

Substantive Due Process - Abortion

Many different threads of substantive due process doctrine converge in the abortion context: family, bodily integrity, autonomy, and perhaps others too. See how well you think the precedents on which *Roe v. Wade* is grounded support its recognition of a constitutional right to abortion. How much does the answer that question depend on the legitimacy of reasoning by analogy in constitutional adjudication?

Roe v. Wade

Supreme Court of the United States, 1973.

410 U.S. 113.

Mr. Justice Blackmun delivered the opinion of the Court.

This Texas federal appeal ... present[s] constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century....

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York* (1905): "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes ... make it a crime to “procure an abortion,” as therein defined, or to attempt one, except with respect to “an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” Similar statutes are in existence in a majority of the States....

II

Jane Roe,¹ a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion “performed by a competent, licensed physician, under safe, clinical conditions”; that she was unable to get a “legal” abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments....

IV

We are next confronted with issues of justiciability [and] standing.... Ha[s] Roe ... established that “personal stake in the outcome of the controversy,” *Baker v. Carr* (1962), that insures that “the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution”? ...

The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.... But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.

Our law should not be that rigid. Pregnancy often comes more than once to the

¹ The name is a pseudonym.

same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be “capable of repetition, yet evading review.” *Southern Pacific Terminal Co. v. ICC* (1911).... We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

V

The principal thrust of appellant’s attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal “liberty” embodied in the Fourteenth Amendment’s Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut* (1965); *Eisenstadt v. Baird* (1972); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut* (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman’s life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.

WORTH NOTING

Here, the Court reviewed the ancient history of abortion; abortion was allowed in most ancient societies. The Hippocratic Oath forbade doctors to perform abortions, but the Court concluded that this reflected a minority view through most of antiquity.

3. *The common law.* It is undisputed that at common law, abortion performed before “quickening”—the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense. The absence of a common-law crime for pre-quickening abortion appears to have developed from a

confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins.

These disciplines variously approached the question in terms of the point at which the embryo or fetus became “formed” or recognizably human, or in terms of when a “person” came into being, that is, infused with a “soul” or “animated” A loose consensus evolved in early English law that these events occurred at some point between conception and live birth. This was “mediate animation.” Although Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, ... there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80 day view, and perhaps to Aquinas’ definition of movement as one of the two first principles of life, [the English treatise writer] Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country....

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide. But the later and predominant view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited passage, [the 17th-century jurist Edward] Coke took the position that abortion of a woman “quick with childe” is “a great misprision, and no murder.” Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), “modern law” took a less severe view. A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime. [Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L.F. 335 (1971).] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, others followed Coke in stating that abortion of a quick fetus was a “misprision,” a term they translated to mean “misdemeanor.” ...

4. *The English statutory law.* England’s first criminal abortion statute, Lord Ellenborough’s Act, came in 1803. It made abortion of a quick fetus a capital crime, but ... it provided lesser penalties for the felony of abortion before quickening, and thus preserved the “quickening” distinction.

WORTH NOTING

The Court goes on to discuss further developments in English law, down to the Abortion Act of 1967, which allowed abortion under certain restrictive circumstances—primarily if continued pregnancy would threaten the life or health of the mother, or if there was a substantial risk that the child would be “seriously handicapped.”

5. *The American law.* In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough’s Act that related to a woman “quick with child.” The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. In 1828, New York enacted legislation that, in two respects, was to serve as a model for early anti-abortion statutes[:]

- First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter.
- Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it “shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose.”

By 1840, when Texas had received the common law, only eight American States had statutes dealing with abortion. It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother’s life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950’s a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother’s health. Three States permitted abortions that were not “unlawfully” performed or that were not “without lawful justification,” leaving interpretation of those standards to the

courts. In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, Sec. 230.3.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

WORTH NOTING

The Court also examined at length the evolving positions of the American Medical Association, the American Public Health Association, and the American Bar Association, each of which had very recently—in the 1970s—taken positions favorable to the availability of abortion services, at least early in pregnancy. As late as 1967, the AMA had passed a resolution opposing abortion except in very restrictive circumstances

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. The appellants and amici contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. This was particularly true prior to the development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and

perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared.

