question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is 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."

5. ***Access of minors to contraceptives.*** In **Carey v. Population Services, International**, 431 U.S. 678 (1977), a case decided after the 1973 decision in Roe v. Wade discussed below, a divided Court struck down a New York prohibition of the sale or distribution of contraceptives to minors under 16. Justice BRENNAN's plurality opinion, joined by Justices Stewart, Marshall and Blackmun, stated that strict scrutiny was required for restrictions on access to contraceptives, "because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in Griswold, Eisenstadt, and Roe." He rejected the argument that the ban on distribution to persons under 16 could be justified "as a regulation of the morality of minors." He noted that minors have some constitutional rights, but that state power over children is greater than over adults. Against that background, he was unpersuaded that the state interest in discouraging sexual activity among the young were sufficiently "significant," and expressed "substantial reason for doubt [that] limiting access to contraceptives will in fact substantially discourage early sexual behavior." He added that, when a state "burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion [that] the burden is connected to such a policy." Does the reference to "significant" state interests rather than the "compelling" state interests usually required to satisfy strict scrutiny suggest that a lesser standard of review applies to regulation of minors?

Justice WHITE concurred only in the result, on the ground that "the State has not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purpose which the State advances." Justice STEVENS, in another separate opinion, concurred because of the irrationality of the means employed, objecting that the state should not be able to discourage underage sex by subjecting minors to increased risks of pregnancy and sexually transmitted disease. Justice POWELL's separate concurrence, while objecting to "extraordinary protection [of] all personal decisions in matters of sex," found the challenged restriction "defective" because it prohibited parents from distributing contraceptives to their children, "a restriction that unjustifiably interferes with parental interests in rearing their children." Justice REHNQUIST submitted a brief dissent; Chief Justice BURGER dissented without opinion.

SUBSTANTIVE DUE PROCESS AND ABORTION

Griswold, Eisenstadt and Carey protected a right to control reproductive choice using seemingly broad language attuned to personal decisionmaking rather than particular pharmaceutical devices. The Court in Eisenstadt, for example, spoke of heightened judicial solicitude for the 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." But these decisions were limited on their facts to the prevention of pregnancy through the use of contraception. Does the privacy calculus in reproductive decisionmaking alter once a pregnancy has begun? The Court finally reached that question in the following cases, which involved challenges to Texas abortion laws then typical of those adopted by most states:

Roe v. Wade

410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

[The challenged Texas law made it a crime to "procure an abortion" except "by medical advice for the purpose of saving the life of the mother." The challengers were a pregnant single woman (Jane Roe), a childless couple (John and Mary Doe), and a licensed physician (Dr. Hallford). The suits by Roe and the Does were class actions. A three-judge district court ruled the Does' complaint nonjusticiable, but granted declaratory relief to Roe and Dr. Hallford, holding the law unconstitutional under the Ninth Amendment.]

■ JUSTICE BLACKMUN delivered the opinion of the Court.

[The] Constitution does not explicitly mention any right of privacy. [But] 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; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights [Griswold]; in the Ninth Amendment [id.]; or in the concept of liberty guaranteed [by] the 14th Amendment [Meyer]. These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" [Palko] are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation [Skinner], contraception [Eisenstadt], family relationships, and child rearing and education [Pierce; Meyer].

This right of privacy, whether it be founded in the 14th Amendment's concept of personal liberty [as] we feel it is, or, as the District Court determined, in the [Ninth Amendment], 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, appellants 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. [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.

[Texas argues] that the fetus is a "person" within the language and meaning of the 14th Amendment. [If so,] the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. [The] Constitution does not define "person" in so many words. Section 1 of the 14th Amendment contains three references to "person." ["Person"] is used in other places in the Constitution. [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.[1] All this, together with our observation [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 14th Amendment, does not include the unborn. [Texas] urges that, apart from the 14th 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] 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 [the] wide divergence of thinking on this most sensitive and difficult question. [The] unborn have never been recognized in the law as persons in the whole sense.

[The] State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman [and] 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] 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 is 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 facility in which the procedure is to be performed; 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

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[1] When Texas urges that a fetus is entitled to 14th 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. The exception [in the Texas law], for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. 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]? [Footnote by Justice Blackmun.]

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] 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, [the Texas law] sweeps too broadly [and] cannot survive the constitutional attack made upon it here.

To summarize: (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] 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].

■ JUSTICE STEWART, concurring.

In 1963, this Court, in [Ferguson v. Skrupa], purported to sound the death knell for the doctrine of substantive due process. Barely two years later, in [Griswold], 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 [due process]. [Yet] the Connecticut law did not violate [any] 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 ["liberty"]. 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. [T]he "liberty" protected by [due process] covers more than those freedoms explicitly named in the Bill of Rights. [In Eisenstadt], 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]. [Justice Douglas and Chief Justice Burger also filed concurrences.]

■ JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

[I] find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers 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.

■ JUSTICE REHNQUIST, dissenting.

[I] have difficulty in concluding [that] the right of "privacy" is involved in this case. [Texas] 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" which the Court finds here even a distant relative of the [Fourth Amendment freedom from searches and seizures]. 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 14th Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree [that "liberty"] embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, but 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. [Lee Optical.] [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. [But] the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard. [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 MEANING AND IMPLICATIONS OF ROE

1. ***The protected privacy interest.*** Notice that Roe locates the privacy right in the liberty protected by the Fourteenth Amendment Due Process Clause, without invoking the approaches used by Justices Douglas (penumbras) and Goldberg (the Ninth Amendment) in Griswold. Justice Blackmun finds the right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." But what aspect of "privacy" explains this interest? The Court concedes that the situation here "is inherently different from marital intimacy [or] marriage, or procreation, or education" with which the cases from Meyer to Eisenstadt were concerned. Roe, unlike Griswold, involved no specter of government snooping into the

spatial privacy of the bedroom. Is the relevant privacy interest then one of bodily integrity? The right against battery is rooted in common law; is that a useful fact in this context? In what sense is a fetus involved in an unwanted touching? Does the answer depend on the circumstances of the pregnancy?

Alternatively, does Roe rest principally on an interest in personal "autonomy" in decisionmaking over certain critical life experiences? If so, what is the constitutional source of such a decisional autonomy interest? That procreative freedom is implicit in the concept of ordered liberty? Why? Because, in the 20th century, interference with procreation (either to facilitate it or to limit it) became associated with totalitarian regimes? Does Roe announce a presumptive right of decisional autonomy over the use of one's body for the life support of others even assuming that a countervailing life is at stake? See Thompson, "A Defense of Abortion," 1 Phil. & Pub. Aff. 47 (1971) (observing that tort law does not normally recognize good samaritan duties to rescue others in distress, and analogizing involuntary pregnancy to involuntary kidney support of an ailing violinist).

2. ***"Balancing" the competing government interests.*** The Court finds that the woman's prima facie right to end her pregnancy can be defeated only by "compelling" state interests. Justice Blackmun notes two relevant state interests: protecting the woman's health; and "protecting the potentiality of human life." At differing points in the trimester scheme, those interests become sufficiently "compelling" to justify state restraints. Consider how the Court determines when these interests become "compelling." Is it helpful to discuss whether the fetus is a "person" within the Fourteenth Amendment—or within any other provision of the Constitution? Is it accurate to say: "We need not resolve the difficult question of when life begins"? Must not the Court at least determine when "the potentiality of human life" represents a sufficiently strong moral claim to justify curtailment of the woman's interest in autonomy? Justice Blackmun states that Texas may not, "by adopting one theory of life," "override the rights of the pregnant woman that are at stake." Yet Justice Blackmun also notes that there is wide disagreement, in medicine and philosophy and law, about when life begins. Why should not that lack of consensus lead the Court to defer to, rather than invalidate, the state's judgment? Can the Court's judgment be supported by anything other than a judicial authority to infuse a particular set of moral values into the Constitution? For contrasting views, compare Tribe, Abortion: The Clash of Absolutes (1990), with McConnell, "How Not to Promote Serious Deliberation About Abortion," 58 U. Chi. L. Rev. 1181 (1991).

3. ***Roe vs. Lochner.*** Is the heightened scrutiny used in Roe v. Wade more justifiable than judicial interventions of the Lochner era? Consider the argument that Roe is even *less* defensible than Lochner because, rather than resting on the illegitimacy of the ends sought or the lack of a "plausible argument" that the legislative means further permissible ends, Roe simply announces that the "goal is not important enough to sustain the restriction." Ely, "The Wages of Crying Wolf: A Comment on Roe v. Wade," 82 Yale L.J. 920 (1973); see also Epstein, "Substantive Due Process by Any Other Name: The Abortion Cases," 1973 Sup. Ct. Rev. 159. Consider the countervailing argument that the Court was not choosing substantively between abortion and continued pregnancy, but rather "choosing among alternative allocations of decisionmaking authority," determining that "some types of choices ought to be remanded, on principle, to private decision-makers

unchecked by substantive governmental control." Tribe, "Foreword: Toward a Model of Roles in the Due Process of Life and Law," 87 Harv. L. Rev. 1 (1973). If so, why are decisions over reproduction more appropriately allocated to the private sphere than decisions over labor relations?

