SUPREME COURT OF THE UNITED STATES

Nos. 91-744 and 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al., PETITIONERS 91-744 *v.* ROBERT P. CASEY, et al., etc. ROBERT P. CASEY, et al., etc., PETITIONERS 91-902

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 1992]

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, *ante*.

Three years ago, in *Webster* v. *Reproductive Health Serv.*, 492 U.S. 490 (1989), 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. *Id.*, at 557 (Blackmun, J., dissenting). See *id.*, at 499 (opinion of Rehnquist, C.J.); *id.*, at 532 (opinion of Scalia, J.). All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. See, *e. g.*, *Ohio* v. *Akron Center for Reproductive Health*, 497 U.S. 502, 524 (1990) (opinion of Blackmun, J.). 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 in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster*. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

Make no mistake, the joint opinion of Justices O'Connor, Kennedy, and Souter is an act of personal courage and constitutional principle. In contrast to previous decisions in which Justices O'Connor and Kennedy postponed reconsideration of *Roe* v. *Wade*, 410 U.S. 113 (1973), the authors of the joint opinion today join Justice Stevens and me in

concluding that "the essential holding of *Roe* should be retained and once again reaffirmed." *Ante*, at 3. In brief, five Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages." *Id.*, at 1.

A fervent view of individual liberty and the force of *stare decisis* have led the Court to this conclusion. *Ante*, at 11. Today a majority reaffirms that the Due Process Clause of the Fourteenth Amendment establishes "a realm of personal liberty which the government may not enter," *ante*, at 5--a realm whose outer limits cannot be determined by interpretations of the Constitution that focus only on the specific practices of States at the time the Fourteenth Amendment was adopted. See *ante*, at 6. Included within this realm of liberty 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.' " *Ante*, at 9, quoting *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) (emphasis in original). "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." *Ante*, at 9 (emphasis added). Finally, the Court today recognizes that in the case of abortion, "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." *Ante*, at 10.

The Court's reaffirmation of *Roe*'s central holding is also based on the force of *stare decisis*. "[N]o erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips." *Ante*, at 18. Indeed, the Court acknowledges that *Roe*'s limitation on state power could not be removed "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the rule in question." *Ante*, at 13. In the 19 years since *Roe* was decided, that case has shaped more than reproductive planning--%an entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society and to make reproductive decisions." *Ante*, at 18. The Court understands that, having "call[ed] the contending sides . . . to end their national division by accepting a common mandate rooted in the Constitution," *ante*, at 24, a decision to overrule *Roe* "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."

Ante, at 22. What has happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch.

In striking down the Pennsylvania statute's spousal notification requirement, the Court has established a framework for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice. [n.1] In determining the burden imposed by the challenged regulation, the Court inquires whether the regulation's "*purpose or effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Ante*, at 35 (emphasis added). The Court reaffirms: "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." *Ante*, at 53-54. Looking at this group, the Court inquires, based on expert testimony, empirical studies, and common sense, whether "in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.*, at 54. "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." *Ante*, at 35. And in applying its test, the Court remains sensitive to the unique role of women in the decision making process. Whatever may have been the practice when the Fourteenth Amendment was adopted, the Court observes, "[w]omen do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family." *Ante*, at 57-58. [n.2]

Lastly, while I believe that the joint opinion errs in failing to invalidate the other regulations, 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. See, *e. g.*, *id.*, at 43. 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*, at 54.

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. Our precedents and the joint opinion's principles require us to subject all non *de minimis* abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions requiring content based counseling, a 24-hour delay,

informed parental consent, and reporting of abortion related information must be invalidated.

The Court today reaffirms the long recognized rights of privacy and bodily integrity. As early as 1891, the Court held, "[n]o right is held more sacred, or is more carefully guarded by the commonlaw, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ." *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891). Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion in such intimate family matters asprocreation, childrearing, marriage, and contraceptive choice. See *ante*, at 5-6. These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. *Eisenstadt*, 405 U.S., at 453. In *Roe* v. *Wade*, this Court correctly applied these principles to a woman's right to choose abortion.

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. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive 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*, 470 U.S. 753 (1985) (invalidating surgical removal of bullet from murder suspect); *Rochin* v. *California*, 342 U.S. 165 (1952) (invalidating stomach pumping). [n.3]

Further, when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning--critical life choices that this Court long has deemed central to the right to privacy. The decision to terminate or continue a pregnancy has no less an impact on a woman's life than decisions about contraception or marriage. 410 U.S., at 153. 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." *Carey* v. *Population Services, Int'l*, 431 U.S. 678 (1977).

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*, 458 U.S. 718, 724-726 (1982); *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976). **[n.4]** 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." *Ante*, at 55.

The Court has held that limitations on the right of privacy are permissible only if they survive "strict" constitutional scrutiny--that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965). We have applied this principle specifically in the context of abortion regulations. *Roe* v. *Wade*, 410 U. S., at 155. **[n.5]**

Roe implemented these principles through a framework that was designed "to insure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact," *ante*, at 30. *Roe* identified two relevant State interests: "an interest in preserving and protecting the health of the pregnant woman" and an interest in "protecting the potentiality of human life." 410 U. S., at 162. With respect to the State's interest in the health of the mother, "the `compelling' point . . . is at approximately the end of the first trimester," because it is at that point that the mortality rate in abortion approaches that in childbirth. *Roe*, 410 U. S., at 163. With respect to the State's interest in potential life, "the `compelling' point is at viability," because it is at that point that the fetus "presumably has the capability of meaningful life outside the mother'swomb." *Ibid.* In order to fulfill the requirement of narrow tailoring, "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered." *Akron*, 462 U. S., at 434.

In my view, application of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe*. Strict scrutiny of state limitations on reproductive choice still

offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion. No majority of this Court has ever agreed upon an alternative approach. The factual premises of the trimester framework have not been undermined, see *Webster*, 492 U.S., at 553 (Blackmun, J., dissenting), and the *Roe* framework is far more administrable, and far less manipulable, than the "undue burden" standard adopted by the joint opinion.

Nonetheless, three criticisms of the trimester framework continue to be uttered. First, the trimester framework is attacked because its key elements do not appear in the text of the Constitution. My response to this attack remains the same as it was in *Webster*:

> "Were this a true concern, we would have to abandon most of our constitutional jurisprudence. [T]he `critical elements' of countless constitutional doctrines nowhere appear in the Constitution's text . . . . The Constitution makes no mention, for example, of the First Amendment's `actual malice' standard for proving certain libels, see *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). . . . Similarly, the Constitution makes no mention of the rational basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims under the Equal Protection Clause. The reason is simple. Like the *Roe* framework, these tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government." 492 U.S., at 548.

The second criticism is that the framework more closely resembles a regulatory code than a body of constitutional doctrine. Again, my answer remains the same as in *Webster*.