Of course, important state interests in the areas of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest—some phrase it in terms of duty—in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone....

It is with these interests, and the weight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, ... the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia* (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio* (1968), *Katz v. United States* (1967); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*; in the Ninth Amendment, *id.* (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska* (1923). These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” *Palko v. Connecticut* (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia* (1967); procreation, *Skinner v. Oklahoma* (1942); contraception, *Eisenstadt v. Baird*; family relationships, *Prince v. Massachusetts* (1944); and child rearing and education, *Pierce v. Society of Sisters* (1925), *Meyer v. Nebraska*.

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

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

any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts* (1905) (vaccination); *Buck v. Bell* (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional.... Others have sustained state statutes.... Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut*....

IX

... Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they

outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and s 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3;² in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.³

All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn.... This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing

² We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

³ When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists.... But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?... Further, the penalty for criminal abortion [under Texas law] is significantly less than the maximum penalty for murder If the fetus is a person, may the penalties be different?

young in the human uterus. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of

embryos, artificial insemination, and even artificial wombs.

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before life birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon life birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem. Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact ... that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed,

that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this “compelling” point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those “procured or attempted by medical advice for the purpose of saving the life of the mother,” sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, “saving” the mother’s life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here....

XI

To summarize and to repeat: ...

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother....

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of

the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall....

It is so ordered.

Mr. Chief Justice Burger, concurring.

I agree that, under the Fourteenth Amendment to the Constitution, the abortion statute ... [of] Texas impermissibly limit[s] the performance of abortions necessary to protect the health of pregnant women, using the term health in its broadest medical context. I am somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion; however, I do not believe that the Court has exceeded the scope of judicial notice accepted in other contexts....

I do not read the Court's holdings today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health. Plainly, the Court today rejects any claim that the Constitution requires abortions on demand.

Mr. Justice Stewart, concurring.

In 1963, this Court, in *Ferguson v. Skrupa*, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic

beliefs for the judgment of legislative bodies, who are elected to pass laws.”⁴

Barely two years later, in *Griswold v. Connecticut*, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court’s opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the “liberty” that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

“In a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.” *Board of Regents v. Roth* (1972). The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights [*Justice Stewart here cites a string of ten cases, including Pierce and Meyer.*] Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.... As recently as last Term, in *Eisenstadt v. Baird*, we recognized “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy....

Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.

The question then becomes whether the state interests advanced to justify this abridgment can survive the “particularly careful scrutiny” that the Fourteenth Amendment here requires. The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient

⁴ Only Mr. Justice Harlan failed to join the Court’s opinion.

to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

Mr. Justice Douglas, concurring.

While I join the opinion of the Court, I add a few words....

I.

The Ninth Amendment obviously does not create federally enforceable rights. It merely says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But a catalogue of these rights includes customary, traditional, and time-honored rights, amenities, privileges, and immunities that come within the sweep of "the Blessings of Liberty" mentioned in the preamble to the Constitution. Many of them, in my view, come within the meaning of the term "liberty" as used in the Fourteenth Amendment.

First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality. These are rights protected by the First Amendment and, in my view, they are absolute, permitting of no exceptions. The Free Exercise Clause of the First Amendment is one facet of this constitutional right. The right to remain silent as respects one's own beliefs, is protected by the First and the Fifth. The First Amendment grants the privacy of first-class mail. All of these aspects of the right of privacy are rights "retained by the people" in the meaning of the Ninth Amendment.

Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children. These rights, unlike those protected by the First Amendment, are subject to some control by the police power. Thus, the Fourth Amendment speaks only of "unreasonable searches and seizures" and of "probable cause." These rights are "fundamental," and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation.

