider, for example, statutes passed in a number of jurisdictions that forbid abortions after twenty weeks of pregnancy, premised on the theory that a fetus can feel pain at that stage of development. Assuming that prevention of fetal pain is a legitimate state interest after *Gonzales*, there seems to be no reason why viability would be relevant to the permissibility of such laws. The same is true of laws designed to "protect[] the integrity and ethics of the medical profession" and restrict procedures likely to "coarsen society" to the "dignity of human life."

. . . . It is indeed "telling that other countries almost uniformly eschew" a viability line. Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12-week line. The Court rightly rejects the arbitrary viability rule today.

. . . . Our established practice is . . . not to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Following that "fundamental principle of judicial restraint," we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. . . .

Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all. . . . Our precedents in this area ground the abortion right in a woman's "right to choose." . . . And there is nothing inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided.

....

. . . . *Roe* adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State's legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right.

....

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi's favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate,

and a woman ordinarily discovers she is pregnant by six weeks of gestation. Almost all know by the end of the first trimester.. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman “to decide for herself” whether to terminate her pregnancy.

. . . . In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: *Brown v. Board of Education* (1954), *West Virginia Bd. of Ed. v. Barnette* (1943), and *West Coast Hotel Co. v. Parrish* (1937). The opinion in *Brown* was unanimous and eleven pages long; this one is neither. *Barnette* was decided only three years after the decision it overruled, three Justices having had second thoughts. And *West Coast Hotel* was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Court’s interpretation of the Constitution, “signal[ing] the demise of an entire line of important precedents,” —a feature the Court expressly disclaims in today’s decision, see *ante*, at 32, 66. None of these leading cases, in short, provides a template for what the Court does today.

The Court says we should consider whether to overrule *Roe* and *Casey* now, because if we delay we would be forced to consider the issue again in short order. There would be “turmoil” until we did so, according to the Court, because of existing state laws with “shorter deadlines or no deadline at all.” But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. . . . We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective.

Both the Court’s opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot share. I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question “admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case.” I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, dissenting.

For half a century, *Roe v. Wade* (1973), and *Planned Parenthood of Southeastern Pa. v. Casey* (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman’s right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman’s body or the course of a woman’s life: It could not determine what the woman’s future would be. Respecting

a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the “moral[ity]” of “terminating a pregnancy, even in its earliest stage.” . . . So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman’s life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a “substantial obstacle” on a woman’s “right to elect the procedure” as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.

. . . .

Whatever the exact scope of the coming laws, one result of today’s decision is certain: the curtailment of women’s rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman’s reproductive freedom, the Constitution also protected “[t]he ability of women to participate equally in [this Nation’s] economic and social life.” But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare. Some women, especially women of means, will find ways around the State’s assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today’s majority holds, provide no shield, despite its guarantees of liberty and equality for all.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird*, (1972). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence v. Texas* (2003); *Obergefell v. Hodges*, (2015). They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does “cast[s] doubt on precedents that do not concern abortion.” But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not “deeply rooted in history”. . . The majority could write just as long an opinion showing, for example, that until the mid-20th century, “there was no support in American law for a constitutional right to obtain [contraceptives].” So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority’s opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority’s cavalier approach to overturning this Court’s precedents. . . . The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women’s expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. . . . The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis*, this Court has often said, “contributes to the actual and perceived integrity of the judicial process” by ensuring that decisions are “founded in the law rather than in the proclivities of individuals.” *Payne v. Tennessee*. Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

. . . . *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within “the reach of majorities and [government] officials.” We believe in a Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman’s life. . . . The Court explained that a long line of precedents, “founded in the Fourteenth Amendment’s concept of personal liberty,” protected individual decisionmaking related to “marriage, procreation, contraception, family relationships, and child rearing and education.” For the same reasons, the Court held, the Constitution must protect “a woman’s decision whether or not to terminate her pregnancy.” The Court recognized the myriad ways bearing a child can alter the “life and future” of a woman and other members of her family. A State could not, “by adopting one theory of life,” override all “rights of the pregnant woman.” At the same time, though, the Court recognized “valid interest[s]” of the State “in regulating the abortion decision.” . . . The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. . . .