"[I]f this were a true and genuine concern, we would have to abandon vast areas of our constitutional jurisprudence. . . . Are [the distinctions entailed in the trimester framework] any finer, or more `regulatory,' than the distinctions we have often drawn in our First Amendment jurisprudence, where, for example, we have held that a `release time' program permitting public school students to leave school grounds during school hours receive religious instruction does not violate the Establishment Clause, even though a release time program permitting religious instruction on school grounds does violate the Clause? Compare *Zorach* v. *Clauson*, 343 U.S. 306 (1952), with *Illinois ex rel.*

McCollum v. *Board of Education of School Dist. No. 71, Champaign County*, 333 U.S. 203 (1948). . . . Similarly, in a Sixth Amendment case, the Court held that although an overnight ban on attorney client communication violated the constitutionally guaranteed right to counsel, *Geders* v. *United States*, 425 U.S. 80 (1976), that right was not violated when a trial judge separated a defendant from his lawyer during a 15-minute recess after the defendant's direct testimony. *Perry* v. *Leake*, 488 U.S. 272 (1989). That numerous constitutional doctrines result in narrow differentiations between similar circumstances does not mean that this Court has abandoned adjudication in favor of regulation." *Id.*, at 549-550.

The final, and more genuine, criticism of the trimester framework is that it fails to find the State's interest in potential human life compelling throughout pregnancy. No member of this Court--nor for that matter, the Solicitor General, Tr. of Oral Arg. 42--has ever questioned our holding in *Roe* that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 410 U.S., at 159. Accordingly, a State's interest in protecting fetal life is not grounded in the Constitution. Nor, consistent with our Establishment Clause, can it be a theological or sectarian interest. See *Thornburgh*, 476 U.S., at 778 (Stevens, J., concurring). It is, instead, a legitimate interest grounded in humanitarian or pragmatic concerns. See *ante*, at 4-5 (opinion of Stevens, J.).

But while a 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," *ante*, at 4, legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling. The question then is how best to accommodate the State's interest in potential human life with the constitutional liberties of pregnant women. Again, I stand by the views I expressed in *Webster*:

"I remain convinced, as six other Members of this Court 16 years ago were convinced, that the *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life. The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the

uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling. As a practical matter, because viability follows `quickening'--the point at which a woman feels movement in her womb--and because viability occurs no earlier than 23 weeks gestational age, it establishes an easily applicable standard for regulating abortion while providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy." 492 U.S., at 553-554. [n.6]

Roe's trimester framework does not ignore the State's interest in prenatal life. Like Justice Stevens, I agree that the State may take steps to ensure that a woman's choice "is thoughtful and informed," *ante*, at 29, 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." *Ante*, at 30. But

> "[s]erious questions arise when a State attempts to `persuade the woman to choose childbirth over abortion.' *Ante*, at 36. 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." *Ante*, at 6 (opinion of Stevens, J.).

As the joint opinion recognizes, "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." *Ante*, at 35.

In sum, *Roe*'s requirement of strict scrutiny as implemented through a trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman's fundamental right. Lastly, no other approach properly accommodates the woman's constitutional right with the State's legitimate interests.

Application of the strict scrutiny standard 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.

This Court has upheld informed and written consent requirements only where the State has demonstrated that they genuinely further important health related state concerns. See *Danforth*, 428 U. S., at 65-67. A

State may not, under the guise of securing informed consent, "require the delivery of information `designed to influence the woman's informed choice between abortion or childbirth.' " *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747, 760 (1986), (quoting *Akron*, 462 U. S., at 443-444). Rigid requirements that a specific body of information be imparted to a woman in all cases, regardless of the needs of the patient, improperly intrude upon the discretion of the pregnant woman's physician and thereby impose an " `undesired and uncomfortable straitjacket.' " *Thornburgh*, 476 U. S., at 762 (quoting *Danforth*, 428 U. S., at 67, n. 8).

Measured against these principles, some aspects of the Pennsylvania informed consent scheme are unconstitutional. While it is unobjectionable for the Commonwealth to require that the patient be informed of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child, compare §§ 3205(a)(i) (iii) with *Akron*, 462 U. S., at 446, n. 37, I remain unconvinced that there is a vital state need for insisting that the information be provided by a physician rather than a counselor. *Id.*, at 448. The District Court found that the physician only requirement necessarily would increase costs to the plaintiff clinics, costs that undoubtedly would be passed on to patients. And because trained women counselors are often more understanding than physicians, and generally have more time to spend with patients, see App. 366a 387a, the physician only disclosure requirement is not narrowly tailored to serve the Commonwealth's interest in protecting maternal health.

Sections 3205(a)(2)(i) (iii) of the Act further requires that the physician or a qualified non physician inform the woman that printed materials are available from the Commonwealth that describe the fetus and provide information about medical assistance for childbirth, information about child support from the father, and a list of agencies offering that provide adoption and other services as alternatives to abortion. *Thornburgh* invalidated biased patient counseling requirements virtually identical to the one at issue here. What we said of those requirements fully applies in this case:

"the listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the woman, not the

professional medical guidance she seeks, and it officially structures--as it obviously was intended to do--the dialogue between the woman and her physician.

"The requirements . . . that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this . . ., for many patients, would be irrelevant and inappropriate. For a patient with a life threatening pregnancy, the `information' in its very rendition may be cruel as well as destructive of the physician patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment . . . . Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest." 476 U. S., at 763.

"This type of compelled information is the antithesis of informed consent," *id.*, at 764, and goes far beyond merely describing the general subject matter relevant to the woman's decision. "That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti abortion character of the statute and its real purpose." *Ibid.* **[n.7]**

The 24 hour waiting period following the provision of the foregoing information is also clearly unconstitutional. The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks, and that it would require two visits to the abortion provider, thereby increasing travel time, exposure to further harassment, and financial cost. Finally, the District Court found that the requirement would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts. App. to Pet. for Cert. in No. 91-902, pp. 380a 382a (hereinafter App.). In *Akron* this Court invalidated a similarly arbitrary or inflexible waiting period because, as here, it furthered no legitimate state interest. **[n.8]**

As Justice Stevens insightfully concludes, the mandatory delay rests either on outmoded or unacceptable assumptions about the decision making capacity of women or the belief that the decision to terminate the pregnancy is presumptively wrong. *Ante*, at 8. The requirement that women consider this obvious and slanted information for an additional 24 hours contained in these provisions will only influence the woman's decision in improper ways. The vast majority of women will know this

information--of the few that do not, it is less likely that their minds will be changed by this information than it will be either by the realization that the State opposes their choice or the need once again to endure abuse and harassment on return to the clinic. [n.9]

Except in the case of a medical emergency, § 3206 requires a physician to obtain the informed consent of a parent or guardian before performing an abortion on an unemancipated minor or an incompetent woman. Based on evidence in the record, the District Court concluded that, in order to fulfill the informed consent requirement, generally accepted medical principles would require an in person visit by the parent to the facility. App. 399a. Although the Court "has recognized that the State has somewhat broader authority to regulate the activities of children than of adults," the State nevertheless must demonstrate that there is a "*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult. "*Danforth*, 428 U. S., at 74-75 (emphasis added). The requirement of an in person visit would carry with it the risk of a delay of several days or possibly weeks, even where the parent is willing to consent. While the State has an interest in encouraging parental involvement in the minor's abortion decision, § 3206 is not narrowly drawn to serve that interest. [n.10]

Finally, the Pennsylvania statute requires every facility performing abortions to report its activities to the Commonwealth. Pennsylvania contends that this requirement is valid under *Danforth*, in which this Court held that recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality are permissible. 428 U. S., at 79-81. The Commonwealth attempts to justify its required reports on the ground that the public has a right to know how its tax dollars are spent. A regulation designed to inform the public about public expenditures does not further the Commonwealth's interest in protecting maternal health. Accordingly, such a regulation cannot justify a legally significant burden on a woman's right to obtain an abortion.