4. ***Roe and sex equality.*** Recall Justice Stone's Carolene Products footnote four, justifying special protection for "discrete and insular minorities" that do not receive adequate representation in the political process. Consider that the consequences of unwanted pregnancy fall, as a physical matter, entirely on women. Does that fact justify special judicial solicitude to protect pregnant women from restrictive abortion laws? See Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," 44 Stan. L. Rev. 261 (1992); Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade," 63 N.C. L. Rev. 375 (1985); Law, "Rethinking Sex and the Constitution," 132 U. Pa. L. Rev. 955 (1984) (emphasizing that "laws governing reproduction implicate equality concerns" and noting that "restrictions on access to abortion plainly oppress women"); Karst, "Book Review," 89 Harv. L. Rev. 1028 (1976) (suggesting that the cases on contraception and abortion helped refashion "the roles women are to play in our society").

Are women a politically disadvantaged group warranting special judicial solicitude? Women are arguably neither discrete, nor insular, nor a minority, and in any event may enjoy consideration in the political process by the men with whom women live and become pregnant. Are "the unborn" a politically powerless group warranting judicial solicitude? Does the abortion right free women from subordination or merely increase men's sexual access to women under conditions of sex inequality? See MacKinnon, "Roe v. Wade: A Study in Male Ideology," in Abortion: Moral and Legal Perspectives 45 (Garfield & Hennessey eds. 1984). For sociological evidence that attitudes to abortion correlate closely with attitudes toward gender roles, see Luker, Abortion and the Politics of Motherhood (1984).

Even if sex equality provides an alternative ground for abortion rights, is such a ground an independently sufficient justification for abortion rights apart from privacy? In a world consisting solely of women (and sperm banks), would there be no justification for overturning a law that prohibited terminating a pregnancy once begun?

5. ***The political reaction to Roe.*** The litigation that led to Roe was not conducted by national pro-choice organizations, which did not yet exist, but by Sarah Weddington and Linda Coffee, aged twenty-six and twenty-seven, recent graduates of the Texas Law School. Nevertheless, Roe elicited fierce opposition and fueled strong efforts at political reversal. Opponents first sought to amend the Constitution to overturn the decision, for example by providing that nothing in the Constitution shall bar any State "from allowing, regulating, or prohibiting the practice of abortion," or that life begins "from the moment of conception." None proved successful. Efforts to curtail the force of Roe at the federal level then shifted from constitutional amendments to legislative initiatives under Congress's civil rights enforcement powers. For example, in 1981, some members of Congress proposed a Human Life Statute, relying on power under § 5 of the Fourteenth Amendment (see Chapter 10 below). Again, this effort failed, in part as a result of doubts about the constitutionality of trying to overturn a Supreme Court decision by statute.

According to some observers, opposition to Roe helped bring together Catholics and Protestant evangelicals, traditional religious opponents, in a common political cause. This alliance in turn became an important element of the conservative revival associated with the Moral Majority, the Christian Right, and the Presidencies of Ronald Reagan and George W. Bush. See Feldman, Divided By God 194–95 (2005). Roe certainly energized an anti-abortion movement and arguably antifeminist movements more broadly by giving citizens opposed to abortion rights a clear target and a reason to speak out. See, e.g., Post & Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," 42 Harv. C.R.-C.L. L. Rev. 373 (2007); Klarman, "Fidelity, Indeterminacy, and the Problem of Constitutional Evil," 65 Fordham L. Rev. 1739 (1997) ("[Roe] actually spawned a right-to-life opposition which did not previously exist.").

6. ***The feminist implications of Roe.*** While Roe is popularly seen as a seminal development in American feminism, some scholars have observed that the decision is antifeminist in its approach. See, e.g., Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," 44 Stan. L. Rev. 261 (1992): "Because Roe and its progeny treat pregnancy as a physiological problem, they obscure the extent to which the community that would regulate a woman's reproductive choices is in fact implicated in them, responsible for defining motherhood in ways that impose material deprivations and dignitary injuries on those who perform its work." Likewise, the opinion could be understood to discount the pregnant woman's preferences in favor of the (implicitly male) doctor's: Justice Blackmun explained that "for the period of pregnancy prior to th[e] '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" (emphasis added).

7. ***State regulation of abortion from Roe to Casey.*** Even if Roe barred states from prohibiting abortion before the third trimester, did it permit states to enact and enforce regulations that increased the difficulty or cost of obtaining an abortion? State legislatures passed a variety of such restrictions on abortion after Roe, and in the period between Roe and Casey, nearly all of them (with the exception of regulations of teenage abortion and limits on abortion funding) were struck down as impermissible under Roe:

a. *Regulations of medical procedures.* In **Doe v. Bolton**, 410 U.S. 179 (1973), the companion case to Roe v. Wade, the Court invalidated portions of a Georgia law requiring that abortions be performed in an accredited hospital, requiring prior approval of abortions by a hospital staff committee, and requiring the additional approval of an abortion by two doctors in addition to the attending doctor. The Court concluded that the attending physician's "best clinical judgment [should] be sufficient."