The liberty to marry a person of one's own choosing, *Loving v. Virginia*, the right of procreation, *Skinner v. Oklahoma*, the liberty to direct the education of one's children, *Pierce v. Society of Sisters*, and the privacy of the marital relation, *Griswold v. Connecticut*, are in this category.... This right of privacy was called by

Mr. Justice Brandeis the right “to be let alone.” *Olmstead v. United States* (dissenting opinion). That right includes the privilege of an individual to plan his own affairs, for, “outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases.”

Third is the freedom to care for one’s health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf. These rights, though fundamental, are likewise subject to regulation on a showing of “compelling state interest.” We stated in *Papachristou v. City of Jacksonville* that walking, strolling, and wandering “are historically part of the amenities of life as we have known [them].” ... In *Meyer v. Nebraska*, the Court said:

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

The [relevant] statute is at war with the clear message of these cases—that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. For example, rejected applicants under the Georgia statute are required to endure the discomforts of pregnancy; to incur the pain, higher mortality rate, and aftereffects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing child care; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.

II

Such a reasoning is, however, only the beginning of the problem. The State has interests to protect.... While childbirth endangers the lives of some women, voluntary abortion at any time and place regardless of medical standards would impinge on a rightful concern of society. The woman’s health is part of that concern; as is the life of the fetus after quickening. These concerns justify the State in treating the procedure as a medical one.... [But] I agree with the Court that endangering the life of the woman or seriously and permanently injuring her health are standards too narrow for the right of privacy that is at stake....

Mr. Justice White, with whom Mr. Justice Rehnquist joins, dissenting.

At the heart of the controversy in these cases are those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc., The common claim before us is that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.

The Court for the most part sustains this position: During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the pregnant woman more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.

With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court's judgments. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant woman more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, ... [the] issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs....

Mr. Justice Rehnquist, dissenting.

... Even if there were a plaintiff in this case capable of litigating the issue which

the Court decides, I would reach a conclusion opposite to that reached by the Court.

I have difficulty in concluding, as the Court does, that the right of “privacy” is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not “private” in the ordinary usage of that word. Nor is the “privacy” that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.

If the Court means by the term “privacy” no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of “liberty” protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of Mr. Justice Stewart in his concurring opinion that the “liberty,” against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law.

The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical Inc.* (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother’s life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson*. But the Court’s sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court’s opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one....

While the Court’s opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York* (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be “compelling.” The decision here to break pregnancy

into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Even today, when society’s views on abortion are changing, the very existence of the debate is evidence that the “right” to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. While many States have amended or updated their laws, 21 of the laws on the books in 1868 remain in effect today. Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857 and “has remained substantially unchanged to the present time.”

There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter....

For all of the foregoing reasons, I respectfully dissent.

The decision in *Roe v. Wade* had many effects. One, beginning immediately with the companion case of *Doe v. Bolton* (1973) and continuing to the present day, was the development of a large and contentious body of caselaw determining which abortion regulations are acceptable and which are not. (In *Doe*, the Court invalidated several Georgia regulations, one of which required that the abortion be performed in an accredited hospital.) Another was a powerful and durable political backlash, especially from the political right. Though five of the seven justices in the *Roe* majority had been appointed by Republicans, by 1984, the Republican Party platform provided that “the unborn child has a fundamental individual right to life which cannot be infringed,” called

for “legislation to make clear that the Fourteenth Amendment’s protections apply to unborn children,” and promised “the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.” On the backdrop of this political focus on judicial nominations, Republican presidents were able to replace three members of the *Roe* majority who retired from 1988 to 1991. Many expected the new justices—Anthony Kennedy, David Souter, and Clarence Thomas—to form the heart of a voting bloc that would overrule *Roe v. Wade*. That expectation was put to the test in *Planned Parenthood v. Casey* (1992), which seemed a plausible vehicle for a decision overruling *Roe* and abandoning the constitutional protection of abortion rights.