The confidential reports concerning the identities and medical judgment of physicians involved in abortions at first glance may seem valid, given the State's interest in maternal health and enforcement of the Act. The District Court found, however, that, notwithstanding the confidentiality protections, many physicians, particularly those who have previously discontinued performing abortions because of harassment, would refuse to refer patients to abortion clinics if their names were to appear on these reports. App. 447a 448a. The Commonwealth has failed to show that the name of the referring physician either adds to the pool of scientific knowledge concerning

abortion or is reasonably related to the Commonwealth's interest in maternal health. I therefore agree with the District Court's conclusion that the confidential reporting requirements are unconstitutional insofar as they require the name of the referring physician and the basis for his or her medical judgment.

In sum, I would affirm the judgment in No. 91-902 and reverse the judgment in No. 91-744 and remand the cases for further proceedings.

At long last, The Chief Justice admits it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "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." *Post*, at 1. If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from The Chief Justice's opinion.

The Chief Justice's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy. *Post*, at 9. This constricted view is reinforced by The Chief Justice's exclusive reliance on tradition as a source of fundamental rights. He argues that the record in favor of a right to abortion is no stronger than the record in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), where the plurality found no fundamental right to visitation privileges by an adulterous father, or in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), where the Court found no fundamental right to engage in homosexual sodomy, or in a case involving the "firing of a gun . . . into another person's body." *Post*, at 9-10. In The Chief Justice's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so called "sexual deviates." [n.11] Given The Chief Justice's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

Even more shocking than The Chief Justice's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental--for The Chief Justice, only women's *psychological* health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration

of the moral implications of their decision. *Post*, at 25-26. In short, The Chief Justice's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

Nor does The Chief Justice give any serious consideration to the doctrine of *stare decisis*. For The Chief Justice, the facts that gave rise to *Roe* are surprisingly simple: "women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children." *Ante*, at 13. This characterization of the issue thus allows The Chief Justice quickly to discard the joint opinion's reliance argument by asserting that "reproductive planning could take . . . virtually immediate account of a decision overruling *Roe*." *Id.*, at 14 (internal quotations omitted).

The Chief Justice's narrow conception of individual liberty and *stare decisis* leads him to propose the same standard of review proposed by the plurality in *Webster*. "States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1955); cf. *Stanley* v. *Illinois*, 405 U.S. 645, 651-653 (1972)." *Post*, at 24. The Chief Justice then further weakens the test by providing an insurmountable requirement for facial challenges: petitioners must " `show that no set of circumstances exists under which the [provision] would be valid.' " *Post*, at 30, quoting *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S., at 514. In short, in his view, petitioners must prove that the statute cannot constitutionally be applied to *anyone*. Finally, in applying his standard to the spousal notification provision, The Chief Justice contends that the record lacks any "hard evidence" to support the joint opinion's contention that a "large fraction" of women who prefer not to notify their husbands involve situations of battered women and unreported spousal assault. *Post*, at 31, n. 2. Yet throughout the explication of his standard, The Chief Justice never explains what hard evidence is, how large a fraction is required, or how a battered woman is supposed to pursue an as applied challenge.

Under his standard, States can ban abortion if that ban is rationally related to a legitimate state interest--a standard which the United States calls "deferential, but not toothless. "Yet when pressed at oral argument to describe the teeth, the best protection that the Solicitor General could offer to women was that a prohibition, enforced by criminal penalties, *with no exception for the life of the mother*, "could raise very serious questions." Tr. of Oral Arg. 49. Perhaps, the Solicitor General offered, the failure to include an exemption for the life of the mother would be "arbitrary and capricious." *Id.*, at 49. If, as The Chief Justice contends,

the undue burden test is made out of whole cloth, the so-called "arbitrary and capricious" limit is the Solicitor General's "new clothes."

Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or incest? Is there anything arbitrary or capricious about a State's prohibiting the sins of the father from being visited upon his offspring? **[n.12]**

But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.

In one sense, the Court's approach is worlds apart from that of The Chief Justice and Justice Scalia. 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.

Notes

1 As I shall explain, the joint opinion and I disagree on the appropriate standard of review for abortion regulations. I do agree, however, that the reasons advanced by the joint opinion suffice to invalidate the spousal notification requirement under a strict scrutiny standard.

2 I also join the Court's decision to uphold the medical emergency provision. As the Court notes, its interpretation is consistent with the essential holding of *Roe* that "forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Ante*, at 38. As is apparent in my analysis below, however, this exception does not renderconstitutional the provisions which I conclude do not survive strict scrutiny.

3 As the joint opinion acknowledges, *ante*, at 15, this Court has recognized the vital liberty interest of persons in refusing unwanted

medical treatment. *Cruzan* v. *Director, Missouri Dept. of Health*, ___ U.S. ___ (1990). Just as the Due Process Clause protects the deeply personal decision of the individual to *refuse* medical treatment, it also must protect the deeply personal decision to *obtain* medical treatment, including a woman's decision to terminate a pregnancy.

[4] A growing number of commentators are recognizing this point. See, *e. g.,* L. Tribe, American Constitutional Law, § 15-10, pp. 1353-1359 (2d ed. 1988); Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 350-380 (1992); Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 31-44 (1992); cf. Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 788-791 (1989) (similar analysis under the rubric of privacy).

[5] To say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute. Regulations can be upheld if they have no significant impact on the woman's exercise of her right and are justified by important state health objectives. See, *e. g.*, *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U.S. 52, 65-67, 79-81 (1976) (upholding requirements of a woman's written consent and record keeping). But the Court today reaffirms the essential principle of *Roe* that a woman has the right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Ante*, at 3. Under *Roe*, any more than *de minimis* interference is undue.

[6] The joint opinion agrees with *Roe*'s conclusion that viability occurs at 23 or 24 weeks at the earliest. Compare *ante*, at 18, with 410 U.S., at 160.

[7] While I do not agree with the joint opinion's conclusion that these provisions should be upheld, the joint opinion has remained faithful to principles this Court previously has announced in examining counseling provisions. For example, the joint opinion concludes that the "information the State requires to be made available to the woman" must be "truthful and not misleading." *Ante*, at 40. Because the State's information must be "calculated to inform the woman's free choice, not hinder it," *ante*, at 34, the measures must be designed to ensure that a woman's choice is "mature and informed," *id.*, at 41, not intimidated, imposed, or impelled. To this end, when the State requires the provision of certain information, the State may not alter the *manner* of presentation in order to inflict "psychological abuse," *id.*, at 51, designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the

performance of an abortion operation. Just as a visual preview of an operation to remove an appendix plays no part in a physician's securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State's interest in the preservation of the woman's health or demonstrate the State's "profound respect for the potential life she carries within her." *Id.*, at 35.