In **Akron v. Akron Center for Reproductive Health (Akron I)**, 462 U.S. 416 (1983), the Court invalidated a requirement that abortions performed after the first trimester be performed in a hospital rather than in outpatient facilities, which were typically less expensive. The Court struck down that provision as "a significant obstacle in the path of women seeking an abortion." The Court also invalidated a provision mandating a set of detailed guidelines regarding information the attending physician had to convey to the woman regarding the development of the fetus, the date of possible viability, and the complications that might result from an abortion.

Although the state said its interest was to insure that the "written consent of the pregnant woman" to an abortion would be "truly informed," Justice Powell's majority opinion found the information requirement unconstitutional, noting that much of the information required was "designed not to inform the woman's consent but rather to persuade her to withhold it altogether."

b. *Spousal and parental consent requirements.* In **Planned Parenthood of Central Missouri v. Danforth**, 428 U.S. 52 (1976), the Court struck down Missouri's requirement of a husband's written consent for an abortion during the first 12 weeks of pregnancy. The 6–3 decision, with Justice Blackmun writing for the majority, held that "the State cannot delegate authority [even to the spouse] to prevent abortion during the first trimester," since the woman "is the more directly and immediately affected by the pregnancy." In the same case, the majority struck down another provision requiring an unmarried woman under eighteen to obtain the consent of a parent as a prerequisite to obtaining an abortion. After holding that a state could not "give a third party an [absolute] veto" over the abortion decision, the Court added that this did not mean that "every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." Rather, as elaborated in a companion case, **Bellotti v. Baird (Bellotti I),** 428 U.S. 132 (1976), a blanket "parental veto" is "fundamentally different" from one permitting "a mature minor [to] obtain [an] order permitting the abortion without parental consultation." In short, a parental consent requirement was unconstitutional only if "it unduly burdens the right to seek an abortion." The Court clarified the extent to which parents could be involved in a minor's abortion decision in **Bellotti v. Baird (Bellotti II),** 443 U.S. 622 (1979). There, Justice Powell's plurality opinion announced that a state could involve a parent in a minor's abortion decision only if it also provided an alternative judicial bypass procedure so that the parental involvement would not amount to an "absolute, and possibly arbitrary, veto."

c. *Waiting period and reporting requirements.* In Akron I, supra, the Court struck down a mandatory 24-hour waiting period after the pregnant woman signed a consent form, a provision that increased the cost of obtaining an abortion by requiring two separate trips to a facility. And in Thornburgh v. American Coll. of Obst. & Gyn., 476 U.S. 747 (1986), the Court struck down several reporting requirements regarding the identities of the physician and the pregnant woman, noting that such provisions would "chill" the freedom to have an abortion.

d. *Abortion funding restrictions.* As to adult women, restrictions on public subsidies were the only abortion regulations upheld in the period between Roe and Casey. In **Maher v. Roe**, 432 U.S. 464 (1977), the Court by a vote of 6–3 upheld a Connecticut regulation granting Medicaid benefits for childbirth but not for medically unnecessary abortions. Justice POWELL's majority opinion held that strict scrutiny was not warranted because the unequal treatment of abortion and childbirth in the scheme did not interfere with the fundamental right recognized in Roe, and upheld the law under deferential "rationality" review. "[The] right [in Roe and its progeny] protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation

of public funds. [The] Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. [There] is a basic difference between direct state interference with a protected activity and state encouragement of an alternative [activity]." Justice BRENNAN's dissent, joined by Justices Marshall and Blackmun, argued that the distinction in state funding in effect coerced "indigent pregnant women to bear children they would not otherwise choose to have," unconstitutionally impinging upon the right of privacy.

Three years later, the Court in **Harris v. McRae**, 448 U.S. 297 (1980), rejected constitutional challenges to federal funding limitations in the so-called Hyde Amendment, which barred payments even for most medically necessary abortions (except for victims of rape or incest or where the mother's life was threatened), and thus went beyond the refusal to uphold medically "unnecessary" abortions upheld in Maher. In rejecting a substantive due process claim, Justice STEWART's majority opinion concluded that "it simply does not follow [from Roe] that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in Maher: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally [under Medicaid], but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. [Although] the liberty protected by the Due Process Clause affords protection against unwarranted governmental interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. [To] translate the limitation on governmental power implicit in [due process] into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result."

Justice BRENNAN, joined again by Justices Marshall and Blackmun in dissent, replied: "[It] is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the government's unequal subsidization of abortion and childbirth. [The] fundamental flaw in the Court's due process analysis [is] its failure to

acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions." Justice STEVENS, a member of the Maher majority, dissented, insisting that this case was "fundamentally different" from Maher because the funding denial reached medically necessary abortions: "[The] Government must use neutral criteria in distributing benefits. [It] may not create exceptions for the sole purpose of furthering a governmental interest that is constitutionally subordinate to the individual interest that the entire program was designed to protect."

