

HB

292

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MEMORANDUM

DATE: February 11, 2004
TO: House Judiciary Committee
FROM: carolyn V. Brown
SUBJECT: Hearing – House Bill 292

Having read through HB 292 and considered its contents for legislation that might address the issues of women's reproductive health, pregnancy, abortion, and contraception, I have attached questions and comments for your consideration as you deliberate these concerns for women.

Please let me know if I can answer questions or provide additional information or evidence-based support for your discussions. There is ample evidence-based medicine information to support our discussion with you all.

Thank you for these considerations.

House Bill 292

Questions and Considerations

- The bill speaks of pregnant women, abortion, contraception, full term pregnancy, and informed consent. What is the bill actually addressing? Please clarify for the public in Alaska.
- The bill appears to be discriminatory in that the informed consent mandated for women who elect abortions is not also mandated for all pregnant women. It has been my professional experience as an obstetrician-gynecologist of some 40 years in practice that there are women who anticipate carrying a pregnancy to term and elect a different

plan when they understand the risks/benefits of that decision. There are women who anticipate an abortion but elect a different plan when they understand the risks/benefits. Please be clear on equality for all pregnant women or change the language of the legislation. Women deserve this.

- The state indicates an interest in protecting the life and health of pregnant women. Does health include both physical and mental health in Alaska? Please clarify.
- In as much as the information about obstetrics is extremely dynamic (not static), a one-time web site will not suffice or be accurate. How will the intervals of update be established? Who will pay for this? Who will the ongoing experts be to provide protection of the public's health?
- Any language that proposes information must include the risks/benefits and potential consequences of full term pregnancy. How will this be assured? We know that full term pregnancy carries a far greater risk to death and morbidity to women than does an abortion. If you need more information on this, please let me know.
- Please clarify for Alaskans just what is "judicial economy and resources".
- Please clarify for Alaskans just what has been the "costly and undue litigation". Where has the money gone? Data is invaluable in decision - making.
- If information is to be provided, virtually ever practice, site, agency, service, clinic, individual, and facility would be required to be listed on the web site. Who will keep up with this "dynamic" (and it will be dynamic) so that Alaskan women have the information intended in the legislation?
- If all agencies, services, clinics, and facilities that provide contraceptive options (and how did that get here?), that would - of course include all pharmacies and outlets where condoms and spermicides are provided. Is the web site prepared to deal with this in a responsible way for appropriate patient care? Who will do this work? Who will pay for this?
- It would seem appropriate and prudent to use correct terminology when dealing with health and medical issues. Philosophical and personal

definitions have no place in legislation. There are enormous differences among definitions for embryo, blastocyst, propositus, fetus, and child. Use of correct terminology in the development of parlance is appropriate for Alaska legislation.

- Would suggest that the language of the "sperm donor" for the pregnancy be changed to "the male involved with the pregnancy" or "sperm donor". Please call it what it is. We do "anonymize" the woman involved with "pregnant women (female)", don't we?
- How long will it take to view this information on the internet? There is a limit to just how much the average person can take in addresses, names, pictures, disclaimers, printed forms, and a detailed presentation of risks/benefits in the midst of a pregnancy that may be wanted or unwanted. Please – come, let us be fair...
- At what reading level will this information be? Who will provide the oversight? At what cost to the state of Alaska?
- Would this law mandate that all physicians' offices where pregnancy termination is done must be registered? What are the criteria? What are the medical and surgical mandates? Who will oversee this?
- What is the reason for the 30 day waiting period? It is clear that there are more risks as pregnancy continues – both for abortion and for pregnancy to term. What is the reason for this mandate? This makes no practical sense to physicians who provide care for women.
- Who will pay for this paper work, forms to be printed, record keeping, transmission and update of the web site?
- All pregnant women need informed consent – whether they elect abortion or carry a pregnancy to term. To do otherwise is to discriminate. Women must have informed, accurate, scientific and appropriate information.



GREGG D. RENKES
ATTORNEY GENERAL OF ALASKA

February 11, 2004

The Honorable Lesil McGuire
Chair, House Judiciary Committee
Alaska Legislature
State Capitol - Room 118
Juneau, AK 99801-1182

The Honorable Tom Anderson
Vice-Chair, House Judiciary Committee
Alaska State Legislature
State Capitol - Room 432
Juneau, AK 99801-1182

Re: Legal Analysis of CS HB 292(HES)

Dear Representatives McGuire and Anderson:

CS HB 292(HES) proposes to establish particular information, to be prepared by the Department of Health and Social Services (DHSS), to be provided to a patient that is seeking an abortion. The bill further proposes that a physician who fails to obtain the "informed consent" of a patient prior to providing abortion services is liable for both compensatory and punitive damages. Finally, the bill seeks to establish a 24-hour waiting period from the time the patient is provided the information to the time that a patient may receive the abortion.

This is well intentioned and necessary legislation that attempts to address the State's compelling interest in ensuring that no abortion is performed in our state without informed consent. However, as proposed, this bill will likely not survive a constitutional challenge under the privacy provision of the Alaska Constitution, Art. I, Sec. 22 and the equal protection provision of the Alaska Constitution, Art. I, Sec. 1.

We provide the following background and suggested changes in an effort to assist your committee in preparing a bill that will survive constitutional challenge. Alaska's courts have consistently found our constitution provides greater protections than the

federal constitution or those of many other states. See e.g., *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997), *State v. Planned Parenthood*, 28 P.3d 904 (Alaska 2001), *State v. Planned Parenthood*, 35 P.3d 30 (Alaska 2001). This is critical to understanding how our courts would address legislation that would purport to restrict abortion rights. In *Valley Hospital Association v. Mat-Su Coalition, infra*, the Alaska Supreme Court explicitly rejected the lessening of protections of the right to an abortion that were articulated in the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Instead, the Alaska Supreme Court established a test similar to that expressed in *Roe v. Wade*, 410 U.S. 113 (1973), affirming the right to an abortion as a fundamental right that can be legally constrained only when the constraints are justified by a compelling state interest and no less restrictive means could advance this interest. The challenge faced by the proposed legislation is that the application of this test to specified information requirements, a 24-hour waiting period, and the physician liability provision could result in a determination that one or more of these provisions are unconstitutional if they employ excessive means to accomplish the ends of assuring that a patient is informed and has given her consent before receiving an abortion. Any evaluation of whether the least restrictive means are being employed is necessarily subjective. What we provide is our best guess at how the court might read the provisions included in the proposed bill. In our view, the bill as presently written raises the following potential legal problems:

Section 1 (Legislative Findings): The Senate sponsors of the bill drafted legislative findings to help establish the status of "compelling interest" in legislating in this area. The House substitute of the bill refined those findings. Although, the findings do not have any legal effect, they do outline the purpose of the legislation. The one problem with this section is found on page 2, lines 9 and 10. The findings mention the availability of immunity for physicians who use the information on the Internet site outlined in Section 2 of the bill. However, there is no corresponding immunity language in the bill. If there is a desire to provide for immunity, then that should be clearly set forth in the body of the bill.

Section 2 (The contents of the pamphlet): Section 2 of the bill provides the substances of what should be included in the pamphlet developed by DHSS. The following are legal issues that we believe would be raised in a challenge to the bill.

Page 2, line 31 and page 3, lines 1-4 (eligibility for public benefits): Under *Karlin v. Faust*, 975 F. Supp. 1177 (W.D. Wisc. 1997) (aff'd 188 F.3d 446 (7th Cir. 1999)), rehearing and rehearing en banc denied, 198 F.3d 620 (7th Cir. 1999), the court held that it was not constitutional to require this type of information to be provided to women who were pregnant as a result of rape or incest, since such information would likely cause

psychological harm and serve no medical purpose. Therefore at a minimum, changes should be made for those circumstances where the pregnancy is the result of rape or incest, where a woman is carrying a child with a lethal anomaly, or where the information would serve no legitimate purpose.

Page 3, lines 7-9 (child support): Although the policy of the State of Alaska may be that fathers are liable for child support, there are legal issues with respect to the establishment of paternity and support orders in civil actions. This statement may lead a woman to believe that she will indeed get child support and it is not always that easy. Thus, we recommend that the reference to child support by fathers be changed to more fully describe the processes available for establishing paternity and liability for child support.

Page 3, lines 11-21 (photos of unborn children in two-week gestational increments): Although tailored to be unbiased and accurate, the graphic nature of such photos may be found burdensome or used to create an undue interference in a woman's right to make a reproductive choice. As articulated in the pamphlet, there would be at least 18 photos of "unborn children" in two-week gestational increments, along with other information, such as viability. The photos would comprise a large portion, if not most of the pamphlet itself. Any legal challenge brought would argue that the pictures were not intended to provide information but to shock and burden a woman's reproductive choice. This argument would most likely state that these pictures were not in proportion to the remainder of the pamphlet. Based upon the recent decisions by the Alaska Supreme Court, this argument would be difficult to overcome and therefore we recommend that some attention be given to the make up of the pamphlet as a whole and the proportion of the pamphlet that includes pictures.

Page 3, lines 22-31 and page 4, lines 1-9 (information regarding risks and benefits of abortion, carrying to term and contraceptives): Despite requiring the submission of information in an objective, unbiased way, these three provisions might be found to be unconstitutionally vague. Specifically, by using both the pamphlet for the purpose of providing information that would be considered informed consent, there is also an express provision in the bill that is entitled informed consent. However, the two provisions do not require the same information. Therefore, a legal challenge would be that a physician who was trying to comply with the legal requirement could not be sure whether they were in compliance or were violating the law. A similar problem arises with respect to the liability provision. Since there is different information being imparted, a physician would not know when they would be liable under the bill.

Since some of the specific information requirements will likely be found unconstitutional in their application to certain circumstances, the clear application of the law is going to be compromised. Even with the severability provision included in this bill, a physician will face potential civil liability for guessing incorrectly about which information is required or whether some information can be omitted because it serves no medical purpose. Generally, physicians are required, both by sound medical practice and by their malpractice insurance providers, to assure that informed consent is obtained from their patients. They are also required to obtain informed consent under AS 09.55.556. To the extent that there is reasonable confusion about the specific information requirements, the civil liability provision is likely to have a chilling effect on the availability of abortions.

Sections 3 and 4 (Require informed consent from abortion and provide for civil liability for the failure to obtain informed consent): It should be noted that the court in *Valley Hospital Association v. Mat-Su Coalition* explicitly found AS 18.16.010(b) to be unconstitutional to the extent it applies to quasi-public institutions. In addition, the parental consent provision and judicial bypass provision were found to be unconstitutional by the superior court in Anchorage. See *Planned Parenthood of Alaska v. State*, 3AN-97-6014 CI (decision on remand from 35 P.3d 30 (Alaska 2001)). To the extent that the above issues are corrected, and the changes to Section 2 of the bill are addressed, the amendment proposed in Section 3 is not problematic.

Section 4 has two problems. First, this is the section that purports to provide immunity from civil liability; however, in the committee substitute there is no mention of immunity. Second, this section appears to impose a 24-hour waiting period. This requirement could be challenged on equal protection grounds. Specifically, the argument would be that the equal protection rights of women are violated because only abortion requires a specific level of informed consent not any other procedure. Although there is a general informed consent provision under Title 9, there is no other informed consent provision in state law that deals with other specific types of medical procedures. In addition, since abortion is a medical procedure only sought by women, the argument would be that in so legislating, we would be violating women's equal protection rights. In addition, under this section there would be a required 24-hour waiting period. Therefore, abortion would be the only medical procedure that had a 24-hour waiting requirement. To survive an equal protection challenge the state would have to show that the 24-hour waiting period was justified by a compelling state interest and no less restrictive means could advance that interest.

In addition, there could be problems with this waiting period because of the rural nature of Alaska. Many women who would seek an abortion will have to travel

from rural communities at great expense. Depending upon how it is implemented a 24-hour waiting requirement could result in time and expense to these women and may result in delays. Under these circumstances a 24-hour delay may not meet the requirement of being the least restrictive means to accomplish the purpose of assuring a woman is informed and has consented to an abortion.

Section 5 (Informed consent requirements): There are four problems with this section. The first relates to the requirement from which informed consent is required. As noted previously, parental consent and judicial bypass provisions have been found unconstitutional by the superior court as recently as August of 2003, although we are arguing for appeal to overturn this ruling. There are also express prohibitions under Title 13 stating that a guardian does not have the authority to consent to an abortion for a ward. Therefore, these sections are either unconstitutional or do not accurately state the law.

The second problem is the 24-hour waiting period, which was discussed above. The same concerns and legal issues arise with the existence of the 24-hour waiting period in this section as do in Section 4. However, there is one change to this section that was not stated in the previous section. Specifically, this section allows for the distribution of the information required under this section or on the Internet to be done by mail, telephone or by facsimile. The availability of these options would provide a defense to the legal arguments that would be raised with respect to the 24-hour waiting period. However, it is not clear whether these options would satisfy the court with respect to the equal protection challenges raised. In addition, these options should be clearly stated so as to apply to any 24-hour waiting requirement in the bill.

The third problem with this section is the provision that authorizes that these protections are not required in a medical emergency. The definition of medical emergency will be challenged as being vague. For example, it does not address the ability to dispense with the formalities in order to avoid a medical emergency. In fact, if the definition is not met, one must wait for a medical emergency to manifest before obtaining an abortion, thereby putting the mother's life in jeopardy. This will be challenged, and it is difficult to predict the success of such a challenge; however, it should be noted that almost identical language was found unconstitutional by the superior court in the parental consent and judicial bypass bill litigation currently being appealed by the state.

The final problem is the same as stated with respect to Section 2 of the bill and the vagueness on what actually constitutes informed consent so that a physician would clearly know what information was required to be dispensed to meet the requirements of the bill. Since this section purports to require different information than that outlined in

Hon. Lesil McGuire, Chair
Hon. Tom Anderson, Vice-Chair
House Judiciary Committee

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the pamphlet, there are vagueness arguments that could be raised and which need to be addressed.

In summary, it is most likely that if this bill passes, a legal challenge will be brought. In light of the foregoing analysis, you see there remain a number of legal problems with the bill that need to be addressed in order to defend any lawsuit that would be filed. We stand ready to assist you in drafting an informed consent bill that will accomplish the critically important objectives pursued by the sponsors of this legislation while at the same time having the best possible chance of surviving judicial scrutiny.

Sincerely,



Gregg D. Renkes
Attorney General

23-LS0867/S
Mischel
2/5/04

CS FOR HOUSE BILL NO. 292(JUD)

**IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - SECOND SESSION**

BY THE HOUSE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): REPRESENTATIVES DAHLSTROM, Lynn, Coghill, Wilson, Scaton, Gatto

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to information and services available to pregnant women and other
2 persons; and ensuring informed consent before an abortion may be performed, except in
3 cases of medical emergency."

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section
6 to read:

7 **LEGISLATIVE FINDINGS.** The legislature finds that

8 (1) duties of the state include regulating medical practice and fostering the
9 development of standards of professional conduct;

10 (2) the state is interested in protecting the life and health of pregnant women;

11 (3) women have a right to know the medical risks associated with their
12 reproductive options.

13 * **Sec. 2.** AS 18.05 is amended by adding a new section to read:

14 **Sec. 18.05.032. Information relating to pregnancy and pregnancy**

*maintain at the time
in the future
printable*

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alternatives. (a) The department shall produce, in printable form, standard information that

(1) contains geographically indexed material designed to inform a person of public and private agencies and services that are available to assist a pregnant woman with the woman's reproductive choices; the department should include information about at least the following types of agencies and services:

(A) agencies, services, clinics, and facilities designed to assist a woman through pregnancy, including adoption agencies and counseling services;

(B) agencies, services, clinics, and facilities that provide abortion options and counseling and post-abortion counseling and services; and

(C) agencies, services, clinics, and facilities designed to assist with or provide contraceptive options and counseling to help prevent future unwanted pregnancies;

(2) includes a comprehensive regional directory of the agencies and clinics identified by the department under (1) of this subsection, a description of the services they offer, and the manner in which the agencies and clinics may be contacted, including telephone numbers;

(3) provides information concerning the circumstantial criteria for the availability of medical assistance benefits for prenatal care, childbirth, and neonatal care, the circumstantial criteria for the availability of medical assistance benefits for abortion services, and the circumstantial criteria for the availability of medical assistance benefits for contraception;

(4) states that informed and voluntary consent is required under AS 18.16.060 for an abortion;

(5) states that the father of a child is liable to assist in the support of the child even in instances where the father has offered to pay for an abortion, and that the law permits adoptive parents to pay costs of prenatal care, childbirth, and neonatal care;

(6) describes the fetal development of a typical unborn child at two-week gestational increments from fertilization to full-term, including photographs

1 depicting the anatomical characteristics of a typical unborn child at two-week
2 gestational increments, and relevant information about the possibility of an unborn
3 child's survival at the various gestational ages; the fetal dimensions in the photographs
4 must be accurately represented and shall be realistic and appropriate for the woman's
5 state of pregnancy; the information must be objective, nonjudgmental information that
6 is reviewed and approved for medical accuracy and appropriateness by recognized
7 obstetrics and gynecological specialists designated by the department and designed to
8 convey only accurate scientific information about unborn children at various
9 gestational ages;

10 (7) contains objective, unbiased information that is reviewed and
11 approved for medical accuracy and appropriateness by recognized obstetrics and
12 gynecological specialists designated by the department and that describes the methods
13 of abortion procedures and treatments commonly employed and the medical risks and
14 possible complications commonly associated with each procedure and treatment, as
15 well as the possible psychological effects that have been associated with having an
16 abortion;

17 (8) contains objective, unbiased information that is reviewed and
18 approved for medical accuracy and appropriateness by recognized obstetrics and
19 gynecological specialists designated by the department and describing the possible
20 medical risks and complications commonly associated with pregnancy and childbirth,
21 as well as the possible psychological effects that have been associated with carrying a
22 child to term.

23 (b) The information required under (a) of this section must be written in easily
24 comprehensible language and must be displayed in a typeface that is large enough to
25 be clearly legible.

26 (c) In this section,

27 (1) "fertilization" means the fusion of a human spermatozoon with a
28 human ovum;

29 (2) "gestational age" means the age of the unborn child as calculated
30 from the first day of the last menstrual period of a pregnant woman;

31 (3) "informed consent" is consent that would be considered voluntary

1 and informed under AS 18.16.060(b);

2 (4) "unborn child" means the offspring of a human being in utero at
3 various stages of biological development.

4 * Sec. 3. AS 18.16.010(a) is amended to read:

5 (a) An abortion may not be performed in this state unless

6 (1) the abortion is performed by a physician or surgeon licensed by the
7 State Medical Board under AS 08.64.200;

8 (2) the abortion is performed in a hospital or other facility approved for
9 the purpose by the Department of Health and Social Services or a hospital operated by
10 the federal government or an agency of the federal government;

11 (3) before an abortion is knowingly performed or induced on an
12 unmarried, unemancipated woman under 17 years of age, consent has been given as
13 required under AS 18.16.020 or a court has authorized the minor to consent to the
14 abortion under AS 18.16.030 and the minor consents; for purposes of enforcing this
15 paragraph, there is a rebuttable presumption that a woman who is unmarried and under
16 17 years of age is unemancipated; [AND]

17 (4) the woman is domiciled or physically present in the state for 30
18 days before the abortion; and

19 (5) the applicable requirements of AS 18.16.060 have been
20 satisfied.

21 * Sec. 4. AS 18.16 is amended by adding a new section to read:

22 **Sec. 18.16.060. Informed consent requirements.** (a) Except in the case of a
23 medical emergency, a person may not knowingly perform or induce an abortion
24 without the voluntary and informed consent of

25 (1) a woman on whom an abortion is to be performed or induced;

26 (2) the parent, guardian, or custodian of a pregnant, unemancipated
27 minor if required under AS 18.16.020;

28 (3) a pregnant, unemancipated minor if authorized by a court under
29 AS 18.60.030; or

30 (4) the parent or guardian of a pregnant woman legally determined to
31 be mentally incompetent.

1 (b) Consent to an abortion is voluntary and informed when all of the following
2 are true:

3 (1) at least 24 hours before the abortion procedure, the physician who
4 is to perform the abortion, a member of the physician's staff who is a licensed health
5 care provider, or the referring physician has verbally informed the woman or another
6 person whose consent is required of the

7 (A) name of the physician who will perform the procedure;

8 (B) gestational estimation of the pregnancy at the time the
9 abortion is to be performed;

10 (C) nature and risks of undergoing or not undergoing the
11 proposed procedure that a reasonable patient would consider material to
12 making a voluntary and informed decision of whether to undergo the
13 procedure; and

14 (D) availability of the information required to be produced
15 under AS 18.05.032; the requirement of this subparagraph may also be
16 satisfied by a member of the physician's staff who is a licensed health care
17 provider performing the required activities if the licensed person offers the
18 person an opportunity to consult a physician; and

19 (2) before the abortion, the woman or another person whose consent is
20 required certifies in writing that the information required to be given under (1) of this
21 subsection has been provided.

22 (c) The information required in (b)(1)(A) - (C) of this section shall be
23 provided individually and in a private setting to protect privacy, maintain the
24 confidentiality of the decision, ensure that the information focuses on the individual
25 circumstances, and ensure an adequate opportunity to ask questions. Provision of the
26 information telephonically or by electronic mail or regular mail at least 24 hours
27 before the person's appointment satisfies the requirements of this subsection as long as
28 the person whose consent is required under (a) of this section has an opportunity to ask
29 questions after receiving the information.

30 (d) In this section, "medical emergency" means a condition that, on the basis
31 of a physician's good faith clinical judgment, so complicates the medical condition of

1 a pregnant woman that

2 (1) the immediate termination of the woman's pregnancy is necessary
3 to avert the woman's death; or

4 (2) a delay in providing an abortion will create serious risk of
5 substantial and irreversible impairment of a major bodily function of the woman.

6 * Sec. 5. AS 18.50.245(e) is amended to read:

7 (e) The state registrar shall adopt regulations to implement this section. The
8 regulations that establish the information that will be required in a report of an induced
9 termination of pregnancy

10 (1) must require information substantially similar to the information
11 required under the United States Standard Report of Induced Termination of
12 Pregnancy, as published by the National Center for Health Statistics, Centers for
13 Disease Control and Prevention, United States Department of Health and Human
14 Services, in April 1998, as part of DHHS Publication No. (PHS) 98-1117;

15 (2) must require, if known, whether the unidentified patient
16 requested and received a written copy of the information required to be
17 produced under AS 18.05.032; and

18 (3) may not include provisions that would violate a woman's
19 privacy by requiring the woman's name or any identifying information in the
20 report.

21 * Sec. 6. The uncodified law of the State of Alaska is amended by adding a new section to
22 read:

23 SEVERABILITY. Under AS 01.10.030, the provisions of this Act are severable.

LEGISLATIVE RESEARCH REPORT

FEBRUARY 4, 2004



REPORT NUMBER 04.093

ABORTION LAWS IN THE UNITED STATES AND ALASKA

PREPARED FOR REPRESENTATIVE LESIL MCGUIRE

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

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You asked for information concerning abortion laws. Specifically, you asked for a summary of abortion laws in the United States and a summary of the current abortion laws in Alaska. You also asked that we include any noteworthy court cases in our summaries.

ABORTION LAWS IN THE UNITED STATES

In response to your request, we attach two resources from the website of the Henry J. Kaiser Family Foundation.¹ One of the resources, which we include as Attachment A, is an *Issue Update* entitled "Abortion Policy and Politics." This update provides a history of abortion laws in the United States, a summary of the nine most important U.S. Supreme Court cases regarding abortion, and an overview of current abortion policies in the U.S. The other resource, which we include as Attachment B, is a Fact Sheet that provides abortion related statistics in the U.S.

We also include a more comprehensive summary of significant United States Supreme Court decisions regarding abortion in the United States. This document, compiled by NARAL,

¹ The Henry J. Kaiser Family Foundation is a private non-profit foundation that focuses on the major health care issues facing the United States. The URL for the Henry J. Kaiser Family Foundation is www.kff.org/.

summarizes 36 of the most significant United States Supreme Court decisions that have impacted abortion laws in the United States.² We include NARAL's list as Attachment C.

We include two cases, the seminal *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992), cited by both the Henry J. Kaiser Family Foundation and by NARAL as playing a significant role in the evolution of abortion law in the U.S.³

In *Roe v. Wade*, which we include as Attachment D, the court ruled that the fundamental right to privacy extends to a woman's decision whether or not to have an abortion. In *Planned Parenthood of Southern Pennsylvania v. Casey*, which we include as Attachment E, the court upheld several restrictions to abortion. These restrictions include a 24-hour waiting period (sometimes referred to as mandatory delay) and specific counseling requirements, provisions similar to elements contained in Senate Bill 30 and House Bill 292 that are currently before the Alaska State Legislature. According to the Henry J. Kaiser Family Foundation, *Planned Parenthood of Southern Pennsylvania v. Casey* is the most important abortion ruling since 1973.

As an additional resource, we located an article in *The Journal of the American Medical Association* that analyzes the impact of Mississippi's 1992 mandatory delay law on abortions and births. We include "The Impact of Mississippi's Mandatory Delay Law on Abortions and Births" as Attachment F.

ABORTION LAWS IN ALASKA

Alaska lawmakers first legalized abortion in 1970 (Chapter 103 SLA 1970), three years prior to the two U.S. Supreme Court decisions that made abortions legal under certain conditions in the United States, *Roe v. Wade* and *Doe v. Bolton*. Alaska Statute 18.16 sets forth the conditions under which abortions may occur in Alaska. Alaska Statute 8.64.105 assigns the Alaska State Medical Board the responsibility of adopting regulations necessary to carry into effect the provisions of the law (AS 18.16), as well as defining ethical, unprofessional, or dishonorable conduct related to abortions, setting standards of professional competency in the performance of abortions, and establishing procedures and standards for facilities, equipment, and care of patients in the performance of an abortion. Over the years there have been challenges to various aspects of Alaska's abortion laws and regulations. These challenges can be categorized into areas related to state constitutional protection, abortion procedures, mandatory hospitalization, physician-only restrictions, public funding, refusal clause, and minors' access to abortion. We provide a summary of each of these categories, with relevant court cases, as follows.

State Constitutional Protection: The right to privacy guaranteed under Article 1, Section 22 of the Alaska Constitution protects a women's right to reproductive choice as a fundamental right, and to a greater extent than does the U.S. Constitution. In 1997, the Alaska Supreme Court

² The NARAL Pro-Choice America (formerly The National Abortion and Reproductive Rights Action League) is the political arm of the pro-choice movement and an advocate of reproductive freedom and choice. The URL for the NARAL is www.naral.org. We also queried the websites of several pro-life organizations; however, none of these organizations compile such information.

³ If you would like copies of any of the other court decision noted by the Henry J. Kaiser Family Foundation or NARAL, please let us know.

struck down a "quasi-public" hospital's policy that barred abortion procedures at the facility. This decision also declared a state statute immunizing persons and hospitals from liability for refusing to participate in abortion invalid as applied to "quasi-public" institutions (*Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963, 1997).

Ban on Abortion Procedures: The superior court held that Alaska's ban on abortion procedures (AS 18.16.050, Partial-birth Abortions) is "vague and imprecise" and therefore unconstitutional under the state constitution. The court issued a permanent injunction prohibiting enforcement of the law (*Planned Parenthood of Alaska, Inc. v. State*, No. 3AN-97 6019 CIV (Alaska Superior Court, March 13, 1998). An appeal was withdrawn (No. S-08610, July 17, 2000).⁴

Mandatory Hospitalization: Alaska Statute 18.16.010 requires that all abortions must be performed in a hospital, in a facility approved for that purpose by the state, or in a hospital operated by the federal government or one of its agencies. Regulations further state that ambulatory surgical facilities (the only non-hospital facilities receiving state-approval to perform abortions) may not perform abortions after the first trimester, affectively requiring that post-first trimester abortions be performed in a hospital.⁵

In 1981, the Alaska Attorney General concluded that the requirement that all abortions be performed in a hospital or other approved facility is invalid since it does not exclude the first trimester of pregnancy (Opinion of the Attorney General, No. J-66-816-81, October 7, 1981, citing *Sendak v. Arnold*, 429 U.S. 968, 1976). In 1984, the Alaska Attorney General further stated that the regulation of other aspects of first trimester abortions is "obviously problematic" (Opinion of the Attorney General, No. 366-028-85, July 24, 1984).

Physician-Only Restriction: Alaska Statute 18.16.010 requires that only a physician or surgeon licensed by the state may perform an abortion. In 1976, the Alaska Attorney General issued an opinion stating that this law is constitutional (Informal Opinion of the Attorney General, Oct. 21, 1976).

Public Funding: Alaska Administrative Code 7.47.200(a) and 7.47.210(a) define the circumstances under which women eligible for state medical assistance for general health care may obtain an abortion. In 2001, the Alaska Supreme Court found the regulation that limited state medical assistance for abortions to cases of life endangerment, rape, or incest to be in violation of the state constitution. The Court issued a permanent injunction prohibiting its enforcement (*State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, Alaska 2001).⁶

In 2002, the Alaska Legislature enacted a FY2003 budget bill that did not provide any state funds for medical assistance to pay for abortions that were not considered a mandatory service under federal law (federal law mandates Medicaid abortion coverage in cases of life endangerment, rape, or incest). The superior court issued an order finding that this budget restriction is without

⁴ The State withdrew its appeal of the superior court's decision following the decision in *Stenberg v. Carhart*, 530 U.S. 914, 2000, in which the U.S. Supreme Court held that a ban on "partial-birth" abortion that lacks an exception to protect a woman's health, and that prohibits more than one procedure places an undue burden on a woman's right to choose and is therefore unconstitutional.

⁵ 7 AAC 12.370.

⁶ The U.S. Supreme Court has upheld a similar restriction under the federal Constitution (*Williams v. Zbaraz*, 448 U.S. 358, 1980).

effect and ordered the state to continue to pay for medically necessary abortions (*Planned Parenthood of Alaska, Inc. v. Livey*, No. 3-AN-98-07004, August 13, 2002).⁷

Refusal Clause: Alaska Statute 18.16.010 states that no person or hospital may be required to participate in an abortion and that no person or hospital may be liable for refusing to participate in an abortion. In 1978, the Alaska Attorney General issued two opinions stating that under the state constitution, non-sectarian hospitals built or operated with public funds may not refuse to offer abortion services (Opinion of the Attorney General, No. 15, March 31, 1978; Opinion of the Attorney General, No. 8, February 10, 1978).⁸

Minors' Access to Abortion: Alaska Statutes 18.16.010, 18.16.020, and 18.16.030 state that an unemancipated minor under age 17 may not obtain an abortion without the written consent of one parent. A minor may obtain an abortion without parental consent if a court finds, by clear and convincing evidence, that she is mature and well informed enough to make an intelligent decision (also referred to as judicial bypass), that there is evidence that she has been subject to physical or sexual abuse or to a pattern of emotional abuse by one or both parents, or that parental consent is not in her best interest.

A state superior court ruled that this law violates the state constitution. The state Supreme Court reversed this ruling and sent the case back to the lower court for an evidentiary hearing to determine the law's constitutionality (*Planned Parenthood of Alaska, Inc. v. State*, No. 3AN-97-6014, February 25, 1998, summary judgment), (Alaska Superior Court, Oct. 5, 1998, final amended judgment). As a result of the evidentiary hearing, the superior court once again found the law unconstitutional and unenforceable (*Planned Parenthood v. State*, 3AN-97-6014 C1, Alaska Superior Court, October 13, 2003, Decision on Remand).

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

⁷ In 2003 the Alaska Legislature attempted to limit funding to mandatory abortion services under federal law in the FY2004 budget bill. However, the Alaska Attorney General stated that such restriction is unconstitutional and that the state must continue to fund medically necessary abortions in accordance with the 2002 court order (Opinion of the Attorney General, No. 883-03-0044, November 18, 2003).

⁸ *Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963, Alaska 1997 can also be applied to this law.

LIST OF ATTACHMENTS

Attachment A

"Abortion Policy and Politics," *Issue Update*, The Henry K. Kaiser Family Foundation, October 2002,
www.kff.org/womenshealth/3270-index.cfm

Attachment B

"Abortion in the U.S.," *Fact Sheet*, The Henry K. Kaiser Family Foundation, January 2003,
www.kff.org/womenshealth/326902-index.cfm

Attachment C

U.S. Supreme Court Decisions Concerning Reproductive Rights, 1965-2003, NARAL Pro-Choice America,
www.prochoiceamerica.org/facts/scotus_decsions_choice.cfm

Attachment D

Roe et al. v. Wade, 410 U.S. 113, 1973

Attachment E

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Attachment F

T. Joyce, S.K. Henshaw, J.D. Skatrud, "The Impact of Mississippi's Mandatory Delay Law on Abortions and Births," *The Journal of the American Medical Association*, Volume 278, Number 8, August 27, 1997

Attachment A

"Abortion Policy and Politics," *Issue Update*, The Henry K. Kaiser Family
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Abortion Policy and Politics

October 2002

Since the landmark U.S. Supreme Court decision *Roe v. Wade* legalized abortion in 1973, debate has continued over how and when abortions are provided. Every state has laws regulating some aspect of the provision of abortion, and many have passed restrictions that are now in effect, such as parental consent or notification requirements; mandated counseling and waiting periods; and limits on funding for abortion. In Congress, the primary focus of legislation has historically been on limiting use of public funds for abortions.

In more recent years, public debate has centered on methods of abortion, particularly those performed later in pregnancy. Congress and most state legislatures have considered whether certain procedures—labeled by opponents as “partial-birth abortions”—should be outlawed. To date, the U.S. Supreme Court and other lower courts have struck down or significantly curtailed enforcement of these bans. Most recently, in August 2002, President Bush signed the “Born-Alive Infants Protection Act,” which grants federal rights to human fetuses “born alive” at any stage of development, specifically including those that might occur during an attempted abortion procedure. Meanwhile, new medical developments—most notably the Food and Drug Administration’s (FDA) September 2000 approval of mifepristone (RU-486), the first non-surgical “medical abortion” drug—is drawing increased attention to early abortions. Federal and state legislators have discussed whether to adopt restrictions specific to medical abortions, and anti-abortion groups filed a petition to the FDA in August 2002 urging the agency to reverse approval of mifepristone.

While the debate over abortion has not abated, the abortion rate—the number of induced abortions per 1,000 women aged 15-44—in the U.S. is at an historic low. In 1998, the most current year for which data is available, there were 17 abortions per 1,000 women of reproductive age, the lowest level in two decades.¹ Even with these declines, abortion remains one of the most commonly performed surgical procedures in the U.S.: Based on 1992 rates, an estimated 43 percent of women will have had an abortion by age 45.²

History and Overview of Abortion

Individual states began restricting or outright outlawing abortion beginning in the mid-1800s. By 1880, the procedure was criminalized in every state with exceptions often allowed in cases where a woman’s life was at risk. In spite of these bans, many women sought out illegal means of terminating unwanted pregnancies, leading to high rates of maternal mortality and reproductive complications.

Beginning in 1970, a handful of states started considering legislation to allow abortion in certain circumstances. The U.S. Supreme Court decriminalized abortion nationwide in 1973 in two companion cases, *Roe v. Wade* and *Doe v. Bolton* (see box on Key Supreme Court Cases on Abortion). The Court asserted that the fundamental constitutional right to privacy encompasses a woman’s decision to terminate a pregnancy

before the point of viability, that is, when the fetus can survive outside of the woman’s body. As a result, legislation regulating abortion during the first two trimesters of pregnancy had to satisfy a “compelling” state interest—a tough legal standard that many restrictions passed after *Roe* did not meet. Abortions could still be banned after viability—with exceptions to protect a woman’s life and health.

Immediately after the Supreme Court’s ruling, abortion opponents introduced legislation at the state and federal level aimed at overturning *Roe*—or at least limiting access to abortion. As a result, the Supreme Court heard several cases challenging abortion regulations during the 1970s, typically rejecting the state laws as violations of the right to choose abortion. The exception was limitations on the use of public funds or public facilities, several of which were found constitutional during this period.

During the 1970s and early 1980s, Congressional attempts to pass a constitutional amendment banning abortion failed. However, in 1980, the U.S. Supreme Court upheld Congress’s first significant national abortion restriction. The justices found constitutional a 1977 appropriations bill rider known as the Hyde Amendment, which forbid the use of federal Medicaid funds for abortions unless a woman’s life is threatened by pregnancy. (Medicaid is the federal-state health insurance program for the poor, including 9.5 million women of reproductive age.) Congress also passed similar restrictions on public funding of abortion in a range of federal agencies and programs.

A series of Supreme Court cases in the 1980s and 1990s considered the constitutionality of various state abortion restrictions and regulations, such as waiting periods or directed counseling. Although most were struck down, the Court did find that states could require girls under age 18 to notify or receive permission from a parent for an abortion, as long as a judicial bypass procedure was available that also allowed for this permission to be granted by a local court.

Public Supports Legal Abortion, With Restrictions

According to recent national surveys, a majority of Americans—58 percent—think that abortion laws should remain as they are or be loosened, rather than tightened.³ However, half favor some restrictions on abortion. Overall, 28 percent of Americans say abortion should be *legal under all circumstances*; 19 percent say abortion should be *illegal under all circumstances*, and a slim majority (51 percent) say abortion should be *legal under certain circumstances*. Further reflecting the public’s mixed views on abortion, the nation is now divided in the percentage of people who identify as “pro-choice” versus “pro-life.” The percentage of Americans who say they are “pro-choice” has *decreased* from 56 percent in 1995 to 47 percent in 2000; likewise, those calling themselves “pro-life” *increased* from 33 percent to 45 percent during the same time period.³

Key Supreme Court Cases on Abortion

January 22, 1973. In *Roe v. Wade*, the Court legalized abortion. The Court based its 7-2 ruling on a woman's constitutional right to privacy. This case established the "trimester framework" to determine when and how abortion services could be regulated. During the first trimester of pregnancy, the Court reserved for the pregnant woman and her physician the right to decide whether or not to terminate a pregnancy, generally without interference from the state. In the second trimester, states were allowed to regulate abortion procedures and services, but only in ways that could be reasonably related to protecting the health of the woman. In the third trimester, the government's interest in potential life became "compelling" at the point of viability, meaning that abortion could be regulated, limited, or even prohibited. States were not allowed, however, to prohibit abortion if it affected the life or health of the pregnant woman.

On the same date, in *Doe v. Bolton*, the Court struck down, also by a 7-2 vote, restrictions on facilities and procedures that could be used to perform abortions. The Court noted that a doctor's judgment about the necessity of an abortion may include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."

July 1, 1976. In *Planned Parenthood v. Danforth*, the Court, by a 6-3 vote, said that states may not give a husband the power to overrule his pregnant wife's decision to have an abortion and that the state may not prohibit the most common second-trimester abortion method at that time (saline amniocentesis). By a 5-4 vote, the Court also said that parents of minor, unmarried girls may not be given an absolute veto over their daughter's abortion choice.

January 9, 1979. In *Colautti v. Franklin*, by a 6-3 vote, the Court reaffirmed its intention to give doctors broad discretion in determining the timing of "fetal viability"—when a fetus can live outside the mother's womb. The justices said states can seek to protect a fetus that has reached viability, but that the determination of when that occurs must be made by doctors, not courts or legislatures.

June 30, 1980. In *Harris v. McRae*, the Court decided, 5-4, that public health care programs for the poor, such as Medicaid, need not cover abortions. The Court noted that while the government may not place obstacles in front of a woman seeking an abortion, it does not have to remove obstacles—such as poverty—"not of its own creation."

June 15, 1983. In three decisions led by one called *City of Akron v. Akron Center for Reproductive Health*, the Court ruled, 6-3, that states and local communities may not require that all abortions after the first trimester of pregnancy be performed in a hospital. The Court also held that states *can* require girls under age 18 to notify a parent, so long as they establish an alternative mechanism—such as a judicial bypass procedure—for girls who could not involve their parents to demonstrate they were mature enough to make the decision or that an abortion was in their "best interests."

June 11, 1986. In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court struck down, 5-4, Pennsylvania abortion regulations that would have required women to delay their abortions for at least 24 hours and said that doctors must inform them about potential risks of abortion and available medical assistance benefits for prenatal care and childbirth.

July 3, 1989. In *Webster v. Reproductive Health Services*, the Court provided states with new authority to limit a woman's right to choose abortion, but stopped short of reversing *Roe v. Wade*. In fact, it was the first time since that ruling that only four justices—less than a majority—supported *Roe* as originally formulated. The High Court upheld Missouri's restrictions on use of public money, medical personnel, or facilities in performing abortion procedures. Also upheld was a requirement that doctors determine, when possible, whether a fetus at least 20 weeks old is capable of surviving outside the womb, by testing lung capacity and conducting other tests.

June 29, 1992. In its most important abortion ruling since 1973, *Planned Parenthood v. Casey*, the Court voted 5-4 to uphold the core of its *Roe v. Wade* decision and affirmed that states may not outlaw abortions before viability. But a plurality of the Court upheld several abortion restrictions—including a 24-hour "waiting period" and specific counseling requirement—and said states may impose limits on women seeking abortions as long as they do not create an "undue burden." Thus, the Court's decision in *Planned Parenthood v. Casey* abandoned the legal framework of its 1973 *Roe* ruling and adopted a new test—abortion regulations will only be struck down if they place a "substantial obstacle" in the path of a woman seeking to end her pregnancy.

June 28, 2000. In *Stenberg v. Carhart*, the Court voted 5-4 to strike down Nebraska's ban on "partial-birth abortions" because it imposed an "undue burden" on women's right to end their pregnancies. The Court said the law, versions of which were also passed in 30 other states, lacked an exemption to preserve women's health and was so broadly worded that it could have been used to ban some of the most common abortion methods used after the first trimester.

In 1992, the Supreme Court explicitly modified *Roe v. Wade* with its decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*. While the Court affirmed the legal right for women to terminate a pregnancy, it also allowed states to restrict abortion services under a new standard: at any point in the pregnancy, including the first trimester, as long as an "undue burden" (defined as a "substantial obstacle") was not created for the woman. This "undue burden" standard has generally been easier for states to meet when attempting to regulate abortion services, but the interpretation of what constitutes an undue burden is ongoing. Waiting periods, counseling requirements, regulation of abortion providers, parental involvement laws, and bans on abortion methods are among the restrictions still being negotiated in state and federal courts and legislatures.

The Current Policy Framework of Abortion

Public Health Programs and Private Insurance

Restrictions on the use of public funds for abortion have been a part of the legislative landscape since the 1970s. At the federal level, the Hyde Amendment continues to ban abortion coverage under Medicaid, unless a woman's life is endangered or the pregnancy resulted from rape or incest. Similar limits apply to a range of other federal departments and programs, including the Federal Employee Health Benefits Program, the health insurance plan for federal employees, their dependents, and retirees. Military health care coverage does not include abortion except in cases of life endangerment. Military personnel and their dependents are prohibited from obtaining abortion services at military facilities overseas (even if they wish to use their own funds), except in cases of life endangerment, rape, or incest.