[8] The Court's decision in *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990), validating a 48-hour waiting period for minors seeking an abortion to permit parental involvement does not alter this conclusion. Here the 24-hour delay is imposed on an *adult* woman. See *Hodgson*, 497 U. S., at ___, n. 35 (slip op. 28-29, n. 35); *Ohio* v. *Akron Ctr. for Reproductive Health, Inc.*, 497 U.S. 502, ___ (1990). Moreover, the statute in *Hodgson* did not require any delay once the minor obtained the affirmative consent of either a parent or the court.

[9] Because this information is so widely known, I am confident that a developed record can be made to show that the 24-hour delay, "in a large fraction of the cases in which [the restriction] is relevant, . . . will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante*, at 54.

[10] The judicial bypass provision does not cure this violation. *Hodgson* is distinguishable, since this case involves more than parental involvement or approval--rather, the Pennsylvania law requires that the parent receive information designed to discourage abortion in a face to face meeting with the physician. The bypass procedure cannot ensure that the parent would obtain the information, since in many instances, the parent would not even attend the hearing. A State may not place any restriction on a young woman's right to an abortion, however irrational, simply because it has provided a judicial bypass.

[11] Obviously, I do not share the plurality's views of homosexuality as sexual deviance. See *Bowers*, 478 U.S., at 185-1866 n.2.

[12] Justice Scalia urges the Court to "get out of this area" and leave questions regarding abortion entirely to the States. *Post*, at 22. Putting aside the fact that what he advocates is nothing short of an abdication by the Court of its constitutional responsibilities, Justice Scalia is uncharacteristically naive if he thinks that overruling *Roe* and holding that restrictions on a woman's right to an abortion are subject only to rational basis review will enable the Court henceforth to avoid reviewing abortion related issues. State efforts to regulate and prohibit abortion in a post-*Roe* world undoubtedly would raise a host of distinct

and important constitutional questions meriting review by this Court. For example, does the Eighth Amendment impose any limits on the degree or kind of punishment a State can inflict upon physicians who perform, or women who undergo, abortions? What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel? Does the First Amendment permit States that choose not to criminalize abortion to ban all advertising providing information about where and how to obtain abortions?

SUPREME COURT OF THE UNITED STATES

Nos. 91-744 and 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al., PETITIONERS 91-744 *v.* ROBERT P. CASEY, et al., etc. ROBERT P. CASEY, et al., etc., PETITIONERS 91-902

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 1992]

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 those I set forth in my separate opinions in *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in judgment), and *Ohio* v. *Akron Center for Reproductive Health*, 497 U.S. 502, 520 (1990) (*Akron II*) (Scalia, J., concurring). The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree the government can adopt one position or the other." *Ante*, at 8. The

Court is correct in adding the qualification that this "assumes a state of affairs in which the choice does not intrude upon a protected liberty," *ante*, at 9--but the crucial part of that qualification is the penultimate word. 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--which entire societies of reasonable people disagree with--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 this case: 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." *Ibid.* 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. [n.1] *Akron II*, *supra*, at 520 (Scalia, J., concurring).

The Court destroys the proposition, evidently meant to represent my position, that "liberty" includes "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," *ante*, at 5 (citing *Michael H.* v. *Gerald D.*, 491 U.S. 110, 127, n. 6 (1989) (opinion of Scalia, J.). That is not, however, what *Michael H.* says; it merely observes that, in defining "lib erty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," 491 U. S., at 127, n. 6. But the Court does not wish to be fettered by any such limitations on its preferences. The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "cur[b] the discretion of federal judges," *ante*, at 5, is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction--towards systematically eliminating checks upon its own power; and it succumbs.

Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have said

before; and 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. I shall discuss each of them under a quotation from the Court's opinion to which they pertain.

"**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.**"

Ante, at 7.

Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying "reasoned judgment," I do not see how that could possibly have produced the answer the Court arrived at in *Roe* v. *Wade*, 410 U.S. 113 (1973). Today's opinion describes the methodology of *Roe*, quite accurately, as weighing against the woman's interest the State's " `important and legitimate interest in protecting the potentiality of human life.' " *Ante*, at 28-29 (quoting *Roe*, *supra*, at 162). But "reasoned judgment" does not 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." See, *e. g.*, *Roe*, *supra*, at 162; *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U.S. 52, 61 (1976); *Colautti* v. *Franklin*, 439 U.S. 379, 386 (1979); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 428 (1983) (*Akron I*); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U.S. 476, 482 (1983). 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 authors of the joint opinion, of course, do not squarely contend that *Roe* v. *Wade* was a *correct* application of "reasoned judgment"; merely that it must be followed, because of *stare decisis*. *Ante*, at 11, 18-19, 29. But in their exhaustive discussion of all the factors that go into the determination of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "[t]he Court's power lies . . . in its legitimacy, a product of substance and perception," *ante*, at 23, the "substance" part

of the equation demands that plain error be acknowledged and eliminated. *Roe* was plainly wrong--even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.

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 this 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," *ante*, at 7; it involves a "most intimate and personal choic[e]," *ante*, at 9; it is "central to personal dignity and autonomy," *ibid.*; it "originate[s] within the zone of conscience and belief," *ibid.*; it is "too intimate and personal" for state interference, *ante*, at 10; it reflects "intimate views" of a "deep, personal character," *ante*, at 11; it involves "intimate relationships," and notions of "personal autonomy and bodily integrity," *ante*, at 15; and it concerns a particularly " `important decisio[n],' " *ante*, at 16 (citation omitted). [n.2] But it is obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority, see *Bowers* v. *Hardwick*, 478 U.S. 186 (1986)) 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. Justice Curtis's warning is as timely today as it was 135 years ago:

> "[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according

to their own views of what it ought to mean." *Dred Scott* v. *Sandford*, 19 How. 393, 621 (1857) (Curtis, J., dissenting).

"**Liberty finds no refuge in a jurisprudence of doubt.** "

Ante, at 1.

One might have feared to encounter this august and sonorous phrase in an opinion defending the real *Roe* v. *Wade*, rather than the revised version fabricated today by the authors of the joint opinion. The shortcomings of *Roe* did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion--which calls upon federal district judges to apply an "undue burden" standard as doubtful in application as it is unprincipled in origin--is really more than one should have to bear.

The joint opinion frankly concedes that the amorphous concept of "undue burden" has been inconsistently applied by the Members of this Court in the few brief years since that "test" was first explicitly propounded by Justice O'Connor in her dissent in *Akron I*, *supra*. See *Ante*, at 34. [n.3] Because the three Justices now wish to "set forth a standard of general application," the joint opinion announces that "it is important to clarify what is meant by an undue burden," *ibid.* I certainly agree with that, but I do not agree that the joint opinion succeeds in the announced endeavor. To the contrary, its efforts at clarification make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.