In **Rust v. Sullivan**, 500 U.S. 173 (1991), the Court extended the reasoning of Maher and McRae to a restriction on abortion counseling by any project receiving federal family planning funds. At issue were regulations promulgated by the Health and Human Services Department providing that a family planning project funded under Title X of the Public Health Service Act "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning," may not "encourage, promote or advocate abortion as a method of family planning," and must be "physically and financially separate" from any abortion counseling or encouragement the recipient might otherwise conduct. The regulations permitted Title X projects to provide pregnant women with information about childbirth and prenatal care, but advised them to tell any pregnant woman who inquired about abortion that the project does not consider abortion an "appropriate method of family planning."

Chief Justice REHNQUIST, writing for the majority in the 5–4 decision, rejected a substantive due process challenge brought under the 5th Amendment by doctors and Title X grantees. "The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and 'implement that judgment by the allocation of public funds' for medical services relating to childbirth but not to those relating to abortion. [Government's] decision to fund childbirth but not abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.' [McRae.]"

Justice BLACKMUN dissented, joined on this point by Justices Marshall and Stevens: "By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights. [Although] her physician's words, in fact, are strictly controlled by the Government and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right to obtain an abortion. [In] view of the inevitable effect of the regulations, the majority's conclusion that [the regulations leave a woman in no worse a position than if the Government had not enacted Title X] is insensitive and contrary to common human experience. Both the purpose and result of the challenged regulations is to deny women the ability voluntarily to decide their procreative destiny. For these women, the Government will have obliterated the freedom to choose as surely as if it had

banned abortions outright. The denial of this freedom is not a consequence of poverty but of the Government's ill-intentioned distortion of information it has chosen to provide." Justice O'Connor dissented separately on the ground that the regulations exceeded statutory authority. (The regulations did not go into effect for the duration of the litigation, and President Clinton rescinded them in 1993.) For more on the intersection of abortion-related disclosures and the First Amendment, see National Institute of Family and Life Advocates v. Becerra, infra, in Chapter 13's discussion of compelled speech.

In **Webster v. Reproductive Health Services**, 492 U.S. 490 (1989), the Court upheld provisions of a Missouri law barring state employees from performing abortions and the use of public facilities for abortions, even where the patient paid for the abortion herself. Chief Justice REHNQUIST, writing for a five-Justice majority, held these provisions constitutional in light of abortion-funding cases such as Harris v. McRae, noting that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid." Chief Justice Rehnquist noted that the case might be different if *all* health care was provided in state facilities, in which case, denial of public subsidies for abortion might have the same practical effect as regulation of abortion.

8. ***Roe and stare decisis.*** In the Court's abortion decisions following Roe, Justices Rehnquist and White maintained their view that the case was wrongly decided, Justices Scalia and Thomas expressed the same view, and Justice O'Connor expressed doubt about elaborations of the decision. Many commentators predicted Roe would be overruled. Others argued that Justice O'Connor was likely to reaffirm Roe at least in some form. See Estrich & Sullivan, "Abortion Politics: Writing for an Audience of One," 138 U. Pa. L. Rev. 119 (1989): "[N]otwithstanding the occasional strength of her rhetoric, Justice O'Connor has never questioned Roe's central premise that the liberty to choose abortion is fundamental, nor accepted [the] view that any state interest at any point in pregnancy may, if a state legislature chooses, outweigh a woman's right to choose. Quite to the contrary, she has sought to articulate a test which, again depending on how it is applied, could protect women as least against significant burdens on their privacy rights." That prediction proved correct, and Justice O'Connor's "undue burden" test became the prevailing one in the following decision, reviewing a set of abortion regulations from Pennsylvania:

Planned Parenthood of Southeastern Pa. v. Casey

505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

[A Pennsylvania law placed various limits on the availability of abortions, such as imposing a mandatory 24-hour waiting period after a woman seeks an abortion before it could be performed, and requiring spousal notification absent a certification that such notice might cause physical injury. Petitioner argued that those conditions violated the holding of Roe v. Wade, which called for a broader protection of the abortion right than Pennsylvania granted. Respondent countered that the Court should overrule Roe entirely.]

■ 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, an opinion with respect to Part V–E, in which JUSTICE STEVENS joins, and an opinion with respect to Parts IV, V–B, and V–D.

I. Liberty finds no refuge in a jurisprudence of doubt. [The] essential holding of [Roe] should be retained and once again reaffirmed.

II. [Constitutional] protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause. [The] Clause has been understood to contain a substantive component. [It] is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. [It] is settled now, as it was when the Court heard arguments in Roe, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity. [Men] and women of good conscience can 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. [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.

[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. [Moreover, in] some critical respects the abortion decision is of the same character as the decision to use contraception, to which Griswold, Eisenstadt, and Carey afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in Roe relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it.