Since the 1970s, federal law has generally prohibited the use of foreign aid funds for abortion services. In the early 1980s, the federal government implemented additional regulations restricting the activities of organizations that receive U.S. foreign aid to provide family planning services. This so-called "global gag rule" was lifted during the Clinton Administration, but the Bush Administration implemented a new version of the policy in 2001, forbidding organizations receiving U.S. international family planning grants from using additional funds of their own to provide legal abortion services, lobby for abortion law reform, or counsel or refer clients for abortion.

As of July 2002, thirty-two states (AL, AZ, AR, CO, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MI, MO, NE, NV, NH, NC, ND, OH, OK, PA, RI, SC, TN, TX, UT, VA, WI, WY) and the District of Columbia fund abortions only under specific conditions, generally when a woman's life is endangered or the pregnancy results from rape or incest. Of these, three (IA, WI, VA) also provide funds for other exceptional circumstances, such as fetal anomaly, while two (MS, SD) only do so in cases of life endangerment—in theory violating federal Medicaid law.⁴ Fourteen states (AK, CA, CT, IL, IN, MA, MN, MT, NJ, NM, OR, TX, VT, WV) were under court order to pay for medically necessary abortions sought by low-income women under Medicaid. An additional four (HI, MD, NY, WA) use their own funds for these abortions, with one (MD) placing limits on the health conditions that qualify.

Eleven states (CO, IL, KY, MA, MS, NE, ND, OH, PA, RI, VA) also prohibit insurance coverage of abortion services for all public employees or in cases when public funds are used; most have some exceptions, such as in cases where the woman's life is endangered.⁴ In five states (ID, KY, MO, ND, RI), abortion can only be covered through private insurance if done so through an optional rider with an additional premium (ID, KY, MO, ND, RI), but one (RI) is not enforcing this law.⁵

Policies Affecting Patients

Forty-three states have passed requirements that a young woman notify or get the consent of one or both parents before an abortion. Of these, thirty-two were in effect as of August 2002: eighteen consent laws (AL, ID, IN, KY, LA, ME, MA, MI, MS, MO, NC, ND, PA, RI, SC, TN, WI, WY) and fourteen notification requirements (AR, DE, GA, IA, KS, MD, MN, NE, OH, SD, TX, UT, VA, WV). For the remaining eleven, consent (AK, AZ, CA, NM, OK) or notification (CO, FL, IL, MT, NV, NJ) were not in effect largely due to court orders.⁶

The U.S. House of Representatives has voted several times, most recently in April 2002, to pass the Child Custody Protection Act (H.R. 476), which would make it a federal crime for anyone other than a parent or legal guardian to "knowingly" transport a minor across state lines for her to obtain an abortion if she has not met a parental notification or consent requirement in her home state. As in previous years, it remains to be seen if this bill will see action in the Senate.

Twenty-two states have passed requirements that women delay set numbers of hours (typically at least a full day or more) and receive state-specified counseling before an abortion. Seventeen have policies that are in effect (AR, ID, IN, KS, KY, LA, MI, MS, NE, ND, OH, PA, SC, SD, UT, VA, WI). Four do not currently enforce the requirements (DE, MA, MT, TN), and one (AL) has a law that has not yet taken effect.

Policies Affecting Medical Practitioners

Recently, a number of state legislatures have considered whether to adopt additional, detailed regulations governing abortion providers' medical practices and facilities. These regulations, and to whom they apply, vary considerably from state to state. Some examples include permitting state health departments to copy and remove patient records; mandating specific structural details, such as doorway widths, of spaces where abortions are performed; or mandating comprehensive and unique administrative reporting or quality assurance programs and special training for staff procedures. Seventeen states (AL, AZ, AR, CT, FL, KY, MI, MS, MO, NE, NC, PA, RI, SC, TN, TX, WI) and Puerto Rico currently have enforceable laws regulating abortion providers and abortions at any stage of gestation, including the first trimester.⁸ Of these, six (AR, MS, NC, PA, RI, SC) have enforceable provisions also regulating second-trimester abortions, while an additional nine states (AK, GA, HI, IN, MN, NJ, SD, UT, VA) have enforceable regulations specific to second-trimester procedures.⁸ In early 2001, the U.S. Supreme Court refused to grant review in the first case challenging one of these laws, which was passed in South Carolina.

"Partial-birth Abortion" Bans

In the 1990s, the emphasis in legislative debate over abortion shifted to types of procedures used after the first trimester of pregnancy—which account for a small proportion of the total number of abortions performed in the United States. Some abortion opponents began to refer to one method—dilation and extraction (D&X), a variant of the more common second-trimester procedure, dilation and evacuation (D&E)—as "partial-birth abortion."

Between 1995 and 2000, the House and Senate passed a bill outlawing so-called "partial-birth abortions" three times. Former President Clinton vetoed the legislation twice—in 1995 and 1997. Both times, override attempts succeeded in the House, but the Senate fell short of the two-thirds majority needed to do so. During the 1999-2000 session, the House and Senate voted again to approve versions of the bill, but differences in the two measures did not get reconciled and sent to the President before the Congressional term ended.

In 2000, in *Stenberg v. Carhart*, a divided Supreme Court struck down a Nebraska law banning "partial-birth abortions." Voting 5-4, the justices said that the law imposes an "undue burden" on a woman's constitutional right to decide to end her pregnancy. The Court found that the Nebraska law was written so broadly that it could criminalize the D&E method as well as the D&X method.⁹

The Court also took issue with the fact that the Nebraska law did not include an exception to preserve a woman's health, even in situations where doctors considered the banned method the best way to do so. Justice Sandra Day O'Connor, who was a crucial fifth vote for the majority, wrote a concurring opinion that said some version of a "partial-birth abortion" ban might be constitutional if it were crafted to only prohibit the D&X procedure and included an exception if the life or health of the pregnant woman was at risk.

Nebraska was one of thirty-one states that passed "partial-birth abortion" bans.¹⁰ Some state legislators have begun crafting new bans in light of the Supreme Court decision, and Congress is likely to consider the issue again. Recently, the Judiciary Committee of the U.S. House of Representatives approved a new version of a "partial-birth abortion" ban, which—unlike previous years—has the President's support.

"Born-Alive Infants Protection Act"

The debate over "partial-birth abortion" is believed to have helped pave the way for the "Born-Alive Infants Protection Act" (HR 2175). Passed in August 2002, the measure gives federal rights to a human fetus "born alive" at any stage of development. Any "live birth" that might occur during an attempted abortion is explicitly included. Essentially, the legislation amends the legal definition of a "person," "human being," "child," and "individual" in federal laws and regulations to include any "born alive infant," meaning that it is completely outside of the woman's body and has a beating heart or other signs of life. The law also states that it does not "affirm, deny, expand, or contract the legal status of a fetus." Abortion opponents strongly supported this legislation, while abortion rights advocates did not actively oppose it.

Medical Abortion

In September 2000, the FDA approved mifepristone (also known as "RU-486") for use as a medical abortion method. The FDA found the drug, when used with a second drug called misoprostol, to be safe and effective in terminating early pregnancies.¹¹ FDA approval was preceded by clinical trials conducted between 1994 and 1995 by the Population Council, the non-profit research organization that holds the U.S. patent for mifepristone.

Mifepristone is being marketed as *Mifeprex*, an early option pill, by Danco Laboratories, a New York-based company licensed by the Population Council. As distribution has gotten under way, questions remain as to whether insurance plans—both public and private—will cover this abortion method in a manner similar to surgical abortions. Some lawmakers, including members of Congress, are debating whether new laws should be adopted to specifically regulate these types of pregnancy terminations. Anti-abortion groups have filed a petition with the FDA calling for the agency to withdraw its approval of mifepristone.¹²

Clinic Violence

Many abortion facilities received threatening mail and hoax overnight packages during the fall of 2001, when the U.S. population was on heightened alert to the possibility of receiving anthrax in their mail.¹³ These were the latest episodes in the ongoing harassment and violence experienced by abortion providers and their staff, which led abortion rights advocates to seek protection from legislatures and the courts. In response, states passed a myriad of laws in the 1990s, and Congress adopted the Freedom of Access to Clinic Entrances Act (FACE) in 1994, making it a federal crime to engage in certain violent, threatening, obstructive, and destructive conduct intended to injure, intimidate, or interfere with those seeking to obtain or provide reproductive health services.

The U.S. Supreme Court has refused appeals by abortion opponents who argue FACE violates the First Amendment. However, the justices have ruled in three other cases brought against abortion opponents for their actions at the workplaces and homes of abortion providers—lawsuits that were among the hundreds filed by physicians and clinics in the 1990s. Most recently, in 2000, a 6-3 majority of the Supreme Court upheld a Colorado law making it a crime to "knowingly obstruct" another person's entry to or exit from a health care facility. *Hill v. Colorado* found that it is constitutional to bar any person within 100 feet of a facility's entrance from coming within eight feet of another person—without their consent.

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Attachment B

"Abortion in the U.S.," *Fact Sheet*, The Henry K. Kaiser Family Foundation.
January 2003,

www.hkff.org/womenshealth/326902-index.cfm

Abortion in the U.S.

Overall, about one quarter of all pregnancies in the United States now end in abortion. About half (49%) of the approximately 5 million pregnancies occurring each year are unintended and, of these, roughly one in two are terminated by abortion.¹ While abortion remains one of the most common surgical procedures in this country, abortion rates have been on the decline.

In 2000, the Alan Guttmacher Institute (AGI) estimates that a total of 1.31 million U.S. pregnancies ended in abortion – down from an all-time annual high of 1.61 million in 1990.² The most recent national data available from the Centers for Disease Control and Prevention (CDC) indicate that, between 1992 and 1997, the number of abortions performed each year nationwide dropped from 1.5 million to about 1.2 million (see Abortion Statistics box for differences in these data sets).³

A number of possible factors have been cited to explain the recent trends, including the aging of the population, greater acceptance of unwed childbearing, more effective use of contraception (including the back-up birth control method “emergency contraception”),⁴ shifts in attitudes, laws restricting abortion access, and a decrease in the number of abortion providers.

Incidence and Trends

- According to AGI, the 2000 abortion rate (the number of abortions per 1,000 women aged 15-44) was 21.3, reflecting a five percent (5%) decline since 1996.² The CDC estimates that the national abortion rate decreased from 26 per 1,000 in 1992 to 20 per 1,000 in 1997.¹
- In 2000, the annual abortion ratio (the proportion of pregnancies that end in abortion) was 24.5.²
- It is estimated that 39 million abortions have been performed since the procedure was legalized in 1973,⁴ and that at least one in three women in the U.S. will have an abortion by age 45.⁵
- Abortion rates vary significantly throughout the world. The most recent estimates – from 1996 – range from a low of 6.5 in the Netherlands to a high of 77.7 in Cuba. While the U.S. abortion rate has historically been higher than that in many western European countries, the 2000 rate of 21.3 is now within the range of other developed nations such as Sweden (18.7) and Australia (22.2).^{2,6}

Methods

- There are two general abortion types available to U.S. women: surgical and non-surgical or “medical” abortions.
- Most abortions (94-99%) performed in the U.S. are surgical.^{3,7} The most common surgical methods include vacuum aspiration, dilation and curettage (D&C), and dilation and evacuation (D&E).⁸ A much less common surgical method used for later abortions is dilation and extraction (D&X), a D&E variant.

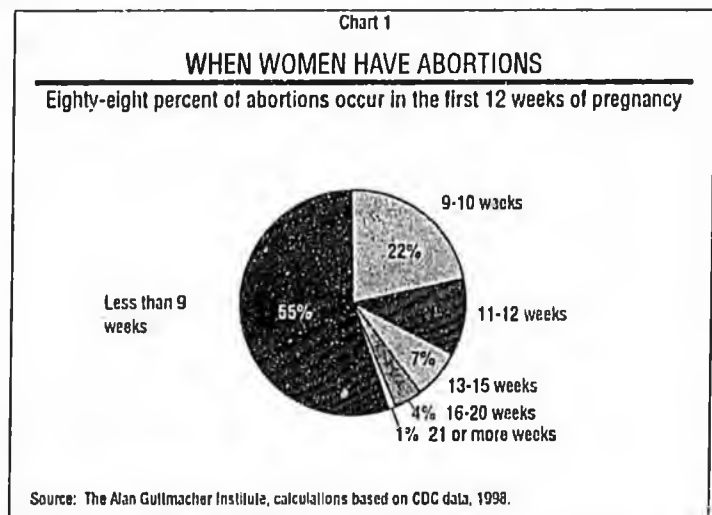
- In September 2000, the Food and Drug Administration (FDA) approved mifepristone, the first drug specifically designed for use as a method of medical abortion. Medical abortions can also be initiated through the “off-label” use of a drug called methotrexate, which has been approved by the FDA for other purposes.
- During the first six months of 2001, one-third of all abortion providers reported performing at least one early medical abortion. Among abortions that took place outside of hospitals, six percent (6%, or about 35,300) were medical abortions. Seventy-two percent (72%) of these abortions used mifepristone.⁷
- The U.S. distributor of mifepristone estimates that a total of 130,000 women have obtained an abortion using mifepristone in the two years since FDA approval.⁹

Safety and Effectiveness

- The overall failure rate for surgical abortion is about one percent (1%); the overall failure rate for medical abortion—those not successfully completed in a given period of time—is five percent (5%).⁸
- The risk of death associated with abortion between 1993 and 1997 was 0.6 per 100,000 abortions, making it one of the safest surgical procedures in the U.S.¹⁰ (The risk of maternal death from childbirth is 6.7 per 100,000 deliveries.) The risk of a major complication is also less than one percent (1%).⁸

Timing

- Eighty-nine percent (89%) of abortions are performed in the first twelve weeks of pregnancy; nearly 56 percent are performed within the first eight weeks of pregnancy. Just one percent (1%) of all abortions occur at twenty-one weeks or later (see Chart 1).¹¹



Abortion Patients

- About 19 percent of women having abortions in the U.S. are teens; 33 percent are between the ages of 20 and 24; and 48 percent are aged 25 and older. Approximately 83 percent are unmarried and 41 percent are white. About 61 percent have given birth before.¹²
- Fifty-four percent (54%) of women who had an abortion in 2000 said that they used contraception in the month that they conceived.⁴
- From 1994-2000, abortion rates declined by 27 percent among adolescents aged 15-19, while rates among low-income women (those living below 100 percent of the federal poverty line) increased by 25 percent.⁶

Abortion Sites and Providers

- Clinics made up 46 percent of abortion providers in 2000, followed by hospitals (33%) and physicians (21%).²
- Most abortions in the U.S. are performed in independent clinics that specialize in abortion services. In 2000, 93 percent of reported abortions were performed in clinics, five percent (5%) took place in hospitals, and two percent (2%) were performed in the private offices of physicians.²
- Eighty-seven percent (87%) of all U.S. counties have no abortion provider, and 34 percent of women of reproductive age (15-44) live in these counties.²
- Older ob/gyns are more likely than their younger colleagues to have performed an abortion in the past five years: 39 percent of ob/gyns 65 and older report doing so, as compared with 20 percent of those under 40. Overall, 58 percent of ob/gyns who performed an abortion in the past five years are 50 or older.¹³
- Seventy percent (70%) of residency programs in obstetrics and gynecology offered training in first-trimester abortion in 1991-1992. The proportion that included abortion as a standard part of residency training had declined from 25 percent to 12 percent since 1985.¹⁴
- A majority (56%) of non-hospital abortion providers reported experiencing one or more forms of harassment in 2000. Among providers performing more than 400 abortions annually, 82 percent said they experienced one or more forms of harassment.¹⁵

Abortion Costs and Coverage

- The costs of an abortion will vary depending on factors such as location, timing, and type of procedure. In 2000, an average self-paying client was charged \$372 for a surgical abortion at 10 weeks and \$470 for a medical abortion performed in a non-hospital setting.¹⁵
- Nationwide, 26 percent of women seeking abortions receive abortion services that are billed directly to public or private insurance.¹⁵
- Thirty-one percent (31%) of Americans with employer-based health insurance are covered for abortion services.¹⁶
- About one in five women (18%) in the U.S. aged 17-44 are uninsured.¹⁷ The majority of states make funding for abortions available through Medicaid only in very limited circumstances such as rape, incest, or a threat to the life of the woman.

Abortion Statistics: Methods and Most Current Data

The most reliable national abortion data come from the Centers for Disease Control and Prevention (CDC), a federal agency, and The Alan Guttmacher Institute (AGI), a private health research organization. The CDC collects data annually, from state health departments, and analysis is available within two to three years. AGI surveys all known abortion providers roughly every four to five years. The most recent national CDC data is from 1997; AGI's is from 2000-2001.

AGI estimates – which are generally higher – have historically been considered more reflective of national abortion statistics. This is largely because the CDC is subject to the reporting limitations of state health departments. Not every state gathers abortion data. Those that do may collect it differently, and differ in how complete their reporting is, how they calculate gestational age, and how they categorize different abortion methods. The CDC also recently changed the way that it calculates abortion data overall. Starting with 1998, the agency no longer takes into account the four states – Alaska, California, New Hampshire, and Oklahoma – that do not report abortion statistics. As a result, nationwide data is not available from the CDC after 1997.

References

- ¹ CDC, Abortion surveillance: preliminary analysis—United States, 1996. *MMWR*, 1998, 47:1025-1028, 1035. While CDC abortion data is available through 1998, the most recent secondary analyses – which provide more details of trends – are based on 1996 figures.
- ² Finer L and Henshaw SK, Abortion incidence and services in the United States in 2000. *Perspectives on Sexual and Reproductive Health*, 2002, 35:6-15. The term "abortion provider" is a place where abortions are performed; it includes hospitals, clinics, and doctors' offices. "Providers" in this context are different from "physicians."
- ³ CDC, Abortion surveillance: preliminary analysis—United States, 1997. *MMWR*, 2000, 48, No. 51 and 52.
- ⁴ Jones RK, Darroch JE and Henshaw SK, Contraceptive use among U.S. women having abortions in 2000-2001. *Perspectives on Sexual and Reproductive Health*, 2002, 34: 294-301.
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- ⁶ Alan Guttmacher Institute, *Sharing Responsibility: Women, Society and Abortion Worldwide*. New York: AGI, 1999.
- ⁷ CDC, Abortion Surveillance—United States, 1998. *MMWR*, 2002, 51(SS03):1-32.
- ⁸ Hatcher RA et al., *Contraceptive Technology*, 17th edition, New York: Ardent Media, Inc, 1998.
- ⁹ Danco Laboratories, Dear Colleague letter, January 10, 2003.
- ¹⁰ National Center for Health Statistics. *Vital Statistics of the United States*, 1991. Washington D.C.: US Public Health Service, 1991, p.2.
- ¹¹ Alan Guttmacher Institute (AGI) calculations using CDC data, published in AGI, *Abortion Fact Sheet*, 2003.
- ¹² Jones RK et al., Patterns in the socioeconomic characteristics of women obtaining abortions in 2000-2001. *Perspectives on Sexual and Reproductive Health*, 2002, 34: 226-35.
- ¹³ Kaiser Family Foundation. 1995 Survey of Obstetrician/Gynecologists on Contraception and Unplanned Pregnancy, Attitudes and Practices with Regard to Abortion, Menlo Park, CA: Henry J. Kaiser Family Foundation, June 1995.
- ¹⁴ MacKay HT and McKay AP, Abortion training in obstetric and gynecology residency programs in the United States, 1991-1992. *Family Planning Perspectives*, 1995, 27: 112-115.
- ¹⁵ Henshaw SK and Finer L, The accessibility of abortion services in the United States, 2001. *Perspectives on Sexual and Reproductive Health*, 2003, 35:16-24.
- ¹⁶ Kaiser Family Foundation and Health Research and Educational Trust, *Survey of Employer-Sponsored Health Benefits 2001*, Menlo Park, CA: Henry J. Kaiser Family Foundation, 2001.
- ¹⁷ Kaiser Family Foundation estimate based on Urban Institute analyses of the March 2000 Current Population Survey, U.S. Bureau of the Census.

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Attachment C

U.S. Supreme Court Decisions Concerning Reproductive Rights,
1965-2003, NARAL Pro-Choice America,
www.prochoiceamerica.org/facts/scotus_decisions_choice.cfm



NARAL
Pro-Choice America Foundation

U.S. SUPREME COURT DECISIONS CONCERNING REPRODUCTIVE RIGHTS 1965-2003

Griswold v.

Connecticut,
381 U.S. 479 (1965)

By a vote of 7-2, the Supreme Court invalidated a Connecticut statute that prohibited the use of contraceptives, holding that the statute violated the constitutional right to marital privacy.

Eisenstadt v. Baird,
405 U.S. 438 (1972)

By a vote of 6-1, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried people, holding that the constitutional right to privacy extends to the reproductive decisions of both married and unmarried people.

Roe v. Wade,
410 U.S. 113 (1973)

By a vote of 7-2, the Court invalidated a Texas law prohibiting abortions not necessary to save the woman's life. The Court held that the fundamental right to privacy extends to a woman's decision whether or not to have an abortion and that any governmental interference with that right is subject to strict judicial scrutiny. The Court recognized two compelling state interests sufficient to justify restrictions on a woman's right to choose. States may regulate the abortion procedure after the first trimester of pregnancy in ways necessary to promote women's health. After the point of fetal viability -- approximately 24 to 28 weeks -- a state may, to protect the potential life of the fetus, prohibit abortions not necessary to preserve the woman's life or health.

Doe v. Bolton,
410 U.S. 179 (1973)

Decided with *Roe v. Wade*. By a vote of 7-2, the Court invalidated provisions of a Georgia law that required that: (1) any abortion be performed in a hospital; (2) a woman secure the approval of three physicians and a hospital committee before obtaining an abortion; and (3) a woman seeking to obtain an abortion be a resident of the state.

Bigelow v. Virginia,
421 U.S. 809 (1975)

By a vote of 7-2, the Court invalidated the application of a Virginia statute that prohibited the advertisement of abortion services.

Connecticut v. Menillo,
423 U.S. 9 (1975)

The Court unanimously upheld the use of a Connecticut statute that prohibited the performance of abortion to prosecute a non-physician.

Bellotti v. Baird (I),
428 U.S. 132 (1976)

The Court unanimously ruled that the district court should have abstained from deciding the constitutionality of a Massachusetts statute requiring parental consent until the state court had interpreted the statute. The Court noted, however, that a state may, in some circumstances, require a minor woman to obtain parental consent before obtaining an abortion.

Planned Parenthood of Central Missouri v. Danforth,
428 U.S. 52 (1976)

By a vote of 6-3, the Court invalidated provisions of a Missouri statute that: (1) required a married woman to obtain the consent of her husband prior to obtaining an abortion; (2) required a physician to preserve the life and health of the fetus at every stage of pregnancy; and (3) prohibited the use of saline amniocentesis as a method of abortion. By a vote of 5-4, the Court struck down a requirement that an unmarried minor woman obtain the written consent of one parent before obtaining an abortion because the statute provided no alternative to parental consent such as judicial waiver of the consent requirement. The Court upheld provisions that: (1) required facilities to keep confidential records, available only for statistical purposes to public health officials, intended to preserve maternal health and life by increasing medical knowledge and to monitor whether abortions are performed in accordance with the law; (2) required that a woman sign a consent form prior to an abortion; and (3) defined "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."

Maher v. Roe,
432 U.S. 464 (1977)

By a vote of 6-3, the Court upheld a Connecticut prohibition of the use of public funds for abortions, except those "medically necessary," even though the state provides funding for childbirth.

Beal v. Doe,
432 U.S. 438 (1977)

Decided with *Maher v. Roe*. By a vote of 6-3, the Court upheld a Pennsylvania regulation that prohibited the use of public funds for abortions not "medically necessary."

Poelker v. Doe,
432 U.S. 519 (1977)

By a vote of 6-3, *per curiam*, the Court upheld the refusal of a public hospital to provide publicly funded abortions when there was no threat to the health or life of the woman.

- Carey v. Population Services*,
431 U.S. 678 (1977) By a vote of 7-2, the Court invalidated a New York law prohibiting the sale or distribution of contraceptives to minors.
- Colautti v. Franklin*,
439 U.S. 379 (1979) By a vote of 6-3, the Court invalidated as unconstitutionally vague a Pennsylvania statute that required a physician, under threat of criminal penalties, to use the method and "degree of care" most likely to preserve the life and health of the fetus if the physician determined the fetus was viable or had "sufficient reason to believe that the fetus may be viable."
- Bellotti v. Baird (II)*,
443 U.S. 622 (1979) By a vote of 8-1, the Court invalidated a Massachusetts law that required a minor to obtain the consent of both parents before obtaining an abortion. Four Justices reasoned that the procedure for judicial waiver was unconstitutional because it required parental consultation in every case before the minor woman was permitted to go to court to demonstrate that she was mature enough to make her own decision or that an abortion was in her best interests. Four other Justices considered the statute unconstitutional because it provided an absolute veto over a minor woman's abortion decision to a third-party, whether a parent or a judge.
- Harris v. McRae*,
448 U.S. 297 (1980) By a vote of 5-4, the Court upheld the Hyde amendment, which prohibits the use of federal funds for abortions not necessary to preserve the woman's life. The Court also held that states that participate in the Medicaid program are not required by Title XIX of the Social Security Act to fund medically necessary abortions for which federal funds are unavailable under the Hyde amendment.
- Williams v. Zbaraz*,
448 U.S. 358 (1980) Decided with *Harris v. McRae*. By a vote of 5-4, the Court upheld an Illinois statute prohibiting the use of state funds for abortions not necessary to save the woman's life.
- H.L. v. Matheson*,
450 U.S. 398 (1981) By a vote of 6-3, the Court upheld as not invalid on its face a Utah statute requiring a physician to notify a minor woman's parent before performing an abortion, but the Court did not decide whether the statute would be unconstitutional as applied to a mature minor because the plaintiff had not alleged that she was mature.
- City of Akron v. Akron Center for Reproductive Health [Akron I]*,
By a vote of 6-3, the Court invalidated those provisions of a city ordinance that: (1) required physicians to give their patients anti-abortion information, including telling them that "the unborn child is a human life from the moment of conception;" (2) required a 24-hour

462 U.S. 416 (1983) waiting period following these lectures; (3) mandated that all abortions after the first trimester be performed in a hospital; (4) required parental consent for a minor woman to obtain an abortion, without providing a procedure for waiver of the consent requirement; and (5) required physicians to dispose of fetal remains in an unspecified "humane and sanitary manner."

Planned Parenthood Association of Kansas City, Mo. v. Ashcroft,
462 U.S. 476 (1983) Decided with *Akron Center*. By a vote of 6-3, the Court invalidated a provision of a Missouri statute that required all second-trimester abortions to be performed in a hospital. By a vote of 5-4, the Court upheld requirements that: (1) a second physician be present during a post-viability abortion; (2) a minor woman obtain either parental consent or a judicial waiver; and (3) a pathology report be made for each abortion.

Simopoulos v. Virginia,
462 U.S. 506 (1983) By a vote of 8-1, the Court affirmed the criminal conviction of a physician for performing a second-trimester abortion outside a licensed hospital, noting that Virginia's definition of "hospital" differed from Missouri's and Akron's in that it included "outpatient hospitals," and was therefore broad enough to include any adequately equipped clinic. Thus, the Court held that the Virginia restriction on abortions after the first trimester was necessary to promote the health of women obtaining abortions.

Thornburgh v. American College of Obstetricians and Gynecologists,
476 U.S. 747 (1986) By a vote of 5-4, the Court invalidated provisions of Pennsylvania statute that required: (1) physicians to secure "informed consent" by providing anti-abortion information, including the availability of State-supplied printed materials describing the characteristics of the fetus and listing alternatives to abortion; (2) the reporting of detailed information available to the public for copying, including identification of the performing and referring physicians and personal information about the woman obtaining an abortion; (3) a physician performing a post-viability abortion to use that "degree of care" required to preserve the life and health of any unborn child intended to be born and to use the method of abortion most likely to preserve the life of the fetus, unless it would present a significantly greater medical risk to the woman's life or health; and (4) the presence of a second physician at abortions when viability is possible without providing an exception for a medical emergency.

Webster v. Reproductive Health Services,
By a vote of 5-4, the Court upheld provisions of a Missouri statute prohibiting the use of public facilities or public personnel to perform abortions and requiring a physician to make determinations and

492 U.S. 490 (1989) perform tests concerning gestational age, weight and lung maturity when he or she has reason to believe a woman to be 20 weeks or more pregnant. For the first time in the sixteen years since *Roe v. Wade*, only a minority of the Justices on the Court -- four Justices -- voted to reaffirm *Roe*.

Hodgson v. Minnesota,
497 U.S. 417 (1990) By a vote of 5-4, the Court invalidated as having no rational basis a Minnesota law requiring notification of both parents without a procedure for judicial waiver of the notice requirement. However, by a vote of 5-4, the Court upheld another provision that required two-parent notification but included a procedure for judicial waiver, as well as a 48-hour waiting period for minors.

Ohio v. Akron Center for Reproductive Health [Akron II],
497 U.S. 502 (1990) By a vote of 6-3, the Court upheld an Ohio statute that required a minor woman to notify one parent or obtain a judicial waiver, rejecting a facial challenge alleging that the burdensome judicial procedure did not fulfill the constitutional requirement of a meaningful bypass procedure.

Rust v. Sullivan,
500 U.S. 173 (1991) By a vote of 5-4, the Court upheld federal regulations prohibiting health care professionals at family planning clinics that receive Title X funds from counseling or referring women regarding abortion, or even informing a pregnant patient that abortion is a legal option.

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992) By a vote of 5-4, the Court "retained and once again reaffirmed" the "essential holding" of *Roe v. Wade*. The 5-4 majority also struck down a spousal notification provision of Pennsylvania's Abortion Control Act. However, by a vote of 7-2, the Court upheld provisions of the Act that required (1) physicians to provide patients with anti-abortion information, including pictures of fetuses at various stages of development, to discourage women from obtaining abortions; (2) a mandatory 24-hour delay following these lectures; and (3) a one-parent consent requirement for minors with a judicial bypass. By a vote of 8-1 (Blackmun was the sole dissenter), the Court upheld a provision that required the filing of reports, available for public inspection and copying, including the name and location of any facility performing abortions that receives any state funds.

Most significantly, the three-justice plurality opinion (authored by O'Connor, Kennedy, and Souter), abandoned *Roe's* trimester framework and the strict scrutiny standard of review applied to fundamental rights, implementing the less protective "undue burden" standard of review for pre-viability abortions. The plurality explicitly overruled portions of *Akron* and *Thornburgh* that had limited states' ability to restrict the right to choose, deeming them "inconsistent with

Roe's statement that the State has a legitimate interest in promoting the life or potential life of the unborn."

Four Justices (Rehnquist, Scalia, Thomas, and White) voted to uphold all the challenged provisions and overturn *Roe* completely, stating that it was wrongly decided and the Constitution does not protect the right to choose. Only two Justices (Blackmun and Stevens) voted to continue to protect the right to choose as a fundamental right under *Roe* by subjecting state restrictions to strict scrutiny.

*Bray v. Alexandria
Women's Health
Clinic,*
506 U.S. 263 (1993)

By a vote of 5-4, the Court held that a federal civil rights law, known as the "Ku Klux Klan" Act, 42 U.S.C. § 1985(3), does not protect women from anti-choice blockaders obstructing access to reproductive health clinics. The Court held that anti-choice blockades do not constitute sex-based discrimination for the purpose of the statute.

*National
Organization for
Women v. Scheidler
[Scheidler I],*
510 U.S. 249 (1994)

By a vote of 9-0, the Court held that claims under the Racketeer Influenced and Corrupt Organizations (RICO) act do not require proof of an economic motive, and that NOW and a group of women's health centers could pursue their civil suit against Joseph Scheidler, the Pro-Life Action League (PLAL) and others.

*Madsen v. Women's
Health Center,*
512 U.S. 753 (1994)

By a vote of 5-4 the Court upheld provisions of a Florida injunction that: (1) created a 36-foot buffer zone outside the entrance to a reproductive health clinic; and (2) prohibited anti-choice protesters from making noise that could be heard by patients inside the clinic during the hours in which surgical procedures were performed. The Court noted that such injunctions burden "no more speech than necessary to serve a significant government interest." The court invalidated provisions creating a 300-foot "no approach" zone around the clinic, a ban on signs and images visible to people inside the clinic, and a 300-foot ban on picketing outside the residences of clinic employees.

*Schenk v. Pro-
Choice Network,*
519 U.S. 357 (1997)

By a vote of 8-1, the Court invalidated the provision in a New York injunction that created a 15-foot "floating" buffer zone around any person or vehicle seeking access to or leaving a clinic. The Court held that the "floating" buffer zones "burden more speech than necessary to serve the relevant government interests." The Court limited this holding to the facts of this case and noted that it did not address "whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protestors, as measured by the distance between the two." By a vote of 6-3, the Court upheld a provision creating a 15-foot "fixed" buffer zone outside of clinic doorways, driveways, and parking lot entrances. The

Court also upheld a "cease and desist" provision that permits two "sidewalk counselors" to approach a person inside the "fixed" buffer zones unless and until the person indicates a desire for the counselor to withdraw; the "sidewalk counselor" must then retreat 15 feet from the person he/she had been counseling and remain outside of the buffer zone.

Lambert v. Wicklund
520 U.S. 292 (1997)

In a *per curiam* opinion, the Court upheld the judicial bypass provision of a Montana statute requiring one-parent notification before a minor may have an abortion. The Court held that a judicial bypass procedure requiring a minor to show that parental notification is not in her best interest is equivalent to a judicial bypass procedure requiring a minor to show that abortion without parental notification is in her best interest.

Mazurek v. Armstrong,
520 U.S. 968 (1997)

By a vote of 6-3, the Court reversed a lower court ruling that would have permitted health care providers to move forward with their challenge to a Montana law banning the performance of abortion by licensed physician assistants working under the supervision of a doctor. Without full briefing or oral argument, the Court found that, in general, physician-only requirements are constitutional. As the Court's first application of the "undue burden" standard since *Planned Parenthood of Southeastern Pennsylvania v. Casey*, this decision indicates that the standard is less protective than it initially appeared and that regardless of a law's intended effect, the Court will not invalidate state restrictions on abortion before viability unless the actual effect is to create a substantial obstacle on women obtaining an abortion.

Stenberg v. Carhart,
530 U.S. 914 (2000)

By a vote of 5-4, the Court invalidated a Nebraska law that prohibited so-called "partial birth" abortion unless the procedure is necessary to save the life of the woman. First, the Court held that the Nebraska law is unconstitutional because it lacks any exception to protect women's health, noting that "[s]ince the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to a previability regulation." The Court also clarified that the health exception must protect women against health risks caused by the pregnancy as well as health risks caused by a regulation that forces women to choose a less medically appropriate procedure. Second, the Court found that the Nebraska law imposed an undue burden on women because it was written so broadly that it would affect not only dilation and extraction (D&X) procedures, but also dilation and evacuation (D&E) procedures, the most common form of previability second trimester abortions. The Court reasoned that

physicians who used the D&E procedure would fear prosecution, conviction, and imprisonment, resulting in an undue burden upon a woman's right to choose.

Hill v. Colorado,
530 U.S. 703 (2000)

By a vote of 6-3, the Court upheld the constitutionality of the zone of separation provision in Colorado's clinic protection statute. The provision prohibits a person from knowingly approaching within eight feet of another person without consent, for the purpose of passing a leaflet or handbill, displaying a sign, or engaging in oral protest, education, or counseling. This restriction applies within a 100-foot radius from clinic entrances. The Court reasoned that states have a legitimate interest in protecting the health and safety of their citizens, and that this interest "may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." The Court held that the Colorado statute is content neutral because it only regulates where the speech can occur. In addition, the statute was not adopted because of any disagreement with the message or viewpoint of any speech. Further, Colorado's interests in protecting clinic access and privacy, and providing clear guidelines for law enforcement officers, are not related to the content of the demonstrators' speech. The Court also held that the zone of separation provision is a valid time, place, and manner regulation because it is narrowly tailored to serve the State's significant and legitimate governmental interests and leaves open ample alternative channels for communication. Such channels include communicating at normal conversational distance, displaying signs, and distributing leaflets near the path of oncoming pedestrians.

Ferguson v. City of Charleston,
532 U.S. 67 (2001)

By a vote of 6-3, the Court held that the Medical University of South Carolina's policy of testing pregnant women for cocaine is unconstitutional under the Fourth Amendment in the absence of consent. The Court recognized that the purpose of the policy was to obtain evidence for criminal prosecution, not to help pregnant women or their fetuses. The Court also noted that punitive programs that punish pregnant women for drug use during pregnancy can actually harm the women and children they purport to protect.

Scheidler v. National Organization for Women [Scheidler III],
537 U.S. 393 (2003)

By a vote of 8-1, the Court held that rights potentially violated by clinic protestors – women's right to seek medical services, clinic doctors' rights to perform their jobs, and clinics' rights to provide medical services and otherwise conduct their business – were not "property" that could be "obtained" within the meaning of the Hobbs Act (a federal anti-extortion statute). On that basis, the Court overturned a jury verdict against clinic protestors, in which jurors had found that the

protestors' had used improper means to obtain "property" belonging to the plaintiffs (clinics, and patients or prospective patients), and had therefore committed extortion. Because it voided the underlying offenses necessary to sustain a RICO violation in the case, the Court declined to reach the issue of whether the clinics could be entitled to injunctive relief under RICO, but it voided the injunction issued in the instant case.

January 1, 2004

Attachment D

Roe et al. v. Wade, 410 U.S. 113, 1973

LEXSEE 410 U.S. 113

ROE ET AL. v. WADE, DISTRICT ATTORNEY OF DALLAS COUNTY

No. 70-18

SUPREME COURT OF THE UNITED STATES

410 U.S. 113; 93 S. Ct. 705; 35 L. Ed. 2d 147; 1973 U.S. LEXIS 159

December 13, 1971, Argued

January 22, 1973, Decided

SUBSEQUENT HISTORY:

Reargued October 11, 1972. Rehearing denied by *Roe v. Wade*, 410 U.S. 959, 35 L. Ed. 2d 694, 93 S. Ct. 1409, 1973 U.S. LEXIS 3282 (1973)

Related proceeding at *McCorvey v. Hill*, 2003 U.S. Dist. LEXIS 12986 (N.D. Tex., June 19, 2003)

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS. *Roe v. Wade*, 314 F. Supp. 1217, 1970 U.S. Dist. LEXIS 11306 (N.D. Tex., 1970)

DISPOSITION:

314 F.Supp. 1217, affirmed in part and reversed in part.

LexisNexis (TM) HEADNOTES- Core Concepts:

SYLLABUS: A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint

not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford. *Held:*

1. While 28 U. S. C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 123.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 123-129.

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages and not simply when the action is initiated. Pp. 124-125.

(b) The District Court correctly refused injunctive, but erred in granting declaratory relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. *Samuels v. Mackell*, 401 U.S. 66. Pp. 125-127.

(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 127-129.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legit-

imate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 147-164.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 163, 164.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 163, 164.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 163-164; 164-165.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. P. 165.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional. P. 166.

COUNSEL:

Sarah Weddington reargued the cause for appellants. With her on the briefs were Roy Lucas, Fred Bruner, Roy L. Merrill, Jr., and Norman Dorsen.

Robert C. Flowers, Assistant Attorney General of Texas, argued the cause for appellee on the reargument. Jay Floyd, Assistant Attorney General, argued the cause for appellee on the original argument. With them on the brief were Crawford C. Martin, Attorney General, Nola White, First Assistant Attorney General, Alfred Walker, Executive Assistant Attorney General, Henry Wade, and John B. Tolle. *

* Briefs of amici curiae were filed by Gary K. Nelson, Attorney General of Arizona, Robert K. Killian, Attorney General of Connecticut, Ed W. Hancock, Attorney General of Kentucky, Clarence A. H. Meyer, Attorney General of Nebraska, and Vernon B. Romney, Attorney General of Utah; by Joseph P. Witherspoon, Jr., for the Association of Texas Diocesan Attorneys; by Charles E. Rice for

Americans United for Life; by Eugene J. McMahon for Women for the Unborn et al.; by Carol Ryan for the American College of Obstetricians and Gynecologists et al.; by Dennis J. Horan, Jerome A. Frazel, Jr., Thomas M. Crisham, and Dolores V. Horan for Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology; by Harriet F. Pilpel, Nancy F. Wechsler, and Frederic S. Nathan for Planned Parenthood Federation of America, Inc., et al.; by Alan F. Charles for the National Legal Program on Health Problems of the Poor et al.; by Martie L. Thompson for State Communities Aid Assn.; by Alfred L. Scanlan, Martin J. Flynn, and Robert M. Byrn for the National Right to Life Committee; by Helen L. Bittenwieser for the American Ethical Union et al.; by Norma G. Zarky for the American Association of University Women et al.; by Nancy Stearns for New Women Lawyers et al.; by the California Committee to Legalize Abortion et al.; and by Robert E. Dunne for Robert L. Sassone.

JUDGES:

Blackmun, J., delivered the opinion of the Court, in which Burger, C. J., and Douglas, Brennan, Stewart, Marshall, and Powell, JJ., joined. Burger, C. J., post, p. 207, Douglas, J., post, p. 209, and Stewart, J., post, p. 167, filed concurring opinions. White, J., filed a dissenting opinion, in which Rehnquist, J., joined, post, p. 221. Rehnquist, J., filed a dissenting opinion, post, p. 171.

OPINION BY:

BLACKMUN

OPINION: [*116] [***156] [**708] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, *Doe v. Bolton*, post, p. 179, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's

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religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend [**709] to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, [***157] free of emotion and of predilection. We seek earnestly to do this, and, because we do, we [*117] have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905):

"[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. n1 These make it a crime to "procure an abortion," as therein [*118] defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States. n2

n1 "Article 1191. Abortion

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an

abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

"Art. 1194. Murder in producing abortion

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

"Art. 1196. By medical advice

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."

The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

n2 *Ariz. Rev. Stat. Ann. § 13-211 (1956); Conn. Pub. Act No. 1 (May 1972 special session) (in 4 Conn. Leg. Serv. 677 (1972)), and Conn. Gen. Stat. Rev. §§ 53-29, 53-30 (1968) (or unborn child); Idaho Code § 18-601 (1948); Ill. Rev. Stat., c. 38, § 23-1 (1971); Ind. Code § 35-1-58-1 (1971); Iowa Code § 701.1 (1971); Ky. Rev. Stat. § 436.020 (1962); La. Rev. Stat. § 37:1285 (6) (1964) (loss of medical license) (but see § 14:87 (Supp. 1972) containing no exception for the life of the mother under the criminal statute); Me. Rev. Stat. Ann., Tit. 17, § 51 (1964); Mass. Gen. Laws Ann., c. 272, § 19 (1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish v. Bd. of Registration*, 356 Mass. 98, 248 N. E. 2d 264 (1969)); Mich. Comp. Laws § 750.14 (1948); Minn. Stat. § 617.18 (1971); Mo. Rev. Stat. § 559.100 (1969); Mont. Rev. Codes Ann. § 94-*

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401 (1969); Neb. Rev. Stat. § 28-405 (1964); Nev. Rev. Stat. § 200.220 (1967); N. H. Rev. Stat. Ann. § 585:13 (1955); N. J. Stat. Ann. § 2A:87-1 (1969) ("without lawful justification"); N. D. Cent. Code §§ 12-25-01, 12-25-02 (1960), Ohio Rev. Code Ann. § 2901.16 (1953); Okla. Stat. Ann., Tit. 21, § 861 (1972-1973 Supp.); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963) ("unlawful"); R. I. Gen. Laws Ann. § 11-3-1 (1969); S. D. Comp. Laws Ann. § 22-17-1 (1967); Tenn. Code Ann. §§ 39-301, 39-302 (1956); Utah Code Ann. §§ 76-2-1, 76-2-2 (1953); Vt. Stat. Ann., Tit. 13, § 101 (1958); W. Va. Code Ann. § 61-2-8 (1966); Wis. Stat. § 940.04 (1969); Wyo. Stat. Ann. §§ 6-77, 6-78 (1957).