The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ibid.*; see also *ante*, at 35-36. An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." *Ante*, at 34. [n.4] This latter statement cannot possibly mean what it says. *Any* regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not *unduly* hinder the woman's decision. That, of course, brings us right back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

The ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis. As The Chief Justice points out, *Roe*'s strict scrutiny standard "at least had a recognized basis in constitutional law at the time *Roe* was decided," *ante*, at 22, while "[t]he same cannot be said for the `undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion," *ibid.* The joint opinion is flatly wrong in asserting that "our jurisprudence relating to all liberties save perhaps abortion has recognized" the permissibility of laws that do not impose an "undue burden." *Ante*, at 31. It argues that the abortion right is similar to other rights in that a law "not designed to strike at the right itself, [but which] has the incidental effect of making it more difficult or more expensive to [exercise the right,]" is not invalid. *Ante*, at 31-32. I agree, indeed I have forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, see *R. A. V.* v. *St. Paul*, 505 U. S. ___, ___ (1992) (slip op., at 11); *Employment Division, Dept. of Human Resources of Ore.* v. *Smith*, 494 U.S. 872, 878-882 (1990), but that principle does not establish the quite different (and quite dangerous) proposition that a law which *directly* regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden." It is that, of course, which is at issue here: Pennsylvania has *consciously and directly* regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1¢. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a "substantial obstacle" to the exercise of First Amendment rights. The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for this case, to preserve some judicial foothold in this ill gotten territory. In claiming otherwise, the three Justices show their willingness to place all constitutional rights at risk in an effort to preserve what they deem the-central holding in *Roe*," *ante*, at 31.

The rootless nature of the "undue burden" standard, a phrase plucked out of context from our earlier abortion decisions, see n. 3, *supra*, is further reflected in the fact that the joint opinion finds it necessary expressly to repudiate the more narrow formulations used in Justice O'Connor's earlier opinions. *Ante*, at 35. Those opinions stated that a statute imposes an "undue burden" if it imposes "*absolute* obstacles or *severe* limitations on the abortion decision," *Akron I*, 462 U. S., at 464 (O'Connor, J., dissenting) (emphasis added); see also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting). Those strong adjectives are

conspicuously missing from the joint opinion, whose authors have for some unexplained reason now determined that a burden is "undue" if it merely imposes a "substantial" obstacle to abortion decisions. See, *e. g.*, *ante*, at 53, 59. Justice O'Connor has also abandoned (again without explanation) the view she expressed in *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U.S. 476 (1983) (dissenting opinion), that a medical regulation which imposes an "undue burden" could nevertheless be upheld if it "reasonably relate[s] to the preservation and protection of maternal health," *id.*, at 505 (citation and internal quotation marks omitted). In today's version, even health measures will be upheld only "*if they do not constitute an undue burden*," *ante*, at 35 (emphasis added). Gone too is Justice O'Connor's statement that "the State possesses *compelling* interests in the protection of potential human life . . . throughout pregnancy," *Akron I*, *supra*, at 461 (emphasis added); see also *Ashcroft*, *supra*, at 505 (O'Connor, J., concurring in judgment in part and dissenting in part); *Thornburgh*, *supra*, at 828 (O'Connor, J., dissenting); instead, the State's interest in unborn human life is stealthily downgraded to a merely "substantial" or "profound" interest, *ante*, at 34, 36. (That had to be done, of course, since designating the interest as "compelling" throughout pregnancy would have been, shall we say, a "substantial obstacle" to the joint opinion's determined effort to reaffirm what it views as the "central holding" of *Roe*. See *Akron I*, 462 U. S., at 420, n. 1.) And "viability" is no longer the "arbitrary" dividing line previously decried by Justice O'Connor in *Akron I*, *id.*, at 461; the Court now announces that "the attainment of viability may continue to serve as the critical fact," *ante*, at 18. **[n.5]** It is difficult to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

Because the portion of the joint opinion adopting and describing the undue burden test provides no more useful guidance than the empty phrases discussed above, one must turn to the 23 pages applying that standard to the present facts for further guidance. In evaluating Pennsylvania's abortion law, the joint opinion relies extensively on the factual findings of the District Court, and repeatedly qualifies its conclusions by noting that they are contingent upon the record developed in this case. Thus, the joint opinion would uphold the 24-hour waiting period contained in the Pennsylvania statute's informed consent provision, 18 Pa. Cons. Stat. § 3205 (1990), because "the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk," *ante*, at 43. The three Justices therefore conclude that "on the record before us, . . . we are not convinced that the 24-hour waiting period constitutes an undue burden." *Ante*, at 44-45. The requirement that a doctor provide the information pertinent to informed consent would also be upheld

because "there is no evidence on this record that [this requirement] would amount in practical terms to a substantial obstacle to a woman seeking an abortion," *ante*, at 42. Similarly, the joint opinion would uphold the reporting requirements of the Act, §§ 3207, 3214, because "there is no . . . showing on the record before us" that these requirements constitute a "substantial obstacle" to abortion decisions. *Ante*, at 59. But at the same time the opinion pointedly observes that these reporting requirements may increase the costs of abortions and that "at some point [that fact] could become a substantial obstacle," *ibid.* Most significantly, the joint opinion's conclusion that the spousal notice requirement of the Act, see § 3209, imposes an "undue burden" is based in large measure on the District Court's "detailed findings of fact," which the joint opinion sets out at great length. *Ante*, at 45-49.

I do not, of course, have any objection to the notion that, in applying legal principles, one should rely only upon the facts that are contained in the record or that are properly subject to judicial notice. [n.6] But what is remarkable about the joint opinion's fact intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a "substantial obstacle" or an "undue burden." See, *e. g.*, *ante*, at 38, 42, 44-45, 45, 52, 53, 59. We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue"--subject, of course, to the possibility of being reversed by a Circuit Court or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

To the extent I can discern *any* meaningful content in the "undue burden" standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the "undue burden" analysis is whether the regulation "prevent[s] a significant number of women from obtaining an abortion," *ante*, at 52; whether a "significant number of women . . . are likely to be deterred from procuring an abortion," *ibid.*; and whether the regulation often "deters" women from seeking abortions, *ante*, at 55-56. We are not told, however, what forms of "deterrence" are

impermissible or what degree of success in deterrence is too much to be tolerated. If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to "deter" a "significant number of women" from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State's "substantial" and "profound" interest in "potential human life," and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful. As Justice Blackmun recognizes (with evident hope), *ante*, at 5, the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "express[ing] a preference for childbirth over abortion," *ante*, at 41. Reason finds no refuge in this jurisprudence of confusion.

"**While we appreciate the weight of the arguments . . . that *Roe* should be overruled, the 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*.** "

Ante, at 11.

The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep what you want and throw away the rest version. I wonder whether, as applied to *Marbury* v. *Madison*, 1 Cranch 137 (1803), for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts.