WHAT TO LOOK FOR

As you read the opinions in *Casey*, try to decide whether the expectations for fundamental change in abortion doctrine were dashed or fulfilled.

Planned Parenthood of Southeastern Pennsylvania v. Casey

Supreme Court of the United States, 1992.

505 U.S. 833.

Justice O’Connor, Justice Kennedy, and Justice Souter announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI ..., and an opinion with respect to Parts IV [and] V-B....

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, *Roe v. Wade* (1973), that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.

[Various provisions of the Pennsylvania Abortion Control Act of 1982 were at issue in the case. The excerpts presented here focus on the following:] The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed.... Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an

abortion must sign a statement indicating that she has notified her husband of her intended abortion. The Act exempts compliance with these ... requirements in the event of a “medical emergency,” which is defined in § 3203 of the Act.... Each provision was challenged as unconstitutional on its face....

[W]e acknowledge that our decisions after *Roe* [have] cast doubt upon the meaning and reach of its holding. Further, The Chief Justice admits that he would overrule the central holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that *Roe*’s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

II

... The controlling word in the cases before us is “liberty.” Although a literal reading of the [Due Process] Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas* (1887) [(upholding conviction for selling liquor)], the Clause has been understood to contain a substantive component as well, one “barring certain government actions regardless of the fairness of the procedures used to implement them.” ...

It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. See *Adamson v. California* (1947) (Black, J., dissenting). But of course this Court has never accepted that view. It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See *Michael H. v. Gerald D.* (1989) (opinion of Scalia, J.). But such a view would be inconsistent with our law.

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before.... Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9.... It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood[, *citing the standard case, including Eisenstadt, Griswold, Pierce, and Myer*], as well as bodily integrity[, *citing three other standard cases*].

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed: "Due process has not been reduced to any formula; its content cannot be determined by reference to any code.... No formula could serve as a substitute, in this area, for judgment and restraint." *Poe v. Ullman* (opinion dissenting from dismissal on jurisdictional grounds).

... Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the

matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest. It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. *See, e.g., Ferguson v. Skrupa* (1963); *Williamson v. Lee Optical of Okla., Inc.* (1955). That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. *See West Virginia Bd. of Ed. v. Barnette* (1943); *Texas v. Johnson* (1989).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of

her spiritual imperatives and her place in society.

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* (1977) afford constitutional protection. We have no doubt as to the correctness of those decisions.... As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

It was this dimension of personal liberty that *Roe* sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed.... [T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*. We turn now to that doctrine.

III

A

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior

case.... So in this case we may enquire whether *Roe*'s central rule has been found unworkable; whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left *Roe*'s central rule a doctrinal anachronism discounted by society; and whether *Roe*'s premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed....

1

Although *Roe* has engendered opposition, it has in no sense proven "unworkable," see *Garcia v. San Antonio Metropolitan Transit Authority* (1985), representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

2

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.

While neither respondents nor their *amici* in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the argument might run, any reliance interest would be *de minimis*. This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social

developments, people have 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. The 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. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

3

No evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973. No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking.

It will be recognized, of course, that *Roe* stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut* (1965). When it is so seen, *Roe* is clearly in no jeopardy, since subsequent constitutional developments have [not] disturbed ... the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child....

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims....

4

We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier. But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns

on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

5

The sum of the precedential enquiry to this point shows *Roe*'s underpinnings unweakened in any way affecting its central holding.... Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe*'s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

B

In a less significant case, *stare decisis* analysis could, and would, stop at the point we have reached. But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.

The first example is that line of cases identified with *Lochner v. New York* (1905), which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire. *Id.* (dissenting opinion).... Fourteen years later, *West Coast Hotel Co. v. Parrish* (1937), signaled the demise of *Lochner* by overruling *Adkins v. Children's Hospital of District of Columbia* (1923)[, which had struck down a statutory minimum wage for women]. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.... The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced....