[*119] Texas [***158] [**710] first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 F. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev. Stat., c. 8, Arts. 536-541 (1879); Texas Rev. Crim. Stat., Arts. 1071-1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother." n3

n3 Long ago, a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question." *Jackson v. State*, 55 Tex. Cr. R. 79, 89, 115 S. W. 262, 268 (1908).

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. *Thompson v. State* (Ct. Crim. App. Tex. 1971), appeal docketed, No. 71-1200. The court held that "the State of Texas has a compelling interest to protect fetal life"; that Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth" and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life

is for the legislature and not the courts; that Art. 1196 "is more definite than the District of Columbia statute upheld in [*United States v.*] *Vuitch*" (402 U.S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.

In *Thompson*, n. 2, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 "is not before us." But see *Veevers v. State*, 172 Tex. Cr. R. 162, 168-169, 354 S. W. 2d 161, 166-167 (1962). Cf. *United States v. Vuitch*, 402 U.S. 62, 69-71 (1971).

[*120] II

Jane Roe, n4 a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

n4 The name is a pseudonym.

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

[***159] James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint he alleged that he had been arrested previously for violations of the Texas abortion statutes and [*121] that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine [**711] whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the

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doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe, n5 a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."

n5 These names are pseudonyms.

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant, [*122] and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the "fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment," and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (ND Tex. 1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to [***160] 28 U. S. C. § 1253,

have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941 (1971). [*123] III

[***111] It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell v. Donovan*, 398 U.S. 427 (1970), and *Gunn v. University Committee*, 399 U.S. 383 [**712] (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter v. Jury Comm'n*, 396 U.S. 320 (1970); *Florida Lime Growers v. Jacobsen*, 362 U.S. 73, 80-81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe v. Bolton*, *post*, p. 179.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast v. Cohen*, 392 U.S. 83, 101 (1968), and *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor? [*124]

A. *Jane Roe*. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

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[***HR2A] [***HR3A] Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele v. Markle*, 452 F.2d 1121, 1125 [***161] (CA2 1971); *Crossen v. Breckenridge*, 446 F.2d 833, 838-839 (CA6 1971); *Poe v. Menghini*, 339 F.Supp. 986, 990-991 (Kan. 1972). See *Truax v. Raich*, 239 U.S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S., at 102, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U.S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, n6 or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

n6 The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Brief for Appellee 13. The docket entries, App. 2, and the transcript, App. 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See App. 77.

[*125]

[***HR41] The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, 340 U.S. 36 [**713] (1950); *Golden v. Zwickler, supra*; *SEC v. Medical Committee for Human Rights*, 404 U.S. 403 (1972).

[***HR5A] But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). See *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Carroll v. Princess Anne*, 393 U.S. 175, 178-179 (1968); *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953).

[***HR2B] [***HR3B] [***HR4B] [***HR5B] We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

B. *Dr. Hallford*. The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

"In the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The [***162] State of Texas vs. [*126] James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-69-2524-H. In both cases the defendant is charged with abortion . . ."

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

[***HR6] [***HR7] Dr. Hallford is, therefore, in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad-faith prosecution. In order to escape the rule articulated in the cases cited in the next paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant" and to assert only the latter for standing purposes here.

We see no merit in that distinction. Our decision in *Samuels v. Mackell*, 401 U.S. 66 (1971), compels the

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conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels v. Mackell*, *supra*, and in *Younger v. Harris*, 401 U.S. 37 (1971); *Boyle v. Landry*, 401 U.S. 77 [*127] (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); and *Byrne v. Karalexis*, 401 U.S. 216 (1971). See also *Dombrowski v. Pfister*, 380 U.S. 479 (1965). We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

[**HIR8] Dr. Hallford's complaint in intervention, therefore, is to be dismissed. n7 He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief [***163] and failed to dismiss his complaint in intervention.

n7 We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further, for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . [and] the class of people who are . . . patients . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F.Supp., at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

C. *The Does*. In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming [*128] parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the

prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that sometime in the future Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and at that time in the future she might want an abortion that might then be illegal under the Texas statutes.

[***HR9] This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger v. Harris*, 401 U.S., at 41-42; *Golden v. Zwickler*, 394 U.S., at 109-110; *Abele v. Markle*, 452 F.2d, at 1124-1125; *Crossen v. Breckenridge*, 446 F.2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Data Processing Service v. Camp*, 397 U.S. 150 [*715] (1970); [*129] and *Epperson v. Arkansas*, 393 U.S. 97 (1968). See also *Truax v. Raich*, 239 U.S. 33 (1915).

[***HR10] The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the [***164] Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *id.*, at 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S., at 486 (Goldberg, J., concurring). Before address-

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ing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

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

[*130] 1. *Ancient attitudes.* These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished. n8 We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era, n9 and that "it was resorted to without scruple." n10 The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. n11 Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion. n12

n8 A. Castiglioni, *A History of Medicine* 84 (2d ed. 1947), E. Krumbhaar, translator and editor (hereinafter Castiglioni).

n9 J. Ricci, *The Genealogy of Gynaecology* 52, 84, 113, 149 (2d ed. 1950) (hereinafter Ricci); L. Lader, *Abortion* 75-77 (1966) (hereinafter Lader); K. Niswander, *Medical Abortion Practices in the United States, in Abortion and the Law* 37, 38-40 (D. Smith ed. 1967); G. Williams, *The Sanctity of Life and the Criminal Law* 148 (1957) (hereinafter Williams); J. Noonan, *An Almost Absolute Value in History, in The Morality of Abortion* 1, 3-7 (J. Noonan ed. 1970) (hereinafter Noonan); Quay, *Justifiable Abortion — Medical and Legal Foundations* (pt. 2), *49 Geo. L. J.* 395, 406-422 (1961) (hereinafter Quay).

n10 L. Edelstein, *The Hippocratic Oath* 10

(1943) (hereinafter Edelstein). But see Castiglioni 227.

n11 Edelstein 12; Ricci 113-114, 118-119; Noonan 5.

n12 Edelstein 13-14.

2. *The Hippocratic Oath.* What then of the famous Oath that has stood so [**716] long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B. C.), who has been described [*131] as the Father of Medicine, the "wisest and the greatest practitioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the [***165] sum of the medical knowledge of the past? n13 The Oath varies somewhat according to the particular translation, but in any translation the content is clear: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion," n14 or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy." n15

n13 Castiglioni 148.

n14 *Id.*, at 154.

n15 Edelstein 3.

Although the Oath is not mentioned in any of the principal briefs in this case or in *Doe v. Bolton, post*, p. 179, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: n16 The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, *Republic*, V, 461; Aristotle, *Politics*, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines," [*132] and "in no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity." n17

n16 *Id.*, at 12, 15-18.

n17 *Id.*, at 18; Lader 76.

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Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A. D. 130-200) "give evidence of the violation of almost every one of its injunctions." n18 But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics" and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto and not the expression of an absolute standard of medical conduct." n19

n18 Edelstein 63.

n19 *Id.*, at 64.

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and revered statement of medical ethics.

3. *The common law.* It is undisputed that at common law, abortion performed *before* "quickening" — the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy n20 — was not an indictable offense. n21 The absence [*133] [***166] of a [*717] common-law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth. n22 This was "mediate animation." Although [*134] Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to

Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.

n20 Dorland's Illustrated Medical Dictionary 1261 (24th ed. 1965).

n21 E. Coke, Institutes III *50; 1 W. Hawkins, Pleas of the Crown, c. 31, § 16 (4th ed. 1762); 1 W. Blackstone, Commentaries *129-130; M. Hale, Pleas of the Crown 433 (1st Amer. ed. 1847). For discussions of the role of the quickening concept in English common law, see Lader 78; Noonan 223-226; Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality (pt. 1), 14 *N. Y. L. F.* 411, 418-428 (1968) (hereinafter Means I); Stern, Abortion: Reform and the Law, 59 *J. Crim. L. C. & P. S.* 84 (1968) (hereinafter Stern); Quay 430-432; Williams 152.

n22 Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female. See, for example, Aristotle, *Hist. Anim.* 7.3.583b; *Gen. An.* 2.3.736. 2.5.741; Hippocrates, *Lib. de Nat. Puer.*, No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, *De Origine Animae* 4.4 (Pub. Law 44.527). See also W. Reany, *The Creation of the Human Soul*, c. 2 and 83-86 (1932); Huser, *The Crime of Abortion in Canon Law* 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D. C., 1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion

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was incorporated by Gratian into the *Decretum*, published about 1140. *Decretum Magistri Gratiani* 2.32.2.7 to 2.32.2.10, in 1 *Corpus Juris Canonici* 1122, 1123 (A. Friedburg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.

For discussions of the canon-law treatment, see Means I, pp. 411-412; Noonan 20-26; Quay 426-430; see also J. Noonan, *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* 18-29 (1965).

Whether abortion of a *quick* fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide. n23 But [***167] the later and predominant [**718] view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited [*135] passage, Coke took the position that abortion of a woman "quick with child" is "a great misprision, and no murder." n24 Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view. n25 A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime. n26 This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, n27 others followed Coke in stating that abortion [*136] of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." n28 That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

n23 Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, *De Legibus et Consuetudinibus Angliae* 279 (T. Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," 2 H. Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968). See Quay 431; see also 2 *Fleta* 60-61 (Book 1, c. 23) (Selden Society ed. 1955).

n24 E. Coke, *Institutes* III *50.

n25 1 W. Blackstone, *Commentaries* *129-130.

n26 Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 *N. Y. L. J.* 335 (1971) (hereinafter Means II). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common-law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon-law crime. See also Lader 78-79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 *Geo. 3*, c. 58, § 1, referred to in the text, *infra*, at 136, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

n27 *Commonwealth v. Bangs*, 9 *Mass.* 387, 388 (1812); *Commonwealth v. Parker*, 50 *Mass.* (9 *Meic.*) 263, 265-266 (1845); *State v. Cooper*, 22 *N. J. L.* 52, 58 (1849); *Abrams v. Foshee*, 3 *Iowa* 274, 278-280 (1856); *Smith v. Gaffard*, 31 *Ala.* 45, 51 (1857); *Mitchell v. Commonwealth*, 78 *Ky.* 204, 210 (1879); *Eggart v. State*, 40 *Fla.* 527, 532, 25 *So.* 144, 145 (1898); *State v. Alcorn*, 7 *Idaho* 599, 606, 64 *P.* 1014, 1016 (1901); *Edwards v. State*, 79 *Neb.* 251, 252, 112 *N. W.* 611, 612 (1907); *Gray v. State*, 77 *Tex. Cr. R.* 221, 224, 178 *S. W.* 337, 338 (1915); *Miller v. Bennett*, 190 *Va.* 162, 169, 56 *S. E.* 2d 217, 221 (1949). Contra, *Mills v. Commonwealth*, 13 *Pa.* 631, 633 (1850); *State v. Slagle*, 83 *N. C.* 630, 632 (1880).

n28 See *Smith v. State*, 33 *Me.* 48, 55 (1851); *Evans v. People*, 49 *N. Y.* 86, 88 (1872); *Lamb v. State*, 67 *Md.* 524, 533, 10 *A.* 208 (1887).

4. *The English statutory law.* England's first criminal abortion statute, Lord Ellenborough's Act, 43 *Geo. 3*, c. 58, came in 1803. It made abortion of a quick fetus, § 1,

a capital crime, but in § 2 it provided [***168] lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. This contrast was continued in the general revision of 1828, 9 *Geo. 4*, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 *Will. 4 & 1 Vict.*, c. 85, § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 *Vict.*, c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 *Geo. 5*, c. 34, came into being. Its emphasis was upon the destruction of "the life of [**719] a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be [*137] found guilty of the offense "unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex v. Bourne*, [1939] 1 *K. B.* 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge Macnaghten referred to the 1929 Act, and observed that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.*, at 691. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's *health*, and instructed the jury to acquit Dr. Bourne if it found he had acted in a good-faith belief that the abortion was necessary for this purpose. *Id.*, at 693-694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 *Eliz. 2*, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a) "that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated," or (b) "that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as [*138] to be seriously handicapped." The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of

others, to terminate a pregnancy where he is of the good-faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a [***169] woman "quick with child." n29 The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. n30 In 1828, New York enacted legislation n31 that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose." By 1840, when Texas had received the common law, n32 only eight American States [*139] had [**720] statutes dealing with abortion. n33 It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

n29 *Conn. Stat.*, Tit. 20, § 14 (1821).

n30 *Conn. Pub. Acts*, c. 71, § 1 (1860).

n31 *N. Y. Rev. Stat.*, pt. 4, c. 1, Tit. 2, Art. 1, § 9, p. 661, and Tit. 6, § 21, p. 694 (1829).

n32 Act of Jan. 20, 1840, § 1, set forth in 2 *H. Gammel*, *Laws of Texas* 177-178 (1898); see *Grigsby v. Reib*, 105 *Tex.* 597, 600, 153 *S. W.* 1124, 1125 (1913).

n33 The early statutes are discussed in Quay 435-438. See also Lader 85-88; Stern 85-88; and Means II 375-376.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penal-

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ties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. n34 The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. n35 Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts. n36 In [*140] the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3, n37 set forth as Appendix [***170] B to the opinion in *Doe v. Bolton*, *post*, p. 205.

n34 Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447-520. See Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U. Ill. L. F. 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

n35 Ala. Code, Tit. 14, § 9 (1958); D. C. Code Ann. § 22-201 (1967).

n36 Mass. Gen. Laws Ann., c. 272, § 19 (1970); N. J. Stat. Ann. § 2A:87-1 (1969); Pa. Stat. Ann., Tit. 18, §§ 4718, 4719 (1963).

n37 Fourteen States have adopted some form of the ALI statute. See Ark. Stat. Ann. §§ 41-303 to 41-310 (Supp. 1971); Calif. Health & Safety Code §§ 25950-25955.5 (Supp. 1972); Colo. Rev. Stat. Ann. §§ 40-2-50 to 40-2-53 (Cum. Supp. 1967); Del. Code Ann., Tit. 24, §§ 1790-1793 (Supp. 1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla. Sess. Law Serv., pp. 380-382; Ga. Code §§ 26-1201 to 26-1203 (1972); Kan. Stat. Ann. § 21-3407 (Supp. 1971); Md. Ann. Code, Art. 43, §§ 137-139 (1971); Miss. Code Ann. § 2323 (Supp. 1972); N. M. Stat. Ann. §§ 40A-5-1 to 40A-5-3 (1972); N. C. Gen. Stat. § 14-45.1 (Supp. 1971); Ore. Rev. Stat. §§ 435.405 to 435.495 (1971); S. C. Code Ann. §§ 16-82 to 16-89 (1962 and Supp. 1971); Va. Code Ann. §§ 18.1-62 to 18.1-62.3 (Supp. 1972). Mr. Justice Clark described some of these States as having "led the way." Religion, Morality, and Abortion:

A Constitutional Appraisal, 2 Loyola U. (L. A.) L. Rev. 1, 11 (1969).

By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw. Rev. Stat. § 453-16 (Supp. 1971); N. Y. Penal Code § 125.05, subd. 3 (Supp. 1972-1973); Wash. Rev. Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, [**721] and very possibly without such a limitation, the opportunity [*141] to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. *The position of the American Medical Association.* The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 73-78 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes of "this general demoralization":

"The first of these causes is a wide-spread popular ignorance of the true character of the crime — a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

"The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life

"The third reason of the frightful extent of this crime

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is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, [*142] and to its life as yet denies all protection." *Id.*, at 75-76. [***171] The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.*, at 28, 78.

In 1871 a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 *Trans. of the Am. Med. Assn.* 258 (1871). It proffered resolutions, adopted by the Association, *id.*, at 38-39, recommending, among other things, that it "be unlawful and unprofessional for any physician to induce abortion or premature labor, without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child — if that be possible," and calling "the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females — aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the [*143] patient," two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing, [**722] " and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates.

Proceedings of the AMA House of Delegates 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;" and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited [***172] hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles. n38 Proceedings [*144] of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion. n39

n38 "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it

"RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further

"RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the

physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice." Proceedings of the AMA House of Delegates 220 (June 1970).

n39 "The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices.

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

7. *The position of the American Public Health Association.* In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"a. Rapid and simple abortion referral must be readily available through state and local public [*145] health departments, medical societies, or other nonprofit organizations.

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services.

" [**723] c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications and not on a routine basis.

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors.

"e. Contraception and/or sterilization should be discussed with each abortion patient." Recommended Standards for Abortion Services, 61 Am. J. Pub. Health 396 (1971).

Among factors pertinent to life and health risks associated with abortion were three that "are recognized as important":

"a. the skill of the physician,

"b. the environment in which the abortion is performed, and above all

" [***173] c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history." *Id.*,

at 397.

It was said that "a well-equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance." Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, [*146] abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that at present abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." *Id.*, at 398.

8. *The position of the American Bar Association.* At its meeting in February 1972 the ADA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A. B. A. J. 380 (1972). We set forth the Act in full in the margin. n40 The [*147] Conference [**724] has appended [***174] an enlightening Prefatory Note. n41

n40 "UNIFORM ABORTION ACT

"SECTION 1. [*Abortion Defined; When Authorized.*]

"(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.

"(b) An abortion may be performed in this state only if it is performed:

"(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, or political subdivision of either;] or by a female upon herself upon the advice of the physician; and

"(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i)

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there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years].

"SECTION 2. [*Penalty.*] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [\$ 1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both.

"SECTION 3. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

"SECTION 4. [*Short Title.*] This Act may be cited as the Uniform Abortion Act.

"SECTION 5. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

"SECTION 6. [*Repeal.*] The following acts and parts of acts are repealed:

"(1)

"(2)

"(3)

"SECTION 7. [*Time of Taking Effect.*] This Act shall take effect — — — — —."

n41 "This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy.

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different condi-

tions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

VII

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

[*148] It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. n42 The appellants and amici contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

n42 See, for example, *YWCA v. Kugler*, 342 F.Supp. 1048, 1074 (N. J. 1972); *Abele v. Markle*, 342 F.Supp. 800, 805-806 (Conn. 1972) (Newman, J., concurring in result), appeal docketed, No. 72-56; *Walsingham v. State*, 250 So. 2d 857, 863 (Ervin, J., concurring) (Fla. 1971); *State v. Gedicke*, 43 N. J. L. 86, 90 (1881); Means II 381-382.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. n43 This was particularly true prior to the [*149] development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century.

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Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

n43 See C. Haagensen & W. Lloyd, *A Hundred Years of Medicine* 19 (1943).

***HR11] ***HR12] ***HR13] ***HR14] Modern **725] medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion, in early pregnancy, that is, prior to the end of the first trimester, although ***175] not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. n44 Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. [*150] The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

n44 Potts, *Postconceptive Control of Fertility*, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); *Abortion Mortality, 20 Morbidity and Mortality* 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, *United States: Therapeutic Abortions, 1963-1968*, 59 *Studies in Family Planning* 5, 7 (1970); Tietze, *Mortality with Contraception and Induced Abortion*, 45 *Studies in Family Planning* 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze

& Lehfeldt, *Legal Abortion in Eastern Europe*, 175 *J. A. M. A.* 1149, 1152 (April 1961). Other sources are discussed in Lader 17-23.

The third reason is the State's interest — some phrase it in terms of duty — in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. n45 The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

n45 See Brief of *Amicus* National Right to Life Committee; R. Drinan, *The Inviolability of the Right to Be Born*, in *Abortion and the Law* 107 (D. Smith ed. 1967); Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 *U. C. L. A. L. Rev.* 233 (1969); Noonan 1.

[*151] Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. n46 Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect ***176] to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose. n47 The few state courts **726] called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus. n48 Proponents of this view point out that in many States, including Texas, n49 by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another. n50 They claim that adoption of the "quickening" distinction through received common [*152] law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

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n46 See, e. g., *Abele v. Markle*, 342 F.Supp. 800 (Conn. 1972), appeal docketed, No. 72-56.

n47 See discussions in Means I and Means II

n48 See, e. g., *State v. Murphy*, 27 N. J. L. 112, 114 (1858).

n49 *Watson v. State*, 9 Tex. App. 237, 244-245 (1880); *Moore v. State*, 37 Tex. Cr. R. 552, 561, 40 S. W. 287, 290 (1897); *Shaw v. State*, 73 Tex. Cr. R. 337, 339, 165 S. W. 930, 931 (1914); *Fondren v. State*, 74 Tex. Cr. R. 552, 557, 169 S. W. 411, 414 (1914); *Gray v. State*, 77 Tex. Cr. R. 221, 229, 178 S. W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. *Hammett v. State*, 84 Tex. Cr. R. 635, 209 S. W. 661 (1919); *Thompson v. State* (Ct. Crim. App. Tex. 1971), appeal docketed, No. 71-1200.

n50 See *Smith v. State*, 33 Me., at 55; *In re Vince*, 2 N. J. 443, 450, 67 A. 2d 141, 144 (1949). A short discussion of the modern law on this issue is contained in the Comment to the ALI's Model Penal Code § 207.11, at 158 and nn. 35-37 (Tent. Draft No. 9, 1959).

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

VIII

[***HR15] [***HR16] [***HR17] The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Boyd v. United States*, 116 U.S. 616 (1886), see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S., at 484-485; in the Ninth Amendment, *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko*

v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities [***177] relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S., at 453-454; *id.*, at 460, 463-465 [*153] (WHITE, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, *supra*.

[***HR18] This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

[***HR19] [***HR20] [***HR21] [***HR22A] [***HR23] [***HR24] On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The [*154] Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the

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claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be [***178] considered against important state interests in regulation.

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. *Abele v. Markle*, 342 F.Supp. 800 (Conn. 1972), appeal docketed, No. 72-56; *Abele v. Markle*, 351 F.Supp. 224 (Conn. 1972), appeal docketed, No. 72-730; *Doe v. Bolton*, 319 F.Supp. 1048 (ND Ga. 1970), appeal decided today, *post*, p. 179; *Doe v. Scott*, 321 F.Supp. 1385 (ND Ill. 1971), appeal docketed, No. 70-105; *Poe v. Menghini*, 339 F.Supp. 986 (Kan. 1972); *YWCA v. Kugler*, 342 F.Supp. 1048 (NJ 1972); *Babbitt v. McCann*, [*155] 310 F.Supp. 293 (ED Wis. 1970), appeal dismissed, 400 U.S. 1 (1970); *People v. Belous*, 71 Cal. 2d 954, 458 P. 2d 194 (1969), cert. denied, 397 U.S. 915 (1970); *State v. Barquet*, 262 So. 2d 431 (Fla. 1972).

Others have sustained state statutes. *Crossen v. Attorney General*, 344 F.Supp. 587 [**728] (ED Ky. 1972), appeal docketed, No. 72-256; *Rosen v. Louisiana State Board of Medical Examiners*, 318 F.Supp. 1217 (ED La. 1970), appeal docketed, No. 70-42; *Corkey v. Edwards*, 322 F.Supp. 1248 (WDNC 1971), appeal docketed, No. 71-92; *Steinberg v. Brown*, 321 F.Supp. 741 (ND Ohio 1970); *Doe v. Rampton* (Utah 1971), appeal docketed, No. 71-5666; *Cheaney v. State*, Ind., 285 N. E. 2d 265 (1972); *Spears v. State*, 257 So. 2d 876 (Miss. 1972); *State v. Munson*, 86 S. D. 663, 201 N. W. 2d 123 (1972), appeal docketed, No. 72-631.

Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

[***HR25] Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state in-

terest," *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. *Griswold v. Connecticut*, 381 U.S., at 485; *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940); see [*156] *Eisenstadt v. Baird*, 405 U.S., at 460, 463-464 (WHITE, J., concurring in result).

In the recent abortion cases, cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the [***179] reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F.Supp., at 1222-1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain *amici* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, [*157] for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. n51 On the other hand, the appellee conceded on reargument n52 that no case could be cited [**729] that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

n51 Tr. of Oral Rearg. 20-21.

n52 Tr. of Oral Rearg. 24.

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The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; n53 in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application. n54

n53 We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

n54 When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[*158] [***180]

[***HR26] All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn. n55 This is in accord with the results reached in those few cases where the issue has been squarely presented. *McGarvey v. Magee-Womens Hospital*, 340 F.Supp. 751 (WD Pa. 1972); *Byrn v. New York City Health & Hospitals Corp.*, 31 N. Y. 2d 194, 286 N. E. 2d 887 (1972), appeal docketed, No. 72-434; *Abele v. Markle*, 351 F.Supp. 224 (Conn. 1972), appeal docketed, No. 72-730. Cf. *Cheaney v. State*, Ind., at , 285 N. E. 2d, at 270; *Montana v. Rogers*, 278 F.2d 68, 72 (CA7 1960), *aff'd sub nom. Montana v. Kennedy*, 366 U.S. 308 (1961); *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P. 2d 617 (1970); *State v. Dickinson*, 28 [*159] Ohio St. 2d 65, 275 N. E. 2d 599 (1971). Indeed, our decision in *United States v. Vuitch*, 402 U.S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the [**730] termination of life entitled to Fourteenth Amendment protection.

n55 Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis. Stat. § 940.04 (6) (1969), and the new Connecticut statute, Pub. Act No. 1 (May 1972 special session), declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on 'o other considerations.

[***HR27] B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that

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of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins [***181] at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

[*160] It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. n56 It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. n57 It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. n58 As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. n59 Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. n60 The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from [*161] the moment of conception. n61 The latter is now, of course, the official belief of the Catholic Church. As one brief *amicus* discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial [**731] problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs. n62

n56 Edelstein 16.

n57 Lader 97-99; D. Feldman, *Birth Control in Jewish Law* 251-294 (1968). For a stricter view, see I. Jakobovits, *Jewish Views on Abortion*, in *Abortion and the Law* 124 (D. Smith ed. 1967).

n58 *Amicus* Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99-101.

n59 L. Hellman & J. Pritchard, *Williams Obstetrics* 493 (14th ed. 1971); *Dorland's Illustrated Medical Dictionary* 1689 (24th ed. 1965).

n60 Hellman & Pritchard, *supra*, n. 59, at 493.

n61 For discussions of the development of the Roman Catholic position, see D. Callahan, *Abortion: Law, Choice, and Morality* 409-447 (1970); Noonan I.

n62 See Brodie, *The New Biology and the Prenatal Child*, 9 *J. Family L.* 391, 397 (1970); Gorney, *The New Biology and the Future of Man*, 15 *U. C. L. A. L. Rev.* 273 (1968); Note, *Criminal Law — Abortion — The "Morning-After Pill" and Other Pre-Implantation Birth-Control Methods and the Law*, 46 *Ore. L. Rev.* 211 (1967); G. Taylor, *The Biological Time Bomb* 32 (1968); A. Rosenfeld, *The Second Genesis* 138-139 (1969); Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 *Mich. L. Rev.* 127 (1968); Note, *Artificial Insemination and the Law*, 1968 *U. Ill. L. F.* 203.

[***182] In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. n63 That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few [*162] courts have squarely so held. n64 In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. n65 Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality

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of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. n66 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.

n63 W. Prosser, *The Law of Torts* 335-338 (4th ed. 1971); 2 F. Harper & F. James, *The Law of Torts* 1028-1031 (1956); Note, 63 *Harv. L. Rev.* 173 (1949).

n64 See cases cited in Prosser, *supra*, n. 63, at 336-338; Annotation, *Action for Death of Unborn Child*, 15 *A. L. R.* 3d 992 (1967).

n65 Prosser, *supra*, n. 63, at 338; Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 *Notre Dame Law.* 349, 354-360 (1971).

n66 Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 *U. C. L. A. L. Rev.* 233, 235-238 (1969); Note, 56 *Iowa L. Rev.* 994, 999-1000 (1971); Note, *The Law and the Unborn Child*, 46 *Notre Dame Law.* 349, 351-354 (1971).

X

[**HR22B] [**HR28] In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches [*163] term and, at a point during pregnancy, each becomes "compelling."

[**HR29] [**HR30A] With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical [*732] fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably re-

lates to the preservation and protection of maternal health. Examples of permissible [**183] state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

[**HR31A] This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

[**HR32A] [**HR33A] With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion [*164] during that period, except when it is necessary to preserve the life or health of the mother.

[**HR34] Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See *United States v. Vuitch*, 402 *U.S.*, at 67-72.

Xi

[**HR30B] [**HR31B] [**HR32B]
[**HR33B] [**HR35] [**HR36] To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a *lifesaving* procedure on behalf of the mother, without regard to preg-

nancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life [*165] may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation [***184] of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the [**733] State, and may proscribe any abortion by a person who is not a physician as so defined.

In *Doe v. Bolton*, *post*, p. 179, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together. n67

n67 Neither in this opinion nor in *Doe v. Bolton*, *post*, p. 179, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N. C. Gen. Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions

on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important [*166] state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler v. Koota*, 389 U.S. 241, 252-255 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger v. Harris*, 401 U.S., at 50.

[***185] We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment [*167] of the District Court is affirmed. Costs are allowed to the appellee.

[EDITOR'S NOTE: Additional opinions by Burger, Douglas, and White are published within *Doe v. Bolton*, 410 U.S. 179.]

It is so ordered.

[For concurring opinion of MR. CHIEF JUSTICE BURGER, see *post*, p. 207.]

[For concurring opinion of MR. JUSTICE DOUGLAS, see *post*, p. 209.]

[For dissenting opinion of MR. JUSTICE WHITE,

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35 L. Ed. 2d 147, ***185; 1973 U.S. LEXIS 159

see post, p. 221.]

CONCURBY:

STEWART

CONCUR:

[***193contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in *Ferguson v. Skrupa*, 372 U.S. 726, [*734] purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in *Skrupa* put it: "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.*, at 730. n1

n1 Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S., at 733.

Barely two years later, in *Griswold v. Connecticut*, 381 U.S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. n2 So it was clear [*168] to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. n3 As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.

n2 There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the

protection of a person's general right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-351 (footnotes omitted).

n3 This was also clear to Mr. Justice Black, 381 U.S., at 507 (dissenting opinion); to Mr. Justice Harlan, 381 U.S., at 499 (opinion concurring in the judgment); and to MR. JUSTICE WHITE, 381 U.S., at 502 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in *Poe v. Ullman*, 367 U.S. 497, 522.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-239; [***194] *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535; *Meyer v. Nebraska*, 262 U.S. 390, 399-400. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 629-630; *United States v. Guest*, 383 U.S. 745, 757-758; *Carrington v. Rash*, 380 U.S. 89, 96; *Aptheker v. Secretary of State*, 378 U.S. 500, 505; *Kent v. Dulles*, 357 U.S. 116, 127; *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Truax v. Raich*, 239 U.S. 33, 41.

[*169] As Mr. Justice Harlan once wrote: "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise [*735] terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, 367 U.S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of

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social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 12; *Griswold v. Connecticut*, *supra*; *Pierce v. Society of Sisters*, *supra*; *Meyer v. Nebraska*, *supra*. See also *Prince v. Massachusetts*, 321 U.S. 158, 166; *Skinner v. Oklahoma*, 316 U.S. 535, 541. As recently as last Term, in *Eisenstadt v. Baird*, 405 U.S. 438, 453, we recognized "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person [*170] as the decision whether to bear or beget a child." That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. "Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the [***195] right to send a child to private school protected in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), or the right to teach a foreign language protected in *Meyer v. Nebraska*, 262 U.S. 390 (1923)." *Abele v. Markle*, 351 F.Supp. 224, 227 (Conn. 1972).

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

It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment [**736] of personal [*171] liberty worked by the existing Texas law. Accordingly, I join the

Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

DISSENTBY:

REHNQUIST

DISSENT:

[***196] MR. JUSTICE REHNQUIST, dissenting.

The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff [***197] who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge v. Iris*, 407 U.S. 163 (1972); *Sierra Club v. Morton*, 405 U.S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her *last* trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may [*172] impose virtually no restrictions on medical abortions performed during the *first* trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). See also *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have

difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. *Katz v. United States*, 389 U.S. 347 (1967).

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth [*173] Amendment protects, embraces more than the rights found in the Bill of Rights. But that [**737] liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical* [** 98] *Co.*, 348 U.S. 483, 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson*, *supra*. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. See *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 179 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused

than it found it.

[*174] While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, 198 U.S. 45, 74 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, [***199] the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn. Stat., Tit. 20, §§ 14, 16. By the time of the adoption of the Fourteenth [*175] Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting [**738] abortion. n1 While many States have amended or updated [*176] their laws, 21 of the laws on the books in 1868 [***200] remain in effect today. n2 Indeed, the Texas statute [**739] struck down today was, as the majority notes, first enacted in 1857 [*177] and "has remained substantially unchanged to the present time." *Ante*, at 119.

n1 Jurisdictions having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:

1. Alabama — Ala. Acts, c. 6, § 2 (1840).
2. Arizona — Howell Code, c. 10, § 45 (1865).
3. Arkansas — Ark. Rev. Stat., c. 44, div. III,

- Art. II, § 6 (1838).
4. California — Cal. Sess. Laws, c. 99, § 45, p. 233 (1849-1850).
 5. Colorado (Terr.) — Colo. Gen. Laws of Terr. of Colo., 1st Sess., § 42, pp. 296-297 (1861).
 6. Connecticut — Conn. Stat., Tit. 20, §§ 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn. Pub. Acts, c. 71, §§ 1, 2, p. 65 (1860).
 7. Florida — Fla. Acts 1st Sess., c. 1637, subc. 3, §§ 10, 11, subc. 8, §§ 9, 10, 11 (1868), as amended, now Fla. Stat. Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1965).
 8. Georgia — Ga. Pen. Code, 4th Div., § 20 (1833).
 9. Kingdom of Hawaii — Hawaii Pen. Code, c. 12, §§ 1, 2, 3 (1850).
 10. Idaho (Terr.) — Idaho (Terr.) Laws, Crimes and Punishments §§ 33, 34, 42, pp. 441, 443 (1863).
 11. Illinois — Ill. Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill. Pub. Laws §§ 1, 2, 3, p. 89 (1867).
 12. Indiana — Ind. Rev. Stat. §§ 1, 3, p. 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind. Laws, c. LXXXI, § 2 (1859).
 13. Iowa (Terr.) — Iowa (Terr.) Stat., 1st Legis., 1st Sess., § 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev. Stat., c. 49, §§ 10, 13 (1843).
 14. Kansas (Terr.) — Kan. (Terr.) Stat., c. 48, §§ 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 28, §§ 9, 10, 37 (1859).
 15. Louisiana — La. Rev. Stat., Crimes and Offenses § 24, p. 138 (1856).
 16. Maine — Me. Rev. Stat., c. 160, §§ 11, 12, 13, 14 (1840).
 17. Maryland — Md. Laws, c. 179, § 2, p. 315 (1868).
 18. Massachusetts — Mass. Acts & Resolves, c. 27 (1845).
 19. Michigan — Mich. Rev. Stat., c. 153, §§ 32, 33, 34, p. 662 (1846).
 20. Minnesota (Terr.) — Minn. (Terr.) Rev. Stat., c. 100, §§ 10, 11, p. 493 (1851).
 21. Mississippi — Miss. Code, c. 64, §§ 8, 9, p. 958 (1848).
 22. Missouri — Mo. Rev. Stat., Art. II, §§ 9, 10, 36, pp. 168, 172 (1835).
 23. Montana (Terr.) — Mont. (Terr.) Laws, Criminal Practice Acts § 41, p. 184 (1864).
 24. Nevada (Terr.) — Nev. (Terr.) Laws, c. 28, § 42, p. 63 (1861).
 25. New Hampshire — N. H. Laws, c. 743, § 1, p. 708 (1848).
 26. New Jersey — N. J. Laws, p. 266 (1849).
 27. New York — N. Y. Rev. Stat., pt. 4, c. 1, Tit. 2, §§ 8, 9, pp. 12-13 (1828). By 1868, this statute had been superseded. N. Y. Laws, c. 260, §§ 1-6, pp. 285-286 (1845); N. Y. Laws, c. 22, § 1, p. 19 (1846).
 28. Ohio — Ohio Gen. Stat. §§ 111 (1), 112 (2), p. 252 (1841).
 29. Oregon — Ore. Gen. Laws, Crim. Code, c. 43, § 509, p. 528 (1845-1864).
 30. Pennsylvania — Pa. Laws No. 374, §§ 87, 88, 89 (1860).
 31. Texas — Tex. Gen. Stat. Dig., c. VII, Arts. 531-536, p. 524 (Oldham & White 1859).
 32. Vermont — Vt. Acts No. 33, § 1 (1846). By 1868, this statute had been amended. Vt. Acts No. 57, §§ 1, 3 (1867).
 33. Virginia — Va. Acts, Tit. II, c. 3, § 9, p. 96 (1848).
 34. Washington (Terr.) — Wash. (Terr.) Stats., c. II, §§ 37, 38, p. 81 (1854).
 35. West Virginia — See Va. Acts., Tit. II, c. 3, § 9, p. 96 (1848); W. Va. Const., Art. XI, par. 8 (1863).
 36. Wisconsin — Wis. Rev. Stat., c. 133, §§ 10, 11 (1849). By 1868, this statute had been superseded. Wis. Rev. Stat., c. 164, §§ 10, 11; c. 169, §§ 58, 59 (1858).
- n2 Abortion laws in effect in 1868 and still applicable as of August 1970:
1. Arizona (1865).

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35 L. Ed. 2d 147, ***200; 1973 U.S. LEXIS 159

2. Connecticut (1860).
3. Florida (1868).
4. Idaho (1863).
5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).
10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1863).
21. Wisconsin (1858).

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

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these self-

same statutory limitations on abortion. My understanding of past practice is that a statute found [*178] to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Street v. New York*, 394 U.S. 576 (1969).

For all of the foregoing reasons, I respectfully dissent.

REFERENCES: Return To Full Text Opinion
Validity, under Federal Constitution, of abortion laws

1 Am Jur 2d, Abortion 1-36; 32 Am Jur 2d, Federal Practice and Procedure 238; 42 Am Jur 2d, Injunctions 342-344

1 Am Jur Pl & Pr Forms (Rev), Abortion, Form Nos. 1-6

2 Am Jur Trials 171, Investigating Particular Crimes 64

US L Ed Digest, Abortion 1; Appeal and Error 327, 428, 1208, 1656, 1662; Constitutional Law 101, 521, 525, 526; Courts 762, 763; Declaratory Judgments 8; Rules of Court 3, 5; Statutes 26

ALR Digests, Abortion 1-3; Constitutional Law 145, 445, 452, 525, 715, 715.5, 751

L Ed Index to Anno, Abortion; Abstention Doctrine; Appeal and Error; Constitutional Law; Declaratory Judgments; Due Process of Law; Physicians and Surgeons; Police Power; Statutes

ALR Quick Index, Abortion; Appeal and Error; Constitutional Law; Declaratory Judgments; Due Process of Law; Physicians and Surgeons; Police Power; Statutes

Federal Quick Index, Abortion; Abstention Doctrine; Appeal and Error; Constitutional Law; Declaratory Judgments; Due Process of Law; Physicians and Surgeons; Police Power; Statutes

Annotation References:

Validity, under Federal Constitution, of abortion laws.
35 L. Ed 2d 735.

Attachment E

*Planned Parenthood of Southeastern Pennsylvania, et al.,
Petitioners 91-744 v. Robert P. Casey, et al., 505 U.S. 833, 1992*

LEXSEE 505 U.S. 833, AT 894

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 v. PLANNED PARENTHOOD OF SOUTHEASTERN
 PENNSYLVANIA ET AL.

No. 91-744

SUPREME COURT OF THE UNITED STATES

505 U.S. 833; 112 S. Ct. 2791; 120 L. Ed. 2d 674; 1992 U.S. LEXIS 4751; 60 U.S.L.W. 4795;
 92 Daily Journal DAR 8982; 6 Fla. J. Weekly Fed. S 663

April 22, 1992, Argued
 June 29, 1992, Decided *

* Together with No. 91-902, Casey, Governor of Pennsylvania, et al. v. Planned
 Parenthood of Southeastern Pennsylvania et al., also on certiorari to the same court.

SUBSEQUENT HISTORY:

As Amended July 2, 1992.

PRIOR HISTORY: ON WRITS OF CERTIORARI TO
 THE UNITED STATES COURT OF APPEALS FOR
 THE THIRD CIRCUIT.

DISPOSITION: 947 F. 2d 682: No. 91-902, affirmed;
 No. 91-744, affirmed in part, reversed in part, and re-
 manded.

LexisNexis (TM) HEADNOTES- Core Concepts:

SYLLABUS: At issue are five provisions of the Pennsylvania Abortion Control Act of 1982: § 3205, which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a "medical emergency" that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services. Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion

services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision but upholding the others.

Held: The judgment in No. 91-902 is affirmed; the judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER delivered the opinion of the Court with respect to Parts I, II, and III, concluding that consideration of the fundamental constitutional question resolved by *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, principles of institutional integrity, and the rule of *stare decisis* require that *Roe's* essential holding be retained and reaffirmed as to each of its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. Pp. 844-869.

(a) A reexamination of the principles that define the woman's rights and the State's authority regarding abortions is required by the doubt this Court's subsequent decisions have cast upon the meaning and reach of *Roe's* central holding, by the fact that THE CHIEF JUSTICE would overrule *Roe*, and by the necessity that state and federal courts and legislatures have adequate guidance on the subject. Pp. 844-845.

(b) *Roe* determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment. Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such "liberty." Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society. The Court's decisions have afforded constitutional protection to personal decisions relating to marriage, see, e. g., *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817, procreation, *Skinner v. Oklahoma ex rel. Williamson*, 326 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110, family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438, child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571, and contraception, *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678, and have recognized the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child, *Eisenstadt v. Baird*, 405 U.S. 438, 453, 31 L. Ed. 2d 349, 92 S. Ct. 1029. *Roe's* central holding properly invoked the reasoning and tradition of these precedents. Pp. 846-853.

(c) Application of the doctrine of *stare decisis* confirms that *Roe's* essential holding should be reaffirmed. In re-examining that holding, the Court's judgment is informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling the holding with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling. Pp. 854-855.

(d) Although *Roe* has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable. P. 855.

(e) The *Roe* rule's limitation on state power could not be

repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed. Pp. 855-856.

(f) No evolution of legal principle has left *Roe's* central rule a doctrinal anachronism discounted by society. If *Roe* is placed among the cases exemplified by *Griswold*, *supra*, it is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the liberty recognized in such cases. Similarly, if *Roe* is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection, this Court's post-*Roe* decisions accord with *Roe's* view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. See, e. g., *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 111 L. Ed. 2d 224, 110 S. Ct. 2841. Finally, if *Roe* is classified as *sui generis*, there clearly has been no erosion of its central determination. It was expressly reaffirmed in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (*Akron I*), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169; and, in *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040, a majority either voted to reaffirm or declined to address the constitutional validity of *Roe's* central holding. Pp. 857-859.