I am certainly not in a good position to dispute that the Court *has saved* the "central holding" of *Roe*, since to do that effectively I would have to know what the Court has saved, which in turn would require me to understand (as I do not) what the "undue burden" test means. I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains. It seems particularly ungrateful to carve the trimester framework out of the core of *Roe*, since its very rigidity (in sharp contrast to the utter

indeterminability of the "undue burden" test) is probably the only reason the Court is able to say, in urging *stare decisis*, that *Roe* "has in no sense proven `unworkable,' " *ante*, at 13. I suppose the Court is entitled to call a "central holding" whatever it wants to call a "central holding"--which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis*. I thought I might note, however, that the following portions of *Roe* have not been saved:

"Under *Roe*, requiring that a woman seeking an abortion be provided truthful information about abortion before giving informed written consent is unconstitutional, if the information is designed to influence her choice, *Thornburgh*, 476 U. S., at 759-765; *Akron I*, 462 U. S., at 442-445. Under the joint opinion's "undue burden" regime (as applied today, at least) such a requirement is constitutional, *ante*, at 38-42.

"Under *Roe*, requiring that information be provided by a doctor, rather than by non physician counselors, is unconstitutional, *Akron I*, *supra*, at 446-449. Under the "undue burden" regime (as applied today, at least) it is not, *ante*, at 42.

"Under *Roe*, requiring a 24-hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional, *Akron I*, *supra*, at 449-451. Under the "undue burden" regime (as applied today, at least) it is not, *ante*, at 43-45.

"Under *Roe*, requiring detailed reports that include demographic data about each woman who seeks an abortion and various information about each abortion is unconstitutional, *Thornburgh*, *supra*, at 765-768. Under the "undue burden" regime (as applied today, at least) it generally is not, *ante*, at 58-59.

" **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* . . . , 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.** "

Ante, at 24.

The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, *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, national abortion lobbying, or abortion marches on Congress, before *Roe* v. *Wade* was decided. Profound disagreement existed among our citizens over the issue--as it does over other issues, such as the death penalty--but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state by state resolution, but also that those results would be more stable. Pre-*Roe*, moreover, political compromise was possible.

Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution *guarantees* abortion, how can it be bad?"--not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. But to portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion umpiring business, it is the perpetuation of that disruption, rather than of any *pax Roeana*, that the Court's new majority decrees.

"**[T]o overrule under fire . . . would subvert the Court's legitimacy . . . .**

" **To all those who will be . . . tested by following, the Court implicitly undertakes to remain steadfast . . . . The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and . . . the commitment [is not] obsolete. . . .**

" **[The American people's] belief in themselves as . . . a people [who aspire to live according to the rule of law] 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.** "

Ante, at 25-26.

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life tenured judges--leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speak[s] before all others for their constitutional ideals"--with the somewhat more modest role envisioned for these lawyers by the Founders.

> "The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment . . . ." The Federalist No. 78, pp. 393-394 (G. Wills ed. 1982).

Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no shadow of change or hint of alteration ("There is a limit to the amount of error that can plausibly be imputed to prior courts," *ante*, at 24), with the more democratic views of a more humble man:

> "[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 139 (1989).

It is particularly difficult, in the circumstances of the present decision, to sit still for the Court's lengthy lecture upon the virtues of "constancy," *ante*, at 26, of "remain[ing] steadfast," *id.*, at 25, of adhering to "principle," *id.*, *passim*. Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence (the joint opinion's "undue burden" standard)--and that principle is inconsistent with *Roe*, see 410 U. S., at 154-156. **[n.7]** To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions. See n. 4 *supra*; see *supra*, at 11 12. It is beyond me how the Court expects these accommodations to be accepted "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." *Ante*, at 23. The only principle the Court "adheres" to, it seems to me,

is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik*--and a wrong one at that.

I cannot agree with, indeed 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. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error filled history book that described the deeply divided country brought together by *Roe*. In my history book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott* v. *Sandford*, 19 How. 393 (1857), an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co.* v.*Parrish*, 300 U.S. 379 (1937), 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. (Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of "substantive due process" that the Court praises and employs today. Indeed, *Dred Scott* was "very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner* v. *New York* and *Roe* v. *Wade*." D. Currie, The Constitution in the Supreme Court 271 (1985) (footnotes omitted).)

But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Constitution has an evolving meaning, see *ante*, at 6; that the Ninth Amendment's reference to "othe[r]" rights is not a disclaimer, but a charter for action, *ibid.*; and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition--then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. We are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change--to show how little they intimidate us.

Of course, as the Chief Justice points out, we have been subjected to what the Court calls "political pressure" by *both* sides of this issue. *Ante*, at 21. Maybe today's decision *not* to overrule *Roe* will be seen as buckling to pressure from *that* direction. 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.

In truth, I am as distressed as the Court is--and expressed my distress several years ago, see *Webster*, 492 U. S., at 535--about the %political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," *ante*, at 7, which turns out to be nothing but philosophical predilection and moral intuition. All manner of "liberties," the Court tells us, inhere in the Constitution and are enforceable by this Court--not just those mentioned in the text or established in the traditions of our society. *Ante*, at 5-6. Why even the Ninth Amendment--which says only that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"--is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted at-rights," definable and enforceable by us, through "reasoned judgment." *Ante*, at 6-7.

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. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional

invocations and benedictions at public high school graduation ceremonies, *Lee* v. *Weisman*, 505 U. S. ___ (1992); if, as I say, our pronouncement of constitutional law rests primarily on 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 accidently 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, *ante*, at 22-23.

* * *

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "cal[l] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante*, at 24.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case--its already apparent consequences for the Court, and its soon to be played out consequences for the Nation--burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national

controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this case, than it was for him in that, to think that an issue of the sort they both involved--an issue involving life and death, freedom and subjugation--can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

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.

Notes

[1] The Court's suggestion, *ante*, at 5, that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted *by a text*--an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. See *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967) ("In the case at bar, . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); see also *id.*, at 13 (Stewart, J., concurring in judgment). The enterprise launched in *Roe*, by contrast, sought to *establish*--in the teeth of a clear, contrary tradition--a value found nowhere in the constitutional text.