The second comparison that 20th century history invites is with the cases employing the separate-but-equal rule for applying the Fourteenth Amendment's equal protection guarantee. They began with *Plessy v. Ferguson* (1896), [which] reject[ed] the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior.... But this understanding of the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education* (1954) (*Brown I*). The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896....

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions... As the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligation....

[T]he cases before us present no such occasion.... Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973....

C

[Thus, in *West Coast Hotel* and *Brown*, a] terrible price ... would have been paid if the Court had not overruled as it did[, but here] the terrible price would be paid for overruling.... As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.... The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the

Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make....

In two circumstances ... the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith... [At some point,] disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

Th[e second] circumstance is to the point here and now. Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation.... [To] surrender to political pressure, and [to] overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question....

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals....

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule

the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.

IV

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

That brings us, of course, to the point where much criticism has been directed at *Roe*, a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function. Liberty must not be extinguished for want of a line that is clear. And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.

We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of *stare decisis*. Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. See *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) [affirming decision to enjoin enforcement of a statute that imposed a 24-hour waiting period and required the provision of information, apparently designed to discourage abortion, as part of the "informed consent" process]; *Akron v. Akron Center for Reproductive Health, Inc.* (1983) (*Akron I*) [striking down similar provisions among others, including one requiring abortions after the first trimester to be performed in a hospital]. Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. It is that

premise which we reaffirm today.

The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.... The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.

On the other side of the equation is the interest of the State in the protection of potential life.... [I]t must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. *See, e.g., Akron I*. Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases.

Roe established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy.... A framework of this rigidity was unnecessary.... Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Webster v. Reproductive Health Services* (1989) (opinion of the Court)....

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have [in some of this Court's subsequent cases] been found to be inconsistent with the rigid trimester framework announced in that case. A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote.... The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause....

[T]he right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*. Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe*'s terms, in practice it undervalues the State's interest in the potential life within the woman.... Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy.

... In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.... Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends....

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State ... may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Even when jurists reason from shared premises, some disagreement is inevitable. That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard. We give this summary:

- (a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
- (b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.
- (c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the

right.

- (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
- (e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

These principles control our assessment of the Pennsylvania statute, and we now turn to the issue of the validity of its challenged provisions.

V

... We now consider the separate statutory sections at issue.

A

Because it is central to the operation of various other requirements, we begin with the statute's definition of medical emergency. Under the statute, a medical emergency is

[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Petitioners argue that the definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks. If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.

The District Court found that there were three serious conditions which would not be covered by the statute: preeclampsia, inevitable abortion, and premature ruptured membrane. Yet, as the Court of Appeals observed, it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences. While the definition could be

interpreted in an unconstitutional manner, the Court of Appeals construed the phrase “serious risk” to include those circumstances... [W]e have said that we will defer to lower court interpretations of state law unless they amount to “plain” error. This “reflect[s] our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.”

We adhere to that course today, and conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman’s abortion right

B

We next consider the informed consent requirement. Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the “probable gestational age of the unborn child.” The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. In this respect, the statute is unexceptional. Petitioners challenge the statute’s definition of informed consent because it includes the provision of specific information by the doctor and the mandatory 24-hour waiting period....

[T]he undue burden standard adopted in this opinion require[s] us to overrule in part some of the Court’s past decisions, decisions driven by the trimester framework’s prohibition of all previability regulations designed to further the State’s interest in fetal life. In *Akron I*, [for example,] we invalidated an ordinance which required that a woman seeking an abortion be provided by her physician with specific information “designed to influence the woman’s informed choice between abortion or childbirth.” ... To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the “probable gestational age” of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.

... It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. An example illustrates the point. We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself.... [I]nformed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.

As we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, [these measures are] a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden....

Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement.... The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic." As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome."

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of "increasing the cost and risk of delay of abortions," but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles....