(g) No change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for its overruling. Although subsequent maternal health care advances allow for later abortions safe to the pregnant woman, and post-*Roe* neonatal care developments have advanced viability to a point somewhat earlier, these facts go only to the scheme of time limits on the realization of competing interests. Thus, any later divergences from the factual premises of *Roe* have no bearing on the validity of its central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on when

viability occurs. Whenever it may occur, its attainment will continue to serve as the critical fact. P. 860.

(h) A comparison between *Roe* and two decisional lines of comparable significance — the line identified with *Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539, and the line that began with *Plessy v. Ferguson*, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 — confirms the result reached here. Those lines were overruled — by, respectively, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, and *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 — on the basis of facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. The overruling decisions were comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances. In contrast, because neither the factual underpinnings of *Roe*'s central holding nor this Court's understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining *Roe* with any justification beyond a present doctrinal disposition to come out differently from the *Roe* Court. That is an inadequate basis for overruling a prior case. Pp. 861-864.

(i) Overruling *Roe*'s central holding would not only reach an unjustifiable result under *stare decisis* principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in *Roe*, its decision has a dimension not present in normal cases and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. Moreover, the country's loss of confidence in the Judiciary would be underscored by condemnation for the Court's failure to keep faith with those who support the decision at a cost to themselves. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. Pp. 864-869.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER concluded in Part IV that an examination of *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, and subsequent cases, reveals a number of

guiding principles that should control the assessment of the Pennsylvania statute:

(a) To protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in potential life, see *id.*, at 162, the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

(b) *Roe*'s rigid trimester framework is rejected. To promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed. Measures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion, but may not impose unnecessary health regulations that present a substantial obstacle to a woman seeking an abortion.

(d) Adoption of the undue burden standard does not disturb *Roe*'s holding that regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" is also reaffirmed. *Id.*, at 164-165. Pp. 869-879.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER delivered the opinion of the Court with respect to Parts V-A and V-C, concluding that:

1. As construed by the Court of Appeals, § 3203's medical emergency definition is intended to assure that compliance with the State's abortion regulations would not in any way pose a significant threat to a woman's life or health, and thus does not violate the essential holding of *Roe*, *supra*, at 164. Although the definition could be interpreted in an unconstitutional manner, this Court defers to lower federal court interpretations of state law unless they amount to "plain" error. Pp. 879-880.

2. Section 3209's husband notification provision constitutes an undue burden and is therefore invalid. A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely. The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant. Furthermore, it cannot be claimed that the father's interest in the fetus' welfare is equal to the mother's protected liberty, since it is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to this Court's present understanding of marriage and of the nature of the rights secured by the Constitution. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69, 49 L. Ed. 2d 788, 96 S. Ct. 2831. Pp. 887-898.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER, joined by JUSTICE STEVENS, concluded in Part V-E that all of the statute's record-keeping and reporting requirements, except that relating to spousal notice, are constitutional. The reporting provision relating to the reasons a married woman has not notified her husband that she intends to have an abortion must be invalidated because it places an undue burden on a woman's choice. Pp. 900-901.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER concluded in Parts V-B and V-D that:

1. Section 3205's informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy. To the extent *Akron I*, 462 U.S. at 444, and *Thornburgh*, 476 U.S. at 762, find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases are inconsistent with *Roe's* acknowledgment of an important interest in potential life, and are overruled. Requiring that the woman be informed of the availability of information relating to the consequences to the fetus does not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman's position, and does not underlie or override the abortion right. Moreover, the physician's First Amendment rights not to speak are

implicated only as part of the practice of medicine, which is licensed and regulated by the State. There is no evidence here that requiring a doctor to give the required information would amount to a substantial obstacle to a woman seeking an abortion. The premise behind *Akron I's* invalidation of a waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion, 462 U.S. at 450, is also wrong. Although § 3205's 24-hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid on the present record and in the context of this facial challenge. Pp. 881-887.

2. Section 3206's one-parent consent requirement and judicial bypass procedure are constitutional. See, e. g., *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510-519, 111 L. Ed. 2d 405, 110 S. Ct. 2972. Pp. 899-900.

JUSTICE BLACKMUN concluded that application of the strict scrutiny standard of review required by this Court's abortion precedents results in the invalidation of all the challenged provisions in the Pennsylvania statute, including the reporting requirements, and therefore concurred in the judgment that the requirement that a pregnant woman report her reasons for failing to provide spousal notice is unconstitutional. Pp. 930, 934-936.

THE CHIEF JUSTICE, joined by JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS, concluded that:

1. Although *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, is not directly implicated by the Pennsylvania statute, which simply regulates and does not prohibit abortion, a reexamination of the "fundamental right" *Roe* accorded to a woman's decision to abort a fetus, with the concomitant requirement that any state regulation of abortion survive "strict scrutiny," *id.*, at 154-156, is warranted by the confusing and uncertain state of this Court's post-*Roe* decisional law. A review of post-*Roe* cases demonstrates both that they have expanded upon *Roe* in imposing increasingly greater restrictions on the States, see *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 783, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (Burger, C. J., dissenting), and that the Court has become increasingly more divided, none of the last three such decisions having commanded a majority opinion, see *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972; *Hodgson v. Minnesota*, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926; *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L.

505 U.S. 833, *; 112 S. Ct. 2791, **;
120 L. Ed. 2d 674, ***; 1992 U.S. LEXIS 4751

Ed. 2d 410, 109 S. Ct. 3040. This confusion and uncertainty complicated the task of the Court of Appeals, which concluded that the "undue burden" standard adopted by JUSTICE O'CONNOR in *Webster* and *Hodgson* governs the present cases. Pp. 944-951.

2. The *Roe* Court reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571; *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625; *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817; and *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678, and thereby deemed the right to abortion to be "fundamental." None of these decisions endorsed an all-encompassing "right of privacy," as *Roe, supra*, at 152-153, claimed. Because abortion involves the purposeful termination of potential life, the abortion decision must be recognized as *sui generis*, different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy. And the historical traditions of the American people — as evidenced by the English common law and by the American abortion statutes in existence both at the time of the Fourteenth Amendment's adoption and *Roe's* issuance — do not support the view that the right to terminate one's pregnancy is "fundamental." Thus, enactments abridging that right need not be subjected to strict scrutiny. Pp. 951-953.

3. The undue burden standard adopted by the joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER has no basis in constitutional law and will not result in the sort of simple limitation, easily applied, which the opinion anticipates. To evaluate abortion regulations under that standard, judges will have to make the subjective, unguided determination whether the regulations place "substantial obstacles" in the path of a woman seeking an abortion, undoubtedly engendering a variety of conflicting views. The standard presents nothing more workable than the trimester framework the joint opinion discards, and will allow the Court, under the guise of the Constitution, to continue to impart its own preferences on the States in the form of a complex abortion code. Pp. 964-966.

4. The correct analysis is that set forth by the plurality opinion in *Webster, supra*: A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. P. 966.

5. Section 3205's requirements are rationally related to the State's legitimate interest in assuring that a woman's

consent to an abortion be fully informed. The requirement that a physician disclose certain information about the abortion procedure and its risks and alternatives is not a large burden and is clearly related to maternal health and the State's interest in informed consent. In addition, a State may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the abortion alternatives' medical aspects. The requirement that information be provided about the availability of paternal child support and state-funded alternatives is also related to the State's informed consent interest and furthers the State's interest in preserving unborn life. That such information might create some uncertainty and persuade some women to forgo abortions only demonstrates that it might make a difference and is therefore relevant to a woman's informed choice. In light of this plurality's rejection of *Roe's* "fundamental right" approach to this subject, the Court's contrary holding in *Thornburgh* is not controlling here. For the same reason, this Court's previous holding invalidating a State's 24-hour mandatory waiting period should not be followed. The waiting period helps ensure that a woman's decision to abort is a well-considered one, and rationally furthers the State's legitimate interest in maternal health and in unborn life. It may delay, but does not prohibit, abortions; and both it and the informed consent provisions do not apply in medical emergencies. Pp. 966-970.

6. The statute's parental consent provision is entirely consistent with this Court's previous decisions involving such requirements. See, e. g., *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517. It is reasonably designed to further the State's important and legitimate interest "in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson, supra*, at 444. Pp. 970-971.

7. Section 3214(a)'s requirement that abortion facilities file a report on each abortion is constitutional because it rationally furthers the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act, while keeping the reports completely confidential. Public disclosure of other reports made by facilities receiving public funds — those identifying the facilities and any parent, subsidiary, or affiliated organizations, § 3207(b), and those revealing the total number of abortions performed, broken down by trimester, § 3214(f) — are rationally related to the State's legitimate interest in informing taxpayers as to who is benefiting from public funds and what services the funds

are supporting; and records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. Pp. 976-977.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS, concluded that a woman's decision to abort her unborn child is not a constitutionally protected "liberty" because (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. See, e. g., *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (SCALIA, J., concurring). The Pennsylvania statute should be upheld in its entirety under the rational basis test. Pp. 979-981.

COUNSEL: Kathryn Kolbert argued the cause for petitioners in No. 91-744 and respondents in No. 91-902. With her on the briefs were Janet Benshoof, Lynn M. Paltrow, Rachael N. Pinc, Steven R. Shapiro, John A. Powell, Linda J. Wharton, and Carol E. Tracy.

Ernest D. Preate, Jr., Attorney General of Pennsylvania, argued the cause for respondents in No. 91-744 and petitioners in No. 91-902. With him on the brief were John G. Knorr III, Chief Deputy Attorney General, and Kate L. Mersheimer, Senior Deputy Attorney General.

Solicitor General Starr argued the cause for the United States as amicus curiae in support of respondents in No. 91-744 and petitioners in No. 91-902. With him on the brief were Assistant Attorney General Gerson, Paul J. Larkin, Jr., Thomas G. Hungar, and Alfred R. Mollin. +

+ Briefs of amici curiae were filed for the State of New York et al. by Robert Abrams, Attorney General of New York, Jerry Boone, Solicitor General, Mary Ellen Burns, Chief Assistant Attorney General, and Sanford M. Cohen, Donna I. Dennis, Marjorie Fujiki, and Shelley B. Mayer, Assistant Attorneys General, and John McKernan, Governor of Maine, and Michael E. Carpenter, Attorney General, Richard Blumenthal, Attorney General of Connecticut, Charles M. Oberly III, Attorney General of Delaware, Warren Price III, Attorney General of Hawaii, Roland W. Burris, Attorney General of Illinois, Bonnie J. Campbell, Attorney General of Iowa, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frankie Sue Del Papa, Attorney General of Nevada, Robert J. Del Tufo, Attorney General of New Jersey, Tom Udall, Attorney General of New Mexico, Lacy H. Thornburg, Attorney General of North

Carolina, James E. O'Neil, Attorney General of Rhode Island, Dan Morales, Attorney General of Texas, Jeffrey L. Amestoy, Attorney General of Vermont, and John Payton, Corporation Counsel of District of Columbia; for the State of Utah by R. Paul Van Dam, Attorney General, and Mary Anne Q. Wood, Special Assistant Attorney General; for the City of New York et al. by O. Peter Sherwood, Conrad Harper, Janice Goodman, Leonard J. Koerner, Lorna Bade Goodman, Gail Rubin, and Julie Mertus; for 178 Organizations by Pamela S. Karlan and Sarah Weddington; for Agudath Israel of America by David Zwiebel; for the Alan Guttmacher Institute et al. by Colleen K. Connell and Dorothy B. Zimbrakos; for the American Academy of Medical Ethics by Joseph W. Dellapenna; for the American Association of Prolife Obstetricians and Gynecologists et al. by William Bentley Ball, Philip J. Murren, and Maura K. Quinlan; for the American College of Obstetricians and Gynecologists et al. by Carter G. Phillips, Ann E. Allen, Laurie R. Rockett, Joel I. Klein, Nadine Taub, and Sarah C. Carey; for the American Psychological Association by David W. Ogden; for Texas Black Americans for Life by Lawrence J. Joyce and Craig H. Greenwood; for Catholics United for Life et al. by Thomas Patrick Monaghan, Jay Alan Sekulow, Walter M. Weber, Thomas A. Glessner, Charles E. Rice, and Michael J. Laird; for the Elliot Institute for Social Sciences Research by Stephen R. Kaufmann; for Feminists for Life of America et al. by Keith A. Fournier, John G. Stepanovich, Christine Smith Torre, Theodore H. Amshoff, Jr., and Mary Dice Grenen; for Focus on the Family et al. by Stephen H. Galebach, Gregory J. Granitto, Stephen W. Reed, David L. Llewellyn, Jr., Benjamin W. Bull, and Leonard J. Pranschke; for the Knights of Columbus by Carl A. Anderson; for the Life Issues Institute by James Bopp, Jr., and Richard E. Coleson; for the NAACP Legal Defense and Educational Fund, Inc., et al. by Julius L. Chambers, Ronald L. Ellis, and Alice L. Brown; for the National Legal Foundation by Robert K. Skolrood; for National Right to Life, Inc., by Messrs. Bopp and Coleson, Robert A. Destro, and A. Eric Johnston; for the Pennsylvania Coalition Against Domestic Violence et al. by Phyllis Gelman; for the Rutherford Institute et al. by Thomas W. Strahan, John W. Whitehead, Mr. Johnston, Stephen E. Hurst, Joseph Secola, Thomas S. Neuberger, J. Brian Heller, Amy Dougherty, Stanley R. Jones, David Melton, Robert R. Melnick, William Bonner, W. Charles Bundren,

and James Knicey; for the Southern Center for Law & Ethics by Tony G. Miller; for the United States Catholic Conference et al. by Mark E. Chopko, Phillip H. Harris, Michael K. Whitehead, and Forest D. Montgomery; for University Faculty for Life by Clarke D. Forsythe and Victor G. Rosenblum; for Certain American State Legislators by Paul Benjamin Linton; for 19 Arizona Legislators by Ronald D. Maines; for Representative Henry J. Hyde et al. by Albert P. Blaustein and Kevin J. Todd; for Representative Don Edwards et al. by Walter Dellinger and Lloyd N. Cutler; and for 250 American Historians by Sylvia A. Law.

JUDGES: O'CONNOR, KENNEDY, and SOUTER, JJ., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, in which BLACKMUN and STEVENS, JJ., joined, an opinion with respect to Part V-E, in which STEVENS, J., joined, and an opinion with respect to Parts IV, V-B, and V-D. STEVENS, J., filed an opinion concurring in part and dissenting in part, post, p. 911. BLACKMUN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, post, p. 922. REHNQUIST, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which WHITE, SCALIA, and THOMAS, JJ., joined, post, p. 944. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and THOMAS, JJ., joined, post, p. 979.

OPINIONBY: O'CONNOR; KENNEDY; SOUTER

OPINION:

[*843] [***693] [**2803] JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, [*844] V-C, and VI, an opinion with respect to Part V-E, in which JUSTICE STEVENS joins, and an opinion with respect to Parts IV, V-B, and V-D.

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*. See Brief for

Respondents 164-117; Brief for the United States as *Amicus Curiae* 8.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]
[***LEdHR3A] [3A] [***LEdHR4A] [4A]
[***LEdHR5A] [5A] [***LEdHR6A] [6A]At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons. Stat. §§ 3203-3220 (1990). Relevant portions of the Act are set forth in the Appendix. *Infra*, 505 U.S. at 902. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(e), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the [***694] Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

[*845] Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief. Each provision was challenged as unconstitutional on its face. The District Court entered a preliminary injunction against the enforcement of the regulations, and, after a 3-day bench trial, held all the provisions at issue here unconstitutional, entering a permanent injunction against Pennsylvania's enforcement of them. 744 F. Supp. 1323 (ED Pa. 1990). The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement. 947 F.2d 682 (1991). We granted certiorari. 502 U.S. 1056 (1992).

The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards. See 947 F.2d at 687-698. And at oral argument in this Court, the attorney for the parties challenging the statute took the position that none of the enactments can be upheld without overruling *Roe v. Wade*. Tr. of Oral Arg. 5-6. We disagree with that analysis; but we acknowledge that our decisions

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after *Roe* cast doubt upon the meaning and reach of its holding. Further, THE CHIEF JUSTICE admits that he would overrule the central [*2804] holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. See *post*, 505 U.S. at 944, 966. State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

[**LEdHR7A] [7A] [**LEdHR8] [8]
[**LEdHR9] [9] [**LEdHR10] [10] After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, [*846] and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

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

[**695] II

[**LEdHR11A] [11A] Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since *Mugler v. Kansas*, 123 U.S. 623, 660-661, 31 L. Ed. 205, 8 S. Ct. 273 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662

(1986). As Justice Brandeis (joined by Justice Holmes) observed, "despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth [*847] Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Whitney v. California*, 274 U.S. 357, 373, 71 L. Ed. 1095, 47 S. Ct. 641 (1927) (concurring opinion). "The guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" *Poe v. Ullman*, 367 U.S. 497, 541, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado v. California*, 110 U.S. 516, 532, 28 L. Ed. 232, 4 S. Ct. 111 (1884)).

The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, e. g., *Duncan v. Louisiana*, 391 U.S. 145, 147-148, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty [*2805] encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. See *Adamson v. California*, 332 U.S. 46, 68-92, 91 L. Ed. 1903, 67 S. Ct. 1672 (1947) (Black, J., dissenting). But of course this Court has never accepted that view.

[**LEdHR11B] [11B] [**LEdHR12] [12] It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See *Michael H. v. Gerald D.*, 491 U.S. 110, 127-128, n.6, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (opinion of SCALIA, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial [**696] marriage was illegal [*848] in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) (relying, in an opinion for eight Justices, on

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the Due Process Clause). Similar examples may be found in *Turner v. Safley*, 482 U.S. 78, 94-99, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987); in *Carey v. Population Services International*, 431 U.S. 678, 684-686, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977); in *Griswold v. Connecticut*, 381 U.S. 479, 481-482, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965), as well as in the separate opinions of a majority of the Members of the Court in that case, *id.*, at 486-488 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (expressly relying on due process), *id.*, at 500-502 (Harlan, J., concurring in judgment) (same), *id.*, at 502-507 (WHITE, J., concurring in judgment) (same); in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925); and in *Meyer v. Nebraska*, 262 U.S. 390, 399-403, 67 L. Ed. 1042, 43 S. Ct. 625 (1923).

[**LEdHR11C] [11C]Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized:

"The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v. Ullman*, supra, at 543 (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote these words in addressing an issue the full Court did not reach in *Poe v. Ullman*, but the Court adopted his position four Terms later in *Griswold v. Connecticut*, supra. In *Griswold*, we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed, under the Equal Protection Clause, for unmarried couples. See *Eisenstadt v. Baird*, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972).

Constitutional protection was extended [**2806] to the sale and distribution of contraceptives in *Carey v. Population Services International*, supra. It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family [***697] and parenthood, see *Carey v. Population Services International*, supra; *Moore v. East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977); *Eisenstadt v. Baird*, supra; *Loving v. Virginia*, supra; *Griswold v. Connecticut*, supra; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); *Pierce v. Society of Sisters*, supra; *Meyer v. Nebraska*, supra, as well as bodily integrity, see, e. g., *Washington v. Harper*, 494 U.S. 210, 221-222, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); *Winston v. Lee*, 470 U.S. 753, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985); *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952).

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. [*850] The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint." *Poe v. Ullman*, 367 U.S. at 542 (opinion dissenting from dis-

missal on jurisdictional grounds).

See also *Rochin v. California*, *supra*, at 171-172 (Frankfurter, J., writing for the Court) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges").

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these [***698] philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps [*851] in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See, e. g., *Ferguson v. Skrupa*, 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963); [**2807] *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. See *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943); *Texas v. Johnson*, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services International*, 431 U.S. at 685. Our cases recognize "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." *Eisenstadt v. Baird*, *supra*, at 453 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices cen-

tral to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

[*852] These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, [***699] to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support [*853] the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of [**2808] creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for

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the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

[***LEdHR7B] [7B]It was this dimension of personal liberty that *Roe* sought to protect, and its holding invoked the reasoning and the tradition of the precedents we have discussed, granting protection to substantive liberties of the person. *Roe* was, of course, an extension of those cases and, as the decision itself indicated, the separate States could act in some degree to further their own legitimate interests in protecting prenatal life. The extent to which the legislatures of the States might act to outweigh the interests of the woman in choosing to terminate her pregnancy was a subject of debate both in *Roe* itself and in decisions following it.

While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude 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*. We turn now to that doctrine.

[*854] III

A

[***LEdHR13] [13]The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With *Cardozo*, we recognize that no judicial system could do society's work if it eyed each issue [***700] afresh in every case that raised it. See *B. Cardozo, The Nature of the Judicial Process 149 (1921)*. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See *Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16*. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, see *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-411, 76 L. Ed. 815, 52 S. Ct. 443 (1932)* (Brandeis, J., dissenting). See also *Payne*

v. Tennessee, 501 U.S. 808, 842, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); *Arizona v. Rumsey, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984)*. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham, 382 U.S. 111, 116, 15 L. Ed. 2d 194, 86 S. Ct. 258 (1965)*; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e. g., United States v. Title Ins. & Trust [*855] Co., 265 U.S. 472, 486 (1924)*; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson v. McLean Credit Union, 491 U.S. 164, 173-174, 105 L. Ed. 2d 132, [*2809] 109 S. Ct. 2363 (1989)*; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e. g., Burnet, supra, at 412* (Brandeis, J., dissenting).

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

1

[***LEdHR7C] [7C]Although *Roe* has engendered opposition, it has in no sense proven "unworkable," see *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)*, representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, [***701] required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

2

The inquiry into reliance counts the cost of a rule's

repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see *Payne v. Tennessee*, [*856] *supra*, at 828, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.

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

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, e. g., R. Petchesky, *Abortion and Woman's Choice* 109, 133, n.7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

[*857] [**2810] 3

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

It will be recognized, of course, that *Roe* stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The *Roe* Court itself placed

its holding in the succession of cases most prominently [***702] exemplified by *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). See *Roe*, 410 U.S. at 152-153. When it is so seen, *Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. See, e. g., *Carey v. Population Services International*, 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977).

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990); cf., e. g., *Riggins v. Nevada*, 504 U.S. 127, 135, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (1992); *Washington v. Harper*, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); see also, e. g., *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358 (1905).

Finally, one could classify *Roe* as *sui generis*. If the case is so viewed, then there clearly has been no erosion of its central determination. The original holding resting on the [*858] concurrence of seven Members of the Court in 1973 was expressly affirmed by a majority of six in 1983, see *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (*Akron I*), and by a majority of five in 1986, see *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169, expressing adherence to the constitutional ruling despite legislative efforts in some States to test its limits. More recently, in *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989), although two of the present authors questioned the trimester framework in a way consistent with our judgment today, see *id.*, at 518 (REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); *id.*, at 529 (O'CONNOR, J., concurring in part and concurring in judgment), a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe*. See *Webster*, 492 U.S. at 521 (REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); *id.*, at 525-526 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 537,

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553 (BLACKMUN, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); *id.*, at 561-563 (STEVENS, J., concurring in part and dissenting in part).

Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central [***703] holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the [**2811] recognition afforded by the Constitution to the woman's liberty. The latter aspect of the decision fits comfortably within the framework of the Court's prior decisions, including *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); *Griswold*, *supra*; *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); and *Eisenstadt v. Baird*, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972), the holdings of which are "not a series of isolated points," but mark a "rational continuum." *Poe v. Ullman*, 367 U.S. at 543 (Harlan, J., dissenting). As we described in [**859] *Carey v. Population Services International*, *supra*, the liberty which encompasses those decisions

"includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" 431 U.S. at 684-685 (citations omitted).

The soundness of this prong of the *Roe* analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions. *E. g.*, *Arnold v. Board of Education of Escambia County, Ala.*, 880 F.2d 305, 311 (CA11 1989) (relying upon *Roe* and concluding that government officials violate the Constitution by coercing a minor to have an abortion); *Avery v. County of Burke*, 660 F.2d 111, 115 (CA4 1981) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait); see also *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (relying on *Roe* in finding a right to terminate medical treatment), cert. denied *sub nom. Garger v. New Jersey*, 429 U.S. 922, 50 L.

Ed. 2d 289, 97 S. Ct. 319 (1976)). In any event, because *Roe's* scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications in future cases.

[*860] 4

We have seen how time has overtaken some of *Roe's* factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see *Akron I*, *supra*, at 429, n.11, and advances in neonatal care have advanced viability to a point somewhat earlier. Compare *Roe*, 410 U.S. at 160, with *Webster*, *supra*, at 515-516 (opinion of REHNQUIST, C. J.); see *Akron I*, 462 U.S. at 457, [***704] and n.5 (O'CONNOR, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe's* central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was [**2812] decided; which is to say that no change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

5

The sum of the precedential enquiry to this point shows *Roe's* underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. 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; no erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant; [*861] *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. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe's* central holding, with whatever de-

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gree of personal reluctance any of us may have, not for overruling it.

B

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

The first example is that line of cases identified with *Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905), which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of *laissez-faire*. *Id.*, at 75 (dissenting opinion). The *Lochner* decisions were exemplified by *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 (1923), in which this Court held it to be an infringement of constitutionally protected liberty of contract [***705] to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1937), signaled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally [*862] false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See *West Coast Hotel Co.*, *supra*, at 399. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: "The older world of *laissez faire* was recognized everywhere outside the Court to be dead." *The Struggle for Judicial Supremacy* 85 (1941). The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing [***2813] the separate-but-equal rule for applying the Fourteenth Amendment's

equal protection guarantee. They began with *Plessy v. Ferguson*, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The *Plessy* Court considered "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*, at 551. Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, see *id.*, at 557, 562 (Harlan, J., dissenting), this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of [*863] the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954) (*Brown I*). As one commentator observed, the question before the Court in *Brown* was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid." Black, *The Lawfulness of the Segregation Decisions*, 69 *Yale L. J.* 421, 427 (1960).

The Court in *Brown* addressed [***706] these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. 347 U.S. at 494-495. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, see *Plessy*, *supra*, at 552-564 (Harlan, J., dissenting), we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declaration disclosed,

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had not been able to perceive. As the decisions were thus comprehensible [*864] they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of *Roe's* central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the [**2814] Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. See, e. g., *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 636, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); *Mapp v. Ohio*, 367 U.S. 643, 677, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) (Harlan, J., dissenting).

C

The examination of the conditions justifying the repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by [***707] *Brown* is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did. In the present cases, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis [*865] would not be complete, however, without explaining why overruling *Roe's* central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.

The root of American governmental power is revealed most clearly in the instance of the power conferred by the

Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is [*866] obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case. This is not to say, of course, that this Court cannot give a perfectly satisfactory explanation in most cases. People understand that some of the Constitution's language is hard to fathom and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions. However upsetting it may be [**2815] to those most directly affected when one judicially derived rule replaces another, the country can accept some correction of error without necessarily questioning the legitimacy of the Court.

In two circumstances, however, [***708] the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that

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a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

That first circumstance can be described as hypothetical; the second is to the point here and now. Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its [*867] decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown v Board of Education*, 349 U.S. 294, 300, 99 L. Ed. 1083, 75 S. Ct. 753 (1955) (*Brown II*) ("It should go without saying that the vitality of the constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them").

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results [*868] when viewed outside of constitutional [***709] terms,

but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance [**2816] with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power [*869] to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe's* original decision, and we do so today.

IV

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom

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

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

[*870] We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of *stare decisis*. Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 759; *Akron I*, 462 U.S. at 419-420. Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent [*2817] with *Roe's* statement that the State has a legitimate interest in promoting the life or potential life of the unborn, see *infra*, 505 U.S. at 882-883, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. It is that premise which we reaffirm today.

The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See *Roe v. Wade*, 410 U.S. at 163. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, see *supra*, at 860, but this is an imprecision within tolerable limits given that the medical community

and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

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

On the other side of the equation is the interest of the State in the protection of potential life. The *Roe* Court recognized the State's "important and legitimate interest in protecting the potentiality of human life." *Roe, supra*, at 162. The weight to be [***711] given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe*. We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.

Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." *Roe, supra*, at 163. That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. See, e. g., *Akron I, supra*, at 427. Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases.

[*872] *Roe* established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the

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[**2818] fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake. *Roe*, *supra*, at 163-166. Most of our cases since *Roe* have involved the application of rules derived from the trimester framework. See, e. g., *Thornburgh v. American College of Obstetricians and Gynecologists*, *supra*; *Akron I*, *supra*.

The trimester framework no doubt was erected to ensure 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. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.

[***LEdHR14A] [14A] [***LEdHR15A] [15A] Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations [***712] designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Webster v. Reproductive Health Services*, 492 U.S. at 511 (opinion of [*873] the Court) (quoting *Poelker v. Doe*, 432 U.S. 519, 521, 53 L. Ed. 2d 528, 97 S. Ct. 2391 (1977)). It follows 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. This, too, we find consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

[***LEdHR16A] [16A] We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. See *Webster v. Reproductive Health Services*, 492 U.S. at 518 (opinion of REHNQUIST, C. J.); *id.*, at 529 (O'CONNOR, J., concurring in part and concurring in judgment) (describing the trimester framework as "problematic"). Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced

in that case. A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they [*874] wish to vote. *Anderson v. Celebrezze*, 460 U.S. 780, 788, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983); *Norman v. Reed*, 502 U.S. 279, 116 L. Ed. 2d 711, 112 S. Ct. 698 (1992).

[**2819] The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where [***713] state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. See *Hodgson v. Minnesota*, 497 U.S. 417, 458-459, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990) (O'CONNOR, J., concurring in part and concurring in judgment in part); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 519-520, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (*Akron II*) (opinion of KENNEDY, J.); *Webster v. Reproductive Health Services*, *supra*, at 530 (O'CONNOR, J., concurring in part and concurring in judgment); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 828 (O'CONNOR, J., dissenting); *Simopoulos v. Virginia*, 462 U.S. 506, 520, 76 L. Ed. 2d 755, 103 S. Ct. 2532 (1983) (O'CONNOR, J., concurring in part and concurring in judgment); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 505, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983) (O'CONNOR, J., concurring in judgment in part and dissenting in part); *Akron I*, 462 U.S. at 464 (O'CONNOR, J., joined by WHITE and REHNQUIST, JJ., dissenting); *Bellotti v. Baird*, 428 U.S. 132, 147, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976)

(*Bellotti I*).

For the most part, the Court's early abortion cases adhered to this view. In *Maier v. Roe*, 432 U.S. 464, 473-474, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977), the Court explained: "Roe did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." See [*875] also *Doe v. Bolton*, 410 U.S. 179, 198, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973) ("The interposition of the hospital abortion committee is unduly restrictive of the patient's rights"); *Bellotti I*, *supra*, at 147 (State may not "impose undue burdens upon a minor capable of giving an informed consent"); *Harris v. McRae*, 448 U.S. 297, 314, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980) (citing *Maier*; *supra*). Cf. *Carey v. Population Services International*, 431 U.S. at 688 ("The same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely").

These considerations of the nature of the abortion right illustrate that it is an overstatement to describe it as a right to decide whether to have an abortion "without interference from the State." *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 61, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976). All abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy. It is, as a consequence, not surprising that despite the protestations contained in the original *Roe* opinion to the effect that the Court was not recognizing an absolute right, 410 U.S. at 154-155, the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far [***714] because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. at 453. [**2820] Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe's* terms, in practice it undervalues the State's interest in the potential life within the woman.

Roe v. Wade was express in its recognition of the State's "important and legitimate interests in preserving and protecting [*876] the health of the pregnant woman [and] in protecting the potentiality of human life." 410 U.S. at 162. The trimester framework, however, does not fulfill *Roe's* own promise that the State has an interest in

protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. *Id.*, at 163. Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy. Cf. *Webster*, 492 U.S. at 519 (opinion of REHNQUIST, C. J.); *Akron I*, *supra*, at 461 (O'CONNOR, J., dissenting).

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent. See, e. g., *Hodgson v. Minnesota*, *supra*, at 459-461 (O'CONNOR, J., concurring in part and concurring in judgment); *Akron II*, *supra*, at 519-520 (opinion of KENNEDY, J.); *Thornburgh v. American College of Obstetricians and Gynecologists*, *supra*, at 828-829 (O'CONNOR, J., dissenting); *Akron I*, *supra*, at 461-466 (O'CONNOR, J., dissenting); *Harris v. McRae*, *supra*, at 314; *Maier v. Roe*, *supra*, at 473; *Beal v. Doe*, 432 U.S. 438, 446, 53 L. Ed. 2d 464, 97 S. Ct. 2366 (1977); *Bellotti I*, *supra*, at 147. Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.

[*877] A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid [***715] because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard. Cf. *McCleskey v. Zant*, 499 U.S. 467, 489, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991) (attempting "to define the doctrine of abuse of the writ with more precision" after acknowledging tension among ear-

lier cases). In our considered judgment, an undue burden is an unconstitutional burden. See *Akron II*, 497 U.S. at 519-520 (opinion of KENNEDY, J.). Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed [**2821] to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. See, e. g., *Akron I*, 462 U.S. at 462-463 (O'CONNOR, J., dissenting). The answer is no.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. See *infra*, 505 U.S. at 899-900 (addressing Pennsylvania's parental consent requirement). [*878] Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

[**LEdHR14B] [14B] [***LEdHR15B] [15B] [***LEdHR16B] [16B] Even when jurists reason from shared premises, some disagreement is inevitable. Compare *Hodgson*, 497 U.S. at 482-497 (KENNEDY, J., concurring in judgment in part and dissenting in part), with *id.*, at 458-460 (O'CONNOR, J., concurring in part and concurring in judgment in part). That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard. We give this summary:

(a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester [***716] framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These mea-

asures must not be an undue burden on the right.

(c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

[*879] (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm *Roe's* holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade*, 410 U.S. at 164-165.

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

V

The Court of Appeals applied what it believed to be the undue burden standard and upheld each of the provisions except for the husband notification requirement. We agree generally with this conclusion, but refine the [**2822] undue burden analysis in accordance with the principles articulated above. We now consider the separate statutory sections at issue.

A

[***LEdHR1B] [1B] Because it is central to the operation of various other requirements, we begin with the statute's definition of medical emergency. Under the statute, a medical emergency is

"that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." 18 Pa. Cons. Stat. § 3203 (1990).

[*880] Petitioners argue that the definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks.

505 U.S. 833, *880; 112 S. Ct. 2791, **2822;
120 L. Ed. 2d 674, ***LEdHR1B; 1992 U.S. LEXIS 4751

If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health. 410 U.S. at 164. See also *Harris v. [***717] McRae*, 448 U.S. at 316.

[***LEdHR1C] [1C][***LEdHR17] [17]The District Court found that there were three serious conditions which would not be covered by the statute: pre-eclampsia, inevitable abortion, and premature ruptured membrane. 744 F. Supp. at 1378. Yet, as the Court of Appeals observed, 947 F.2d at 700-701, it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences. While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase "serious risk" to include those circumstances. *Id.*, at 701. It stated: "We read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Ibid.* As we said in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985): "Normally, . . . we defer to the construction of a state statute given it by the lower federal courts." Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to "plain" error. *Palmer v. Hoffman*, 318 U.S. 109, 118, 87 L. Ed. 645, 63 S. Ct. 477 (1943). This "reflects our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Frisby v. Schultz*, 487 U.S. 474, 482, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988) (citation omitted). We adhere to that course today, and conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right.

[*881] B

[***LEdHR2B] [2B]We next consider the informed consent requirement. 18 Pa. Cons. Stat. § 3205 (1990). Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alter-

natives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has [**2823] been provided them if she chooses to view them.

Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. at 67. In this respect, the statute is unexceptional. Petitioners challenge the statute's definition of informed consent because it includes the provision of specific information by the doctor and the mandatory 24-hour waiting period. The conclusions reached by a majority of the Justices in the separate opinions filed today and the [***718] undue burden standard adopted in this opinion require us to overrule in part some of the Court's past decisions, decisions driven by the trimester framework's prohibition of all previability regulations designed to further the State's interest in fetal life.

In *Akron I*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983), we invalidated an ordinance which required that a woman seeking an abortion be provided by her physician with specific information "designed to influence the woman's informed choice between abortion or childbirth." *Id.*, at 444. As we later described [*882] the *Akron I* holding in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 762, there were two purported flaws in the Akron ordinance: the information was designed to dissuade the woman from having an abortion and the ordinance imposed "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient . . ." *Ibid.*

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe's* acknowledgment of an important interest in potential life, and are overruled. This is clear even on the very terms of *Akron I* and *Thornburgh*. Those decisions, along with *Danforth*, recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. *E. g.*, *Danforth*, *supra*, at 66-67. It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State

further the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. An example illustrates the point. We would think [*883] it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself. A requirement that the physician make available information similar to that mandated by the statute here was described in *Thornburgh* as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." 476 U.S. at 762. [***719] We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As [**2824] we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

Our prior cases also suggest that the "straitjacket," *Thornburgh*, *supra*, at 762 (quoting *Danforth*, *supra*, at 67, n.8), of particular information which must be given in each case interferes with a constitutional right of privacy between a pregnant woman and her physician. As a preliminary matter, it is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions "if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely [*884] adverse effect on the physical or mental health of the patient." 18 Pa. Cons. Stat. § 3205 (1990). In this respect, the statute does not prevent the physician from exercising his or her medical

judgment.

Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

The Pennsylvania statute also requires us to reconsider the holding [***720] in *Akron I* that the State need not require that a physician, as opposed to a qualified assistant, provide information relevant to a woman's informed consent. 462 U.S. at 448. Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not [*885] an undue burden. Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 (1955). Thus, we uphold the provision [**2825] as a reasonable means to ensure that the woman's consent is informed.

Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement. In *Akron I* we said: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served

by requiring a 24-hour delay as a matter of course." 462 U.S. at 450. We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be [*886] a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of antiabortion protestors demonstrating outside a clinic." 744 F. Supp. at 1351. As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be "particularly burdensome." *Id.*, at 1352.

These findings are troubling in [***721] some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of "increasing the cost and risk of delay of abortions," *id.*, at 1378, but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles. Rather, applying the trimester framework's strict prohibition of all regulation designed to promote the State's interest in potential life before viability, see *id.*, at 1374, the District Court concluded that the waiting period does not further the state "interest in maternal health" and "infringes the physician's discretion to exercise sound medical judgment," *id.*, at 1378. Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a rea-

son to invalidate it. In light of the construction given the statute's definition of medical emergency by the Court of Appeals, and the District Court's findings, we cannot say that the waiting period imposes a real health risk.

We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period [*887] on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period [***2826] is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

We are left with the argument that the various aspects of the informed consent requirement are unconstitutional because they place barriers in the way of abortion on demand. Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand. See, e. g., *Doe v. Bolton*, 410 U.S. at 189. Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State. Because the informed consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right *Roe* protects. The informed consent requirement is not an undue burden on that right.

C

[***LEdHR3B] [3B]Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone [***722] else to inflict bodily injury upon her. A physician who performs an abortion on [*888] a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

The District Court heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of this statute. These included:

"273. The vast majority of women con-

sult their husbands prior to deciding to terminate their pregnancy. . . .

"279. The 'bodily injury' exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children. . . .

"281. Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is usually not reported until it reaches life-threatening proportions) the actual number of families affected by domestic violence. In fact, researchers estimate that one of every two women will be battered at some time in their life. . . .

"282. A wife may not elect to notify her husband of her intention to have an abortion for a variety of reasons, including the husband's illness, concern about her own health, the imminent failure of the marriage, or the husband's absolute opposition to the abortion. . . .

"283. The required filing of the spousal consent form would require plaintiff-clinics to change their counseling [*889] procedures and force women to reveal their most intimate decision-making on pain of criminal sanctions. The confidentiality of these revelations could not be guaranteed, since [**2827] the woman's records are not immune from subpoena. . . .

"284. Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered. . . .

"285. Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the battering can cover a

broad range of actions and be gruesome and torturous. . . .

"286. Married women, victims of battering, have been killed in Pennsylvania and throughout the United States. . . .

"287. Battering can often involve a substantial amount of sexual abuse, including marital rape and sexual mutilation. . . .

"288. In a domestic abuse situation, it is common for the battering husband to also abuse the children in an attempt to coerce the wife. . . .

[***723] "289. Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy. . . . The battering husband may deny parentage and use the pregnancy as an excuse for abuse. . . .

"290. Secrecy typically shrouds abusive families. Family members are instructed not to tell anyone, especially police or doctors, about the abuse and violence. Battering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence and tells her that nobody will believe her. A battered woman, therefore, is highly unlikely to disclose [*890] the violence against her for fear of retaliation by the abuser. . . .

"291. Even when confronted directly by medical personnel or other helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered. . . .

"294. A woman in a shelter or a safe house unknown to her husband is not 'reasonably likely' to have bodily harm inflicted upon her by her batterer, however her attempt to notify her husband pursuant to section 3209 could accidentally disclose her whereabouts to her husband. Her fear of future ramifications would be realistic under the circumstances.

"295. Marital rape is rarely discussed with others or reported to law enforcement

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authorities, and of those reported only few are prosecuted. . . .

"296. It is common for battered women to have sexual intercourse with their husbands to avoid being battered. While this type of coercive sexual activity would be spousal sexual assault as defined by the Act, many women may not consider it to be so and others would fear disbelief. . . .

"297. The marital rape exception to section 3209 cannot be claimed by women who are victims of coercive sexual behavior other than penetration. The 90-day reporting requirement of the spousal sexual assault statute, 18 Pa. Con. Stat. Ann. § 3218(c), further narrows the class of sexually abused wives who can claim the exception, since many of these women may be psychologically unable to discuss or report the rape for several years after the incident. . . .

"298. Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of [*891] whether the section applies to them." 744 F. Supp. at 1360-1362 (footnote omitted).

These findings are supported by studies of domestic violence. The American Medical Association (AMA) has published a summary of the recent research in this field, which indicates that in an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners. In a 1985 survey, women reported that nearly one of every eight husbands had assaulted [***724] their wives during [**2828] the past year. The AMA views these figures as "marked underestimates," because the nature of these incidents discourages women from reporting them, and because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions or hospitals when the survey is conducted. According to the AMA, "researchers on family violence agree that the true incidence of partner violence is probably *double* the above estimates; or four million severely assaulted women per year. Studies on prevalence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." AMA Council on Scientific Affairs, *Violence Against Women* 7 (1991) (emphasis in original). Thus on an average day in the United States nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault. *Id.*, at 3-4; Shields & Hanneke, *Battered Wives' Reactions*

to Marital Rape, in *The Dark Side of Families: Current Family Violence Research* 131, 144 (D. Finkelhor, R. Gelles, G. Hataling, & M. Straus eds. 1983). In families where wifebeating takes place, moreover, child abuse is often present as well. *Violence Against Women, supra*, at 12.