. . . .
Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*’s core precepts. . . . Central to that conclusion was a full-throated restatement of a woman’s right to choose. Like *Roe*, *Casey* grounded that right in the Fourteenth Amendment’s guarantee of “liberty.” . . . Especially important in this web of precedents protecting an individual’s most “personal choices” were those guaranteeing the right to contraception. In those cases, the Court had recognized “the right of the individual” to make the vastly consequential “decision whether to bear” a child. So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life’s course.

. . . .

We make one initial point about this analysis in light of the majority’s insistence that *Roe* and *Casey*, and we in defending them, are dismissive of a “State’s interest in protecting prenatal life.” Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman’s liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment. But what *Roe* and *Casey* also recognized—which today’s majority does not—is that a woman’s freedom and equality are likewise involved. That fact—the presence of countervailing interests—is what made the abortion question hard, and what necessitated balancing. . . .

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in “1868, the year when the Fourteenth Amendment was ratified”? Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century.. But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. See *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022). Second—and embarrassingly for the majority—early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before “quickening”—the point when the fetus moved in the womb. And early American law followed the common-law rule.³ On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, “post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.” *New York State Rifle & Pistol Assn., Inc.*,

. . .

. . . Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women’s rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship. . . . But times had changed. A woman’s place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was “no longer consistent with our understanding” of the Constitution. Now, “[t]he Constitution protects all individuals, male or female,” from “the abuse of governmental power” or “unjustified state interference.”

. . . .

. . . . [T]his Court has rejected the majority’s pinched view of how to read our Constitution. “The Founders,” we recently wrote, “knew they were writing a document designed to apply to ever-changing circumstances over centuries.” . . . The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers’ invitation. It has kept true to the Framers’ principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of “liberty” and “equality” for all. . . . The Fourteenth Amendment’s ratifiers did not think it gave black and white people a right to

marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia*, (1967), read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification"—even when they conflict with "liberty" and "equality" as later and more broadly understood. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

. . . [A]pplications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. . . . [T]he constitutional "tradition" of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell's* example, have a right to marry across racial lines. . . .

. . . . It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe's* recognition and *Casey's* reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy. But that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven—all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

And eliminating that right, we need to say before further describing our precedents, is not taking a "neutral" position, as JUSTICE KAVANAUGH tries to argue.

His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want? . . . [W]hen it comes to rights, the Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. . . .

Consider first, then, the line of this Court's cases protecting "bodily integrity." "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." *Casey* recognized the "doctrinal affinity" between those precedents and *Roe*. And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. . . .

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children—and crucially, whether and when to have children. In varied cases, the Court explained that those choices—"the most

intimate and personal” a person can make—reflect fundamental aspects of personal identity; they define the very “attributes of personhood.” . . .

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim—because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. . . . *Casey* similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. A woman then, *Casey* wrote, “had no legal existence separate from her husband.” Women were seen only “as the center of home and family life,” without “full and independent legal status under the Constitution.” But that could not be true any longer: The State could not now insist on the historically dominant “vision of the woman’s role.” . . . And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. “The ability of women to participate equally” in the “life of the Nation”—in all its economic, social, political, and legal aspects—“has been facilitated by their ability to control their reproductive lives.” Without the ability to decide whether and when to have children, women could not—in the way men took for granted—determine how they would live their lives, and how they would contribute to the society around them.

. . . .

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. . . . The first problem with the majority’s account comes from JUSTICE THOMAS’s concurrence—which makes clear he is not with the program. . . . According to the majority, no liberty interest is present—because (and only because) the law offered no protection to the woman’s choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner v. Oklahoma ex rel. Williamson*, (1942), not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too—whatever the particular state interests involved. . . .

. . . .

[T]oday’s decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority’s commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation’s history and traditions, and the step-by-step evolution of the Court’s precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman—even in the first days of her pregnancy—that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. Even before we get to *stare decisis*, we dissent.

By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law. “. . . *Stare decisis* also “contributes to the integrity of our constitutional system of government” by ensuring that decisions “are founded in the law rather than in the proclivities of individuals.” . . . And as Blackstone said before him: It “keep[s] the scale of justice even and steady, and not liable to waver with every new judge's opinion.” . . . That means the Court may not overrule a decision, even a constitutional one, without a “special justification.” *Stare decisis* is, of course, not an “inexorable command”; it is sometimes appropriate to overrule an earlier decision. But the Court must have a good reason to do so over and above the belief “that the precedent was wrongly decided.”