We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden....

C

Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her

license revoked, and is liable to the husband for damages....

[Medical and social science research, as well as the] District Court's findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209's notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from § 3209's notification requirement....

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. We disagree with respondents' basic method of analysis.

The analysis does not end with the one percent of women upon whom the

statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant....

Section 3209's real target is ... married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement. The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women.

We recognize that a husband has a "deep and proper concern and interest ... in his wife's pregnancy and in the growth and development of the fetus she is carrying." With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody. If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal. Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.

The Court has held that "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Planned Parenthood of Central Missouri v. Danforth* (1976).... The

Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State* (1873), three Members of this Court reaffirmed the common-law principle that “a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state....” Only one generation has passed since this Court observed that “woman is still regarded as the center of home and family life,” with attendant “special responsibilities” that precluded full and independent legal status under the Constitution. *Hoyt v. Florida* (1961) [(upholding statute that required men, but not women, to register for jury duty)]. These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

In keeping with our rejection of the common-law understanding of a woman’s role within the family, the Court held in *Danforth* that the Constitution does not permit a State to require a married woman to obtain her husband’s consent before undergoing an abortion. The principles that guided the Court in *Danforth* should be our guides today. For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife’s decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*. The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.... Women do not lose their constitutionally protected liberty when they marry....

VI

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty....

Justice Stevens, concurring in part and dissenting in part.

The portions of the Court's opinion that I have joined are more important than those with which I disagree. I shall therefore first comment on significant areas of agreement, and then explain the limited character of my disagreement.

I

The Court is unquestionably correct in concluding that the doctrine of stare decisis has controlling significance in a case of this kind, notwithstanding an individual Justice's concerns about the merits.⁵ The central holding of *Roe v. Wade* has been a "part of our law" for almost two decades. It was a natural sequel to the protection of individual liberty established in *Griswold v. Connecticut* (1965). The societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women....

I also accept what is implicit in the Court's analysis, namely, a reaffirmation of *Roe*'s explanation of *why* the State's obligation to protect the life or health of the mother must take precedence over any duty to the unborn. The Court in *Roe* carefully considered, and rejected, the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment." ... Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection." From this holding, there was no dissent; indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

II

My disagreement with the joint opinion begins with its understanding of the trimester framework established in *Roe*. Contrary to the suggestion of the joint opinion, it is not a "contradiction" to recognize that the State may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability (although other interests,

⁵ It is sometimes useful to view the issue of stare decisis from a historical perspective. In the last 19 years, 15 Justices have confronted the basic issue presented in *Roe v. Wade* (1973). Of those, 11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Justices Blackmun, O'Connor, Kennedy, Souter, and myself. Only four—all of whom happen to be on the Court today—have reached the opposite conclusion

such as maternal health, may). The fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty. It is appropriate, therefore, to consider more carefully the nature of the interests at stake....

Weighing the State's interest in potential life and the woman's liberty interest, I agree with the joint opinion that the State may "expres[s] a preference for normal childbirth," that the State may take steps to ensure that a woman's choice "is thoughtful and informed," and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments....

Under these principles, [some of the informed consent requirements] are unconstitutional. Those sections require a physician or counselor to provide the woman with a range of materials clearly designed to persuade her to choose not to undergo the abortion. While the Commonwealth is free ... to produce and disseminate such material, the Commonwealth may not inject such information into the woman's deliberations just as she is weighing such an important choice.

Under this same analysis, [other elements of the informed consent requirements] are constitutional. Those sections, which require the physician to inform a woman of the nature and risks of the abortion procedure and the medical risks of carrying to term, are neutral requirements comparable to those imposed in other medical procedures. Those sections indicate no effort by the Commonwealth to influence the woman's choice in any way. If anything, such requirements *enhance*, rather than skew, the woman's decisionmaking.