Other studies fill in the rest of this troubling picture. Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common. L. Walker, *The Battered [*892] Woman Syndrome* 27-28 (1984). Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Herbert, Silver, & Ellard, *Coping with an Abusive Relationship: I. How and Why do Women Stay?*, 53 *J. Marriage & the Family* 311 (1991). Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 *J. Nat. Assn. of Social Workers* 350, 352 (1985). Returning to one's abuser can be dangerous. Recent Federal Bureau of Investigation statistics disclose that 8.8 percent of all homicide victims in the United States are killed by their spouses. Mercy & Saltzman, *Fatal Violence Among Spouses in the United States, 1976-85*, 79 *Am. J. Public Health* 595 (1989). Thirty percent of female homicide victims are killed by their male partners. *Domestic Violence: Terrorism in the Home*, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess., 3 (1990).

The limited research that has been conducted with respect to notifying one's husband about an abortion, although involving samples too small to be representative, also supports the District Court's findings of fact. The vast majority of women notify their male partners of their decision to obtain an abortion. In many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair. Where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence. Ryan & Plutzer, *When [***725] Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 *J. Marriage & the Family* 41, 44 (1989).

This information and the District Court's findings reinforce what common sense would suggest. In well-functioning [*893] marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are

the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable [**2829] fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209's notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from § 3209's notification requirement. And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault, § 3209(b)(3), because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins, § 3128(c). If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by § 3209.

The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose [*894] a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify

for one of the exceptions, the statute affects [***726] fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. See Brief for Respondents 83-86. We disagree with respondents' basic method of analysis.

[***LEdHR18] [18]The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 41 L. Ed. 2d 730, 94 S. Ct. 2831 (1974). 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.

[***LEdHR3C] [3C]Respondents' argument itself gives implicit recognition to this principle, at one of its critical points. Respondents speak of the one percent of women seeking abortions who are married and would choose not to notify their husbands of their plans. By selecting as the controlling class women [*895] who wish to obtain abortions, rather than all women or all pregnant women, respondents in effect concede that § 3209 must be judged by reference to those for whom it is an actual rather than an irrelevant restriction. Of course, as we have said, § 3209's real target is narrower even than the class of women seeking abortions identified by the State: it is married women seeking abortions who do not wish to notify their husbands of their [**2830] intentions and who do not qualify for one of the statutory exceptions to the notice requirement. The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. See, e. g., *Akron II*, 497 U.S. at 510-519; *Bellotti v. Baird*, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979) (*Bellotti II*); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. at 74. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women.

We recognize that a husband has a "deep and proper

505 U.S. 833, *895; 112 S. Ct. 2791, **2830;
120 L. Ed. 2d 674, ***LEdHR3C; 1992 U.S. LEXIS 4751

cern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying." *Danforth, supra*, at 69. With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody. *Stanley v. Illinois*, 405 U.S. 645, 651-652, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972); see also *Quilloin v. Walcott*, 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978); *Caban v. Mohammed*, 441 U.S. 380, 60 L. Ed. 2d 297, [***727] 99 S. Ct. 1760 (1979); *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983). If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living [*896] child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.

Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. Cf. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. at 281. The Court has held that "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Danforth, supra*, at 71. This conclusion rests upon the basic nature of marriage and the nature of our Constitution: "The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. at 453 (emphasis in original). The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1872), three Members of this [*897] Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and [**2831] representative in the

social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States." *Id.*, at 141 (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment). Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. *Hoyt v. Florida*, 368 U.S. 57, 62, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961). These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

In keeping with our rejection of the common-law understanding of a [***728] woman's role within the family, the Court held in *Danforth* that the Constitution does not permit a State to require a married woman to obtain her husband's consent before undergoing an abortion. 428 U.S. at 69. The principles that guided the Court in *Danforth* should be our guides today. For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*. The women most affected by this law — those who most reasonably fear the consequences of notifying their husbands that they are pregnant — are in the gravest danger.

[*898]

[***LEdHR3D] [3D] [***LEdHR19] [19]The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. If a husband's interest in the potential life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a postfertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking. Perhaps married women should notify their hus-

bands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs. And if a husband's interest justifies notice in any of these cases, one might reasonably argue that it justifies exactly what the *Danforth* Court held it did not justify — a requirement of the husband's consent as well. A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

[***LEdHR3E] [3E]Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women 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. These considerations confirm our conclusion that § 3209 is invalid.

[*899] [**2832] D

[***LEdHR4B] [4B]We next consider the parental consent provision. Except in a medical emergency, an emancipated young woman under 18 may not obtain an abortion unless she and [***729] one of her parents (or guardian) provides informed consent as defined above. If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.

We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. See, e. g., *Akron II*, 497 U.S. at 510-519; *Hodgson*, 497 U.S. at 461 (O'CONNOR, J., concurring in part and concurring in judgment in part); *id.*, at 497-501 (KENNEDY, J., concurring in judgment in part and dissenting in part); *Akron I*, 462 U.S. at 440; *Bellotti II*, 443 U.S. at 643-644 (plurality opinion). Under these precedents, in our view, the one-parent consent requirement and judicial bypass procedure are constitutional.

The only argument made by petitioners respecting this provision and to which our prior decisions do not speak is the contention that the parental consent requirement is invalid because it requires informed parental consent. For the most part, petitioners' argument is a reprise of

their argument with respect to the informed consent requirement in general and we reject it for the reasons given above. Indeed, some of the provisions regarding informed consent have particular force with respect to minors: the waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in [*900] the context of the values and moral or religious principles of their family. See *Hodgson*, *supra*, at 448-449 (opinion of STEVENS, J.).

E

[***LEdHR5B] [5B]Under the recordkeeping and reporting requirements of the statute, every facility which performs abortions is required to file a report stating its name and address as well as the name and address of any related entity, such as a controlling or subsidiary organization. In the case of state-funded institutions, the information becomes public.

For each abortion performed, a report must be filed identifying: the physician (and the second physician where required); the facility; the referring physician or agency; the woman's age; the number of prior pregnancies and prior abortions she has had; gestational age; the type of abortion procedure; the date of the abortion; whether there were any pre-existing medical conditions which would complicate pregnancy; medical complications with the abortion; where applicable, the basis for the determination that the abortion was medically necessary; the weight of the aborted fetus; and whether the woman was married, and if so, whether notice was provided or the basis for the failure to give notice. Every abortion facility must also file quarterly reports showing the number of abortions performed broken down by trimester. See 18 Pa. Cons. Stat. §§ 3207, 3214 (1990). In all events, the identity of each woman who has had an abortion remains confidential.

In *Danforth*, 428 U.S. at 80, we held [***730] that recordkeeping and reporting provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." We think that under this standard, all the provisions at issue here, except that relating to spousal notice, are constitutional. Although they do not relate to the State's interest in informing the woman's choice, they do relate to health. The collection of information with respect to actual patients [*901] is a vital element of medical research, and so it cannot be said that the [**2833] requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's

choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

***LEdHR6B] [6B] Subsection (12) of the reporting provision requires the reporting of, among other things, a married woman's "reason for failure to provide notice" to her husband. § 3214(a)(12). This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal. Like the spousal notice requirement itself, this provision places an undue burden on a woman's choice, and must be invalidated for that reason.

VI

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

***LEdHR20] [20] The judgment in No. 91-902 is affirmed. The judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion, including consideration of the question of severability.

It is so ordered.

[*902] [***731] APPENDIX TO OPINION OF O'CONNOR, KENNEDY, AND SOUTER, JJ.

Selected Provisions of the 1988 and 1989 Amendments to the Pennsylvania Abortion Control Act of 1982

18 PA. CONS. STAT. (1990).

"§ 3203. Definitions.

....

"'Medical emergency.' That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major

bodily function."

"§ 3205. Informed consent.

"(a) General rule. — No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

"(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:

"(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.

"(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.

"(iii) The medical risks associated with carrying her child to term.

"(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility [*903] has been delegated by [**2834] either physician, has informed the pregnant woman that:

"(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

"(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of

such assistance is contained in the printed materials published by the department.

***732] "(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

"(3) A copy of the printed materials has been provided to the woman if she chooses to view these materials.

"(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

"(b) Emergency. — Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.

"(c) Penalty. — Any physician who violates the provisions of this section is guilty of 'unprofessional conduct' and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P. L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the [*904] act of December 20, 1985 (P. L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. Any physician who performs or induces an abortion without first obtaining the certification required by subsection (a)(4) or with knowledge or reason to know that the informed consent of the woman has not been obtained shall for the first offense be guilty of a summary offense and for each subsequent offense be guilty of a misdemeanor of the third degree. No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.

"(d) Limitation on civil liability. — Any physician who complies with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P. L. 390, No. 111), known as the Health Care Services Malpractice Act."

"§ 3206. Parental consent.

"(a) General rule. — Except in the case of a medical emergency or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or if she has been adjudged an incompetent under 20 Pa. C. S. § 5511 (relating to petition and hearing; examination by court-appointed physician), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the informed consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In the case of a pregnancy that is the result [***733] of incest, where [*905] the father is a party to the incestuous act, [**2835] the pregnant woman need only obtain the consent of her mother.

"(b) Unavailability of parent or guardian. — If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

"(c) Petition to the court for consent. — If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

"(d) Court order. — If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

"(e) Representation in proceedings. — The pregnant woman may participate in proceedings in the court on

her own behalf and the court may appoint a guardian ad litem to assist her. The court shall, however, advise her that she has [*906] a right to court appointed counsel, and shall provide her with such counsel unless she wishes to appear with private counsel or has knowingly and intelligently waived representation by counsel."

"§ 3207. Abortion facilities.

....

"(b) Reports. — Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, containing the following information:

"(1) Name and address of the facility.

"(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

"(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility.

The information contained in those reports which are filed pursuant to this [***734] subsection by facilities which receive State-appropriated funds during the 12-calendar-month period immediately preceding a request to inspect or copy such reports shall be deemed public information. Reports filed by facilities which do not receive State-appropriated funds shall only be available to law enforcement officials, the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of \$500 for each day it is in violation hereof."

"§ 3208. Printed information.

"(a) General rule. — The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, and shall update on an annual basis, the following easily comprehensible printed materials:

[*907] [**2836] "(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agen-

cies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner, including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall provide information on the availability of medical assistance benefits for prenatal care, childbirth and neonatal care, and state that it is unlawful for any individual to coerce a woman to undergo abortion, that any physician who performs an abortion upon a woman without obtaining her informed consent or without according her a private medical consultation may be liable to her for damages in a civil action at law, that the father of a child is liable to assist in the support of that child, even in instances where the father has offered to pay for an abortion and that the law permits adoptive parents to pay costs of prenatal care, childbirth and neonatal care.

"(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival; provided that any such pictures or drawings must contain the dimensions of the fetus and must be realistic and appropriate for the woman's stage of pregnancy. The materials shall be objective, non-judgmental and designed [*908] to convey only accurate scientific information about the unborn child at the various gestational ages. The material shall also contain objective information describing the methods of abortion [***735] procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with each such procedure and the medical risks commonly associated with carrying a child to term.

"(b) Format. — The materials shall be printed in a

typeface large enough to be clearly legible.

"(c) Free distribution. — The materials required under this section shall be available at no cost from the department upon request and in appropriate number to any person, facility or hospital."

"§ 3209. Spousal notice.

"(a) Spousal notice required. — In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

"(b) Exceptions. — The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:

"(1) Her spouse is not the father of the child.

["**2837] "(2) Her spouse, after diligent effort, could not be located.

["*909] "(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.

"(4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

"(c) Medical emergency. — The requirements of subsection (a) shall not apply in case of a medical emergency.

"(d) Forms. — The department shall cause to be published, forms which may be utilized for purposes of providing the signed statements required by subsections (a) and (b). The department shall distribute an adequate supply of such forms to all abortion facilities in this Commonwealth.

"(e) Penalty; civil action. — Any physician who violates the provisions of this section is guilty of 'unprofessional conduct,' and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P. L. 1109, No. 261), known as the Osteopathic Medical Practice Act, [***736] the act of December 20, 1985 (P. L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of \$5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs."

"§ 3214. Reporting.

"(a) General rule. — For the purpose of promotion of maternal health and life by adding to the sum of medical and [*910] public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child, a report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

"(1) Identification of the physician who performed the abortion, the concurring physician as required by section 3211(c)(2) (relating to abortion on unborn child of 24 or more weeks gestational age), the second physician as required by section 3211(c)(5) and the facility where the abortion was performed and of the referring physician, agency or service, if any.

"(2) The county and state in which the woman resides.

"(3) The woman's age.

"(4) The number of prior pregnancies and prior abortions of the woman.

"(5) The gestational age of the unborn child at the time of the abortion.

"(6) The type of procedure performed or prescribed and the date of the abortion.

"(7) Pre-existing medical conditions of the woman which would complicate pregnancy, if any, and if known, any medical complication which resulted from the abortion itself.

"(8) The basis for the medical judgment

505 U.S. 833, *910; 112 S. Ct. 2791, **2837;
120 L. Ed. 2d 674, ***736; 1992 U.S. LEXIS 4751

of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed pursuant to section 3211(b)(1).

[**2838] "(9) The weight of the aborted child for any abortion performed pursuant to section 3211(b)(1).

"(10) Basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision of this chapter.

[*911] "(11) The information required to be reported under section 3210(a) (relating to determination of gestational age).

"(12) Whether the abortion was performed upon a married woman and, if so, whether notice to her spouse was given. If no notice to her [***737] spouse was given, the report shall also indicate the reason for failure to provide notice.

"(f) Report by facility. — Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. Any report shall be available for public inspection and copying only if the facility receives State-appropriated funds within the 12-calendar-month period immediately preceding the filing of the report. These reports shall be submitted on a form prescribed by the department which will enable a facility to indicate whether or not it is receiving State-appropriated funds. If the facility indicates on the form that it is not receiving State-appropriated funds, the department shall regard its report as confidential unless it receives other evidence which causes it to conclude that the facility receives [***738] State-appropriated funds."

DISSENTBY: STEVENS (In Part); BLACKMUN (In Part); REHNQUIST (In Part); SCALIA (In Part)

DISSENT:

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.

[*912] I

The Court is unquestionably correct in concluding that the doctrine of *stare decisis* has controlling significance in a case of this kind, notwithstanding an individual Justice's concerns about the merits. n1 The central holding of *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), has been a "part of our law" for almost two decades. *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 101, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (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, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). See also *Carey v. Population Services International*, 431 U.S. 678, 687, 702, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (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.

n1 It is sometimes useful to view the issue of *stare decisis* from a historical perspective. In the last 19 years, 15 Justices have confronted the basic issue presented in *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). Of those, 11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and JUSTICES BLACKMUN, O'CONNOR, KENNEDY, SOUTER, and myself. Only four — all of whom happen to be on the Court today — have reached the opposite conclusion.

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 "if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except [**2839] when it is necessary to preserve the life or health of the mother." 410 U.S. at 163-164; see *ante*, 505 U.S. at 879.

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 [*913] 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. [***739] 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." n2 This has been and, by the Court's holding today, [*914] remains a fundamental premise of our constitutional law governing reproductive autonomy.

n2 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." Unenumerated Rights: Whether and How *Roe* Should be Overruled, 59 *U. Chi. L. Rev.* 381, 400-401 (1992).

II

My disagreement with the joint opinion begins with its understanding of the trimester framework established

in *Roe*. Contrary to the suggestion of the joint opinion, *ante*, 505 U.S. at 876, 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, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (STEVENSON, J., concurring); see generally *Webster v. Reproductive Health Services*, 492 U.S. 490, 563-572, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989) (STEVENSON, J., concurring in part and dissenting in part). [**2840] 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 [***740] 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 [*915] 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, n3 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.

n3 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

505 U.S. 833, *915; 112 S. Ct. 2791, **2840;
120 L. Ed. 2d 674, ***740; 1992 U.S. LEXIS 4751

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.

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, 96 L. Ed. 183, 72 S. Ct. 205 (1952); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (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, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (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*, 429 U.S. 589, 598-600, 51 L. Ed. 2d 64, 97 S. Ct. 869 [*916] (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.

[***LEdHR14C] [14C] [***LEdHR15C] [15C] Weighing the State's interest in potential life and the woman's liberty interest, I agree with the joint opinion that the State may "express 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*, [***741] 505 U.S. at 872-873. Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." *Ante*, 505 U.S. at 878. 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 [**2841] 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 [*917] written informed consent, see *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (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, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (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, 76 L. Ed. 2d 755, 103 S. Ct. 2532 (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, 44 L. Ed. 2d 600, 95 S. Ct. 2222 (1975), or by "requiring 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, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (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, Pa. Cons. Stat. §§ 3205(a)(2)(i)-(iii) (1990) 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 Commonwealth is free, pursuant to § 3208 of the Pennsylvania law, to produce and disseminate such material, the Commonwealth may not inject such information into the woman's deliberations just as she is weighing such an important choice.

Under this same analysis, §§ 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 Commonwealth

to influence the [*918] woman's [***742] choice in any way. If anything, such requirements *enhance*, rather than skew, the woman's decisionmaking.

III

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 Commonwealth's interests in two ways, neither of which is constitutionally permissible.

First, it may be argued that the 24-hour delay is justified by the mere fact that it is likely to reduce the number of abortions, thus furthering the Commonwealth's interest in potential life. But such an argument would justify any form of coercion that placed an obstacle in the woman's path. The Commonwealth cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right.

Second, it can more reasonably be argued that the 24-hour delay furthers the Commonwealth's interest in ensuring that the woman's decision is informed and thoughtful. But there is no evidence that the mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the patient. The mandatory delay thus appears to rest on outmoded [**2842] and unacceptable assumptions about the decisionmaking capacity of women. While there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions, see *Hodgson v. Minnesota*, 497 U.S. 417, 449, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990), n4 none of those reasons applies to an [*919] adult woman's decisionmaking ability. Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, see *ante*, 505 U.S. at 895-898, 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, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971).

n4 As we noted in that opinion, the State's "legitimate interest in protecting minor women from their own immaturity" distinguished that case from *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983), which involved "a provision that required that mature women, capable of consenting to an abortion, wait 24 hours after giving consent before undergoing an abortion." *Hodgson*, 497 U.S. at 449. n.35.

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. n5

n5 The joint opinion's reliance on the indirect effects of the regulation of constitutionally protected activity, see *ante*, 505 U.S. at 873-874, 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, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), or deny prisoners the right to marry, *Turner v. Safley*, 482 U.S. 78, 94-99, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (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, 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. See, e.g., *Maher v. Roe*, 432 U.S. 464, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977); cf. *Webster v. Reproductive Health Services*, 492 U.S. 490, 508-511, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989); *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

505 U.S. 833, *919; 112 S. Ct. 2791, **2842;
120 L. Ed. 2d 674, ***742; 1992 U.S. LEXIS 4751

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.'" 497 U.S. at 435.

[*920] [***743] Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

IV

In my opinion, a correct application of the "undue burden" standard leads to the same conclusion concerning the constitutionality of these requirements. A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: [**2843] A burden may be "undue" either because the burden is too severe or because it lacks a legitimate, rational justification. n6

n6 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*, 505 U.S. at 988-990 (opinion concurring in judgment in part and dissenting in part), 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, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (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.

The 24-hour delay requirement fails both parts of this test. The findings of the District Court establish the severity of [*921] 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 [***744] 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 these cases, 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 n7 when fetal age has less relevance than when the fetus nears viability. Nor can the information [*922] required by the statute be justified as relevant to any "philosophic" or "social" argument, *ante*, 505 U.S. at 872, 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.

n7 U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 71 (111th ed. 1991).

[***LEdHR5C] [5C] [***LEdHR6C] [6C] Accordingly, while I disagree with Parts IV, V-B, and V-D of the joint opinion, n8 I join the remainder of the Court's opinion.

n8 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 rea-

sons given in Part V-B, with which I disagree.

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*.

[**2844] Three years ago, in *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989), four Members of this Court appeared poised to "cast 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 (plurality opinion of REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); *id.*, at 532 (SCALIA, J., concurring in part and concurring in judgment). All that remained between [***745] 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, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (BLACKMUN, J., dissenting). But now, just when so many expected the darkness to fall, the flame has grown bright.

[*923] 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.

I

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, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), the authors of the joint opinion today join JUSTICE STEVENS and me in concluding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Ante*, 505 U.S. at 846. 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." *Ante*, 505 U.S. at 844.

A fervent view of individual liberty and the force of *stare decisis* have led the Court to this conclusion. *Ante*, 505 U.S. at 853. Today a majority reaffirms that the Due Process Clause of the Fourteenth Amendment establishes "a realm of personal liberty which the gov-

ernment may not enter," *ante*, 505 U.S. at 847 — 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*, 505 U.S. at 848-849. 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*, 505 U.S. at 851, quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (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 [*924] liberty protected by the Fourteenth Amendment." *Ante*, 505 U.S. at 851 (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*, 505 U.S. at 852.

The Court's reaffirmation of *Roe's* central holding is also based on the force of *stare decisis*. "No erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant; *Roe* [***746] 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*, 505 U.S. at 860-861. 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 [**2845] it." *Ante*, 505 U.S. at 855. 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*, 505 U.S. at 860. The Court understands that, having "called the contending sides . . . to end their national division by accepting a common mandate rooted in the Constitution," *ante*, 505 U.S. at 867, 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*, 505 U.S. at 865. 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 [*925] for evaluating abortion regulations that

505 U.S. 833, *925; 112 S. Ct. 2791, **2845;
120 L. Ed. 2d 674, ***746; 1992 U.S. LEXIS 4751

responds to the social context of women facing issues of reproductive choice. n1 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*, 505 U.S. at 878 (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*, 505 U.S. at 894. 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." *Ante*, 505 U.S. at 895. "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*, 505 U.S. at 877. And in applying its test, the Court remains sensitive to the unique role of women in the decisionmaking process. Whatever may have been the practice when the Fourteenth Amendment was adopted, the Court observes, "women 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 [***747] that power is employed for the supposed benefit of a member of the individual's family." *Ante*, 505 U.S. at 898. n2

n1 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.

n2 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 to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Ante*, 505 U.S. at 880. As is apparent in my analysis below, however, this exception does not render constitutional the provisions which I conclude do not survive strict scrutiny.

[*926] 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., *ante*, 505 U.S. at 885-886. 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*, 505 U.S. at 895.

II

[***LEdHR6D] [6D] Today, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected [**2846] to the strictest 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.

A

The Court today reaffirms the long recognized rights of privacy and bodily integrity. As early as 1891, the Court held, "no right is held more sacred, or is more carefully guarded by the common law, 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. Rotsford*, 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891). Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion [*927] in such intimate family matters as procreation, child-rearing, marriage, and contraceptive choice. See *ante*, 505 U.S. at 847-849. 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 [***748] 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, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985) (invalidating surgical removal of bullet from mur-

505 U.S. 833, *927; 112 S. Ct. 2791, **2846;
120 L. Ed. 2d 674, ***748; 1992 U.S. LEXIS 4751

der suspect); *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952) (invalidating stomach pumping).
n3

n3 As the joint opinion acknowledges, *ante*, 505 U.S. at 857, this Court has recognized the vital liberty interest of persons in refusing unwanted medical treatment. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (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.

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., [*928] 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 International*, 431 U.S. 678, 685, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (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 [*2847] 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, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982); *Craig v. Boren*, 429 U.S. 190, 198-199, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). n4 The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our [*929] understanding of the family,

the individual, [***749] or the Constitution." *Ante*, 505 U.S. at 897.

n4 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. Rubinfeld, The Right of Privacy, 102 *Harv. L. Rev.* 737, 788-791 (1989) (similar analysis under the rubric of privacy); MacKinnon, Reflections on Sex Equality Under Law, 100 *Yale L. J.* 1281, 1308-1324 (1991).

B

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, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). We have applied this principle specifically in the context of abortion regulations. *Roe v. Wade*, 410 U.S. at 155. n5

n5 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, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976) (upholding requirements of a woman's written consent and recordkeeping). 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*, 505 U.S. at 846. Under *Roe*, any more than *de minimis* interference is undue.

Roe implemented these principles through a framework that was designed "to ensure 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*, 505 U.S. at 872. *Roe* identified two relevant state interests: "an interest in preserving and pro-

505 U.S. 833, *929; 112 S. Ct. 2791, **2847;
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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. *Id.*, 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 [*930] fetus "presumably has the capability of meaningful life outside the mother's womb." *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 v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 434, 76 L. Ed. 2d 687, 103 S. Ct. 248! (1983).

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 [**2848] 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 [***750] 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. The '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, 11 L. Ed. 2d 686, 84 S. Ct. 710 (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 [*931] 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*:

"If 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 to 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, 96 L. Ed. 954, 72 S. Ct. 679 (1952), with *Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County*, 333 U.S. 203, 92 L. Ed. 649, 68 S. Ct. 461 (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, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (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. Leeke*, 488 U.S. 272, 102 L. Ed. 2d 624, 109 S. Ct. 594 (1989).

" That numerous constitutional doctrines result in narrow differentiations between similar circumstances does [*932] not mean that this Court has abandoned adjudication in favor of regulation." 492 U.S. at 549-550.

The final, and more genuine, criticism of the trimester framework is [***751] 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, see Tr. of Oral Arg. 42 — has

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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. [**2849] 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 v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 778, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (STEVENS, J., concurring). It is, instead, a legitimate interest grounded in humanitarian or pragmatic concerns. See *ante*, 505 U.S. at 914-915 (STEVENS, J., concurring in part and dissenting in part).

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*, 505 U.S. at 846, 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 [*933] 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. n6

n6 The joint opinion agrees with *Roe's* conclusion that viability occurs at 23 or 24 weeks at the earliest. Compare *ante*, 505 U.S. at 860, with *Roe v. Wade*, 410 U.S. 113, 160, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973).

[***LEdHR14D] [14D][***LEdHR15D] [15D]*Roe's* trimester framework does not ignore the State's interest in prenatal life. Like JUSTICE STEVENS, *ante*, 505 U.S. at 916, I agree that the State may take steps to ensure that a woman's choice "is thoughtful and informed," *ante*, 505 U.S. at 872, and that "States are free to enact [***752] laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Ante*, 505 U.S. at 873. But

"serious questions arise . . . when a State attempts to persuade the woman to choose childbirth over abortion. *Ante*, 505 U.S. at 878. 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 [*934] the individual's freedom to make such judgments." *Ante*, 505 U.S. at 916 (STEVENS, J., concurring in part and dissenting in part) (internal quotation marks omitted).

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*, 505 U.S. at 877.

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 [**2850] constitutional right with the State's legitimate interests.

C

[***LEdHR6E] [6E]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

505 U.S. 833, *934; 112 S. Ct. 2791, **2850;
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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 *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 65-67, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976). 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*, 476 U.S. at 760, 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. [*935] 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 Pa. Cons. Stat. §§ 3205(a)(i)-(iii) (1990) 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 [***753] 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. 366-387, 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 nonphysician 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 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 these cases:

"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 [*936] 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 [**2851] 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 762-763 (citation omitted).

"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 [***754] character of the statute and its real purpose." *Ibid.* n7

n7 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*, 505 U.S. at 882. Because the State's information must be "cal-

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culated to inform the woman's free choice, not hinder it," *ante*, 505 U.S. at 877, the measures must be designed to ensure that a woman's choice is "mature and informed," *ante*, 505 U.S. at 883, 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," *ante*, 505 U.S. at 893, 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 life of the unborn." *Ante*, 505 U.S. at 877.

[*937] 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. 744 F. Supp. 1323, 1378-1379 (ED Pa. 1990). In *Akron* this Court invalidated a similarly arbitrary or inflexible waiting period because, as here, it furthered no legitimate state interest. n8

n8 The Court's decision in *Hodgson v. Minnesota*, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (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 *id.*, at 449-450, n.35; *Ohio v. Akron Center for Reproductive Health, Inc.*, 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (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.

As JUSTICE STEVENS insightfully concludes, the mandatory delay rests either on outmoded or unaccept-

able assumptions about the decisionmaking capacity of women or the belief that the decision to terminate the pregnancy is [*938] presumptively wrong. *Ante*, 505 U.S. at 918-919. 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 [**2852] 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. n9

n9 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*, 505 U.S. at 895.

[***755] 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. 744 F. Supp. at 1382. 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. n10

n10 The judicial-bypass provision does not cure this violation. *Hodgson* is distinguishable, since these cases involve 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

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any restriction on a young woman's right to an abortion, however irrational, simply because it has provided a judicial bypass.

[*939]

[**LEdHR6F] [6F]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 record-keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality are permissible. *Id.*, 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 Commonwealth'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. 744 F. Supp. at 1392. 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 [***756] in maternal health. I therefore agree with the District Court's conclusion that the confidential reporting requirements are unconstitutional [*940] insofar as they require the name of the referring physician and the basis for his or her medical judgment.

[**2853] 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.

III

At long last, THE CHIEF JUSTICE and those who have joined him admit 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, 505 U.S. at 944. 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*, 505 U.S. at 951. 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, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989), where the plurality found no fundamental right to visitation privileges by an adulterous father, or in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (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*, 505 U.S. at 951-952. 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 [*941] deviates. n11 Given THE CHIEF JUSTICE's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

n11 Obviously, I do not share THE CHIEF JUSTICE's views of homosexuality as sexual deviance. See *Bowers*, 478 U.S. at 202-203, n.2.

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 her decision. *Post*, 505 U.S. at 967-968. In short, THE CHIEF JUSTICE's [***757] 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 some-

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where, depending on medical technology, where a fetus becomes viable, and women give birth to children." *Post*, 505 U.S. at 955. 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*. *Post*, 505 U.S. at 956 (internal quotation marks 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 [**2854] interest. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955); cf. *Stanley v. Illinois*, 405 U.S. 645, 651-653, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)." *Post*, 505 U.S. at 966. THE [*942] 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*, 505 U.S. at 973, 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*, 505 U.S. at 974, 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. 48. 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

[**758] incest? Is there anything arbitrary or capricious about a [*943] State's prohibiting the sins of the father from being visited upon his offspring? n12

n12 JUSTICE SCALIA urges the Court to "get out of this area," *post*, 505 U.S. at 1002, and leave questions regarding abortion entirely to the States, *post*, 505 U.S. at 999-1000. 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?

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.

IV

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 [**2855] 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.

[*944] CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, concurring in the judgment in part and

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dissenting in part.

[**LEdHR16C] [16C]The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the plurality in *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989), and uphold the challenged provisions of the Pennsylvania statute in their entirety.

I

In ruling on this litigation below, the Court of Appeals for the Third Circuit first observed that "this appeal does not directly implicate *Roe*; this case involves the regulation of abortions rather than their outright prohibition." 947 F.2d 682, 687 (1991). Accordingly, the court directed its attention to the question of the standard of review for abortion regulations. [***759] In attempting to settle on the correct standard, however, the court confronted the confused state of this Court's abortion jurisprudence. After considering the several opinions in *Webster v. Reproductive Health Services*, *supra*, and *Hodgson v. Minnesota*, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990), the Court of Appeals concluded that JUSTICE O'CONNOR's "undue burden" test was controlling, as that was the narrowest ground on which we had upheld recent abortion regulations. 947 F.2d at 693-697 ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (quoting *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977) (internal quotation marks omitted))). Applying this standard, the Court of Appeals upheld all of the challenged regulations except the one [*945] requiring a woman to notify her spouse of an intended abortion.

In arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in *Roe v. Wade*, *supra*, in which we held unconstitutional a Texas statute making it a crime to procure an abortion except to save the life of the mother. n1 We agree with the Court of Appeals that our decision in *Roe* is not directly implicated by the Pennsylvania statute, which does not prohibit, but simply regulates, abortion. But, as the Court of Appeals found, the state of our post-*Roe* decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination

of that line of cases is in order. Unfortunately for those who must apply this Court's decisions, the reexamination undertaken today leaves the Court no less divided than beforehand. Although they reject the trimester framework that formed the underpinning of *Roe*, JUSTICES O'CONNOR, KENNEDY, and SOUTER adopt a revised undue burden standard to analyze the challenged regulations. We conclude, however, that such an outcome is an unjustified constitutional compromise, one which leaves the [**2856] Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do so under the Constitution.

n1 Two years after *Roe*, the West German constitutional court, by contrast, struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected. *Judgment of February 25, 1975*, 39 BVerfGE 1 (translated in Jonas & Gorby, West German Abortion Decision: A Contrast to *Roe v. Wade*, 9 *John Marshall J. Prac. & Proc.* 605 (1976)). In 1988, the Canadian Supreme Court followed reasoning similar to that of *Roe* in striking down a law that restricted abortion. *Morgentaler v. The Queen*, 1 S. C. R. 30, 44 D.L.R. 4th 385 (1988).

In *Roe*, the Court opined that the State "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . and that it has still another important and legitimate interest in protecting [*946] the potentiality of human life." 410 U.S. at 162 (emphasis omitted). In the companion case of *Doe v. Bolton*, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973), the Court referred to its conclusion in *Roe* "that a pregnant woman does not have an absolute constitutional right to an abortion [***760] on her demand." 410 U.S. at 189. But while the language and holdings of these cases appeared to leave States free to regulate abortion procedures in a variety of ways, later decisions based on them have found considerably less latitude for such regulations than might have been expected.

For example, after *Roe*, many States have sought to protect their young citizens by requiring that a minor seeking an abortion involve her parents in the decision. Some States have simply required notification of the parents, while others have required a minor to obtain the consent of her parents. In a number of decisions, however, the Court has substantially limited the States in their ability to impose such requirements. With regard to parental notice requirements, we initially held that a State could require a minor to notify her parents before proceeding with an abortion. *H. L. v. Mutheson*, 450 U.S. 398, 407-410, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981). Recently, however,

we indicated that a State's ability to impose a notice requirement actually depends on whether it requires notice of one or both parents. We concluded that although the Constitution might allow a State to demand that notice be given to one parent prior to an abortion, it may not require that similar notice be given to two parents, unless the State incorporates a judicial bypass procedure in that two-parent requirement. *Hodgson v. Minnesota*, *supra*.

We have treated parental consent provisions even more harshly. Three years after *Roe*, we invalidated a Missouri regulation requiring that an unmarried woman under the age of 18 obtain the consent of one of her parents before proceeding with an abortion. We held that our abortion jurisprudence prohibited the State from imposing such a "blanket provision . . . requiring the consent of a parent." *Planned Parenthood [*947] of Central Mo. v. Danforth*, 428 U.S. 52, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976). In *Bellotti v. Baird*, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979), the Court struck down a similar Massachusetts parental consent statute. A majority of the Court indicated, however, that a State could constitutionally require parental consent, if it alternatively allowed a pregnant minor to obtain an abortion without parental consent by showing either that she was mature enough to make her own decision, or that the abortion would be in her best interests. See *id.*, at 643-644 (plurality opinion); *id.*, at 656-657 (WHITE, J., dissenting). In light of *Bellotti*, we have upheld one parental consent regulation which incorporated a judicial bypass option we viewed as sufficient, see *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983), but have invalidated another because of our belief that the judicial procedure did not satisfy the dictates of *Bellotti*, see *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 439-442, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983). We have never had occasion, as we have in the parental notice context, to further parse our parental consent jurisprudence into one-parent and two-parent components.

In *Roe*, the Court observed that certain States recognized the right of the father to participate in the abortion decision in certain circumstances. [***761] Because neither *Roe* nor *Doe* [**2857] involved the assertion of any paternal right, the Court expressly stated that the case did not disturb the validity of regulations that protected such a right. *Roe v. Wade*, *supra*, at 165, n.67. But three years later, in *Danforth*, the Court extended its abortion jurisprudence and held that a State could not require that a woman obtain the consent of her spouse before proceeding with an abortion. *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. at 69-71.

States have also regularly tried to ensure that a

woman's decision to have an abortion is an informed and well-considered one. In *Danforth*, we upheld a requirement that a woman sign a consent form prior to her abortion, and observed that "it is desirable and imperative that [the decision] [*948] be made with full knowledge of its nature and consequences." *Id.*, at 67. Since that case, however, we have twice invalidated state statutes designed to impart such knowledge to a woman seeking an abortion. In *Akron*, we held unconstitutional a regulation requiring a physician to inform a woman seeking an abortion of the status of her pregnancy, the development of her fetus, the date of possible viability, the complications that could result from an abortion, and the availability of agencies providing assistance and information with respect to adoption and childbirth. *Akron v. Akron Center for Reproductive Health*, *supra*, at 442-445. More recently, in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986), we struck down a more limited Pennsylvania regulation requiring that a woman be informed of the risks associated with the abortion procedure and the assistance available to her if she decided to proceed with her pregnancy, because we saw the compelled information as "the antithesis of informed consent." *Id.*, at 764. Even when a State has sought only to provide information that, in our view, was consistent with the *Roe* framework, we concluded that the State could not require that a physician furnish the information, but instead had to alternatively allow nonphysician counselors to provide it. *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 448-449. In *Akron* as well, we went further and held that a State may not require a physician to wait 24 hours to perform an abortion after receiving the consent of a woman. Although the State sought to ensure that the woman's decision was carefully considered, the Court concluded that the Constitution forbade the State to impose any sort of delay. *Id.*, at 449-451.

We have not allowed States much leeway to regulate even the actual abortion procedure. Although a State can require that second-trimester abortions be performed in outpatient clinics, see *Simopoulos v. Virginia*, 462 U.S. 506, 76 L. Ed. 2d 755, 103 S. Ct. 2532 (1983), we concluded in *Akron* and *Ashcroft* that a State could not [*949] require that such abortions be performed only in hospitals. See *Akron v. Akron Center for Reproductive Health*, *supra*, at 437-439; [***762] *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, *supra*, at 481-482. Despite the fact that *Roe* expressly allowed regulation after the first trimester in furtherance of maternal health, "present medical knowledge," in our view, could not justify such a hospitalization requirement under the trimester framework. *Akron v. Akron Center for Reproductive Health*, *supra*, at 437 (quoting *Roe v. Wade*, *supra*, at

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163). And in *Danforth*, the Court held that Missouri could not outlaw the saline amniocentesis method of abortion, concluding that the Missouri Legislature had "failed to appreciate and to consider several significant facts" in making its decision. 428 U.S. at 77.

Although *Roe* allowed state regulation after the point of viability to protect the potential [**2858] life of the fetus, the Court subsequently rejected attempts to regulate in this manner. In *Colautti v. Franklin*, 439 U.S. 379, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979), the Court struck down a statute that governed the determination of viability. *Id.*, at 390-397. In the process, we made clear that the trimester framework incorporated only one definition of viability — ours — as we forbade States to decide that a certain objective indicator — "be it weeks of gestation or fetal weight or any other single factor" — should govern the definition of viability. *Id.*, at 389. In that same case, we also invalidated a regulation requiring a physician to use the abortion technique offering the best chance for fetal survival when performing postviability abortions. See *id.*, at 397-401; see also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 768-769 (invalidating a similar regulation). In *Thornburgh*, the Court struck down Pennsylvania's requirement that a second physician be present at postviability abortions to help preserve the health of the unborn child, on the ground that it did not incorporate a sufficient medical emergency exception. *Id.*, at 769-771. Regulations governing the treatment of aborted fetuses have [*950] met a similar fate. In *Akron*, we invalidated a provision requiring physicians performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." 462 U.S. at 451 (internal quotation marks omitted).

Dissents in these cases expressed the view that the Court was expanding upon *Roe* in imposing ever greater restrictions on the States. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 783 (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent"); *id.*, at 814 (WHITE, J., dissenting) ("The majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*"). And, when confronted with state regulations of this type in past years, the Court has become increasingly more divided: The three most recent abortion cases have not commanded a Court opinion. See *Ohio v. Akron Center for Reproductive [***763] Health*, 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990); *Hodgson v. Minnesota*, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990); *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989).

The task of the Court of Appeals in the present cases was obviously complicated by this confusion and uncertainty. Following *Marks v. United States*, 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977), it concluded that in light of *Webster* and *Hodgson*, the strict scrutiny standard enunciated in *Roe* was no longer applicable, and that the "undue burden" standard adopted by JUSTICE O'CONNOR was the governing principle. This state of confusion and disagreement warrants reexamination of the "fundamental right" accorded to a woman's decision to abort a fetus in *Roe*, with its concomitant requirement that any state regulation of abortion survive "strict scrutiny." See *Payne v. Tennessee*, 501 U.S. 808, 827-828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) (observing that reexamination of constitutional decisions is appropriate when those decisions have generated uncertainty and failed to provide clear guidance, because "correction through legislative [*951] action is practically impossible" (internal quotation marks omitted)); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-547, 557, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985).

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149 [**2859] (1937). Three years earlier, in *Snyder v. Massachusetts*, 291 U.S. 97, 78 L. Ed. 674, 54 S. Ct. 330 (1934), we referred to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*, at 105; see also *Michael H. v. Gerald D.*, 491 U.S. 110, 122, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (plurality opinion) (citing the language from *Snyder*). These expressions are admittedly not precise, but our decisions implementing this notion of "fundamental" rights do not afford any more elaborate basis on which to base such a classification.

In construing the phrase "liberty" incorporated in the Due Process Clause of the Fourteenth Amendment, we have recognized that its meaning extends beyond freedom from physical restraint. In *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), we held that it included a parent's right to send a child to private school; in *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), we held that it included a right to teach a foreign language in a parochial school. Building on these cases, we have held that the term "liberty" includes a right to marry, *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); a right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); and a right to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965);

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Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972). But a reading of these opinions makes clear that they do not endorse any all-encompassing "right of privacy."

[***764] In *Roe v. Wade*, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 152-153. We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier [*952] opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980). The abortion decision must therefore "be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." *Thornburgh v. American College of Obstetricians and Gynecologists*, *supra*, at 792 (WHITE, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See *Michael H. v. Gerald D.*, *supra*, at 124, n.4 (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body").

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, *Abortion in America* 200 (1978). By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. *Roe v. Wade*, 410 U.S. at 139-140; *id.*, at 176-177, n.2 (REHNQUIST, J., dissenting). On this record, [**2860] it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history [*953] supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of

our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny." In so concluding, we repeat the observation made in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986):

"Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due [***765] Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.*, at 194.

We believe that the sort of constitutionally imposed abortion code of the type illustrated by our decisions following *Roe* is inconsistent "with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does." *Webster v. Reproductive Health Services*, 492 U.S. at 518 (plurality opinion). The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce*, *Meyer*, *Loving*, and *Griswold*, and thereby deemed the right to abortion fundamental.

II

The joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding." *Ante*, 505 U.S. at 871. Instead of claiming that *Roe* [*954] was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*. *Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. *Ante*, 505 U.S. at 872-873; see *Roe v. Wade*, *supra*, at 162-164. *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. *Ante*, 505 U.S. at 873.

Stare decisis is defined in Black's Law Dictionary as

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meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following *Roe*, such as *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986), are frankly overruled in part under the "undue burden" standard expounded in the joint opinion. *Ante*, 505 U.S. at 881-884.