There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention, *ante*, at 17, that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the

only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

[2] Justice Blackmun's parade of adjectives is similarly empty: Abortion is among "the most intimate and personal choices," *ante*, at 2-3; it is a matter "central to personal dignity and autonomy," *ibid.*; and it involves "personal decisions that profoundly affect bodily integrity, identity, and destiny," *ante*, at 6. Justice Stevens is not much less conclusory: The decision to choose abortion is a matter of "the highest privacy and the most personal nature," *ante*, at 5; it involves a "difficult choice having serious and personal consequences of major importance to [a woman's] future," *ibid.*; the authority to make this "traumatic and yet empowering decisio[n]" is "an element of basic human dignity," *ibid.*; and it is "nothing less than a matter of conscience," *ibid.*

[3] The joint opinion is clearly wrong in asserting, *ante*, at 32, that "the Court's early abortion cases adhered to" the "undue burden" standard. The passing use of that phrase in Justice Blackmun's opinion for the Court in *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976) (*Bellotti I*), was not by way of setting forth the *standard* of unconstitutionality, as Justice O'Connor's later opinions did, but by way of expressing the *conclusion* of unconstitutionality. Justice Powell for a time appeared to employ a variant of "undue burden" analysis in several non majority opinions, see, *e. g.*, *Bellotti* v. *Baird*, 443 U.S. 622, 647 (1979) (plurality opinion of Powell, J.) (*Bellotti II*); *Carey* v. *Population Services International*, 431 U.S. 678, 705 (1977) (Powell, J., concurring in part and concurring in judgment), but he too ultimately rejected that standard in his opinion for the Court in *Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 420, n. 1 (1983) (*Akron I*). The joint opinion's reliance on *Maher* v. *Roe*, 432 U.S. 464, 473 (1977), and *Harris* v. *McRae*, 448 U.S. 297, 314 (1980), is entirely misplaced, since those cases did not involve regulation of abortion but mere refusal to fund it. In any event, Justice O'Connor's earlier formulations have apparently now proved unsatisfactory to the three Justices, who--in the name of *stare decisis* no less--today find it necessary to devise an entirely new version of "undue burden" analysis, see *ante*, at 35.

[4] The joint opinion further asserts that a law imposing an undue burden on abortion decisions is not a "permissible" means of serving "legitimate" state interests. *Ante*, at 34-35. This description of the undue burden standard in terms more commonly associated with the rational basis test will come as a surprise even to those who have followed closely our wanderings in this forsaken wilderness. See, *e. g.*, *Akron I*, *supra*, at 463 (O'Connor, J., dissenting) ("The `undue burden' . . . represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions

under the exacting `compelling state interest' standard"); see also *Hodgson* v. *Minnesota*, 497 U.S. 417, ___ (1990) (O'Connor, J., concurring in part and concurring in judgment in part); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting). This confusing equation of the two standards is apparently designed to explain how one of the Justices who joined the plurality opinion in *Webster* v. *Reproductive Health Services*, 492 U.S. 490 (1989), which adopted the rational basis test, could join an opinion expressly adopting the undue burden test. See *id.*, at 520 (rejecting the view that abortion is a "fundamental right," instead inquiring whether a law regulating the woman's "liberty interest" in abortion is "reasonably designed" to further "legitimate" state ends). The same motive also apparently underlies the joint opinion's erroneous citation of the plurality opinion in *Ohio* v. *Akron Center for Reproductive Health*, 497 U.S. 502, ___ (1990) (*Akron II*) (opinion of Kennedy, J.), as applying the undue burden test. See *ante*, at 34 (using this citation to support the proposition that "two of us"--*i. e.*, two of the authors of the joint opinion--have previously applied this test). In fact, *Akron II* does not mention the undue burden standard until the conclusion of the opinion, when it states that the statute at issue "does not impose an undue, *or otherwise unconstitutional*, burden." 497 U. S., at 519 (emphasis added). I fail to see how anyone can think that saying a statute does not impose an unconstitutional burden under *any* standard, including the undue burden test, amounts to adopting the undue burden test as the *exclusive* standard. The Court's citation of *Hodgson* as reflecting Justice Kennedy's and Justice O'Connor's "shared premises," *ante*, at 35-36, is similarly inexplicable, since the word "undue" was never even used in the former's opinion in that case. I joined Justice Kennedy's opinions in both *Hodgson* and *Akron II*; I should be grateful, I suppose, that the joint opinion does not claim that I, too, have adopted the undue burden test.

5 Of course Justice O'Connor was correct in her former view. The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother, *ante*, at 28. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

[6] The joint opinion is not entirely faithful to this principle, however. In approving the District Court's factual findings with respect to the spousal notice provision, it relies extensively on non record materials, and in reliance upon them adds a number of factual conclusions of its own. *Ante*, at 49-52. Because this additional fact finding pertains to matters that surely are "subject to reasonable dispute," Fed. Rule Evid. 201(b), the joint opinion must be operating on the premise that these are "legislative" rather than "adjudicative" facts, see Rule 201(a). But if a court can find an undue burden simply by selectively string citing the right social science articles, I do not see the point of emphasizing or requiring "detailed factual findings" in the District Court.

[7] Justice Blackmun's effort to preserve as much of *Roe* as possible leads him to read the joint opinion as more "constan[t]" and "steadfast" than can be believed. He contends that the joint opinion's "undue burden" standard requires the application of strict scrutiny to "all non *de minimis*" abortion regulations, *ante*, at 5, but that could only be true if a "substantial obstacle," *ante*, at 34 (joint opinion), were the same thing as a non *de minimis* obstacle--which it plainly is not.

SUPREME COURT OF THE UNITED STATES

Nos. 91-744 and 91-902

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al., PETITIONERS 91-744 *v.* ROBERT P. CASEY, et al., etc. ROBERT P. CASEY, et al., etc., PETITIONERS 91-902

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 1992]

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.

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. [n.1] The central holding of *Roe* v.*Wade,* 410 U.S. 113 (1973), has been a "part of our law" for almost two decades. *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U.S. 52, 101 (1976) (Stevens, J., concurring in part and dissenting in part). It was a natural sequel to the protection of individual liberty established in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). See also *Carey* v. *Population Services Int'l*, 431 U.S. 678, 687, 702 (1977) (White, J., concurring in part and concurring in result). 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.

Stare decisis also provides a sufficient basis for my agreement with the joint opinion's reaffirmation of *Roe*'s post-viability analysis. Specifically, I accept the proposition that "[i]f 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." 410 U. S., at 163-164; see *ante*, at 36-37.

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." 410 U. S., at 156. After analyzing the usage of "person" in the Constitution, the Court concluded that that word "has application only postnatally." *Id.*, at 157. Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "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." *Id.*, at 162. Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection." *Id.*, at 159. From this holding, there was no dissent, see *id.*, at 173; 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." [n.2] This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

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, *ante*, at 33, 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, 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.

First, it is clear that, in order to be legitimate, the State's interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest. See *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring); see generally *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 563-572 (1989) (Stevens, J., concurring in part and dissenting in part). Moreover, as discussed above, the state interest in potential human life is not an interest *in loco parentis*, for the fetus is not a person.

Identifying the State's interests--which the States rarely articulate with any precision--makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more than a million abortions each year is intolerable; many find third trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense. The State may also have a broader interest in expanding the population, [n.3] believing society would benefit from the services of additional productive citizens--or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life.

In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person. See *e. g., Rochin* v. *California*, 342 U.S. 165 (1952); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). This right is neutral on the question of abortion: The Constitution would be equally offended by an absolute requirement that all women undergo abortions as by an absolute prohibition on abortions. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969). The same holds true for the power to control women's bodies.

The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. Cf. *Whalen* v. *Roe*, 409 U.S. 589, 598-600 (1977). A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future--perhaps to the salvation of her own immortal soul." *Thornburgh*, 476 U. S., at 781. The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.

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." *Ante*, at 30. Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." *Ante*, at 36. 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.