III

The 24-hour waiting period required by ... the Pennsylvania statute raises even more serious concerns. Such a requirement arguably furthers the Commonwealth's interests in two ways, neither of which is constitutionally permissible.

First, it may be argued that the 24-hour delay is justified by the mere fact that it is likely to reduce the number of abortions, thus furthering the Commonwealth's interest in potential life. But such an argument would justify any form of coercion

that placed an obstacle in the woman's path. The Commonwealth cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right.

Second, it can more reasonably be argued that the 24-hour delay furthers the Commonwealth's interest in ensuring that the woman's decision is informed and thoughtful. But there is no evidence that the mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the patient. The mandatory delay thus appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women....

In the alternative, the delay requirement may be premised on the belief that the decision to terminate a pregnancy is presumptively wrong. This premise is illegitimate.... No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference....

Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

IV

In my opinion, a correct application of the “undue burden” standard leads to the same conclusion concerning the constitutionality of these requirements. A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: A burden may be “undue” either because the burden is too severe or because it lacks a legitimate, rational justification.⁶

Accordingly, while I disagree with Parts IV, V-B, and V-D of the joint opinion, I join the remainder of the Court's opinion.

Justice Blackmun, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I, II, III, V-A, V-C, and VI of the joint opinion of Justices O'Connor, Kennedy, and Souter.... I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court [under the strict scrutiny

⁶ The meaning of any legal standard can only be understood by reviewing the actual cases in which it is applied. For that reason, I discount both Justice Scalia's comments on past descriptions of the standard, *see post*, and the attempt to give it crystal clarity in the joint opinion....

standard]. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

I

... [W]hile I believe that the joint opinion errs in failing to invalidate the other regulations [apart from the spousal notification requirement], I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it. I am confident that in the future evidence will be produced to show that “in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman’s choice to undergo an abortion.” *Ante*....

II

Today, no less than yesterday, the Constitution and decisions of this Court require that a State’s abortion restrictions be subjected to the strictest of judicial scrutiny.... Under this standard, the Pennsylvania statute’s provisions requiring content-based counseling [and] a 24-hour delay ... must be invalidated.

... State restrictions on abortion violate a woman’s right of privacy in two ways. First, compelled continuation of a pregnancy infringes upon a woman’s right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm.... [R]estrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. *See, e.g., Winston v. Lee* (1985) (invalidating surgical removal of bullet from murder suspect); *Rochin v. California* (1952) (invalidating stomach pumping). [Second], when the State restricts a woman’s right to terminate her pregnancy, it ... has no less an impact on a woman’s life than decisions about contraception or marriage. Because motherhood has a dramatic impact on a woman’s educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life. For these reasons, “the decision whether or not to beget or bear a child” lies at “the very heart of this cluster of constitutionally protected choices.”

A State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The

State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause. See, e.g., *Mississippi Univ. for Women v. Hogan* (1982); *Craig v. Boren* (1976).⁷ The joint opinion recognizes that these assumptions about women’s place in society “are no longer consistent with our understanding of the family, the individual, or the Constitution.”

The Court has held that limitations on the right of privacy are permissible only if they survive “strict” constitutional scrutiny.... *Griswold v. Connecticut* (1965).... Application of the strict scrutiny standard results in the invalidation of all the challenged provisions....

* * *

In one sense, the Court’s approach is worlds apart from that of the Chief Justice.... And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote. I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Chief Justice Rehnquist, with whom Justice White, Justice Scalia, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade* (1973), but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would ... uphold the challenged provisions of the Pennsylvania statute in their entirety....

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is “implicit in the concept of ordered liberty.” *Palko v. Connecticut* (1937). Three years earlier, in *Snyder v. Massachusetts* (1934), we referred to a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” These

⁷ A growing number of commentators are recognizing this point. See, e.g., L. Tribe, *American Constitutional Law* (1988); MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281 (1991).

expressions are admittedly not precise, but our decisions implementing this notion of “fundamental” rights do not afford any more elaborate basis on which to base such a classification.... [And] a reading of these opinions [in these cases] makes clear that they do not endorse any all-encompassing “right of privacy.” ...