In our view, authentic principles of *stare decisis* do not require that any portion of the [**2861] reasoning in *Roe* be kept intact. "*Stare decisis* is not . . . a universal, inexorable command," [***766] especially in cases involving the interpretation of the Federal Constitution. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 76 L. Ed. 815, 52 S. Ct. 443 (1932) (Brandeis, J., dissenting). Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for [*955] constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depart from a proper understanding" of the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. at 557; see *United States v. Scott*, 437 U.S. 82, 101, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978) ("In cases involving the Federal Constitution, . . . the Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function" (quoting *Burnet v. Coronado Oil & Gas Co.*, *supra*, at 406-408 (Brandeis, J., dissenting))); *Smith v. Allwright*, 321 U.S. 649, 665, 88 L. Ed. 987, 64 S. Ct. 757 (1944). Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question. See, e. g., *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

The joint opinion discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe*. Two of these factors are that the main "factual underpinning" of *Roe* has remained the same, and that its doctrinal foundation is no weaker now than it was in 1973. *Ante*, 505 U.S. at 857-860. Of course, what might be called the basic facts which gave rise to *Roe* have remained the same — women become pregnant, there is

a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive [*956] forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

Nor does the joint opinion faithfully follow this alleged requirement. The opinion frankly concludes that *Roe* and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. *Ante*, 505 U.S. at 871-873. But there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception.

The joint opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for [***767] precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "considerations in favor of *stare decisis* are at their acme." *Payne v. Tennessee*, 501 U.S. at 828. But, as the joint opinion apparently agrees, *ante*, 505 U.S. at 855-856, any traditional notion of reliance is not applicable here. The Court today cuts back on the protection afforded by *Roe*, and no one claims that this action defeats any reliance interest in the disavowed trimester framework. Similarly, reliance interests would not be diminished were the Court to go further and acknowledge the full error of *Roe*, as "reproductive planning could take virtually [**2862] immediate account of" this action. *Ante*, 505 U.S. at 856.

The joint opinion thus turns to what can only be described as an unconventional — and unconvincing — notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. *Ante*, 505 U.S. at 856. The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in [*957] reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market,

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and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men. *Ante*, 505 U.S. at 856.

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have "ordered their thinking and living around" it. *Ante*, 505 U.S. at 856. As an initial matter, one might inquire how the joint opinion can view the "central holding" of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision's trimester framework. Furthermore, at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed "separate but equal" treatment of minorities, see *Plessy v. Ferguson*, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896), or that "liberty" under the Due Process Clause protected "freedom of contract," see *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 (1923); *Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905). The "separate but equal" doctrine lasted 58 years after *Plessy*, and *Lochner's* protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here. See *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954) (rejecting the "separate but equal" doctrine); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 (1937) (overruling [***768] *Adkins v. Children's Hospital*, *supra*, in upholding Washington's minimum wage law).

Apparently realizing that conventional *stare decisis* principles do not support its position, the joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect [*958] the "legitimacy" of this Court. *Ante*, 505 U.S. at 861-869. Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, *ante*, 505 U.S. at 865, the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests.

But the joint opinion goes on to state that when the Court "resolves the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," its de-

cision is exempt from reconsideration under established principles of *stare decisis* in constitutional cases. *Ante*, 505 U.S. at 866. This is so, the joint opinion contends, because in those "intensely divisive" cases the Court has "called the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and must therefore take special care not to be perceived as "surrendering to political pressure" and continued opposition. *Ante*, 505 U.S. at 866, 867. This is a truly [**2863] novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away*.

The first difficulty with this principle lies in its assumption that cases that are "intensely divisive" can be readily distinguished from those that are not. The question of whether a particular issue is "intensely divisive" enough to qualify for special protection is entirely subjective and dependent on the individual assumptions of the Members of this Court. In addition, because the Court's duty is to ignore public opinion and criticism on issues that come before it, its Members are [*959] in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of *stare decisis* when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions. See *Payne v. Tennessee*, *supra*, at 828-830, and *n. 1* (listing cases).

The joint opinion picks out and discusses two prior Court rulings that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to *Roe*. *Ante*, 505 U.S. at 861-864 (discussing *Lochner* [***769] *v. New York*, *supra*, and *Plessy v. Ferguson*, *supra*). It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose *not* to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's "legitimacy" principle. See *West Coast Hotel Co. v. Parrish*, *supra*; *Brown v. Board of Education*, *supra*. One might also wonder how it is that the joint opinion puts these, and not others, in the "intensely divisive" category, and how it assumes that these are the only two lines of cases of comparable dimension to *Roe*. There is no reason to think that either *Plessy* or

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Lochner produced the sort of public protest when they were decided that *Roe* did. There were undoubtedly large segments of the bench and bar who agreed with the dissenting views in those cases, but surely that cannot be what the Court means when it uses the term "intensely divisive," or many other cases would have to be added to the list. In terms of public protest, however, *Roe*, so far as we know, was unique. But just as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the [*960] decision at all costs lest it seem to be retreating under fire. Public protests should not alter the normal application of *stare decisis*, lest perfectly lawful protest activity be penalized by the Court itself.

Taking the joint opinion on its own terms, we doubt that its distinction between *Roe*, on the one hand, and *Plessy* and *Lochner*, on the other, withstands analysis. The joint opinion acknowledges that the Court improved its stature by overruling *Plessy* in *Brown* on a deeply divisive issue. And our decision in *West Coast Hotel*, which overruled *Adkins v. Children's Hospital*, *supra*, and *Lochner*, was rendered at a time when Congress was considering President Franklin Roosevelt's proposal to "reorganize" this Court and enable him to name six additional Justices in the event that any Member of the Court over the age of 70 did not elect to retire. It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time, and, under the general principle proclaimed in the joint opinion, the Court seemingly should have responded to this opposition [**2864] by stubbornly refusing to re-examine the *Lochner* rationale, lest it lose legitimacy by appearing to "overrule under fire." *Ante*, 505 U.S. at 867.

The joint opinion agrees that the Court's stature would have been seriously damaged if in *Brown* and *West Coast Hotel* it had dug in its heels and refused to apply normal principles of *stare decisis* to the earlier decisions. But the opinion contends that the Court was entitled to overrule *Plessy* and *Lochner* in those cases, despite the existence of opposition to the original decisions, only because both the Nation and the Court had learned new lessons in the interim. This is at best a feebly supported, *post hoc* rationalization for those decisions.

For example, the opinion asserts that the Court could justifiably overrule its decision in *Lochner* only because the Depression had convinced "most people" that constitutional [***770] protection of contractual freedom contributed to an economy [*961] that failed to protect the welfare of all. *Ante*, 505 U.S. at 861. Surely the joint opinion does not mean to suggest that people saw this Court's failure to uphold minimum wage statutes as the

cause of the Great Depression! In any event, the *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simply believed, erroneously, that "liberty" under the Due Process Clause protected the "right to make a contract." *Lochner v. New York*, 198 U.S. at 53. Nor is it the case that the people of this Nation only discovered the dangers of extreme laissez-faire economics because of the Depression. State laws regulating maximum hours and minimum wages were in existence well before that time. A Utah statute of that sort enacted in 1896 was involved in our decision in *Holden v. Hardy*, 169 U.S. 366, 42 L. Ed. 780, 18 S. Ct. 383 (1898), and other States followed suit shortly afterwards, see, e. g., *Muller v. Oregon*, 208 U.S. 412, 52 L. Ed. 551, 28 S. Ct. 324 (1908); *Bunting v. Oregon*, 243 U.S. 426, 61 L. Ed. 830, 37 S. Ct. 435 (1917). These statutes were indeed enacted because of a belief on the part of their sponsors that "freedom of contract" did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before the Great Depression. Whether "most people" had come to share it in the hard times of the 1930's is, insofar as anything the joint opinion advances, entirely speculative. The crucial failing at that time was not that workers were not paid a fair wage, but that there was no work available at any wage.

When the Court finally recognized its error in *West Coast Hotel*, it did not engage in the *post hoc* rationalization that the joint opinion attributes to it today; it did not state that *Lochner* had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that "the Constitution does not speak of freedom of contract." *West Coast Hotel Co. v. Parrish*, 300 U.S. at 391; *Lochner v. New York*, *supra*, at 75 (Holmes, [*962] J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*"). Although the Court did acknowledge in the last paragraph of its opinion the state of affairs during the then-current Depression, the theme of the opinion is that the Court had been mistaken as a matter of constitutional law when it embraced "freedom of contract" 32 years previously.

The joint opinion also agrees that the Court acted properly in rejecting the doctrine of "separate but equal" in *Brown*. In fact, the opinion lauds *Brown* in comparing it to *Roe*. *Ante*, 505 U.S. at 867. This is strange, in that under the opinion's "legitimacy" principle the Court would seemingly have been forced to adhere to its erroneous decision in *Plessy* because of its "intensely divisive" [**2865] character. To us, adherence to *Roe* today

under the guise of "legitimacy" would seem to resemble more closely adherence to *Plessy* on the [***771] same ground. Fortunately, the Court did not choose that option in *Brown*, and instead frankly repudiated *Plessy*. The joint opinion concludes that such repudiation was justified only because of newly discovered evidence that segregation had the effect of treating one race as inferior to another. But it can hardly be argued that this was not urged upon those who decided *Plessy*, as Justice Harlan observed in his dissent that the law at issue "puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." *Plessy v. Ferguson*, 163 U.S. at 562. It is clear that the same arguments made before the Court in *Brown* were made in *Plessy* as well. The Court in *Brown* simply recognized, as Justice Harlan had recognized beforehand, that the Fourteenth Amendment does not permit racial segregation. The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground [*963] alone the Court was justified in properly concluding that the *Plessy* Court had erred.

There is also a suggestion in the joint opinion that the propriety of overruling a "divisive" decision depends in part on whether "most people" would now agree that it should be overruled. Either the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision. How such agreement would be ascertained, short of a public opinion poll, the joint opinion does not say. But surely even the suggestion is totally at war with the idea of "legitimacy" in whose name it is invoked. The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.

There are other reasons why the joint opinion's discussion of legitimacy is unconvincing as well. In assuming that the Court is perceived as "surrendering to political pressure" when it overrules a controversial decision, *ante*, 505 U.S. at 867, the joint opinion forgets that there are two sides to any controversy. The joint opinion asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to *adhere* to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those who have demonstrated in favor of

the original decision. The decision in *Roe* has engendered large demonstrations, including repeated marches on this Court and on Congress, both in opposition to and in support of that opinion. A decision either way on *Roe* can therefore be perceived as favoring one group or the other. But this perceived dilemma arises only if one assumes, as the joint opinion does, that the Court [*964] should make its decisions with [***772] a view toward speculative public perceptions. If one assumes instead, as the Court surely did in both *Brown* and *West Coast Hotel*, that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side.

Roe is not this Court's only decision to generate conflict. Our decisions in some recent capital cases, and in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), have also engendered demonstrations in opposition. The joint opinion's message to such protesters appears to be that they must cease their activities in order to serve their cause, because their [**2866] protests will only cement in place a decision which by normal standards of *stare decisis* should be reconsidered. Nearly a century ago Justice David J. Brewer of this Court, in an article discussing criticism of its decisions, observed that "many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all." Justice Brewer on "The Nation's Anchor," 57 *Albany L. J.* 166, 169 (1898). This was good advice to the Court then, as it is today. Strong and often misguided criticism of a decision should not render the decision immune from reconsideration, lest a fetish for legitimacy penalize freedom of expression.

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion — the "undue burden" standard. As indicated above, *Roe v. Wade* adopted a "fundamental right" standard under which state regulations could survive only if they met the requirement of "strict scrutiny." While we disagree with that standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result [*965] in the sort of "simple limitation," easily applied, which the joint opinion anticipates. *Ante*, 505 U.S. at 855. In sum, it is a standard which is not built to last.

In evaluating abortion regulations under that standard, judges will have to decide whether they place a "substantial obstacle" in the path of a woman seeking an abortion.

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Ante, 505 U.S. at 877. In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent "judges from roaming at large in the constitutional field" guided only by their personal views. *Griswold v. Connecticut*, 381 U.S. at 502 (Harlan, J., concurring in judgment). Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views. For example, in the very matter before us now, the authors of the joint opinion would uphold Pennsylvania's 24-hour waiting period, concluding that a "particular burden" on some women is not a substantial obstacle. *Ante*, 505 U.S. at 887. But the authors would at the same time strike down Pennsylvania's [***773] spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. *Ante*, 505 U.S. at 895. And, while the authors conclude that the informed consent provisions do not constitute an "undue burden," JUSTICE STEVENS would hold that they do. *Ante*, 505 U.S. at 920-922.

Furthermore, while striking down the spousal notice regulation, the joint opinion would uphold a parental consent restriction that certainly places very substantial obstacles in the path of a minor's abortion choice. The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. *Ante*, 505 U.S. at 895. This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between parental consent and [*966] spousal consent which the joint opinion adopts. Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.

The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out [**2867] to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened

scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in *Webster*. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955); cf. *Stanley v. Illinois*, 405 U.S. 645, 651-653, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972). With this rule in mind, we examine each of the challenged provisions.

III

A

Section 3205 of the Act imposes certain requirements related to the informed consent of a woman seeking an abortion. 18 Pa. Cons. Stat. § 3205 (1990). Section 3205(a)(1) requires that the referring or performing physician must inform a woman contemplating an abortion of (i) the nature of the procedure and the risks and alternatives that a reasonable patient would find material; (ii) the fetus' probable gestational [*967] age; and (iii) the medical risks involved in carrying her pregnancy to term. Section 3205(a)(2) requires a physician or a nonphysician counselor to inform the woman that (i) the state health department publishes free [***774] materials describing the fetus at different stages and listing abortion alternatives; (ii) medical assistance benefits may be available for prenatal, childbirth, and neonatal care; and (iii) the child's father is liable for child support. The Act also imposes a 24-hour waiting period between the time that the woman receives the required information and the time that the physician is allowed to perform the abortion. See Appendix to opinion of O'CONNOR, KENNEDY, and SCUTER, JJ., *ante*, 505 U.S. at 902-904.

This Court has held that it is certainly within the province of the States to require a woman's voluntary and informed consent to an abortion. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 760. Here, Pennsylvania seeks to further its legitimate interest in obtaining informed consent by ensuring that each woman "is aware not only of the reasons for having an abortion, but also of the risks associated with an abortion and the availability of assistance that might make the alternative of normal childbirth more attractive than it might otherwise appear." *Id.*, at 798-799 (WHITE, J., dissenting).

[***LEDJHR2C] [2C]We conclude that this provision of the statute is rationally related to the State's interest in assuring that a woman's consent to an abortion be a fully informed decision.

Section 3205(a)(1) requires a physician to disclose

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certain information about the abortion procedure and its risks and alternatives. This requirement is certainly no large burden, as the Court of Appeals found that "the record shows that the clinics, without exception, insist on providing this information to women before an abortion is performed." 947 F.2d at 703. We are of the view that this information "clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent." *Akron v. [**968] Akron Center for Reproductive Health, Inc.*, 462 U.S. at 446. An accurate description of the gestational age of the fetus and of the risks involved in carrying a child to term helps to further both those interests and the State's legitimate interest in unborn human life. See *id.*, at 445-446, n.37 (require disclosure of gestational age of the fetus "certainly is not objectionable"). Although petitioners contend that it is unreasonable for the State to require that a physician, as [**2868] opposed to a nonphysician counselor, disclose this information, we agree with the Court of Appeals that a State "may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the medical aspects of the available alternatives." 947 F.2d at 704.

Section 3205(a)(2) compels the disclosure, by a physician or a counselor, of information concerning the availability of paternal child support and state-funded alternatives if the woman decides to proceed with her pregnancy. Here again, the Court of Appeals observed that "the record indicates that most clinics already require that a counselor consult in person with the woman about alternatives to abortion before the abortion is performed." *Id.*, at 704-705. And petitioners do not claim that the information required to be disclosed by statute is in any way false [***775] or inaccurate; indeed, the Court of Appeals found it to be "relevant, accurate, and non-inflammatory." *Id.*, at 705. We conclude that this required presentation of "balanced information" is rationally related to the State's legitimate interest in ensuring that the woman's consent is truly informed, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 830 (O'CONNOR, J., dissenting), and in addition furthers the State's interest in preserving unborn life. That the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids the provision of such information. Indeed, it only demonstrates that this information might [*969] very well make a difference, and that it is therefore relevant to a woman's informed choice. Cf. *id.*, at 801 (WHITE, J., dissenting) ("The ostensible objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice"). We acknowledge that in *Thornburgh* this Court struck down informed consent requirements similar to the

ones at issue here. See *id.*, at 760-764. It is clear, however, that while the detailed framework of *Roe* led to the Court's invalidation of those informational requirements, they "would have been sustained under any traditional standard of judicial review, . . . or for any other surgical procedure except abortion." *Webster v. Reproductive Health Services*, 492 U.S. at 517 (plurality opinion) (citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 802 (WHITE, J., dissenting); *id.*, at 783 (Burger, C. J., dissenting)). In light of our rejection of *Roe's* "fundamental right" approach to this subject, we do not regard *Thornburgh* as controlling.

For the same reason, we do not feel bound to follow this Court's previous holding that a State's 24-hour mandatory waiting period is unconstitutional. See *Akron v. Akron Center for Reproductive Health, Inc.*, *supra*, at 449-451. Petitioners are correct that such a provision will result in delays for some women that might not otherwise exist, therefore placing a burden on their liberty. But the provision in no way prohibits abortions, and the informed consent and waiting period requirements do not apply in the case of a medical emergency. See 18 Pa. Cons. Stat. §§ 3205(a), (b) (1990). We are of the view that, in providing time for reflection and reconsideration, the waiting period helps ensure that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus. It "is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences [*970] on fetal life, and the possible effects on her own." 462 U.S. at 474 (O'CONNOR, J., dissenting).

B

[***LEdHR4C] [4C] In addition to providing her own informed consent, before an unemancipated woman under the age of 18 may obtain an abortion she [**2869] must either furnish the consent of one of her parents, or must opt for [***776] the judicial procedure that allows her to bypass the consent requirement. Under the judicial bypass option, a minor can obtain an abortion if a state court finds that she is capable of giving her informed consent and has indeed given such consent, or determines that an abortion is in her best interests. Records of these court proceedings are kept confidential. The Act directs the state trial court to render a decision within three days of the woman's application, and the entire procedure, including appeal to Pennsylvania Superior Court, is to last no longer than eight business days. The parental consent requirement does not apply in the case of a medical emergency. 18 Pa. Cons. Stat. § 3206 (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, 505 U.S. at 904-906.

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This provision is entirely consistent with this Court's previous decisions involving parental consent requirements. See *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983) (upholding parental consent requirement with a similar judicial bypass option); *Akron v. Akron Center for Reproductive Health, Inc.*, *supra*, at 439-440 (approving of parental consent statutes that include a judicial bypass option allowing a pregnant minor to "demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests"); *Bellotti v. Baird*, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979).

We think it beyond dispute that a State "has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes [*971] impair their ability to exercise their rights wisely." *Hodgson v. Minnesota*, 497 U.S. at 444 (opinion of STEVENS, J.). A requirement of parental consent to abortion, like myriad other restrictions placed upon minors in other contexts, is reasonably designed to further this important and legitimate state interest. In our view, it is entirely "rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. at 520 (opinion of KENNEDY, J.); see also *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring) ("There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child"). We thus conclude that Pennsylvania's parental consent requirement should be upheld.

C

Section 3209 of the Act contains the spousal notification provision. It requires that, before a physician may perform an abortion on a married woman, the woman must sign a statement indicating that she has notified her husband of her planned [***777] abortion. A woman is not required to notify her husband if (1) her husband is not the father, (2) her husband, after diligent effort, cannot be located, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) the woman has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her by him or by another individual. In addition, a woman is exempted from the notification requirement in the case of a medical emergency. 18 Pa. Cons. Stat. § 3209 (1990). See Appendix to opinion of O'CONNOR, KENNEDY,

and SOUTER, JJ., *ante*, 505 U.S. at 908-909.

[*972] We first emphasize that Pennsylvania has not imposed a spousal *consent* requirement of the type the Court struck down in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. at 67-72. Missouri's spousal consent provision was invalidated in that case because of the Court's view that it unconstitutionally [***2870] granted to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." *Id.*, at 71. But the provision here involves a much less intrusive requirement of spousal *notification*, not consent. Such a law requiring only notice to the husband "does not give any third party the legal right to make the [woman's] decision for her, or to prevent her from obtaining an abortion should she choose to have one performed." *Hodgson v. Minnesota*, *supra*, at 496 (KENNEDY, J., concurring in judgment in part and dissenting in part); see *H. L. v. Matheson*, 450 U.S. at 411, n.17. *Danforth* thus does not control our analysis. Petitioners contend that it should, however; they argue that the real effect of such a notice requirement is to give the power to husbands to veto a woman's abortion choice. The District Court indeed found that the notification provision created a risk that some woman who would otherwise have an abortion will be prevented from having one. 947 F.2d at 712. For example, petitioners argue, many notified husbands will prevent abortions through physical force, psychological coercion, and other types of threats. But Pennsylvania has incorporated exceptions in the notice provision in an attempt to deal with these problems. For instance, a woman need not notify her husband if the pregnancy is the result of a reported sexual assault, or if she has reason to believe that she would suffer bodily injury as a result of the notification. 18 Pa. Cons. Stat. § 3209(b) (1990). Furthermore, because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision "might operate unconstitutionally under some conceivable set of circumstances." *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). Thus, it is not enough for petitioners [*973] to show that, in some "worst case" circumstances, the notice provision will operate as a grant of veto power to husbands. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. at 514. Because they are making a facial challenge to the provision, they must "show that no set of circumstances exists under which the [provision] would be valid." *Ibid.* (internal [***778] quotation marks omitted). This they have failed to do. n2

n2 The joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the

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abortion decision. *Ante*, 505 U.S. at 887-898. In most instances the notification requirement operates without difficulty. As the District Court found, the vast majority of wives seeking abortions notify and consult with their husbands, and thus suffer no burden as a result of the provision. 744 F. Supp. 1323, 1360 (ED Pa. 1990). In other instances where a woman does not want to notify her husband, the Act provides exceptions. For example, notification is not required if the husband is not the father, if the pregnancy is the result of a reported spousal sexual assault, or if the woman fears bodily injury as a result of notifying her husband. Thus, in these instances as well, the notification provision imposes no obstacle to the abortion decision.

The joint opinion puts to one side these situations where the regulation imposes no obstacle at all, and instead focuses on the group of married women who would not otherwise notify their husbands and who do not qualify for one of the exceptions. Having narrowed the focus, the joint opinion concludes that in a "large fraction" of those cases, the notification provision operates as a substantial obstacle, *ante*, 505 U.S. at 895, and that the provision is therefore invalid. There are certainly instances where a woman would prefer not to notify her husband, and yet does not qualify for an exception. For example, there are the situations of battered women who fear psychological abuse or injury to their children as a result of notification; because in these situations the women do not fear bodily injury, they do not qualify for an exception. And there are situations where a woman has become pregnant as a result of an unreported spousal sexual assault; when such an assault is unreported, no exception is available. But, as the District Court found, there are also instances where the woman prefers not to notify her husband for a variety of other reasons. See 744 F. Supp. at 1360. For example, a woman might desire to obtain an abortion without her husband's knowledge because of perceived economic constraints or her husband's previously expressed opposition to abortion. The joint opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a "large fraction" of those cases in which women prefer not to notify their husbands (and do not qualify for an exception). *Ante*, 505 U.S. at 895. This assumption is not based on any hard evidence, however. And were it helpful to an attempt to reach a desired result, one could just

as easily assume that the battered women situations form 100 percent of the cases where women desire not to notify, or that they constitute only 20 percent of those cases. But reliance on such speculation is the necessary result of adopting the undue burden standard.

[*974] [*2871] The question before us is therefore whether the spousal notification requirement rationally furthers any legitimate state interests. We conclude that it does. First, a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. at 69 ("We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying"); *id.*, at 93 (WHITE, J., concurring in part and dissenting in part); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 541. The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have [***779] been denied him. This participation might in some cases result in a decision to proceed with the pregnancy. As Judge Alito observed in his dissent below, "the Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems -- such as economic constraints, future plans, or the husbands' previously expressed [*975] opposition -- that may be obviated by discussion prior to the abortion." 947 F.2d at 726 (opinion concurring in part and dissenting in part).

The State also has a legitimate interest in promoting "the integrity of the marital relationship." 18 Pa. Cons. Stat. § 3209(a) (1990). This Court has previously recognized "the importance of the marital relationship in our society." *Planned Parenthood of Central Mo. v. Danforth*, *supra*, at 69. In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity. See *Labine v. Vincent*, 401 U.S. 532, 538, 28 L. Ed. 2d 288, 91 S. Ct. 1017 (1971) ("The power to make rules to establish, protect, and strengthen family life" is committed to the state legislatures). Petitioners argue that the notification requirement does not further any such interest;

they assert that the majority of wives already notify their husbands of their abortion decisions, and the remainder have excellent reasons for keeping their decisions a secret. In the first case, they argue, the law is unnecessary, and in the second case it will only serve to foster marital discord and threats of harm. Thus, petitioners see the law as a totally irrational means of furthering whatever legitimate interest the State might have. But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife. See *Planned Parenthood of Central Mo. v. Danforth*, *supra*, at 103-104 (STEVENS, J., concurring in part and dissenting in part) (making a similar point in the context of a parental consent statute). The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but "the existence of particular cases in which a feature of a statute performs no function (or is even counterproductive) [*976] [**2872] ordinarily does not render the statute unconstitutional or even constitutionally suspect." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 800 (WHITE, J., dissenting). The Pennsylvania Legislature was in a position to weigh the likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial. Whether this was a wise decision or not, we cannot say that it was irrational. We therefore conclude that the spousal notice provision comports with the Constitution. See *Harris v. McRae*, 448 U.S. at 325-326 ("It is not the mission of this Court or any other to decide [***780] whether the balance of competing interests . . . is wise social policy").

D

[***LEdHR5D] [5D]The Act also imposes various reporting requirements. Section 3214(a) requires that abortion facilities file a report on each abortion performed. The reports do not include the identity of the women on whom abortions are performed, but they do contain a variety of information about the abortions. For example, each report must include the identities of the performing and referring physicians, the gestational age of the fetus at the time of abortion, and the basis for any medical judgment that a medical emergency existed. See 18 Pa. Cons. Stat. §§ 3214(a)(1), (5), (10) (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, 505 U.S. at 909-911. The District Court found that these reports are kept completely confidential. 947 F.2d at 716. We further conclude that these reporting requirements rationally further the State's legitimate interests in advanc-

ing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act.

Section 3207 of the Act requires each abortion facility to file a report with its name and address, as well as the names [*977] and addresses of any parent, subsidiary, or affiliated organizations. 18 Pa. Cons. Stat. § 3207(b) (1990). Section 3214(f) further requires each facility to file quarterly reports stating the total number of abortions performed, broken down by trimester. Both of these reports are available to the public only if the facility received state funds within the preceding 12 months. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, 505 U.S. at 906, 911. Petitioners do not challenge the requirement that facilities provide this information. They contend, however, that the forced public disclosure of the information given by facilities receiving public funds serves no legitimate state interest. We disagree. Records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. See Pa. Stat. Ann., Tit. 65, §§ 66.1, 66.2 (Purdon 1959 and Supp. 1991-1992). As the Court of Appeals observed, "when a state provides money to a private commercial enterprise, there is a legitimate public interest in informing taxpayers who the funds are benefiting and what services the funds are supporting." 947 F.2d at 718. These reporting requirements rationally further this legitimate state interest.

E

Finally, petitioners challenge the medical emergency exception provided for by the Act. The existence of a medical emergency exempts compliance with the Act's informed consent, parental consent, and spousal notice requirements. See 18 Pa. Cons. Stat. §§ 3205(a), 3206(a), 3209(c) (1990). The Act defines a "medical emergency" as

"that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial [*978] and irreversible [**2873] impairment of major bodily function." § 3203.

[***781] Petitioners argued before the District Court that the statutory definition was inadequate because it did not cover three serious conditions that pregnant women can suffer — preeclampsia, inevitable abortion, and prematurely ruptured membrane. The District Court agreed

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with petitioners that the medical emergency exception was inadequate, but the Court of Appeals reversed this holding. In construing the medical emergency provision, the Court of Appeals first observed that all three conditions do indeed present the risk of serious injury or death when an abortion is not performed, and noted that the medical profession's uniformly prescribed treatment for each of the three conditions is an immediate abortion. See 947 F.2d at 700-701. Finding that "the Pennsylvania legislature did not choose the wording of its medical emergency exception in a vacuum," the court read the exception as intended "to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Id.*, at 701. It thus concluded that the exception encompassed each of the three dangerous conditions pointed to by petitioners.

We observe that Pennsylvania's present definition of medical emergency is almost an exact copy of that State's definition at the time of this Court's ruling in *Thornburgh*, one which the Court made reference to with apparent approval. 476 U.S. at 771 ("It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so").ⁿ³ We find that the interpretation [*979] of the Court of Appeals in these cases is eminently reasonable, and that the provision thus should be upheld. When a woman is faced with any condition that poses a "significant threat to [her] life or health," she is exempted from the Act's consent and notice requirements and may proceed immediately with her abortion.

ⁿ³ The definition in use at that time provided as follows:

"'Medical emergency.' That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function." Pa. Stat. Ann., Tit. 18, § 3203 (Purdon 1983).

IV

For the reasons stated, we therefore would hold that each of the challenged provisions of the Pennsylvania statute is consistent with the Constitution. It bears emphasis that our conclusion in this regard does not carry with it any necessary approval of these regulations. Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution. If, as we believe, these do, their wisdom as a matter of public policy is for the people of Pennsylvania to decide.

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 *Weber v. Reproductive* [***782] *Health Services*, 492 U.S. 490, 532, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989) (opinion concurring in part and concurring in judgment), and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 520, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (*Akron II*) (concurring opinion). 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*, 505 U.S. at 851. The Court is correct in adding the qualification that this "assumes a state of [**2874] affairs in which the choice does not intrude upon a protected liberty," *ibid.* — but the crucial part of that qualification [*980] 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 — with which entire societies of reasonable people disagree — intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." *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. ⁿ¹ *Akron II*, *supra*, at 520 (SCALIA, J., concurring).

ⁿ¹ The Court's suggestion, *ante*, 505 U.S. at 847-848, that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was con-

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tradicted 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, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (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 v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), 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*, 505 U.S. at 859, 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.

[*981] [***783] 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*, 505 U.S. at 847 (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 127, n.6, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (opinion of SCALIA, J.)). That is not, however, what *Michael H.* says; it merely observes that, in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," *ibid.* 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 authoritative nature of tradition in order to "curb the discretion of federal judges," *ante*, 505 U.S. at 847, 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.

[***LEdHR2D] [2D] [***LEdHR4D] [4D] [***LEdHR5E] [5E] Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have [**2875] 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 [*982] in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment." *Ante*, 505 U.S. at 849.

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, 35 L. Ed. 2d 147, 93 S. Ct. 705 (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*, 505 U.S. at 871 (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, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976); *Colautti v. Franklin*, 439 U.S. 379, 386, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 428, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983) [***784] (*Akron I*); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 482, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (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.

[***LEdHR16D] [16D] 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*, 505 U.S. at 853, 861, 871. But in their exhaustive discussion of all the factors that go into the determination [*983] of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "the Court's power lies . . . in its legitimacy, a product of substance and perception," *ante*, 505 U.S. at 865, 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 these and other cases, the best the Court can do to explain how it is that the word "liberty" must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in "liberty" because it is among "a person's most basic decisions," *ante*, 505 U.S. at 849; it involves a "most intimate and personal choice," *ante*, 505 U.S. at 851; it is "central to personal dignity and [*2876] autonomy," *ibid.*; it "originates within the zone of conscience and belief," *ante*, 505 U.S. at 852; it is "too intimate and personal" for state interference, *ibid.*; it reflects "intimate views" of a "deep, personal character," *ante*, 505 U.S. at 853; it involves "intimate relationships" and notions of "personal autonomy and bodily integrity," *ante*, 505 U.S. at 857; and it concerns a particularly "important decision," *ante*, 505 U.S. at 859 (citation omitted). n2 But it [***785] is [*984] 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, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (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 "deeply 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:

"When 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*, 60 U.S. (19 How.) 393, 621, 15 L. Ed. 691 (1857) (dissenting opinion).

"Liberty finds no refuge in a jurisprudence of doubt." *Ante*, 505 U.S. at 844.

n2 JUSTICE BLACKMUN's parade of adjectives is similarly empty: Abortion is among "the most intimate and personal choices," *ante*, 505 U.S. at 923; 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*, 505 U.S. at 927. 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*, 505 U.S. at 915; it involves a "difficult choice having serious and personal consequences of major importance to [a woman's] future," *ante*, 505 U.S. at 916; the authority to make this "traumatic and yet empowering decision" is "an element of basic human dignity," *ibid.*; and it is "nothing less than a matter of conscience," *ibid.*

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 [*985] 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*, 462 U.S.

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416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983). See *ante*, 505 U.S. at 876. n3 Because [***786] the three Justices now wish to "set forth a standard [**2877] 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 [*986] make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.

n3 The joint opinion is clearly wrong in asserting, *ante*, 505 U.S. at 874, 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, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (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, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979) (*Bellotti II*); *Carey v. Population Services International*, 431 U.S. 678, 705, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977) (opinion 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, Inc.*, 462 U.S. 416, 420, n.1, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983) (*Akron I*). The joint opinion's reliance on *Maher v. Roe*, 432 U.S. 464, 473, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977), and *Harris v. McRae*, 448 U.S. 297, 314, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (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*, 505 U.S. at 877-879.

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." *Ante*, 505 U.S. at 877; see also *ante*, 505 U.S. at 877-879. An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." *Ante*, 505 U.S. at 877. n4 This latter statement cannot [*987]

[***787] 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 [**2878] test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

n4 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*, 505 U.S. at 877. 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, 458-460, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (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, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (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, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (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, 506, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (*Akron II*) (opinion of KENNEDY, J.), as applying the undue burden test. See *ante*, 505 U.S. at 876 (using this citation to support the proposition that "two of us" — *i. e.*, two of the

505 U.S. 833, *987; 112 S. Ct. 2791, **2878;
120 L. Ed. 2d 674, ***787; 1992 U.S. LEXIS 4751

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, 505 U.S. at 878, 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.

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, 505 U.S. at 964, while "the same cannot be said for the 'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion," *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, 505 U.S. at 873. 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, 505 U.S. at 874. I agree, indeed I have [*988] 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. 377, 389-390, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992); *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-882, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (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 [cent]. 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 these cases, to preserve some judicial foothold in this ill-gotten territory. In claiming otherwise, the three Justices show their willingness [***788] to place all constitutional rights at risk in an effort to preserve what they deem the "central holding in *Roe*." Ante, 505 U.S. at 873.

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, 505 U.S. at 876-877. 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 (dissenting opinion) (emphasis added); see also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (dissenting [*989] opinion). 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, 505 U.S. at 895, 901. 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, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983) (dissenting opinion), that a medical regulation which imposes an "undue burden" could nevertheless be upheld if it "reasonably relates to the preservation and protection of maternal health," *id.* at 505 (citation and internal quotation marks omitted). In today's version, [**2879] even health measures will be upheld only "if they do not constitute an undue burden," ante, 505 U.S. at 878 (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 (dissenting opinion) (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, 505 U.S. at 876, 878. (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 decreed 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*, 505 U.S. at 860. n5 It is difficult to [*990] [***789] maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

n5 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*, 505 U.S. at 870. 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.

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 these cases. 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*, 505 U.S. at 885. 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*, 505 U.S. at 887. 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*, 505 U.S. at 884. 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" [*991] to abortion decisions. *Ante*, 505 U.S. at 901. 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*, 505 U.S. at 888-891.

[**2880] 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. n6 But what is remarkable about the joint opinion's [***790] 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*, 505 U.S. at 880, 884-885, 887, 893-894, 895, 901. 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 [*992] 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 court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

n6 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 nonrecord materials, and in reliance upon them adds a number of factual conclusions of its own. *Ante*, 505 U.S. at 891-893. Because this additional factfinding 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

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are "legislative" rather than "adjudicative" facts, see Rule 201(n). 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.

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 "prevents a significant number of women from obtaining an abortion," *ante*, 505 U.S. at 893; whether a "significant number of women . . . are likely to be deterred from procuring an abortion," *ante*, 505 U.S. at 894; and whether the regulation often "deters" women from seeking abortions, *ante*, 505 U.S. at 897. 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*, 505 U.S. at 926, 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 [*993] for childbirth over abortion," *ante*, 505 U.S. at 883. Reason finds no refuge in this jurisprudence of confusion.

"While we appreciate the weight of the arguments . . . that [***791] *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* [**2881] are outweighed by the explanation of individual liberty we have given combined with the force of *stare decisis*." *Ante*, 505 U.S. at 853.

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*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (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*, 505 U.S. at 855. I suppose the [*994] 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*, 505 U.S. at 881-885.

. Under *Roe*, requiring that information be provided by a doctor, rather than by nonphysician counselors, is unconstitutional. *Akron I*, *supra*, at 446-449. Under the "undue burden" regime (as applied today, at least) it is not. *Ante*, 505 U.S. at 884-885.

. 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*, 505 U.S. at 885-887.

. [***792] 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

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the "undue burden" regime (as applied today, at least) it generally is not. *Ante*, 505 U.S. at 900-901.

"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 [*995] national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante*, 505 U.S. at 866-867.

[**2882] 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 [*996] in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disrup-

tion, rather than of any *Pax Roeana*, that the Court's new majority decrees.

"To 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, [***793] 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*, 505 U.S. at 867-868.

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 "speaks 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 [*997] 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*, 505 U.S. at 866), with [**2883] the more democratic views of a more humble man:

"The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irre-

vocably 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*, 505 U.S. at 868, of "remaining steadfast," *ibid.*, and adhering to "principle," *ante*, *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. n7 To make matters worse, two of the three, in [***794] order thus to remain steadfast, had to abandon previously stated positions. See n.4, *supra*; see *supra*, at 988-990. 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*, 505 U.S. at 865-866. The only principle the Court "adheres" [*998] 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.

n7 JUSTICE BLACKMUN's effort to preserve as much of *Roe* as possible leads him to read the joint opinion as more "constant" 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*, 505 U.S. at 926, but that could only be true if a "substantial obstacle," *ante*, 505 U.S. at 877 (joint opinion), were the same thing as a non-*de-minimis* onstacle — which it plainly is not.

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*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (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, 81 L. Ed. 703, 57 S. Ct. 578 (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 [*999] has an evolving meaning, see [**2884] *ante*, 505 U.S. at 848; that the Ninth Amendment's reference to "other" 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 [***795] 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*, 505 U.S. at 963. 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?

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(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 [*1000] 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*, 505 U.S. at 849, 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*, 505 U.S. at 847-849. Why even the Ninth Amendment — which says only that "the 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*, 505 U.S. at 848-849.

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 [***796] 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 [**2885] ceremonies, *Lee v. Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992); if, as I say, our pronouncement of constitutional law rests primarily on value [*1001] judgments, then a free and intelligent people's at-

titude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school — maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. JUSTICE BLACKMUN not only regards this prospect with equanimity, he solicits it. *Ante*, 505 U.S. at 943.

* * *

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 "call the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante*, 505 U.S. at 867.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Tancay, 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 [*1002] 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 "calling 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 litigation, than it was for him in that, to think that an issue of the [***797] sort they both involved — an issue involving life and

505 U.S. 833, *1002; 112 S. Ct. 2791, **2885;
120 L. Ed. 2d 674, ***797; 1992 U.S. LEXIS 4751

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.

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Attachment F

T. Joyce, S.K. Henshaw, J.D. Skatrud, "The Impact of Mississippi's Mandatory Delay Law on Abortions and Births," *The Journal of the American Medical Association*, Volume 278, Number 8, August 27, 1997

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The Impact of Mississippi's Mandatory Delay Law on Abortions and Births

Theodore Joyce, PhD; Stanley K. Henshaw, PhD; Julia DeClerque Skatrud, DrPh

Context.—Beginning August 8, 1992, a woman in the state of Mississippi had to wait 24 hours after in-person receipt of state-mandated information regarding abortion and birth complications, fetal development, and alternatives to abortion before an abortion could be performed.

Objective.—To analyze the effect of the law on the abortion and birth rates of Mississippi residents.

Design.—A retrospective analysis of abortion and birth rates before and after the law in Mississippi as contrasted with abortion and birth rates in 2 comparison states, Georgia and South Carolina. Neither Georgia nor South Carolina enforced a mandatory delay law, but both states began enforcement of parental notification statutes during the study period.

Patients.—Female residents of reproductive age in Mississippi, Georgia, and South Carolina between 1989 and 1994.

Main Outcome Measures.—We compared birth rates, abortion rates, the percentage of late abortions, and the percentage of abortions performed outside the state of residence for all women and then by age and race before and after August 1992 among women of Mississippi, Georgia, and South Carolina.

Results.—We found that rate ratios (RRs) of resident abortion rates (rate after law implementation/rate before law implementation) declined 12% more in Mississippi than in South Carolina (95% confidence interval [CI], 8%-15%) and 14% more in Mississippi than in Georgia (95% CI, 10%-17%) in the 12 months after the law went into effect. Rate ratios for white adults declined 22% more in Mississippi than in South Carolina (95% CI, 17%-27%) and 20% more in Mississippi than in Georgia (95% CI, 15%-25%). Changes among nonwhite adults and white teens were more modest but also statistically significant ($P < .05$). For all women, RRs of the percentage of abortions performed after 12 weeks' gestation increased 39% more in Mississippi than in either South Carolina or Georgia ($P < .05$); the increase in the percentage of abortions after 12 weeks' gestation was observed for white and nonwhite adults ($P < .05$). We also show that the percentage of abortions performed out of state increased 42% more among women in Mississippi relative to women in South Carolina after the law (95% CI, 34%-50%).

Conclusion.—The timing of the decline in abortion rates in Mississippi, the lack of similar declines in comparison states, the rise in percentage of late abortions and abortions performed out of state and the apparent completeness of abortion reports suggest that Mississippi's mandatory delay statute was responsible for a decline in abortion rates and an increase in abortions performed later in pregnancy among residents of Mississippi. The effect of delay laws in other states will likely depend on whether statutes require 2 separate visits to the abortion provider (ie, clinics, hospitals, or physicians' offices where abortions are performed) and the availability of abortion services.

JAMA. 1997;278:653-658

THE US SUPREME COURT, in *Planned Parenthood of Southeastern Pennsylvania v Casey*,¹ ruled that laws

requiring waiting periods of 24 hours after receipt of state-mandated information about abortion complications, fetal development, and alternatives to abortion did not on their face represent an undue burden on a woman's constitutional right to abortion. The Court left open the possibility that the laws might be unconstitutional if experience demonstrated an undue burden. Since then, 11 states have begun to enforce mandatory waiting pe-

riods and 8 states have had similar legislation enjoined or not enforced.² Sponsors of mandatory waiting period legislation argue that the law insures that women have the information and time needed to make an informed decision. Opponents contend that the law creates an unnecessary barrier to abortion and increases the health risks by causing delay.

Of the approximately 6.5 million pregnancies in the United States in 1992, 1.5 million or 23% were voluntarily terminated.³ Despite the importance of abortion as a method of fertility control, there has been little analysis of the effect of mandatory waiting periods on reproductive behavior. Mandatory delay laws could discourage abortion and cause an increase in births resulting from unintended pregnancies. Conversely, the laws could induce fewer births and abortions if women increased contraceptive efforts to avoid compliance with the law. Finally, whether delay laws affect the number of abortions and births, they may cause women to terminate pregnancies later in gestation.