III. A. [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.

1. [Although] Roe has engendered opposition, it has in no sense proven "unworkable," representing as it does a simple limitation beyond which a state law is unenforceable. While Roe has [required] judicial assessment of [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, [these] determinations fall within judicial competence.

2. [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. [But] for two decades, [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. [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. [Roe] itself placed its holding in the succession of cases most prominently exemplified by Griswold. Roe [may also be seen] as a rule [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.

4. [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 underpinnings 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. [No] change in Roe's factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

B. [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. The first example is that line of cases identified with [Lochner]. [West Coast Hotel] signaled the demise of Lochner by overruling Adkins. 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] second comparison that 20th century history invites is with the cases employing the separate-but-equal rule. [They] began with Plessy v. Ferguson [1896; p. 657 below], holding that legislatively mandated racial segregation in public transportation works no denial of equal protection. [This rule was] repudiated in Brown v. Board of Education [1954; p. 661 below]. The Court in Brown [observed] 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 [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. While we think Plessy was wrong the day it was decided, we must also recognize that the Plessy Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine Plessy was on this ground alone not only justified but required.

[Because] neither the factual underpinnings of Roe's central holding nor our understanding of it has changed, [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. [Overruling] Roe's central holding would not only reach an unjustifiable result under principles of stare decisis, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. [The] Court's power [lies] 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. [Where] 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. [T]o 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. [The] promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. [It] is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

IV. [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. [In] our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty. [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. [Regulations] which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, 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.

[We] now turn to [the] validity of [the] challenged provisions.

V. B. [Except] in a medical emergency, the [Pennsylvania] 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." [To] the extent Akron I and Thornburgh find a constitutional violation when the government requires, as it does here, the giving of [such] truthful, nonmisleading information, [those] cases go too far [and] are overruled. [A] State [may] 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.

[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. [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.

C. [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. [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. [The] spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion.

[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. [The] husband's interest in the life of the child [does] not permit the State to empower him with this troubling degree of authority over his wife. [Women] do not lose their constitutionally protected liberty when they marry.

D. [Pennsylvania also provides that, except] in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent as defined above. If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests. We have been over most of this ground before. [We] reaffirm today that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided there is an adequate judicial bypass [procedure].

E. [Every Pennsylvania] facility which performs abortions is required to file a [detailed report on the circumstances of the abortion]. Every abortion

facility must also file quarterly reports showing the number of abortions performed broken down by trimester. In all events, the identity of each woman who has had an abortion remains confidential. [We] think [all these] provisions except that relating to spousal notice are constitutional. [The] collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing [here].

■ JUSTICE STEVENS, concurring in part and dissenting in part.

The Court is unquestionably correct in concluding that the doctrine of stare decisis has controlling significance in a case of this kind. 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] 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.

■ JUSTICE BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

Three years ago, [in Webster,] four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. All that remained between the promise of Roe and the darkness of the plurality was a single, flickering flame. [But] now, just when so many expected the darkness to fall, the flame has grown bright. I do not underestimate the significance of today's joint opinion. Yet I remain steadfast [that] the right to reproductive choice is entitled to the full protection afforded [before] Webster. [The] Roe framework is far more administrable, and far less manipulable, than the "undue burden" standard. [Application] of [its strict scrutiny] results in the invalidation of all the challenged provisions. Indeed, as this Court has invalidated virtually identical provisions in prior cases, stare decisis requires that we again strike them down.

■ 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 [retains] the outer shell of Roe, 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. [We] are now of the view that, in terming [the pregnant woman's] 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 potential life." [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. 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. [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.

[The] joint opinion['s] 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." [The] joint opinion rejects that view. Roe analyzed abortion regulation under a rigid trimester framework. [The] joint opinion rejects that framework. [Decisions] following Roe, such as Akron I and Thornburgh are frankly overruled in part under the "undue burden" standard expounded in the joint opinion. [Authentic] principles of stare decisis do not require that any portion of [Roe] be kept intact. [Erroneous] decisions in [constitutional] cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. [When] it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question. [The] simple fact that a generation or more had grown used to [Plessy and Lochner] did not prevent the Court from correcting its errors in those cases, nor should it prevent us [here].

[The] opinion contends that the Court was entitled to overrule Plessy and Lochner in those cases, despite the existence of opposition to the original decisions, only because both the Nation and the Court had learned new lessons in the interim. This is at best a feebly supported, post hoc rationalization. [When] the Court finally recognized its error in West Coast Hotel, it did not [state] that Lochner had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled. [And the] rule of Brown is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation. [The] Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments [comport] with the Constitution. [The] sum of the joint opinion's labors in the name of stare decisis and "legitimacy" is this: Roe 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 [is] imported to decide the constitutionality of state laws regulating abortion. Neither stare decisis nor "legitimacy" are truly served by such an effort.