This theme runs throughout our decisions concerning reproductive freedom. In general, *Roe*'s requirement that restrictions on abortions before viability be justified by the State's interest in *maternal* health has prevented States from interjecting regulations designed to influence a woman's decision. Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. We have, for example, upheld regulations requiring written informed consent, see *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U.S. 52 (1976); limited recordkeeping and reporting, see *ibid.*; and pathology reports, see *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft,* 462 U.S. 476 (1983); as well as various licensing and qualification provisions, see *e. g., Roe*, 410 U. S., at 150; *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983). Conversely, we have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, see *Bigelow* v.*Virginia*, 421 U.S. 809 (1975), or by "requir[ing] the delivery of information designed `to influence the woman's informed choice between abortion or childbirth.'

" *Thornburgh*, 476 U. S., at 760; see also *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 442-449 (1983).

In my opinion, the principles established in this long line of cases and the wisdom reflected in Justice Powell's opinion for the Court in *Akron* (and followed by the Court just six years ago in *Thornburgh*) should govern our decision today. Under these principles, §§ 3205(a)(2)(i) (iii) of the Pennsylvania statute 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 State is free, pursuant to § 3208 of the Pennsylvania law, to produce and disseminate such material, the State may not inject such information into the woman's deliberations just as she is weighing such an important choice.

Under this same analysis, §§ 3205(a)(1)(i) and (iii) of the Pennsylvania statute 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 State to influence the woman's choice in any way. If anything, such requirements *enhance*, rather than skew, the woman's decision making.

The 24-hour waiting period required by §§ 3205(a)(1) (2) of the Pennsylvania statute raises even more serious concerns. Such a requirement arguably furthers the State'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 State'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 State 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 State'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 decision making capacity of women. While there are well established and consistently maintained reasons for the State to view with skepticism the ability of minors to make decisions, see *Hodgson* v. *Minnesota*, 497 U.S. 417, 449 (1990), [n.4] none of those reasons applies

to an adult woman's decision making ability. Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, see *ante*, at 54-57, so we must reject the notion that a woman is less capable of deciding matters of gravity. Cf. *Reed* v. *Reed*, 404 U.S. 71 (1971).

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. Those who disagree vehemently about the legality and morality of abortion agree about one thing: The decision to terminate a pregnancy is profound and difficult. 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. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion. **[n.5]**

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.

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. **[n.6]**

The 24-hour delay requirement fails both parts of this test. The findings of the District Court establish the severity of the burden that the 24-hour delay imposes on many pregnant women. Yet even in those cases in which the delay is not especially onerous, it is, in my opinion, "undue" because there is no evidence that such a delay serves a useful and legitimate purpose. As indicated above, there is no legitimate reason to require a woman who has agonized over her decision to leave the clinic or hospital and return again another day. While a general requirement that a physician notify her patients about the risks of a proposed medical procedure is appropriate, a rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, "undue" burden.

The counseling provisions are similarly infirm. Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate. In this case, the Pennsylvania statute directs that counselors provide women seeking abortions with information concerning alternatives to abortion, the availability of medical assistance benefits, and the possibility of child support payments. §§ 3205(a)(2)(i) (iii). The statute requires that this information be given to *all* women seeking abortions, including those for whom such information is clearly useless, such as those who are married, those who have undergone the procedure in the past and are fully aware of the options, and those who are fully convinced that abortion is their only reasonable option. Moreover, the statute requires physicians to inform all of their patients of "the probable gestational age of the unborn child." § 3205(a)(1)(ii). This information is of little decisional value in most cases, because 90% of all abortions are performed during the first trimester [n.7] when fetal age has less relevance than when the fetus nears viability. Nor can the information required by the statute be justified as relevant to any "philosophic" or "social" argument, *ante*, at 30, either favoring or disfavoring the abortion decision in a particular case. In light of all of these facts, I conclude that the information requirements in § 3205(a)(1)(ii) and §§ 3205(a)(2)(i) (iii) do not serve a useful purpose and thus constitute an unnecessary--and therefore undue--burden on the woman's constitutional liberty to decide to terminate her pregnancy.

Accordingly, while I disagree with Parts IV, V B, and V D of the joint opinion, [n.8] I join the remainder of the Court's opinion.

Notes

[1] It is sometimes useful to view the issue of *stare decisis* from a historical perspective. In the last nineteen years, fifteen Justices have confronted the basic issue presented in *Roe.* Of those, eleven 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.

[2] Professor Dworkin has made this comment on the issue :

"The suggestion that states are free to declare a fetus a person. . . . assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional

rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others.

"If a state could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment's guarantee of free speech, which could not be understood as a license to kill. . . .Once we understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women." Dworkin, Unenumerated Rights: Whether and How *Roe* Should be Overruled, 59 U. Chi. L. Rev. 381, 400-401 (1992).

[3] The state interest in protecting potential life may be compared to the state interest in protecting those who seek to immigrate to this country. A contemporary example is provided by the Haitians who have risked the perils of the sea in a desperate attempt to become "persons" protected by our laws. Humanitarian and practical concerns would support a state policy allowing those persons unrestricted entry; countervailing interests in population control support a policy of limiting the entry of these potential citizens. While the state interest in population control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman's liberty interest. Thus, a state interest in population control could not justify a state imposed limit on family size or, for that matter, state mandated abortions.

[4] As we noted in that opinion, the State's "legitimate interest in protecting minor women from their own immaturity" distinguished that case from *Akron* which involved "a provision that required mature women, capable of consenting to an abortion, [to] wait 24 hours after giving consent before undergoing an abortion." *Hodgson,* 497 U. S., at 449, n. 35.

[5] The joint opinion's reliance on the indirect effects of the regulation of constitutionally protected activity, see *ante*, 31-32, is misplaced; what matters is not only the effect of a regulation but also the reason for the regulation. As I explained in *Hodgson*:

"In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the constitutionally protected

interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders, *Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969), or deny prisoners the right to marry, *Turner* v. *Safley*, 482 U.S. 78, 94-99 (1987). But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. Cf. *Turner* v. *Safley*, *supra*; *Loving* v. *Virginia*, 388 U.S. 1 (1967). In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize non therapeutic abortions for minors or adults. See, e. g., *Maher* v. *Roe*, 432 U.S. 464 (1977); cf. *Webster* v. *Reproductive Health Services*, 492 U.S. 490, 508-511 (1989) (plurality opinion); *id.*, at 523-524 (O'Connor, J., concurring in part and concurring in judgment). A State's value judgment favoring childbirth over abortion may provide adequate support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing `obstacles--absolute or otherwise--in the pregnant woman's path to an abortion.' " *Hodgson*, 497 U. S., at 435.

[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*, at 11-12 (opinion of Scalia, J.), and the attempt to give it crystal clarity in the joint opinion. The several opinions supporting the judgment in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), are less illuminating than the central holding of the case, which appears to have passed the test of time. The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.

[7] U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 71 (111th ed. 1991).

[8] Although I agree that a parental consent requirement (with the appropriate bypass) is constitutional, I do not join Part V D of the joint opinion because its approval of Pennsylvania's

informed parental consent requirement is based on the reasons given in Part V B, with which I disagree.