Mississippi's mandatory waiting period statute went into effect on August 8, 1992. The law requires that women who seek an abortion in the state of Mississippi must be told the name of the physician who will perform the abortion, medical risks associated with the procedure, probable gestational age of the fetus, and the medical risks of carrying the pregnancy to term. In addition, the woman must be told that she may be eligible for medical assistance and that the father is liable for child support. The information must be given by either the referring or performing physician at least 24 hours before the abortion is performed. Only in Mississippi, Louisiana, and Utah have delay laws been interpreted as requiring that the information be given to women in person, necessitating 2 visits to the clinic.

One preliminary report estimated that 6 months after Mississippi's mandatory waiting period became effective, abortions to residents of Mississippi declined 11% and a larger proportion of abortions were terminated later in pregnancy.⁴ The study, however, lacked data from other states for comparison and covered too short a period to adequately assess effects of the law on birth rates.

The objective of this study was to analyze effects of Mississippi's mandatory

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waiting period statute on 4 outcomes: abortions, abortions performed outside the state of residence, abortion delay, and births. Toward this end, we examined changes in live births and induced abortions for all women and then separately by age and race to residents of Mississippi before and after August 1992, the month Mississippi's mandatory delay statute went into effect. We compared the experience of Mississippi residents with changes in births and abortions in Georgia and South Carolina, 2 southern states with no mandatory delay statute.

METHODS

Data

Data on births and induced abortions are from vital records in Mississippi, Georgia, and South Carolina. We chose South Carolina and Georgia as comparison states for several reasons. First, neither state imposed a 24-hour waiting period between 1989 and 1994. Second, both are southern states with comparably large nonwhite populations, permitting a race-specific analysis. Third, except for mandatory delay, abortion policies in Mississippi, Georgia, and South Carolina are similar: none of the states funds abortions through Medicaid except in cases of rape or incest, and all 3 states began enforcement of parental notification or consent statutes between 1990 and 1993. Finally Mississippi, South Carolina, and Georgia all maintain computerized records of induced termination as part of their vital statistics and all have reciprocal agreements with neighboring states to exchange information on residents who have abortions out of state.

Completeness of Abortion Data

Comparison with data from the Alan Guttmacher Institute (AGI), New York, NY, which periodically surveys all abortion providers (defined as clinics, hospitals, and physicians' offices where abortions are performed, here and throughout the text), indicates that counts of abortion by state of occurrence are quite complete for Mississippi and reasonably complete for Georgia and South Carolina. The Mississippi Department of Health reported 7555 abortions performed in the state in 1992 (AGI, 7550). The South Carolina Department of Health reported 11 008 abortions (AGI, 12 190), and the Georgia State Department of Health reported 38 052 abortions (AGI, 39 680).^{5,6}

Counts of abortions by state of residence are more difficult to assess, yet consistent counts by state of residence are important to our assessment. If, for instance, more residents of Mississippi seek abortions in other states in response to a mandatory waiting period and if a proportion of these abortions are not recorded by the Mississippi Department of Health, then

we will overestimate the effect of the law on abortion rates to residents of Mississippi. As a partial check on the quality of reporting across states, we compared resident data on abortions as reported by the Mississippi Department of Health with occurrence data as collected by agencies in Tennessee and Alabama on Mississippi residents. The Tennessee Department of Health⁷ reported that 793 abortions to residents of Mississippi were performed in Tennessee in 1992. The Mississippi Department of Health⁸ reported that 785 abortions to residents of Mississippi were performed in Tennessee. The Alabama Department of Health⁹ recorded 766 abortions to residents of Mississippi as compared with 762 abortions reported by the Mississippi Department of Health. The agreement among the 3 states indicates that reciprocal reporting arrangements of known abortions are effective.

Another potentially important border state, Louisiana, does not collect data on abortions to residents of Mississippi. However, a sample survey of Louisiana abortion providers by AGI suggests that about 1000 Mississippi residents have abortions in Louisiana each year (S. K. H., unpublished data, March 1996). Finally, the Arkansas Department of Health recorded only 9 abortions to Mississippi residents in 1991.

We analyzed births and abortions for all women and then separately by age (≤ 19 years or ≥ 20 years) and race (white or nonwhite). We analyzed data for teens separately since during the time period under study all 3 states imposed parental consent or notification statutes for minors seeking abortion. Except for a subgroup of minors in South Carolina, parental involvement laws are associated with a relatively minor decline in teen abortions to residents of Mississippi and South Carolina. Parental involvement laws, however, are associated with an increase in the number of minors who obtain abortions out of state.^{10,11} They may also be associated with increases in abortions performed later in gestation.

Abortion rates are expressed as abortions per 1000 women aged 15 to 44 years. For the subgroup analysis, we used race-specific women aged 15 to 19 years or 20 to 44 years as denominators. For birth rates, we lagged population figures by 6 months to match births and abortions to women who became pregnant during the same time period. Population figures by age, race, sex, and state for July 1 for each year from 1988 through 1993 were taken from US Census Bureau data files (Larry Sink, MA, MS, unpublished data for 1988-1993, Population Branch, US Bureau of the Census, Washington, DC, November 1995). For July 1994, we estimated rates of growth for each age, race, and sex

grouping based on national figures for July 1, 1993, and July 1, 1994.¹² We projected state-specific totals by age and race for 1993 by the national rate of growth to obtain state estimates for July 1994. Monthly totals incorporate proportionate changes between annual totals. Rates for 12-month periods are based on the average of the monthly population estimates for the period.

Stratification by age and race resulted in a minor loss of data because of missing information on one or both of the characteristics (ie, age or race). In Mississippi and South Carolina, we eliminated less than 0.5% of abortions and less than 0.1% of births due to missing age, race, or both. In Georgia, we eliminated 5.2% of abortions. This percentage was relatively stable between 1989 and 1994, and almost half of these cases were to residents of Georgia who obtained an abortion out of state. As a result of the small number of reported abortions to residents of Georgia performed in another state, we do not analyze out-of-state abortions to residents of Georgia.

Gestational age was computed as the difference between the date of the termination and the date of the last menstrual period. If data were lacking on the day of the last menstrual period but were available for month and year, we assumed the last menstrual period took place on the 15th day of the month. If more than the day was missing, we used the physician's estimate of gestational age. Based on this algorithm, we had no missing information on gestational age in any of the 3 states after elimination of cases with missing data on age and race.

Statistical Methods

Mississippi's mandatory waiting statute took effect on August 8, 1992. To assess the impact of the law on abortion, we compared abortion rates for the 12 months preceding August 8, 1992, with those for the 12-month period after the law took effect. For births, we used the same preperiod as abortions, but we defined March 1993 through February 1994 as the postlaw period since we would not expect any change in births for at least 6 months after the law went into effect.

We used rate ratios (RRs) to measure association between Mississippi's mandatory delay law and birth and abortion rates. Specifically, we divided the abortion rate for the 12 months after enforcement of the law by the abortion rate for the 12 months prior to the law. We used the large sample standard error of the natural logarithm of the RR to estimate 95% confidence intervals (CIs) around the RR.¹³ We analyzed birth rates similarly. To compare the change in abortion rates in Mississippi to changes in South Caro-

lina and Georgia, we divided the RR for abortion in Mississippi by the RR for abortion in South Carolina and Georgia. We termed these relative RRs. We analyzed birth rates similarly.

Relative RRs will not eliminate time-varying factors unique to each state that may generate changes in abortion and birth rates coincident with the law. As an additional strategy, we created state-specific time series of monthly abortion rates from January 1989 through December 1994. We pooled these series by state and regressed the natural logarithm of the abortion rate on a dichotomous indicator for the mandatory delay statute that equals 1 after the law was implemented (August 1992). We included controls for seasonal variation, linear and quadratic trends, and interactions between state and law as well as state and trend.

RESULTS

Figures 1 and 2 display annual abortion and birth rates by race for residents of Mississippi, Georgia, and South Carolina. Abortion rates are plotted for 12 months from August through July, beginning with August 1989, to distinguish the prelaw and postlaw periods. We do the same for birth rates, except for the final segment, which covers the 12 months from March 1993 through February 1994, the earliest period in which any potential effects of the law on birth rates would be evident.

Based on visual inspection, we noted that annual abortion rates among white and nonwhite women in Mississippi had been increasing up to the 12-month period ending July 1992 and declined thereafter (Figure 1). Abortion rates of white women in South Carolina and Georgia declined almost continuously during the 5-year span. Birth rates for nonwhites in both South Carolina and Georgia declined more rapidly after July 1992 than did nonwhite birth rates in Mississippi (Figure 2). Among whites, birth rates were approximately the same in all 3 states.

Rate Ratios

Total abortions to residents of Mississippi, including those obtained in Alabama and Tennessee, declined from 7801 prior to the law to 6591 after the law. Expressed as rates per 1000 females aged 15 to 44 years, they declined from 12.9 to 10.8 (Table 1). The RR indicates that the post-law abortion rate was 84% of its prelaw level ($(10.8/12.9) \times 100$), a decline of 16%. Rate ratios for the comparison states indicate that the abortion rate was 95% of its prelaw level in South Carolina ($(14.9/15.6) \times 100$) and 97% of its prelaw level in Georgia ($(19.9/20.4) \times 100$). Based on relative RRs, the abortion rate in Mississippi decreased 14% compared with South

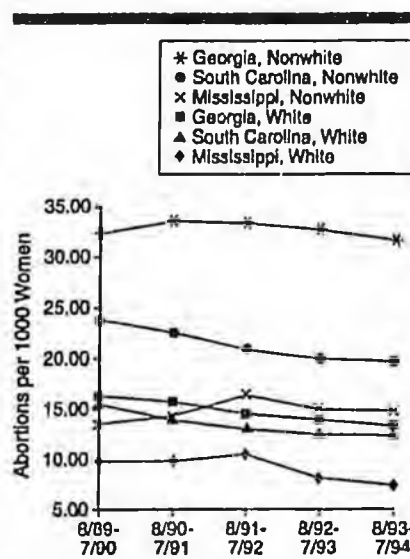


Figure 1.—Annual abortion rates for whites and nonwhites in Mississippi, Georgia, and South Carolina from August 1989 through July 1994.

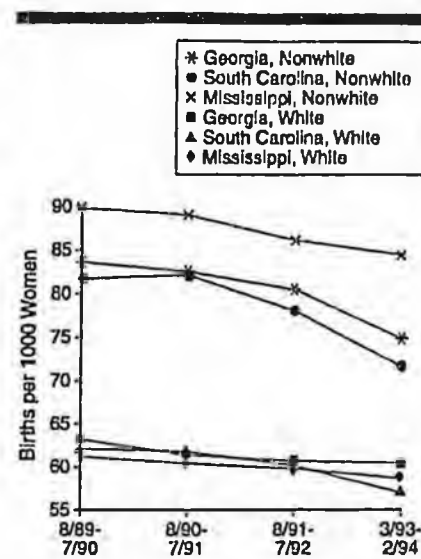


Figure 2.—Annual birth rates for whites and nonwhites in Mississippi, Georgia, and South Carolina from August 1989 through February 1994.

Table 1.—Resident Births and Abortions in Mississippi, South Carolina, and Georgia Before and After Mississippi's Mandatory Delay Law*

	Before, No. (Rate)†	After, No. (Rate)†	RR (95% CI)‡	Relative RR (95% CI)§
Resident births				
Mississippi	42 695 (70.64)	42 164 (69.27)	0.98 (0.97-0.99)	...
South Carolina	56 711 (66.30)	53 192 (62.05)	0.94 (0.93-0.95)	1.05 (1.03-1.07)
Georgia	110 843 (67.37)	110 485 (65.73)	0.98 (0.97-0.98)	1.00 (0.99-1.02)
Resident abortions‡				
Mississippi	7 801 (12.9)	6 591 (10.8)	0.84 (0.81-0.87)	...
South Carolina	13 375 (15.6)	12 770 (14.8)	0.95 (0.93-0.98)	0.88 (0.85-0.92)
Georgia	33 768 (20.4)	33 442 (19.9)	0.97 (0.96-0.99)	0.86 (0.83-0.90)
Resident abortions obtained out of state¶				
Mississippi	1 448 (18.6)	1 678 (25.4)	1.37 (1.29-1.46)	...
South Carolina	2 436 (18.2)	2 244 (17.6)	0.96 (0.92-1.02)	1.42 (1.34-1.50)
Resident abortions after 12 weeks' gestation¶				
Mississippi	810 (10.4)	958 (14.5)	1.40 (1.28-1.53)	...
South Carolina	886 (6.8)	852 (6.7)	1.01 (0.92-1.10)	1.39 (1.26-1.52)
Georgia	4 554 (13.5)	4 529 (13.5)	1.00 (0.97-1.04)	1.39 (1.30-1.49)

*Period of 12 months before law defined as August 1991 through July 1992. After defined as August 1992 through July 1993. Period after law for resident births lagged 3 months and is defined as March 1993 through February 1994.

†Rates are resident abortions or births per 1000 female residents aged 15 to 44 years.

‡For each outcome, the rate ratio (RR) is the outcome 12 months after the law divided by the outcome 12 months before the law. CI indicates confidence interval.

§The relative RR is the RR for Mississippi divided by the RR for South Carolina or Georgia. Ellipses indicate referent. The SE for the relative RR is the square root of the sum of the variances for the respective RRs.

¶Resident abortions include all known abortions to residents of a state regardless of where they were performed. For Mississippi, this includes all abortions to residents performed in Mississippi, Alabama, or Tennessee.

‡‡The percentage of abortions obtained out of state or after 12 weeks' gestation is the number of abortions to residents performed out of state or the number performed after 12 weeks' gestation divided by all resident abortions.

Carolina ($(0.84/0.95) \times 100$), and 12% compared with Georgia ($(0.84/0.97) \times 100$) in the first year after the law.

Changes in the timing and occurrence of abortions associated with the law among residents of Mississippi, South Carolina, and Georgia are shown in Table 1. The percentage of total resident abortions obtained outside of Mississippi increased 6.8 percentage points, from 18.6%

to 25.4%, in the first year after the law went into effect. The relative RR between Mississippi and South Carolina was 1.42 (1.37/0.96). With respect to timing, the percentage of total resident abortions performed after 12 weeks' gestation increased by 4 percentage points from 10.4% to 14.5% in Mississippi during the 12 months after the law. No such change occurred in either South Carolina or

Table 2.—Resident Abortions in Mississippi, South Carolina, and Georgia, by Age and Race, 12 Months Before and After Mississippi's Mandatory Delay Law

	Before, No. (Rate)*	After, No. (Rate)*	RR (95% CI)†	Relative RR (95% CI)‡
White adults, ≥20 y§				
Mississippi	2850 (9.27)	2188 (7.06)	0.78 (0.72-0.80)	...
South Carolina	5591 (11.38)	5456 (11.13)	0.98 (0.94-1.01)	0.78 (0.73-0.83)
Georgia	13 110 (13.40)	12 518 (12.73)	0.95 (0.93-0.97)	0.80 (0.75-0.85)
Nonwhite adults, ≥20 y§				
Mississippi	2979 (15.37)	2749 (13.98)	0.91 (0.88-0.98)	...
South Carolina	4584 (19.32)	4522 (18.94)	0.98 (0.94-1.02)	0.93 (0.87-0.99)
Georgia	13 762 (31.19)	14 287 (30.94)	0.98 (0.97-1.02)	0.92 (0.87-0.97)
White teens, ≤19 y 				
Mississippi	987 (17.53)	782 (13.62)	0.78 (0.71-0.85)	...
South Carolina	1789 (22.74)	1573 (20.34)	0.89 (0.84-0.95)	0.87 (0.77-0.97)
Georgia	3302 (21.07)	3188 (20.98)	0.97 (0.92-1.02)	0.80 (0.72-0.89)
Nonwhite teens, ≤19 y 				
Mississippi	985 (20.15)	911 (18.58)	0.92 (0.84-1.01)	...
South Carolina	1431 (28.08)	1219 (23.88)	0.85 (0.79-0.92)	1.08 (0.98-1.22)
Georgia	3612 (43.96)	3449 (41.37)	0.94 (0.90-0.98)	0.98 (0.89-1.08)

*Period before law defined as August 1991 through July 1992, and after law defined as August 1992 through July 1993. Resident abortions include all known abortions to residents of a state regardless of where they are performed. For Mississippi, this includes all abortions to residents performed in Mississippi, Alabama, or Tennessee.

†For each outcome, the rate ratio (RR) is the outcome 12 months after the law divided by the outcome 12 months before the law. CI indicates confidence interval.

‡The relative RR is the RR for Mississippi divided by the RR for South Carolina or Georgia. The SE for the relative RR is the square root of the sum of the variances for the respective RRs. Ellipses indicate referent.

§White adult abortion rates are all resident abortions to women aged 20 years or older per 1000 white female residents aged 20 to 44 years. Nonwhite adult abortion rates are defined analogously.

||White teenager abortion rates are all resident abortions to adolescents aged 18 years or younger per 1000 white female residents aged 15 to 19 years. Nonwhite teenager abortion rates are defined analogously.

Georgia. The relative RRs indicate that the increase in the percentage of late abortions was 39% greater in Mississippi compared with South Carolina or Georgia during the 12 months after the law.

Birth rates decreased in all 3 states after the law. Relative RRs indicate that birth rates declined approximately 5% less in Mississippi relative to South Carolina [(0.98/0.94)-1]×100, but declined by the same percentage in Mississippi and Georgia.

Age-specific and race-specific resident abortion rates are shown in Table 2. Abortion rates in the year ensuing the law were 0.76 of their prelaw level among white adults, 0.78 among white teens, 0.91 among nonwhite adults, and 0.92 among nonwhite teens. The decline in abortion rates for each group except nonwhite teens was greater in Mississippi than in each of the 2 comparison states. Abortion rates declined 22% more among white adults in Mississippi relative to South Carolina and 20% more relative to adults in Georgia. Abortion rates for white teens in Mississippi decreased 13% compared with South Carolina and 20% more compared with Georgia. For nonwhite adults, the decline in Mississippi was 7% and 8% relative to South Carolina and Georgia, respectively. There was no difference between nonwhite teens in Mississippi as compared with nonwhite teens in either South Carolina or Georgia.

The percentage of abortions performed after 12 weeks' gestation rose among the 4 age and racial groups in Mississippi, but the relative increase was greater for

whites than nonwhites (Table 3). The RR was 1.55 for white adults, 1.69 for white teens, 1.25 for nonwhite adults, and 1.27 for nonwhite teens. Except for nonwhite teens, the proportion of late abortions by age and race increased in Mississippi compared with South Carolina and Georgia.

Regression Analysis

Table 4 displays the average change in the natural logarithm of abortion rates between Mississippi and South Carolina and between Mississippi and Georgia in the period following implementation of Mississippi's mandatory delay statute by age and race. Changes were adjusted for state-specific linear and curvilinear trends in the natural logarithm of monthly resident abortion rates. Interpreting changes in the natural logarithm as proportionate changes, we showed that overall abortion rates declined between 10% and 13% in Mississippi after the law compared with South Carolina and Georgia. Among white adults, abortion rates decreased between 17% and 23% in Mississippi relative to South Carolina and Georgia, and among white teens there was an 18% decline in Mississippi relative to white teens in Georgia. Changes among nonwhites, although consistent in magnitude to changes in the relative RRs in Table 2, were statistically insignificant. Regarding differences in variance between the binomial and regression approaches, the binomial was likely to underestimate the variance as it did not incorporate between-month variation.

COMMENT

Beginning in August 1992, women seeking abortion in Mississippi had to wait 24 hours from the time they received state-mandated information on complications of abortion and birth, fetal development, abortion alternatives, and financial assistance for prenatal and infant care before the abortion could be performed. In response to the law, abortion providers required women to make at least 2 separate visits to the abortion facility. There were only 8 abortion providers in Mississippi in 1992, 5 of whom were located in Jackson, Miss.⁶ For some women then, 2 visits may present a substantial cost in terms of time and out-of-pocket expenses. In this study, we have investigated whether Mississippi's delay statute is associated with changes in abortion and birth rates by comparing Mississippi's rate with those of 2 neighboring states lacking this requirement.

We found a substantial and statistically significant decline in abortion rates among residents of Mississippi 12 months after the law went into effect. From this we conclude that the fall in abortion rates is unlikely spurious and is related to enforcement of the 24-hour mandatory delay statute. Our conclusion is bolstered by corroborating increases in the percentage of abortions performed out of state and the percentage of abortions performed after 12 weeks' gestation. We also found no similar increases in abortion rates, the percentage of late abortions, or the percentage of out-of-state abortions in 2 comparison states, Georgia and South Carolina. Finally, our findings do not appear to be an artifact of underreporting. The numbers of abortions performed in Mississippi in 1992 as measured by vital records are almost identical to totals obtained by the AGI survey of providers.^{6,8}

The percentage decline in the abortion rate of teens in Mississippi was about as great as that of adults, but the comparisons with Georgia and South Carolina show less difference because teen abortion rates also fell in those states. In South Carolina, teen abortion rates decreased 11% among whites and 15% among nonwhites, compared with a 2% decline among adults. The large decline in teen rates relative to adult abortion rates of both races in South Carolina implies that factors specific to South Carolina had a unique impact on the abortion rate of teens in that state.

One explanation for these findings is that enforcement of the parental consent statute enacted in May 1990 in South Carolina may have precipitated a downward trend in teen abortion rates. Georgia also enacted a parental notification statute in September 1991 that may have

had an impact on teen abortion rates in South Carolina as well. Georgia borders South Carolina, and previous research has shown that a substantial proportion of minors from South Carolina went out of state for an abortion in the first year after South Carolina's parental consent was enforced.¹¹ Mississippi's parental notification law did not go into effect until the end of May 1993. In sum, legislation tightening access to abortion services for teens in South Carolina and Georgia around the time of our study period may have compromised their usefulness as comparison states for teens in Mississippi.

Differences in abortion rates by race are more difficult to interpret. We suggest 2 possible explanations. One possibility is that whites are more likely than nonwhites to substitute contraception for abortion in response to laws limiting abortion. This is consistent with our finding that birth rates among nonwhites in Mississippi decreased 2.4% after the law relative to declines of 6.4% and 8.3% in Georgia and South Carolina, respectively (results available on request). There was no differential change in birth rates by state among whites associated with the law, even though the proportionate decline in abortion rates among whites was substantially greater than among nonwhites in Mississippi. Another possibility is that cost of compliance was less for nonwhites than for whites, since a greater proportion of nonwhites live closer to abortion providers. Ten percent of all nonwhite residents of Mississippi in 1990 lived in the city of Jackson, compared with 5% of all whites, and 5 of the 8 abortion providers in the state also are located in Jackson. Proximity to abortion providers, especially central-city providers, would lower the time and travel costs associated with a delay statute that requires 2 separate visits.

A consistent finding by age and race was the substantial increase in the percent of abortions performed after 12 weeks' gestational age. It is important to note that the increase represents a rise in the absolute number of second trimester abortions in spite of the decline in total abortions. In results not shown, we found a proportionate increase in late abortions to Mississippi residents performed both in state as well as out of state. We found no significant change in the distribution of the timing of abortions among residents of South Carolina and Georgia. In short, the Mississippi law was associated with a substantive and statistically significant increase in abortion delay. We do not know if the increase in later abortions has resulted in an increase in complications. At a minimum, however, the law has increased the average costs per abortion in Mississippi since second trimester proce-

Table 3.—Resident Abortions Performed After 12 Weeks' Gestation in Mississippi, South Carolina, and Georgia, by Age and Race, 12 Months Before and After Mississippi's Mandatory Delay Law

	Before, No. (%) ^a	After, No. (%) ^a	RR (95% CI) [†]	Relative RR (95% CI) [‡]
White adults, ≥20 y§				
Mississippi	210 (7.4)	248 (11.4)	1.55 (1.30-1.85)	...
South Carolina	317 (5.7)	259 (4.7)	0.84 (0.71-0.98)	1.85 (1.62-2.09)
Georgia	1438 (11.0)	1321 (10.6)	0.98 (0.90-1.03)	1.61 (1.42-1.80)
Nonwhite adults, ≥20 y§				
Mississippi	338 (11.4)	392 (14.3)	1.25 (1.09-1.44)	...
South Carolina	280 (6.1)	299 (8.8)	1.08 (0.92-1.26)	1.16 (0.95-1.37)
Georgia	1763 (12.8)	1886 (13.2)	1.03 (0.97-1.09)	1.22 (1.07-1.38)
White teens, ≤19 y 				
Mississippi	86 (8.7)	112 (14.7)	1.69 (1.29-2.20)	...
South Carolina	143 (8.0)	138 (8.8)	1.11 (0.88-1.38)	1.52 (1.10-1.87)
Georgia	557 (16.9)	540 (16.9)	1.00 (0.90-1.12)	1.38 (1.39-1.97)
Nonwhite teens, ≤19 y 				
Mississippi	175 (17.8)	208 (22.6)	1.27 (1.06-1.52)	...
South Carolina	146 (10.2)	155 (12.7)	1.24 (1.01-1.54)	1.02 (0.74-1.30)
Georgia	798 (22.1)	782 (22.7)	1.03 (0.94-1.12)	1.24 (1.04-1.44)

^aThe period 12 months before the law is defined as August 1991 through July 1992; and the period 12 months after the law as August 1992 through July 1993. Resident abortions include all known abortions to residents of a state regardless of where they are performed. For Mississippi, this includes all abortions to residents performed in Mississippi, Alabama, or Tennessee.

[†]For each outcome, the rate ratio (RR) is the outcome 12 months after the law divided by the outcome 12 months before the law. CI indicates confidence interval.

[‡]The relative RR is the RR for Mississippi divided by the RR for South Carolina or Georgia. The SE for the relative RR is the square root of the sum of the variances for the respective RRs. Ellipses indicate referent.

[§]For white adults, the percentage of abortions after 12 weeks' gestation is the number of resident abortions to white women aged 20 years and older performed after 12 weeks' gestation divided by all resident abortions to white women aged 20 years and older. Nonwhite abortion rates are defined analogously.

^{||}For white teenagers, we used resident abortions to white adolescents aged 19 years or younger performed after 12 weeks' gestation divided by all resident abortions to adolescents aged 19 years or younger. Nonwhite abortion rates are defined analogously.

Table 4.—Average Difference in the Natural Logarithm of Resident Abortion Rates Between Mississippi and South Carolina and Between Mississippi and Georgia*

	Proportionate Changes in Monthly Abortion Rates (SE)				
	All Women (n=216)	White Adults (n=216)	Nonwhite Adults (n=216)	White Teens (n=216)	Nonwhite Teens (n=216)
Mississippi vs South Carolina	-0.126† (0.050)	-0.230‡ (0.061)	-0.083 (0.081)	-0.127 (0.080)	0.083 (0.084)
Mississippi vs Georgia	-0.101† (0.050)	-0.170‡ (0.061)	-0.040 (0.081)	-0.183‡ (0.080)	0.006 (0.084)
Adjusted R ²	0.938	0.909	0.944	0.850	0.907

*Figures, based on period from January 1989 through December 1994, are the coefficients on the interaction between an indicator variable for the state and an indicator variable for the law that is 1 in the postimplementation period. Because the dependent variable is the natural logarithm of the abortion rate, coefficients can be interpreted as proportionate changes in the abortion rate. Separate regressions were estimated for all women and then for each age and racial group separately. All regressions were estimated by ordinary least squares. Additional controls included indicator variables for each month of the year as well as linear and quadratic trend terms interacted with state. Resident abortions include all known abortions to residents of a state regardless of where they are performed. For Mississippi, this includes all abortions to residents performed in Mississippi, Alabama, or Tennessee. R² indicates multiple correlation coefficient.

†P<.05.

‡P<.01.

dures are more expensive than first trimester abortions.

The number and proportion of abortions to Mississippi residents performed in Alabama and Tennessee increased after the law for each age and race group. The proportion of abortions performed out of state increased more for whites than nonwhites. The absolute magnitudes, however, were not large. Thus, if all states that border Mississippi had imposed mandatory delay laws, abortion rates of Mississippi residents might have declined more, but not substantially. This also suggests that omission of data from Louisiana would have relatively little effect on our results. To see this, note that

only the change in out-of-state abortions, not the level, matters for our analysis. We reported an increase of 228 abortions performed in either Alabama or Tennessee after the law (Table 1). Assume an additional 228 abortions to Mississippi residents performed in Louisiana went unrecorded. If we add these 228 abortions to the postlaw totals, the abortion rate increases from 10.8 to 11.2 and the RR reported in Table 1 increases from 0.84 to 0.87, but remains statistically significant.

The results were inconclusive with respect to birth rates, although not inconsistent with the hypothesis that the law caused an increase in the number of unintended pregnancies carried to term.

Definitive tests of the hypothesis were impossible because the expected effects on the birth rates of the observed decline in abortions are small and can be masked by unmeasured state-specific factors that also affect the birth rate. For example, abortions declined by 1210 a year after the law took effect (Table 1). If carried to term, these pregnancies would have resulted in approximately 1089 live births after adjustment for fetal loss. This would have increased the postlaw birth rate by 1.79 per 1000 women aged 15 to 44 years, or 2.5%. In fact, the birth rate decreased by 2% in Mississippi, 6.4% in South Carolina, and 2.4% in Georgia after the law. Thus, although the law may have contributed to the relatively slower decline in Mississippi, other factors may have played an even larger role.

The delay law may have stimulated greater contraceptive use, causing unintended pregnancies to decrease. If this happened, the relative increase in the birth rate among residents of Mississippi would be less than the 2.5% that would have been observed had the decline in abortions resulted in a one-for-one increase in births. In this case, the power of our statistical procedures to detect an effect on birth rates would be even further diminished.

We have no way of assessing whether illegal abortions increased as a result of the law. An analysis of illegal abortion following enforcement of the Hyde amendment found no evidence of a meaningful increase in illegal abortions associated with a decrease in Medicaid-financed abortions.¹⁴ Another assessment estimated that there may have been a 1% increase in illegal abortion associated with the Hyde amendment.¹⁵ An increase in illegal abortion of 1% in Mississippi would not alter our conclusions.

Could other changes have occurred in Mississippi during the study period to precipitate the observed decline in abortion rates? Although we cannot exclude the possibility, our research design eliminated

several sources of potential confounding. A before-and-after analysis within a state removes state-specific confounders that do not vary during the study period. Marital status, for instance, is an important correlate of abortion, but unless the marriage rate within a state changes during the 24-month study period, marital status cannot be a confounder for the law. The same argument pertains to other potential confounders such as the percentage of the population residing in metropolitan areas or per capita income. In fact, we could find no demographic or socioeconomic shifts to explain the decline. The marriage rate and per capita income varied by less than 3% in the 3 study states between 1992 and 1993, and the percentage of the population living in metropolitan areas varied by less than 2% between 1992 and 1993.^{3,16} There were no major changes in abortion service availability to account for the observed decline. The number of abortion providers in Mississippi increased from 7 to 8 between 1991 and 1992, while the number of abortion providers fell from 69 to 56 in Georgia and from 20 to 18 in South Carolina (S. K. H., unpublished data, March 1996).

A before-and-after analysis, however, will not eliminate confounding by factors that vary during the study period. If, for example, abortion rates in Mississippi have been trending downward because of changing attitudes toward abortion, then a decline in abortion rates after the law may reflect changing sentiment toward abortion and not the effects of the mandatory delay statute. We attempted to eliminate time-varying confounders in 2 ways. First, we divided the RR for abortion and births in Mississippi by the RR for abortion and births in Georgia and South Carolina. We termed these relative RRs. The objective was to eliminate time-varying factors common across Mississippi and our comparison states that were related to abortion and birth rates, but unrelated to the law. If, for example, the abortion rate were to decline 10% in Mississippi after the law, but also decline 10%

for the same period in South Carolina, the relative RR would be 1. We would interpret such a finding to mean that changes in Mississippi's abortion rate associated with the law were indistinguishable from general trends in abortion that existed in comparative states. Finally, we used regression analysis to control for state-specific linear and quadratic trends in the natural logarithm of monthly abortion rates. The pattern of results was consistent across methodologies.

Are the results from Mississippi relevant to the effects of mandatory delays in other states? We believe so, but our findings are most germane to states in which the law has been interpreted as requiring 2 visits to an abortion provider. Of the 10 states in addition to Mississippi with enforced mandatory delay statutes, only Louisiana and Utah have interpreted their laws to require 2 separate visits to an abortion provider. Other states permit counseling and state-mandated information regarding the fetus and alternatives to abortion to be communicated via the telephone or through the mail.

The availability of abortion providers is also important to consider. The effect of mandatory delay statutes necessitating 2 visits to a provider may be greater in states that have relatively fewer abortion providers. In Mississippi, there were only 8 abortion providers in the entire state in 1992 or 1.3 providers per 100 000 women aged 15 to 44 years; South Carolina had 2.1, Georgia had 3.3, and the national average was 4.0.⁶ Thus, the large decline in abortion rates we observed in Mississippi may not occur in states with greater availability of abortion providers both within state and among neighboring states. Still, some women in all states have difficulty gaining access to abortion services, and a law that created a barrier for a substantial proportion of Mississippi women would undoubtedly have a similar effect on many women in other states.

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ALASKA STATE LEGISLATURE

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Economic Development, Trade, &
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Sectional Analysis HB 292

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

Section 1: FINDINGS language describes the interests and intentions of the Legislature's intervention in this issue. Interests include regulating medical practice, protecting the life and health and choices of pregnant women, and clarifying a physician's requirements to obtain informed consent, which will in turn, conserve legal and judicial resources.

Section 2: directs the Department of Health and Social Services to develop a website designed to assist a pregnant woman with her reproductive choices. This pamphlet will provide resources for women to use in order to make and implement these decisions. The material will include information specific to geographic region, adoption services, counseling, abortion, clinics, medical assistance benefits, requirements for doctors who performs abortions, the father's liability, fetal development, and medical risks/rewards for each procedure option.

Section 3: adds that abortion may not be performed unless informed consent is obtained, as outlined in Section 4. This elevates 12 A.A.C. 40.070 to statute.

Section 4: adds civil liability for a person who performs or induces an abortion without meeting the informed consent provisions. A doctor who prints the website's information and distributes it to the pregnant woman is not liable under this section.

Section 5: states the terms of qualification for consent to an abortion to be informed and voluntary. Medical emergency, as defined in this section, bypasses the informed consent requirements. The pregnant woman or her parent/guardian/etc. will certify the requirements in writing as met. Voluntary informed means: at least 24 hours before the procedure, in an individual and private and confidential setting, the physician will provide information on the woman's individual circumstances including the physician's name, gestational estimation of the pregnancy, and the nature and risks of the procedure and its alternatives, and the availability of the website's information.

Section 6: adds to the current abortion reporting law. In preparing the report, the state registrar must require whether or not the pregnant woman received the website's information.

Section 7: provides severability of this legislation.

FISCAL NOTE
FN 1

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. CSHB 292(HES)

ANALYSIS CONTINUATION

web-based materials required under this bill.

Although this fiscal note is created under the Maternal, Child, & Family Hlth component, this program has been transferred to the Child Health Services BRU, Womens and Adolescents Services component in FY04.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note 1
 Bill Version: CSHB 292(HES)
 (H) Publish Date: 5/17/03
 Dept. Affected: Health & Social Services
 BRU State Health Services
 Component Maternal, Child, & Family Hlth

Revision Date/Time (Note if correction):
 Title INFORMED CONSENT BEFORE ABORTION

Sponsor DAHLSTROM
 Requester _____

Component No. 290

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual	20.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	20.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES (0)						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	20.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	20.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: _____
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill requires that information be prepared and made available via the Internet, to every woman seeking an abortion, on the medical risks of abortion, pregnancy, and where services can be sought, by geographic region. The Department of Health and Social Services already produces, procures, and disseminates a range of materials regarding how to have a healthy baby and ways to keep the baby safe and healthy after birth. In addition, the Department maintains a 24-hour referral line for services. Ensuring the intent of this bill is addressed will require resources for the production of the additional informational materials on abortion.

CONTRACTUAL: \$20.0 for a professional services contract in Year 1 for the production and posting of the

Prepared by: Doug Bruce, Director Phone 465-3090
 Division Public Health Date/Time 05/06/2003
 Approved by: Joel S. Gilbertson, Commissioner Date 05/06/2003
 Agency Department of Health and Social Services

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 292(HES)
 (H) Publish Date: 5/17/03
 Dept. Affected: Health & Social Services
 BRU State Health Services
 Component Bureau of Vital Statistics

Revision Date/Time (Note if correction):

Title INFORMED CONSENT BEFORE ABORTION

Sponsor DAHLSTROM

Requester _____

Component No. 961

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual	30.0					
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	30.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES (0)						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	30.0					
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
TOTAL	30.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill would add a requirement to the report of Induced Termination of Pregnancy (ITOP) program that the Bureau of Vital Statistics collect and record data on whether or not each reported patient requested and received a written copy of information on reproductive options required to be maintained on the Internet.

CONTRACTUAL: \$30.0 in GF for contractual services costs would be required in Year 1 (one-time cost) to provide for 1) a contract to revise the BVS ITOP computer program (\$20,000); 2) to produce, print and distribute revised ITOP reporting forms to providers throughout Alaska (\$2,000); and 3) to contract for the drafting of regulations to implement AS 18.50.245(e) (\$8,000).

Prepared by: Doug Bruce, Director
 Division Public Health
 Approved by: Joel S. Gilbertson, Commissioner
 Agency Department of Health and Social Services

Phone 465-3090
 Date/Time 05/06/2003
 Date 05/06/2003

ALASKA STATE LEGISLATURE

Co-Chair:
Resources

Vice Chair:
Joint Armed Services Committee

Member:
Military and Veterans Affairs Committee
Labor and Commerce Committee
Economic Development, Trade, &
Tourism Committee



Session:
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REPRESENTATIVE NANCY DAHLSTROM

ELMENDORF AFB • FORT RICHARDSON • BIRCHWOOD • FIRE LAKE • GOVERNMENT HILL • MULDOON
Representative_Nancy_Dahlstrom@legis.state.ak.us

HB 292 SPONSOR STATEMENT

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

Since the early 1970's, Alaskan physicians who perform or induce abortions are required, in regulation, to inform patients "of the medical implications and the possible emotional and physical sequelae (consequence) of the procedure" (12 A.A.C. 40.070). HB 292 raises these regulations into statute, and standardizes the information presented to the patients by means of a website maintained by the Department of Health and Social Services. This website will list accurate, objective information that explains resources available to a pregnant woman that may assist her in making and implementing her own reproductive decisions. This bill will enable women to make healthy, educated choices regarding their own individual and private circumstances.

ARTICLE 2. ABORTIONS

Section

- 60. Termination of pregnancy
- 70. Informed consent
- 80. Medical procedures
- 90. Evaluation
- 100. Consultation requirements
- 110. Abortion procedures
- 120. Standards for hospitals and facilities
- 130. Records
- 140. Limitation

12 AAC 40.060. TERMINATION OF PREGNANCY. Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.

12 AAC 40.070. INFORMED CONSENT. Unless otherwise provided in 12 AAC 40.060, a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

12 AAC 40.080. MEDICAL PROCEDURES. The patient shall be examined by a physician licensed in Alaska, and a written record of the patient's physical and emotional health shall be prepared before performing an abortion procedure as set out in 12 AAC 40.110.

12 AAC 40.090. EVALUATION. The attending physician shall make an evaluation of the patient and an estimation of the duration of gestation based upon the patient's history, examination and test results. This information shall be recorded on the patient's chart.

12 AAC 40.100. CONSULTATION REQUIREMENTS. Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy.

12 AAC 40.110. ABORTION PROCEDURES. During the second or third trimester of a pregnancy, acceptable procedures include dilation and curettage, suction aspiration of the uterus, injection of pharmacological agents, hysterectomy and hysterotomy. The exact procedure to be used will depend upon the patient's total health, age, associated disease and pathology, and anomalies such as skeletal defects and other medical indications.

12 AAC 40.120. STANDARDS FOR HOSPITALS AND FACILITIES. (a) During the second or third trimester of a pregnancy, abortions shall be performed under sterile conditions. A bed and a registered nurse shall be available for a minimum recovery period of one-half hour. A registered nurse shall be present during the procedure.

(b) During the second or third trimester of a pregnancy, blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed, and an operating room appropriately staffed and equipped for major surgery in accordance with regulations adopted under AS 18.20.060 shall be immediately available.

12 AAC 40.130. RECORDS. During the second or third trimester of a pregnancy, the attending physician shall record a medical history, findings of the physical examination, operative report of the abortion procedure and pathology report as part of the clinical record to be maintained by the hospital or facility. The physician and hospital or facility shall treat the patient's identity and medical record as confidential information.

12 AAC 40.140. LIMITATION. A fetus which has not developed beyond 150 days after the first day of the last menstrual period may be considered nonviable for purposes of AS 11.15.060(a). In the performance of an abortion after that date, the physician shall be guided by a reasonable judgment as to whether the fetus is viable in fact.

Informed Consent/Abortion Info

AS 08.64.105. Regulation of abortion procedures.

The board shall adopt regulations necessary to carry into effect the provisions of AS 18.16.010 and shall define ethical, unprofessional, or dishonorable conduct as related to abortions, set standards of professional competency in the performance of abortions, and establish procedures and set standards for facilities, equipment, and care of patients in the performance of an abortion.

12 A.A.C. 40.070

Unless otherwise provided in 12 AAC 40.060 (Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian), a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

History: Eff. 12/20/70, Register 36; am 8/29/73, Register 47

Sec. 18.16.010. Abortions.

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200 ;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) before an abortion is knowingly performed or induced on an unmarried, unemancipated woman under 17 years of age, consent has been given as required under AS 18.16.020 or a court has authorized the minor to consent to the abortion under AS 18.16.030 and the minor consents; for purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 17 years of age is unemancipated; and

(4) the woman is domiciled or physically present in the state for 30 days before the abortion.

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than \$1,000, or by imprisonment for not more than five years, or by both.

(d) [Repealed, Sec. 6 ch 14 SLA 1997].

(e) A person who performs or induces an abortion in violation of (a)(3) of this section is civilly liable to the pregnant minor and the minor's parents, guardian, or custodian for compensatory and punitive damages.

(f) It is an affirmative defense to a prosecution or claim for a violation of (a)(3) of this section that the pregnant minor provided the person who performed or induced the abortion with false, misleading, or incorrect information about the minor's age, marital status, or emancipation, and the person who performed or induced the abortion did not otherwise have reasonable cause to believe that the pregnant minor was under 17 years of age, unmarried, or unemancipated.

(g) It is an affirmative defense to a prosecution or claim for violation of (a)(3) of this section that compliance with the requirements of (a)(3) of this section was not possible because an immediate threat of serious risk to the life or physical health of the pregnant minor or from the continuation of the pregnancy created a medical emergency necessitating the immediate performance or inducement of an abortion. In this subsection, "medical emergency" means a condition that, on the basis of the physician's or surgeon's good faith clinical judgment, so complicates the medical condition of a pregnant minor that

(1) an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or

(2) a delay in providing an abortion will create serious risk of substantial and irreversible impairment of a major bodily function of the pregnant minor.