The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling *Roe* and *Casey*. But none does. . . . The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. None of those factors apply here: Nothing—and in particular, no significant legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives. First, for all the reasons we have given, *Roe* and *Casey* were correct. . . .

Contrary to the majority's view, there is nothing unworkable about *Casey*'s “undue burden” standard. . . . General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. . . . Of course, it has provoked some disagreement among judges. *Casey* knew it would: That much “is to be expected in the application of any legal standard which must accommodate life's complexity.” . . . As for lower courts, there is now a one-year-old, one-to-one Circuit split about how the undue burden standard applies to state laws that ban abortions for certain reasons, like fetal abnormality. . . . To borrow an old saying that might apply here: Not one or even a couple of swallows can make the majority's summer.

Anyone concerned about workability should consider the majority's substitute standard. . . . Must a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? . . . Finally, the majority's ruling today invites a host of questions about interstate conflicts. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising

out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? . . . In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested issues, including moral and philosophical ones, that the majority criticizes *Roe* and *Casey* for addressing.

. . . .

Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about “intimate relationships, the family,” and contraception. *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the Court relied on *Casey* to hold that the Fourteenth Amendment protects same-sex intimate relationships. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. . . .

Moreover, no subsequent factual developments have undermined *Roe* and *Casey*. Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. . . . Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. . . . Pregnancy and childbirth may also impose large-scale financial costs. The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. . . . Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most.

. . . .

Mississippi’s own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority’s supposed “modern developments.” Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use. The State neither bans pregnancy discrimination nor requires provision of paid parental leave. . . .

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. . . .

West Coast Hotel overruled *Adkins v. Children’s Hospital of D. C.* (1923), and a whole line of cases beginning with *Lochner v. New York* (1905). *Adkins* had found a state minimum-wage law unconstitutional because, in the Court’s view, the law interfered with a constitutional right to contract. But then the Great Depression hit, bringing with it unparalleled economic despair. The experience undermined—in fact, it disproved—*Adkins*’s assumption that a wholly unregulated market could meet basic human needs. . . .

Brown v. Board of Education overruled *Plessy v. Ferguson* (1896), along with its doctrine of “separate but equal.” By 1954, decades of Jim Crow had made clear what *Plessy*’s turn of phrase actually meant: “inherent[] [in]equal[ity].” Segregation was not, and could not ever be, consistent with the Reconstruction Amendments, ratified to give the former slaves full citizenship. . . .

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. . . . *Roe* and *Casey* continue to reflect, not diverge from, broad trends in American society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: *Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. Only a dozen years before *Roe*, the Court described women as "the center of home and family life," with "special responsibilities" that precluded their full legal status under the Constitution. By 1973, when the Court decided *Roe*, fundamental social change was underway regarding the place of women—and the law had begun to follow. By 1992, when the Court decided *Casey*, the traditional view of a woman's role as only a wife and mother was "no longer consistent with our understanding of the family, the individual, or the Constitution." Under that charter, *Casey* understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since *Casey*—no changed law, no changed fact—has undermined that promise.

. . . .
The disruption of overturning *Roe* and *Casey* will . . . be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. . . . As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life.

. . . The majority proclaims that " 'reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.' " The facts are: 45 percent of pregnancies in the United States are unplanned. . . . Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. . . . Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. . . .

That is especially so for women without money. When we "count[] the cost of [*Roe*'s] repudiation" on women who once relied on that decision, it is not hard to see where the greatest burden will fall. In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line. . . .

Finally, the expectation of reproductive control is integral to many women's identity and their place in the Nation. It reflects that she is an autonomous person, and that society and the law recognize her as such. . . . Withdrawing a woman's right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today's Court has wrenched this choice from women and given it to the States. To allow a State to exert control

over one of “the most intimate and personal choices” a woman may make is not only to affect the course of her life, monumental as those effects might be. It is to alter her “views of [herself]” and her understanding of her “place[] in society” as someone with the recognized dignity and authority to make these choices. . . Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

. . . .

One last consideration counsels against the majority’s ruling: the very controversy surrounding *Roe* and *Casey*. . . . *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, for the Court to stick to the law. Would that today’s majority had done likewise.

. . . . Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. Here, we know that citizens will continue to contest the Court’s decision, because “[m]en and women of good conscience” deeply disagree about abortion. When that contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on. . . . Since the right’s recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than *Roe* and *Casey* did. All that has changed is this Court.

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With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.