■ JUSTICE SCALIA, with whom CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

[Applying] the rational basis test, I would uphold the Pennsylvania statute in its entirety. I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered. [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. [It] is not reasoned judgment that supports the Court's decision; only personal predilection. [The] Court's reliance upon stare decisis can best be described as contrived. [I] confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. [The] Court's description of the place of Roe in the social history of the United States is unrecognizable. Not only did Roe not [resolve] the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests [or] abortion marches on Congress, before Roe was decided. Profound disagreement existed among our citizens over the issue [but] that disagreement was being worked out at the state level.

[I] am appalled by the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—against overruling, no less—by the substantial and continuing public opposition the decision has generated. [In] my history-book, the Court was covered with dishonor and deprived of legitimacy by Dred Scott v. Sandford, an erroneous (and widely opposed) opinion that it did not abandon, rather than by West Coast Hotel, which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal. [Instead] of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is legally right by asking two questions: (1) Was Roe correctly decided? (2) Has Roe succeeded in producing a settled body of law? If the answer to both questions is no, Roe should undoubtedly be overruled.

THE MEANING AND IMPLICATIONS OF CASEY

1. ***Casey's influence on substantive due process.*** The joint opinion promoted an expansive and philosophical definition of constitutionally protected liberty: "[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." Is this language merely a distillation of precedent—a restatement of the right to privacy underlying Griswold and Roe—or does it signify the expansion of substantive due process to protect other fundamental values? If not privacy, then what values was the Court

inferring from the Due Process Clause? The passage seems to suggest two, which are closely related: personal dignity and autonomy, in the sense of a person's right of self-definition. Does the joint opinion provide a standard for applying these values in particular cases, or does it, as Justice Scalia's dissent argued, merely "decorate a value judgment and conceal a political choice?"

The notion of personal dignity has had an especially powerful influence on Justice Kennedy's subsequent jurisprudence. Most notably, he cited Casey's "choices central to personal dignity" language verbatim in his 2003 opinion in Lawrence v. Texas, p. 563 below, holding that the Due Process Clause prohibits states from criminalizing consensual sodomy. He also repeatedly referenced "dignity" as a core constitutional value in two other major gay rights opinions: United States v. Windsor, p. 575 below, overturning the federal government's refusal to recognize state-sanctioned same-sex marriages, and Obergefell v. Hodges, p. 583 below, recognizing a constitutional right to marriage that cannot be denied to same-sex couples. By contrast, Justice Kennedy joined the opinion of the Court in Washington v. Glucksberg, p. 595 below, which rejected reliance on Casey's "personal dignity" language and upheld a state ban on physician-assisted suicide. He also explained that the Partial-Birth Abortion Ban Act "expresses respect for the dignity of human life" in Gonzales v. Carhart, p. 541 below, which, in sustaining federal abortion restrictions, arguably curtailed Casey's scope. Can these decisions be reconciled under a consistent definition of dignity, or do they illustrate that the concept is too malleable and subjective to serve as a constitutional standard?

2. ***Abortion and stare decisis.*** Casey surprised many observers with its strong emphasis on the need to adhere to Roe to protect the legitimacy of the judiciary. Was the joint opinion's homage to stare decisis convincing in light of the way it reaffirmed Roe but overruled Akron I and Thornburgh? Was the joint opinion's justification for a super-strong deference to precedent in controversial cases convincing? Was the joint opinion wise to emphasize the risks of "overrul[ing] under fire"? Do you agree with the joint opinion's view that the overruling of the Lochner line of cases and of Plessy v. Ferguson were justifiably based on changed "facts, or [society's] understanding of facts"? Is it arguable that the more important changes that explain West Coast Hotel and Brown were changes in values rather than facts? Note the comment in Fried, "Constitutional Doctrine," 107 Harv. L. Rev. 1140 (1994), that "paradoxically [the authors of the joint opinion in Casey] seem to give [continuity and stability] undue prominence relative to their conviction of the rightness of the actual [Roe] decision—almost as if the decision could not stand on its own and needed an apology."

3. ***Abortion regulation as sex discrimination.*** Note that all of the prevailing opinions in Casey refer to the relationship between the abortion right and gender equality. Consider the view that the Court in Casey addressed, "essentially for the first time," one of the issues central to the abortion debate, "the effect of abortion laws on the status of women" and "the danger that the political process will subordinate women." Strauss, "Abortion, Toleration, and Moral Uncertainty," 1993 Sup. Ct. Rev. 1. Did the joint opinion's discussion of the spousal notice provision in particular evince an understanding of abortion regulation as part of gender hierarchy? Why didn't the Court make an equal protection basis for the decision more explicit?