In *Roe v. Wade*, the Court recognized a “guarantee of personal privacy” which “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion “involves the purposeful termination of a potential life.” The abortion decision must therefore “be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.” *Thornburgh v. American College of Obstetricians and Gynecologists* (1986) (White, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See *Michael H. v. Gerald D.* (1989) (To look “at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person’s body”).

Nor do the historical traditions of the American people support the view that the right to terminate one’s pregnancy is “fundamental.” The common law which we inherited from England made abortion after “quickening” an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as “fundamental” under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in *Roe* when it classified a woman’s decision to terminate her pregnancy as a “fundamental right” that could be abridged only in a manner which withstood “strict scrutiny.” ...

II

The joint opinion of Justices O'Connor, Kennedy and Souter cannot bring itself to say that *Roe* was correct as an original matter.... Instead of claiming that *Roe* was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*.

This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*. *Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to “strict scrutiny” and could be justified only in the light of “compelling state interests.” The joint opinion rejects that view. *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court’s decisionmaking for 19 years. The joint opinion rejects that framework.

Stare decisis is defined in Black’s Law Dictionary as meaning “to abide by, or adhere to, decided cases.” Whatever the “central holding” of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following *Roe*, such as *Akron v. Akron Center for Reproductive Health, Inc.* (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), are frankly overruled in part under the “undue burden” standard expounded in the joint opinion....

The end result of the joint opinion’s paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman’s right to abortion—the “undue burden” standard. As indicated above, *Roe v. Wade* adopted a “fundamental right” standard under which state regulations could survive only if they met the requirement of “strict scrutiny.” While we disagree with that standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the “undue burden” standard, which is created largely out of whole cloth by the authors of the joint opinion....

The sum of the joint opinion’s labors in the name of *stare decisis* and “legitimacy” is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor “legitimacy” are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that ... [a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson v. Lee Optical of Oklahoma, Inc.* (1955). With this rule in mind, each of the challenged provisions of the Pennsylvania statute is consistent with the Constitution....

Justice Scalia, with whom The Chief Justice, Justice White, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

My views on this matter are unchanged from [previous cases].... A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example—with which entire societies of reasonable people disagree—intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed....

[A]pplying the rational basis test, I would uphold the Pennsylvania statute in its entirety....

Assuming that the question before us is to be resolved ... by simply applying "reasoned judgment," I do not see how ... "[r]easoned judgment" [could] begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human.

There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so....

The emptiness of the “reasoned judgment” that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the word “liberty” *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in “liberty” because it is among “a person’s most basic decisions”; it involves a “most intimate and personal choic[e]”; it is “central to personal dignity and autonomy”; it “originate[s] within the zone of conscience and belief”; it is “too intimate and personal” for state interference; it reflects “intimate views” of a “deep, personal character”; it involves “intimate relationships” and notions of “personal autonomy and bodily integrity”; and it concerns a particularly “important decisio[n].”

But it is obvious to anyone applying “reasoned judgment” that the same adjectives can be applied to many forms of conduct that this Court ... has held are *not* entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally “intimate” and “deep[ly] personal” decisions involving “personal autonomy and bodily integrity,” and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court’s decision; only personal predilection....

In truth, I am as distressed as the Court is ... about the “political pressure” directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions..... [But what] makes all this relevant to the bothersome application of “political pressure” against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text—the public pretty much left us alone.... But if in reality our process of constitutional adjudication consists primarily of making *value judgments* ... then a free and intelligent people’s attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value

judgments are quite as good as those taught in any law school—maybe better.

If, indeed, the “liberties” protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents’ most favored and most disfavored alleged constitutional rights, and seek the nominee’s commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. Justice Blackmun not only regards this prospect with equanimity, he solicits it...

* * *

... We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.