Sec. 18.16.020. Consent required before minor's abortion.

A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under 17 years of age, and unemancipated unless, before the abortion, at least one of the following applies:

(1) one of the minor's parents or the minor's guardian or custodian has consented in writing to the performance or inducement of the abortion;

(2) a court issues an order under AS 18.16.030 authorizing the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion; or

(3) a court, by its inaction under AS 18.16.030, constructively has authorized the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion.

Sec. 18.16.030. Judicial bypass for minor seeking an abortion.

(a) A woman who is pregnant, unmarried, under 17 years of age, and unemancipated who wishes to have an abortion without the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian.

(b) The complaint shall be made under oath and must include all of the following:

(1) a statement that the complainant is pregnant;

(2) a statement that the complainant is unmarried, under 17 years of age, and unemancipated;

(3) a statement that the complainant wishes to have an abortion without the consent of a parent, guardian, or custodian;

(4) an allegation of either or both of the following:

(A) that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without the consent of a parent, guardian, or custodian; or

(B) that one or both of the minor's parents or the minor's guardian or custodian was engaged in physical abuse, sexual abuse, or a pattern of emotional abuse against the minor, or that the consent of a parent, guardian, or custodian otherwise is not in the minor's best interest;

(5) a statement as to whether the complainant has retained an attorney and, if an attorney has been retained, the name, address, and telephone number of the attorney.

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

(d) If the complainant has not retained an attorney, the court shall appoint an attorney to represent the complainant.

(e) If the complainant makes only the allegation set out in (b)(4)(A) of this section and if the court finds by clear and convincing evidence that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of

an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(f) If the complainant makes only the allegation set out in (b)(4)(B) of this section and the court finds that there is clear and convincing evidence of physical abuse, sexual abuse, or a pattern of emotional abuse of the complainant by one or both of the minor's parents or the minor's guardian or custodian, or by clear and convincing evidence the consent of the parents, guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(g) If the complainant makes both of the allegations set out in (b)(4) of this section, the court shall proceed as follows:

(1) the court first shall determine whether it can make the finding specified in (e) of this section and, if so, shall issue an order under that subsection; if the court issues an order under this paragraph, it may not proceed under (f) of this section; if the court does not make the finding specified in (e) of this section, it shall proceed under (2) of this subsection;

(2) if the court under (1) of this subsection does not make the finding specified in (e) of this section, it shall proceed to determine whether it can make the finding specified in (f) of this section and, if so, shall issue an order under that subsection; if the court does not make the finding specified in (f) of this section, it shall dismiss the complaint.

(h) The court may not notify the parents, guardian, or custodian of the complainant that the complainant is pregnant or wants to have an abortion.

(i) If the court dismisses the complaint, the complainant has the right to appeal the decision to the supreme court, and the superior court immediately shall notify the complainant that there is a right to appeal.

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within four days after the notice of appeal is filed. Upon receipt of the notice and record, the clerk of the supreme court shall place the appeal on the docket. The appellant shall file a brief within four days after the appeal is docketed. Unless the appellant waives the right to oral argument, the supreme court shall hear oral argument within five days after the appeal is docketed. The supreme court shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed. Upon motion of the appellant and for good cause shown, the supreme court may shorten or extend the maximum times set out in this subsection. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this subsection authorizing the appellant to consent to the performance or inducement of an abortion without consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

(k) Each hearing under this section, and all proceedings under (j) of this section, shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section, including papers and records that pertain to an appeal under this section, shall be kept confidential and are not public records under AS 40.25.110 - 40.25.120.

(l) The supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint or appeal under this section. The clerk of each superior court shall furnish blank copies of the forms, without charge, to any person who requests them.

(m) A filing fee may not be required of, and court costs may not be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under this section.

(n) Blank copies of the forms prescribed under (l) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required under this subsection must also include notification to the minor that

(1) there is no filing fee required for either form;

- (2) no court costs will be assessed against the minor for procedures under this section;
- (3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;
- (4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present.

Sec. 18.16.050. Partial-birth abortions.

(a) Notwithstanding compliance with AS 18.16.010 , a person may not knowingly perform a partial-birth abortion unless a partial-birth abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury and no other medical procedure would suffice for that purpose. Violation of this subsection is a class C felony.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section or under any other law if the prosecution is based on this section.

(c) In this section, "partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

Sec. 18.16.090. Definitions.

In this chapter,

(1) "abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "abortion" does not include the termination of a pregnancy if done with the intent to

- (A) save the life or preserve the health of the unborn child;
- (B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child; or
- (C) remove a dead unborn child;

(2) "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:

- (A) entered the armed services of the United States;
- (B) become employed and self-subsisting;
- (C) been emancipated under AS 09.55.590 ; or
- (D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian.

Alaska Civil Liberties Union

An Affiliate of the American Civil Liberties Union

P. O. Box 201844, Anchorage, AK 99520-1844

Phone: (907) 258-0044 Fax: (907) 258-0288 Email: akclu@alaska.net

To: Rep. Lesil McGuire, Chair, and Members of the House Judiciary Committee
From: Jennifer Rudinger, Executive Director
Date: February 11, 2004
Re: Comments on House Bill 292 – Requirements for Informed Consent for Abortion

Dear Rep. McGuire and Members of the House Judiciary Committee:

Unfortunately, I am unable to call in for today's hearing on HB 292, but I would appreciate the opportunity to alert you and the Committee to some of our concerns about this bill, and I ask that these comments be distributed to the Committee and included in the bill packets.

HB 292 raises a number of constitutional concerns and questions, and we wish to go on record opposing the bill. HB 292 singles out one specific medical procedure – abortion – and imposes extra burdens on women seeking to exercise their fundamental constitutional right to terminate their pregnancy. For example, for no other medical procedure is a 24-hour waiting period required. Women who do not have access to the Internet and who cannot use a phone line in privacy without being overheard would likely have to undergo an extra visit to the doctor's office – once to receive the state-mandated counseling, and then a second time, 24 hours or more later, to be able to give informed consent for the procedure.

Furthermore, a waiting period insults women by implying that they have not thought through this medical decision and that they need to go home and reconsider before their informed consent will be deemed valid. Women seeking to carry their pregnancy to term are not forced to receive counseling that encourages them to consider other options. Thus, the only logical conclusion is that this bill is intended to discourage women from exercising their right to choose because only these women are being directed by the state to go "think it over again" before they will be allowed to give informed consent. For the past two sessions that this bill has been introduced, doctors have repeatedly and consistently testified on the record that physicians already spend a great deal of time counseling their patients and advising them of their options before performing abortion or any other surgical procedure. HB 292 is unnecessary.

There are incorrect definitions in the bill that include:

-- "unborn child" means the offspring of a human being in utero at various stages of biological development.

-- "gestational age" means the age of the unborn child as calculated from the first day of the last menstrual period of a pregnant woman. [Note the use of the biased, non-medical term "unborn child," which appears throughout the bill.]

-- "relevant information about the possibility of an unborn child's survival at various gestational ages" is something that people in the medical field do not agree on. The gestational age of "viability" is hotly debated and shifts with developing technology (and the availability of that technology).

Finally, in reviewing this bill, we noticed that it purports to amend AS 18.16.010(a), and we wish to alert the House Judiciary Committee to a provision in that existing law that this Committee should delete in order to protect women's constitutional rights. The 30-day residency/physical presence requirement in 18.16.010(a)(4) raises serious constitutional concerns, and we strongly urge this Committee to remove that requirement from existing statutes.

Thank you very much for your consideration of this matter. Please feel free to contact me at (907) 258-0044 if I may be of further assistance.

Sincerely,



Jennifer Rudinger
Executive Director

Subject: Abortion

Date: Mon, 16 Feb 2004 17:51:20 -0900

From: "Dr. Bob Johnson" <dr.bob@keconnect.net>

To: "McGuire, Lesil" <Rep.Lesil.McGuire@legis.state.ak.us>

Lesil:

I will not be able to testify on this bill on Wednesday since Kodiak is not included in the hearing. The issue of abortion is important enough for each of you to take the time to consider my expert opinion. You have been exposed to a number of lay opinions. I choose this means of communication as the simplest and most efficient to reach you.

The task of legislators, intended by our Constitution as I am sure you must know, is to pass legislation that protects the right of individuals to engage in whatever activity they please as long as it does no harm to anyone else. This right is the whole basis of our system. It is not the business of legislators to restrict or eliminate individual choice. It is not the business of legislators to determine what is, or is not, morally right or wrong. Abortion legislation does both, and I will try to illustrate why.

HB 292 and SB 30, in particular, definitely restrict the choice of both women, who would *choose* an abortion, and physicians, who would *choose* to provide this service! Those who propose these bills have used the term *unborn child* which is an arbitrary judgement declaring the fetus a person, which *has not been determined* and indicates a bias! Those who propose these bills are a select group who feel that abortion is a sin. They, and others who pursue the use of the term *unborn child*, are interested in establishing the *personhood* of the fetus which opens the door to the consideration of fetal injury as a crime and, eventually, to the reversal of Roe vs. Wade.

I was in practice in Kodiak before the passage of Roe vs. Wade. At that time, women who became pregnant and did not want children, had no alternative. Unwanted children fared poorly. Many were abused. Most became wards of the State. I applauded the legalization of abortion which, after passage, was quickly adopted by the States, indicating that it was sorely needed. I have subsequently done approximately 700 abortions, and my experience does not support many of the problems that those who oppose the procedure would lead you to believe.

<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

I am retired and have nothing to gain by speaking against this kind of legislation. My purpose in writing to you, is to prevent obstacles being placed before women who, for multiple reasons, feel they need an abortion. I appeared to testify on HB 292 last year, at which time the committee spent about 30 minutes discussing various aspects of the bill. During this process, Senator Dyson appeared and cautioned the *house committee not to entertain objections* to the term *unborn child*, which clearly indicated his bias, not to mention his obvious *conflict of interest*. This was to have been a hearing, not a discussion of the bill or testimony of the committee in favor of the bill, which it became apparent that it was. Because of this only two were able to testify that afternoon.

My experience with abortion is not exceptional. Each of my patients was presented with options available for them in addition to an abortion. Each was told as much as they wanted to know about the procedure, the risks and the outcomes. Each was scheduled for a follow up visit two weeks after the procedure. Only two of my patients developed post-abortion depression requiring treatment, which is less than the

incidence of post-partum depression. Both of these recovered. None lost enough blood to require a transfusion. Two had minor post-abortion infections, which responded promptly to treatment. Those, who so desired, went on to have normal pregnancies. I saw no fertility problems associated with abortion.

There is no indication for this kind of legislation. Legislators have no business telling patients what they must know, in spite of what advice they receive or from whom. It is an insult to the intelligence of women who, in my opinion, know exactly what they want to know and, if encouraged, will make sure their physician tells them. Do you think that physicians are not familiar with their responsibility to explain the options, risks, benefits and procedural details of any treatment?

This legislation places more obstacles in the path of those who need an abortion. It, along with much inaccurate publicity, complicates the decision and tends—indeed, *intends*, I believe—to make women who elect to have an abortion feel guilty. I think the occasional suicide I have heard mentioned in connection with abortion is a direct result of this.

Ladies and Gentlemen, I ask you. Should anyone have the right to make decisions for others regarding their choice? Should anyone have the right to set up rules of procedure for others that serve as an impediment to their exercise of choice? Should anyone have the right to determine what is, or is not, morally right, for someone else? In the name of compassion for women who cannot manage to bear or raise a child, for whatever reason, I implore you to reject any legislation that has to do with abortion.

Sincerely.

Dr. Bob Johnson

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
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FAX (907) 465-2029
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Juneau, Alaska 99801-1182
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MEMORANDUM

February 2, 2004

SUBJECT: Informed Consent for an Abortion (HB 292)

TO: Representative Nancy Dahlstrom
Attn: Brent

FROM: Jean M. Mischel
Legislative Counsel



You have asked about the similarities and differences between HB 292 and a Texas bill (SB 319). The only similarities between these two bills is that they both pertain to pregnant women and both allow for a civil remedy and criminal penalties against a licensed physician for performing an abortion without the requisite informed consent. Otherwise, these two bills are completely different.

HB 292 is an informed consent bill providing that certain information be provided to a pregnant woman by a licensed physician before an abortion. The bill contains a civil liability provision for failing to do so and adds a violation of the informed consent provisions to the list of violations that could result in criminal penalties.

The Texas bill provides for civil and criminal penalties for the death of an "unborn child" caused by anyone other than the mother and by some means other than a lawful medical procedure done for the purpose of causing the death and with the "requisite consent." It is conceivable, then, under the Texas bill, that a health care provider performing an abortion without informed consent could be held criminally as well as civilly liable. The bill would also cover third parties, who, cause the death of a fetus in some other way such as a motor vehicle accident.

In order to amend HB 292 to do what the Texas legislation does, HB 292 would have to be rewritten to add civil and criminal penalties for the death of an "unborn child." For instance, adding the contents of HB 294, of which you are a cosponsor, would be an option, although the single-subject rule might require omission of some of the material in HB 292 that is not strictly related to unborn children, such as material related to post-abortion counseling.

If I may be of further assistance, please advise.

JMM:lmb
04-017.lmb

S.B. No. 319

AN ACT

relating to the death of or injury to an unborn child; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

ARTICLE 1. CIVIL REMEDIES

SECTION 1.01. Section 71.001, Civil Practice and Remedies Code, is amended by adding Subdivisions (3) and (4) to read as follows:

(3) "Death" includes, for an individual who is an unborn child, the failure to be born alive.

(4) "Individual" includes an unborn child at every stage of gestation from fertilization until birth.

SECTION 1.02. Section 71.003, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 71.003. APPLICATION; CERTAIN CONDUCT EXCEPTED.

(a) This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if the individual ~~had~~ had lived or had been born alive.

(b) This subchapter applies whether the injury occurs inside or outside this state.

(c) This subchapter does not apply to a claim for the death of an individual who is an unborn child that is brought against:

(1) the mother of the unborn child;

(2) a physician or other licensed health care provider, if the death is the intended result of a lawful medical procedure performed by the physician or health care provider with the requisite consent;

(3) a person who dispenses or administers a drug in accordance with law, if the death is the result of the dispensation or administration of the drug; or

(4) a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider.

SECTION 1.03. Subchapter A, Chapter 71, Civil Practice and Remedies Code, is amended by adding Section 71.0055 to read as follows:

Sec. 71.0055. EVIDENCE OF PREGNANCY. In an action under this subchapter for the death of an individual who is an unborn child, the plaintiff shall provide medical or other evidence that the mother of the individual was pregnant at the time of the individual's death.

SECTION 1.04. The changes in law made by this article apply only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before the effective date of this Act is governed by the law as it existed

immediately before the effective date of this Act and that law is continued in effect for that purpose.

ARTICLE 2. CRIMINAL PENALTIES

SECTION 2.01. Subsection (a), Section 1.07, Penal Code, is amended by amending Subdivision (26) and adding Subdivision (49) to read as follows:

(26) "Individual" means a human being who ~~has been born and~~ is alive, including an unborn child at every stage of gestation from fertilization until birth.

(49) "Death" includes, for an individual who is an unborn child, the failure to be born alive.

SECTION 2.02. Chapter 19, Penal Code, is amended by adding Section 19.06 to read as follows:

Sec. 19.06. APPLICABILITY TO CERTAIN CONDUCT. This chapter does not apply to the death of an unborn child if the conduct charged is:

(1) conduct committed by the mother of the unborn child;

(2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure;

(3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or

(4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

SECTION 2.03. Section 20.01, Penal Code, is amended by adding Subdivisions (4) and (5) to read as follows:

(4) "Person" means an individual, corporation, or association.

(5) Notwithstanding Section 1.07, "individual" means a human being who has been born and is alive.

SECTION 2.04. Chapter 22, Penal Code, is amended by adding Section 22.12 to read as follows:

Sec. 22.12. APPLICABILITY TO CERTAIN CONDUCT. This chapter does not apply to conduct charged as having been committed against an individual who is an unborn child if the conduct is:

(1) committed by the mother of the unborn child;

(2) a lawful medical procedure performed by a physician or other health care provider with the requisite consent;

(3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or

(4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.

SECTION 2.05. Chapter 49, Penal Code, is amended by adding Section 49.12 to read as follows:

Sec. 49.12. APPLICABILITY TO CERTAIN CONDUCT. Sections 49.07 and 49.08 do not apply to injury to or the death of an unborn child if the conduct charged is conduct committed by the mother of the unborn child.

SECTION 2.06. Chapter 38, Code of Criminal Procedure, is amended by adding Section 38.40 to read as follows:

Sec. 38.40. EVIDENCE OF PREGNANCY. (a) In a prosecution for the death of or injury to an individual who is an unborn child,

the prosecution shall provide medical or other evidence that the mother of the individual was pregnant at the time of the alleged offense.

(b) For the purpose of this section, "individual" has the meaning assigned by Section 1.07, Penal Code.

SECTION 2.07. (a) The changes in law made by this article apply only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

ARTICLE 3. EFFECTIVE DATE

SECTION 3.01. This Act takes effect September 1, 2003.

President of the Senate

Speaker of the House

I hereby certify that S.B. No. 319 passed the Senate on May 22, 2003, by a viva-voce vote; and that the Senate concurred in House amendments on May 31, 2003, by a viva-voce vote.

Secretary of the Senate

I hereby certify that S.B. No. 319 passed the House, with amendments, on May 28, 2003, by the following vote: Yeas 112, Nays 15, two present not voting.

Chief Clerk of the House

Approved:

Date

Governor

**ARTICLE 2.
ABORTIONS**

Section

- 60. Termination of pregnancy**
- 70. Informed consent**
- 80. Medical procedures**
- 90. Evaluation**
- 100. Consultation requirements**
- 110. Abortion procedures**
- 120. Standards for hospitals and facilities**
- 130. Records**
- 140. Limitation**

12 AAC 40.060. TERMINATION OF PREGNANCY. Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.

12 AAC 40.070. INFORMED CONSENT. Unless otherwise provided in 12 AAC 40.060, a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

12 AAC 40.080. MEDICAL PROCEDURES. The patient shall be examined by a physician licensed in Alaska, and a written record of the patient's physical and emotional health shall be prepared before performing an abortion procedure as set out in 12 AAC 40.110.

12 AAC 40.090. EVALUATION. The attending physician shall make an evaluation of the patient and an estimation of the duration of gestation based upon the patient's history, examination and test results. This information shall be recorded on the patient's chart.

12 AAC 40.100. CONSULTATION REQUIREMENTS. Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy.

12 AAC 40.110. ABORTION PROCEDURES. During the second or third trimester of a pregnancy, acceptable procedures include dilation and curettage, suction aspiration of the uterus, injection of pharmacological agents, hysterectomy and hysterotomy. The exact procedure to be used will depend upon the patient's total health, age, associated disease and pathology, and anomalies such as skeletal defects and other medical indications.

12 AAC 40.120. STANDARDS FOR HOSPITALS AND FACILITIES. (a) During the second or third trimester of a pregnancy, abortions shall be performed under sterile conditions. A bed and a registered nurse shall be available for a minimum recovery period of one-half hour. A registered nurse shall be present during the procedure.

(b) During the second or third trimester of a pregnancy, blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed, and an operating room appropriately staffed and equipped for major surgery in accordance with regulations adopted under AS 18.20.060 shall be immediately available.

12 AAC 40.130. RECORDS. During the second or third trimester of a pregnancy, the attending physician shall record a medical history, findings of the physical examination, operative report of the abortion procedure and pathology report as part of the clinical record to be maintained by the hospital or facility. The physician and hospital or facility shall treat the patient's identity and medical record as confidential information.

12 AAC 40.140. LIMITATION. A fetus which has not developed beyond 150 days after the first day of the last menstrual period may be considered nonviable for purposes of AS 11.15.060(a). In the performance of an abortion after that date, the physician shall be guided by a reasonable judgment as to whether the fetus is viable in fact.

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MEMORANDUM

February 5, 2004

SUBJECT: Informed Consent for Abortion (CSHB 292(JUD))

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: Jean M. Mischel
Legislative Counsel 

Enclosed is the bill draft you requested.

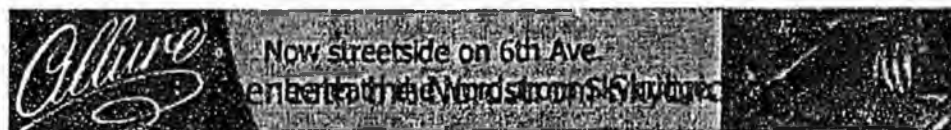
You have asked whether, in reference to the above bill, the phrase "unborn child" is legally recognized. I have done a search of Alaska law and have found two references, one in statute and one in regulation, neither of which contains a definition. The statutory reference, at AS 18.16.090, pertains to abortions. The regulatory reference, at 7 AAC 45.510, pertains to temporary assistance eligibility for pregnant women.

Unless this legislation passes with the definition of "unborn child," courts rely on common law, plain meaning, and legislative intent to supply a definition.

If I may be of further assistance, please advise.

JMM:lmb
04-020.lmb

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ALASKA

Parental consent law struck down

ABORTION: Statute goes too far in its effort to protect teens, judge says.

By SHEILA TOOMEY
Anchorage Daily News

(Published: October 15, 2003)

A state law requiring the consent of a parent or judge before pregnant minors can get an abortion has been struck down as unconstitutional.

In a decision signed Monday, Superior Court Judge Sen Tan agreed the state had several compelling reasons for enacting a parental consent law, but said the existing law is more restrictive than it needs to be to protect endangered teens, according to Anchorage attorney Kevin Clarkson, who defended the statute at trial in January.

The law has been on hold since shortly after it was passed in 1997 by the Legislature over a veto by Gov. Tony Knowles. It was challenged in court by Planned Parenthood of Alaska.

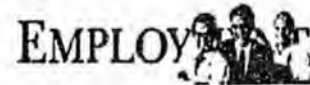
In written comments, Lt. Gov. Loren Leman criticized Tan's decision, saying it "undermines the rights of parents to be involved in one of the most difficult decisions that a child will ever make."

Leman sponsored the law when he was a member of the state Senate.

Clarkson said he expects the governor and attorney general will appeal Tan's ruling to the Alaska Supreme Court.

"I just think it's a good law," Clarkson said. "You have to be for protecting young and believing that most parents care about their children."

Tan first threw out the law in 1998, saying a trial was not necessary. At that time he said the issue was equal rights.



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FOR IMMEDIATE RELEASE: February 5, 2004

State Seeks to Uphold Alaska Parental Consent Act in Appeal to Alaska Supreme Court

(Juneau, AK) *Attorney General Gregg Renkes announced today that the State filed an appeal to the Alaska Supreme Court from a recent superior court decision that found the Alaska Parental Consent Act unconstitutional.

The Parental Consent Act prohibits doctors from performing abortions on girls aged 16 and under who are both unmarried and unemancipated, unless the girl has first obtained the consent of either one of her parents or a superior court judge. The law applies only to elective abortions; it contains an exception for medically necessary emergency abortions. Similar laws have been upheld by the United States Supreme Court and are in operation in nearly 40 other states.

Attorney General Renkes expressed confidence that the State amassed a substantial and impressive evidentiary record proving that the Parental Consent Act furthers the State's multiple compelling interests.


"We developed an extensive record in the superior court," Renkes said. "We will argue on appeal that the record establishes that the Parental Consent Act serves the compelling state interests at stake here."

The superior court found that the State has a compelling interest in protecting minors from their own immaturity; protecting the physical, emotional, and psychological health of minors; ensuring that doctors obtain informed consent from minor patients; protecting minors from sexual abuse; fostering and protecting the family structure; and protecting the rights of a minor child to bring a civil action against the doctor performing the abortion.

"We look forward to presenting our arguments to the Alaska Supreme Court," Renkes concluded. "I am hopeful that on review, the high court will reverse this decision. I believe we have the evidence needed to prove that we should be allowed to provide these important protections for Alaskan families and children."

This is the state's second appeal in this case to the Alaska Supreme Court. The Alaska Legislature enacted the Parental Consent Act in 1997. Planned Parenthood of Alaska brought suit challenging the new law's constitutionality. The superior court initially held the Act unconstitutional. The State appealed to the Alaska Supreme Court, which decided that the lower court should have considered evidence on whether the State has a compelling interest in enforcing the Parental Consent Act, and whether the Act is properly tailored to promote the state's interest. Following a three-week hearing, the superior court ruled in October of 2003 that the State established numerous compelling interests, but that the Act is not sufficiently tailored to serve those interests.

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A pregnant teen who decides to have her baby has a legal right to make treatment birth decisions without anyone's consent. Pregnant teens who choose not to give are entitled to the same freedom, he concluded.

In 2001, the state Supreme Court sent the case back to Tan with instructions to testimony about whether the state has a compelling interest in requiring minors consent. The vote was 3-2, with two justices ready to forego an evidence hearing to uphold the law.

After listening to experts on both sides, Tan has concluded the state does have compelling interests, Clarkson said Tuesday, including protecting minors from their immature judgment, protecting their physical and emotional health, and protecting them against sex abuse.

But the law, as written, doesn't accomplish these goals in the least restrictive way according to the decision.

No one from Planned Parenthood could be reached Tuesday evening for comment.

Daily News reporter Sheila Toomey can be reached at stoomey@adn.com.

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Representative_Nancy_Dahlstrom@legis.state.ak.us

HB 292 SPONSOR STATEMENT

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

Since the early 1970's, Alaskan physicians who perform or induce abortions are required, in regulation, to inform patients "of the medical implications and the possible emotional and physical sequelae (consequence) of the procedure" (12 A.A.C. 40.070). HB 292 raises these regulations into statute, and standardizes the information presented to the patients by means of a website maintained by the Department of Health and Social Services. This website will list accurate, objective information that explains resources available to a pregnant woman that may assist her in making and implementing her own reproductive decisions. This bill will enable women to make healthy, educated choices regarding their own individual and private circumstances.

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Sectional Analysis HB 292

"An Act relating to information and services available to pregnant women and other persons; and ensuring informed consent before an abortion may be performed, except in cases of medical emergency."

Section 1: FINDINGS language describes the interests and intentions of the Legislature's intervention in this issue. Interests include regulating medical practice, protecting the life and health and choices of pregnant women, and clarifying a physician's requirements to obtain informed consent, which will in turn, conserve legal and judicial resources.

Section 2: directs the Department of Health and Social Services to develop a website designed to assist a pregnant woman with her reproductive choices. This pamphlet will provide resources for women to use in order to make and implement these decisions. The material will include information specific to geographic region, adoption services, counseling, abortion, clinics, medical assistance benefits, requirements for doctors who performs abortions, the father's liability, fetal development, and medical risks/rewards for each procedure option.

Section 3: adds that abortion may not be performed unless informed consent is obtained, as outlined in Section 4. This elevates 12 A.A.C. 40.070 to statute.

Section 4: adds civil liability for a person who performs or induces an abortion without meeting the informed consent provisions. A doctor who prints the website's information and distributes it to the pregnant woman is not liable under this section.

Section 5: states the terms of qualification for consent to an abortion to be informed and voluntary. Medical emergency, as defined in this section, bypasses the informed consent requirements. The pregnant woman or her parent/guardian/etc. will certify the requirements in writing as met. Voluntary informed means: at least 24 hours before the procedure, in an individual and private and confidential setting, the physician will provide information on the women's individual circumstances including the physician's name, gestational estimation of the pregnancy, and the nature and risks of the procedure and its alternatives, and the availability of the website's information.

Section 6: adds to the current abortion reporting law. In preparing the report, the state registrar must require whether or not the pregnant woman received the website's information.

Section 7: provides severability of this legislation.

Informed Consent/Abortion Info

AS 08.64.105. Regulation of abortion procedures.

The board shall adopt regulations necessary to carry into effect the provisions of AS 18.16.010 and shall define ethical, unprofessional, or dishonorable conduct as related to abortions, set standards of professional competency in the performance of abortions, and establish procedures and set standards for facilities, equipment, and care of patients in the performance of an abortion.

12 A.A.C. 40.070

Unless otherwise provided in 12 AAC 40.060 (Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.), a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

History: Eff. 12/20/70, Register 36; am 8/29/73, Register 47

Sec. 18.16.010. Abortions.

(a) An abortion may not be performed in this state unless

(1) the abortion is performed by a physician or surgeon licensed by the State Medical Board under AS 08.64.200 ;

(2) the abortion is performed in a hospital or other facility approved for the purpose by the Department of Health and Social Services or a hospital operated by the federal government or an agency of the federal government;

(3) before an abortion is knowingly performed or induced on an unmarried, unemancipated woman under 17 years of age, consent has been given as required under AS 18.16.020 or a court has authorized the minor to consent to the abortion under AS 18.16.030 and the minor consents; for purposes of enforcing this paragraph, there is a rebuttable presumption that a woman who is unmarried and under 17 years of age is unemancipated; and

(4) the woman is domiciled or physically present in the state for 30 days before the abortion.

(b) Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.

(c) A person who knowingly violates a provision of this section, upon conviction, is punishable by a fine of not more than \$1,000, or by imprisonment for not more than five years, or by both.

(d) [Repealed, Sec. 6 ch 14 SLA 1997].

(e) A person who performs or induces an abortion in violation of (a)(3) of this section is civilly liable to the pregnant minor and the minor's parents, guardian, or custodian for compensatory and punitive damages.

(f) It is an affirmative defense to a prosecution or claim for a violation of (a)(3) of this section that the pregnant minor provided the person who performed or induced the abortion with false, misleading, or incorrect information about the minor's age, marital status, or emancipation, and the person who performed or induced the abortion did not otherwise have reasonable cause to believe that the pregnant minor was under 17 years of age, unmarried, or unemancipated.

(g) It is an affirmative defense to a prosecution or claim for violation of (a)(3) of this section that compliance with the requirements of (a)(3) of this section was not possible because an immediate threat of serious risk to the life or physical health of the pregnant minor from the continuation of the pregnancy created a medical emergency necessitating the immediate performance or inducement of an abortion. In this subsection, "medical emergency" means a condition that, on the basis of the physician's or surgeon's good faith clinical judgment, so complicates the medical condition of a pregnant minor that

- (1) an immediate abortion of the minor's pregnancy is necessary to avert the minor's death; or
- (2) a delay in providing an abortion will create serious risk of substantial and irreversible impairment of a major bodily function of the pregnant minor.

Sec. 18.16.020. Consent required before minor's abortion.

A person may not knowingly perform or induce an abortion upon a minor who is known to the person to be pregnant, unmarried, under 17 years of age, and unemancipated unless, before the abortion, at least one of the following applies:

- (1) one of the minor's parents or the minor's guardian or custodian has consented in writing to the performance or inducement of the abortion;
- (2) a court issues an order under AS 18.16.030 authorizing the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion; or
- (3) a court, by its inaction under AS 18.16.030, constructively has authorized the minor to consent to the abortion without consent of a parent, guardian, or custodian, and the minor consents to the abortion.

Sec. 18.16.030. Judicial bypass for minor seeking an abortion.

(a) A woman who is pregnant, unmarried, under 17 years of age, and unemancipated who wishes to have an abortion without the consent of a parent, guardian, or custodian may file a complaint in the superior court requesting the issuance of an order authorizing the minor to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian.

(b) The complaint shall be made under oath and must include all of the following:

- (1) a statement that the complainant is pregnant;
- (2) a statement that the complainant is unmarried, under 17 years of age, and unemancipated;
- (3) a statement that the complainant wishes to have an abortion without the consent of a parent, guardian, or custodian;
- (4) an allegation of either or both of the following:

(A) that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion without the consent of a parent, guardian, or custodian; or

(B) that one or both of the minor's parents or the minor's guardian or custodian was engaged in physical abuse, sexual abuse, or a pattern of emotional abuse against the minor, or that the consent of a parent, guardian, or custodian otherwise is not in the minor's best interest;

(5) a statement as to whether the complainant has retained an attorney and, if an attorney has been retained, the name, address, and telephone number of the attorney.

(c) The court shall fix a time for a hearing on any complaint filed under (a) of this section and shall keep a record of all testimony and other oral proceedings in the action. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this subsection is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the complainant and any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such consent.

(d) If the complainant has not retained an attorney, the court shall appoint an attorney to represent the complainant.

(e) If the complainant makes only the allegation set out in (b)(4)(A) of this section and if the court finds by clear and convincing evidence that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of

an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(f) If the complainant makes only the allegation set out in (b)(4)(B) of this section and the court finds that there is clear and convincing evidence of physical abuse, sexual abuse, or a pattern of emotional abuse of the complainant by one or both of the minor's parents or the minor's guardian or custodian, or by clear and convincing evidence the consent of the parents, guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian. If the court does not make the finding specified in this subsection, it shall dismiss the complaint.

(g) If the complainant makes both of the allegations set out in (b)(4) of this section, the court shall proceed as follows:

(1) the court first shall determine whether it can make the finding specified in (e) of this section and, if so, shall issue an order under that subsection; if the court issues an order under this paragraph, it may not proceed under (f) of this section; if the court does not make the finding specified in (e) of this section, it shall proceed under (2) of this subsection;

(2) if the court under (1) of this subsection does not make the finding specified in (e) of this section, it shall proceed to determine whether it can make the finding specified in (f) of this section and, if so, shall issue an order under that subsection; if the court does not make the finding specified in (f) of this section, it shall dismiss the complaint.

(h) The court may not notify the parents, guardian, or custodian of the complainant that the complainant is pregnant or wants to have an abortion.

(i) If the court dismisses the complaint, the complainant has the right to appeal the decision to the supreme court, and the superior court immediately shall notify the complainant that there is a right to appeal.

(j) If the complainant files a notice of appeal authorized under this section, the superior court shall deliver a copy of the notice of appeal and the record on appeal to the supreme court within four days after the notice of appeal is filed. Upon receipt of the notice and record, the clerk of the supreme court shall place the appeal on the docket. The appellant shall file a brief within four days after the appeal is docketed. Unless the appellant waives the right to oral argument, the supreme court shall hear oral argument within five days after the appeal is docketed. The supreme court shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed. Upon motion of the appellant and for good cause shown, the supreme court may shorten or extend the maximum times set out in this subsection. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without the consent of a parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this subsection authorizing the appellant to consent to the performance or inducement of an abortion without consent of another person. In the interest of justice, the supreme court, in an appeal under this subsection, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

(k) Each hearing under this section, and all proceedings under (i) of this section, shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section, including papers and records that pertain to an appeal under this section, shall be kept confidential and are not public records under AS 40.25.110 - 40.25.120.

(l) The supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint or appeal under this section. The clerk of each superior court shall furnish blank copies of the forms, without charge, to any person who requests them.

(m) A filing fee may not be required of, and court costs may not be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under this section.

(n) Blank copies of the forms prescribed under (l) of this section and information on the proper procedures for filing a complaint or appeal shall be made available by the court system at the official location of each superior court, district court, and magistrate in the state. The information required under this subsection must also include notification to the minor that

(1) there is no filing fee required for either form;

(2) no court costs will be assessed against the minor for procedures under this section;

(3) an attorney will be appointed to represent the minor if the minor does not retain an attorney;

(4) the minor may request that the superior court with appropriate jurisdiction hold a telephonic hearing on the complaint so that the minor need not personally be present.

Sec. 18.16.050. Partial-birth abortions.

(a) Notwithstanding compliance with AS 18.16.010, a person may not knowingly perform a partial-birth abortion unless a partial-birth abortion is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury and no other medical procedure would suffice for that purpose. Violation of this subsection is a class C felony.

(b) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section or under any other law if the prosecution is based on this section.

(c) In this section, "partial-birth abortion" means an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery.

Sec. 18.16.090. Definitions.

In this chapter,

(1) "abortion" means the use or prescription of an instrument, medicine, drug, or other substance or device to terminate the pregnancy of a woman known to be pregnant, except that "abortion" does not include the termination of a pregnancy if done with the intent to

(A) save the life or preserve the health of the unborn child;

(B) deliver the unborn child prematurely to preserve the health of both the pregnant woman and the woman's child; or

(C) remove a dead unborn child;

(2) "unemancipated" means that a woman who is unmarried and under 17 years of age has not done any of the following:

(A) entered the armed services of the United States;

(B) become employed and self-sustaining;

(C) been emancipated under AS 09.55.590; or

(D) otherwise become independent from the care and control of the woman's parent, guardian, or custodian.

**ARTICLE 2.
ABORTIONS**

Section

- 60. Termination of pregnancy**
- 70. Informed consent**
- 80. Medical procedures**
- 90. Evaluation**
- 100. Consultation requirements**
- 110. Abortion procedures**
- 120. Standards for hospitals and facilities**
- 130. Records**
- 140. Limitation**

12 AAC 40.060. TERMINATION OF PREGNANCY. Termination of pregnancy must be requested by the pregnant woman, unless she has been adjudged mentally incompetent or is unmarried and under 18 years of age, in which case the request must be made by her parent or guardian.

12 AAC 40.070. INFORMED CONSENT. Unless otherwise provided in 12 AAC 40.060, a written informed consent shall be obtained from the patient or from any other person whose consent is required before termination of a pregnancy. Such written informed consent shall be on the patient's chart. The patient and other persons whose consent is required shall be advised of the medical implications and the possible emotional and physical sequelae of the procedure.

12 AAC 40.080. MEDICAL PROCEDURES. The patient shall be examined by a physician licensed in Alaska, and a written record of the patient's physical and emotional health shall be prepared before performing an abortion procedure as set out in 12 AAC 40.110.

12 AAC 40.090. EVALUATION. The attending physician shall make an evaluation of the patient and an estimation of the duration of gestation based upon the patient's history, examination and test results. This information shall be recorded on the patient's chart.

12 AAC 40.100. CONSULTATION REQUIREMENTS. Abortions interrupting a pregnancy up to and including the twelfth week of gestation may be performed without consultation. Abortions performed after the twelfth week of gestation shall be preceded by consultation with another physician. The consultation shall include an opinion as to the preferred method of termination of pregnancy.

12 AAC 40.110. ABORTION PROCEDURES. During the second or third trimester of a pregnancy, acceptable procedures include dilation and curettage, suction aspiration of the uterus, injection of pharmacological agents, hysterectomy and hysterotomy. The exact procedure to be used will depend upon the patient's total health, age, associated disease and pathology, and anomalies such as skeletal defects and other medical indications.

12 AAC 40.120. STANDARDS FOR HOSPITALS AND FACILITIES. (a) During the second or third trimester of a pregnancy, abortions shall be performed under sterile conditions. A bed and a registered nurse shall be available for a minimum recovery period of one-half hour. A registered nurse shall be present during the procedure.

(b) During the second or third trimester of a pregnancy, blood, blood derivatives, blood substitutes or plasma expanders shall be immediately available when an abortion is performed, and an operating room appropriately staffed and equipped for major surgery in accordance with regulations adopted under AS 18.20.060 shall be immediately available.

12 AAC 40.130. RECORDS. During the second or third trimester of a pregnancy, the attending physician shall record a medical history, findings of the physical examination, operative report of the abortion procedure and pathology report as part of the clinical record to be maintained by the hospital or facility. The physician and hospital or facility shall treat the patient's identity and medical record as confidential information.

12 AAC 40.140. LIMITATION. A fetus which has not developed beyond 150 days after the first day of the last menstrual period may be considered nonviable for purposes of AS 11.15.060(a). In the performance of an abortion after that date, the physician shall be guided by a reasonable judgment as to whether the fetus is viable in fact.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note 1
 Bill Version: CSHB 292(HES)
 (H) Publish Date: 5/17/03
 Dept. Affected: Health & Social Services
 BRU State Health Services
 Component Maternal, Child, & Family Hlth

Revision Date/Time (Note if correction):
 Title INFORMED CONSENT BEFORE ABORTION

Sponsor DAHLSTROM

Requester _____ Component No. 290

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|------------------------|-------------|------------|------------|------------|------------|------------|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | 20.0 | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 20.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES (0) | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---------------------------------------|-------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 20.0 | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other(Specify Type-do not abbreviate) | | | | | | |
| TOTAL | 20.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY2003) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

This bill requires that information be prepared and made available via the Internet, to every woman seeking an abortion, on the medical risks of abortion, pregnancy, and where services can be sought, by geographic region. The Department of Health and Social Services already produces, procures, and disseminates a range of materials regarding how to have a healthy baby and ways to keep the baby safe and healthy after birth. In addition, the Department maintains a 24-hour referral line for services. Ensuring the intent of this bill is addressed will require resources for the production of the additional informational materials on abortion.

CONTRACTUAL: \$20.0 for a professional services contract in Year 1 for the production and posting of the

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 Division Public Health
 Approved by: Joel S. Gilbertson, Commissioner
 Agency Department of Health and Social Services

Phone 465-3090
 Date/Time 05/06/2003
 Date 05/06/2003

FISCAL NOTE
FN 1

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. CSHB 292(HES)

ANALYSIS CONTINUATION

web-based materials required under this bill.

Although this fiscal note is created under the Maternal, Child, & Family Hlth component, this program has been transferred to the Child Health Services BRU, Womens and Adolescents Services component in FY04.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 292(HES)
 (H) Publish Date: 5/17/03
 Dept. Affected: Health & Social Services
 BRU State Health Services
 Component Bureau of Vital Statistics

Revision Date/Time (Note if correction): _____

Title INFORMED CONSENT BEFORE ABORTION

Sponsor DAHLSTROM

Requester _____

Component No. 961

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

| OPERATING EXPENDITURES | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|------------------------|-------------|------------|------------|------------|------------|------------|
| Personal Services | | | | | | |
| Travel | | | | | | |
| Contractual | 30.0 | | | | | |
| Supplies | | | | | | |
| Equipment | | | | | | |
| Land & Structures | | | | | | |
| Grants & Claims | | | | | | |
| Miscellaneous | | | | | | |
| TOTAL OPERATING | 30.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

| | | | | | | |
|-----------------------------|--|--|--|--|--|--|
| CAPITAL EXPENDITURES | | | | | | |
|-----------------------------|--|--|--|--|--|--|

| | | | | | | |
|-------------------------------|--|--|--|--|--|--|
| CHANGE IN REVENUES (0) | | | | | | |
|-------------------------------|--|--|--|--|--|--|

FUND SOURCE (Thousands of Dollars)

| | | | | | | |
|---------------------------------------|-------------|------------|------------|------------|------------|------------|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | 30.0 | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other(Specify Type-do not abbreviate) | | | | | | |
| TOTAL | 30.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY2003) cost: _____

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

| | | | | | | |
|-----------|--|--|--|--|--|--|
| Full-time | | | | | | |
| Part-time | | | | | | |
| Temporary | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

This bill would add a requirement to the report of Induced Termination of Pregnancy (ITOP) program that the Bureau of Vital Statistics collect and record data on whether or not each reported patient requested and received a written copy of information on reproductive options required to be maintained on the Internet.

CONTRACTUAL: \$30.0 in GF for contractual services costs would be required In Year 1 (one-time cost) to provide for 1) a contract to revise the BVS ITOP computer program (\$20,000); 2) to produce, print and distribute revised ITOP reporting forms to providers throughout Alaska (\$2,000); and 3) to contract for the drafting of regulations to implement AS 18.50.245(e) (\$8,000).

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 Division Public Health
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 Date/Time 05/06/2003
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