4. ***The "undue burden" standard and facial and as-applied challenges.*** Does the joint opinion's "undue burden" standard promise clarity and stability? What is its likely effect on restrictions on abortions of the sort litigated during the pre-Casey era but not considered in Casey? Note that the joint opinion, while finding the informed consent and waiting period requirements constitutional on their face, left open the question of whether they imposed undue burdens as applied. Does the test simply place a heavier burden on challengers to produce factual data of the sort relied on by the joint opinion in invalidating the spousal notice provision? Was the joint opinion consistent in striking down the spousal notification provision but upholding the 24-hour waiting period, despite acknowledging the prohibitive effect of both for some women?

Is facial invalidation always the right remedy for an abortion law containing a constitutional infirmity in some applications? **Ayotte v. Planned Parenthood of Northern New England**, 546 U.S. 320 (2006), answered that question in the negative, remanding for the lower courts' consideration of a more modest remedy a state abortion law that would have been unconstitutional in medical emergencies because it lacked an exception for the health of the mother. Justice O'CONNOR, in her final opinion on the Court, wrote for a unanimous Court: "New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother,' [nor that in] some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avert serious and often irreversible damage to their health. [When] a statute restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief? In the case that is before us [we] agree with New Hampshire that the lower courts need not have invalidated the law wholesale. [Only] a few applications of New Hampshire's parental notification statute would present a constitutional problem. So long as they are faithful to legislative intent, then, in this case the lower courts can issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application." The Court remanded for determination whether the New Hampshire legislature would have viewed the law as so severable and for the choice of appropriate remedy.

5. ***"Partial birth" abortion.*** After Casey, abortion opponents escalated pressure to restrict certain procedures used to perform late-term abortions, labeling them "partial birth abortions." In **Stenberg v. Carhart**, 530 U.S. 914 (2000), the Court, applying Casey, struck down by a 5–4 vote a Nebraska law prohibiting late-term "dilation and extraction" (D & X) abortions without providing for exceptions to preserve the mother's health. Justice BREYER's majority opinion, joined by Justices Stevens, O'Connor, Souter, and Ginsburg, stated: "[Where] substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, Casey requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.' " Justice STEVENS, joined by Justice Ginsburg, concurred: "[D]uring the past 27 years, the central holding of Roe v. Wade has been endorsed by all but 4 of the 17 Justices who have addressed the issue. That holding—that the word 'liberty' in the Fourteenth Amendment includes a woman's right to make this difficult and extremely personal decision—makes it impossible for me to understand how a State has any legitimate interest in requiring a doctor to

follow any procedure other than the one that he or she reasonably believes will best protect the woman in her exercise of this constitutional liberty." Justice GINSBURG and Justice O'CONNOR filed separate concurrences.

Although he had been one of the authors of the Casey joint opinion, Justice KENNEDY dissented, joined by Chief Justice Rehnquist: "The Court's failure to accord any weight to Nebraska's interest in prohibiting partial-birth abortion is erroneous and undermines its discussion and holding. [Casey] is premised on the States having an important constitutional role in defining their interests in the abortion debate. [States] may take sides in the abortion debate and come down on the side of [life] in the unborn. [Nebraska] was entitled to conclude that its ban, while advancing important interests regarding the sanctity of life, deprived no woman of a safe abortion and therefore did not impose a substantial obstacle on the rights of any woman." Justice THOMAS also dissented, joined by Chief Justice Rehnquist and Justice Scalia: "[The] majority [fails] to distinguish between cases in which health concerns require a woman to obtain an abortion and cases in which health concerns cause a woman who desires an abortion (for whatever reason) to prefer one method over another. [Such] a health exception requirement eviscerates Casey's undue burden standard and imposes unfettered abortion-on-demand."

Seven years later, in the first full Term after Justice O'Connor's retirement from the Court and Justice Alito's succession to her seat, the Court came to the opposite conclusion with respect to the constitutionality of a *federal* ban on late-term abortions entitled the Partial-Birth Abortion Ban Act of 2003. This time, Justice Kennedy, who dissented in Stenberg, wrote for the Court. Does the Court succeed in distinguishing rather than overruling Stenberg?

Gonzales v. Carhart

550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007).

■ JUSTICE KENNEDY delivered the opinion of the Court, in which CHIEF JUSTICE ROBERTS and JUSTICES SCALIA, THOMAS, and ALITO joined.

[The] surgical procedure referred to as "dilation and evacuation" or "D & E" is the usual abortion method in [the second] trimester. [In D & E, the] doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus, [evacuating] the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety. [The] abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D & E. [In] an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart.

[The] Act departs in material ways from the statute in Stenberg. It adopts the phrase "delivers a living fetus," instead of " 'delivering . . . a living unborn child, or a substantial portion thereof.' " The Act's language, unlike the statute in Stenberg, expresses the usual meaning of "deliver" when used in connection with "fetus," namely, extraction of an entire fetus rather than removal of fetal pieces. [The] identification of specific anatomical landmarks