

ALASKA LEGISLATURE

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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 enjoining 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 risk 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 be an outmoded [**2842] and unacceptable assumption 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

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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

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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. Boysford*, 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-

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-

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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. 2481 (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

505 U.S. 833, *932; 112 S. Ct. 2791, **2848;
120 L. Ed. 2d 674, ***751; 1992 U.S. LEXIS 4751

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 its 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;
120 L. Ed. 2d 674, ***LEdHR6E; 1992 U.S. LEXIS 4751

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 *82. Because the State's information must be "cal-

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 shew 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

505 U.S. 833, *938; 112 S. Ct. 2791, **2852;
120 L. Ed. 2d 674, ***755; 1992 U.S. LEXIS 4751

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-

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 *Websler*. "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. 545, 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

505 U.S. 833, *944; 112 S. Ct. 2791, **2855;
120 L. Ed. 2d 674, ***758; 1992 U.S. LEXIS 4751

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. Matheson*, 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 termination 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 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*, 497 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);

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 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* read 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); *Eric R. Co. v. Tompkins*, 304 U.S. 64, 74-78, 82 L. Ed. 1188, 58 S. Ct. 817 (1933).

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 823. 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,

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 SOUTER, 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).

[**LEd11R2C] [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

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 (required 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

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 1226 (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;

505 U.S. 833, *975; 112 S. Ct. 2791, **2871;
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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

505 U.S. 833, *978; 112 S. Ct. 2791, **2873;
120 L. Ed. 2d 674, ***781; 1992 U.S. LEXIS 4751

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 *Webster 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-

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 effort 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*, 48 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 *Mecher 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;
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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

are "legislative" rather than "adjudicative" facts, see Rule 201(a). But if a court can find an undue burden simply by selectively string-citing the right social science articles, I do not see the point of emphasizing or requiring "detailed factual findings" in the District Court.

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 "expressing 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 case 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 disrupt-

tion, rather than of any *Pax Roana*, 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 steady 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* obstacle — 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 Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There [*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.

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THE US SUPREME COURT, in *Planned Parenthood of Southeastern Pennsylvania v Casey*,¹ ruled that laws

From Baruch College, City University of New York, and National Bureau of Economic Research Inc, New York, NY (Dr Joyce); Alon Guttmacher Institute, New York, NY (Dr Henshaw); and University of North Carolina at Chapel Hill (Dr DeClerque Skatrud).

Corresponding author: Theodore Joyce, PhD, National Bureau of Economic Research, 50 E 42nd St, 17th Floor, New York, NY 10017-5405.

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

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).^{6A}

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 16th 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 postlaw 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

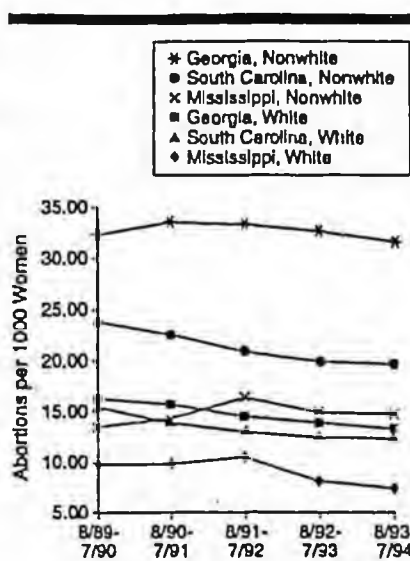


Figure 1.—Annual abortion rates for whites and nonwhites in Mississippi, Georgia, and South Carolina from August 1989 through July 1994.

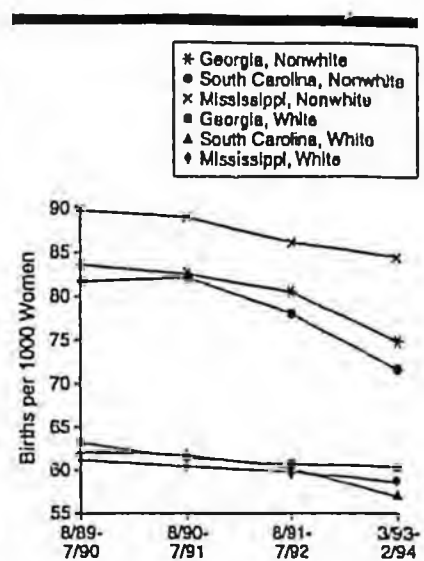


Figure 2.—Annual birth rates for whites and nonwhites in Mississippi, Georgia, and South Carolina from August 1989 through February 1994.

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 (53.27)	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 (85.73)	0.93 (0.97-0.98)	1.00 (0.99-1.02)
Resident abortions				
Mississippi	7801 (12.9)	6591 (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	33 786 (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	1448 (18.6)	1676 (25.4)	1.37 (1.29-1.46)	...
South Carolina	2436 (18.2)	2244 (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	888 (6.8)	852 (8.7)	1.01 (0.92-1.10)	1.39 (1.26-1.52)
Georgia	4554 (13.5)	4529 (13.5)	1.00 (0.97-1.04)	1.38 (1.30-1.48)

*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 6 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)	2168 (7.06)	0.78 (0.72-0.80)	...
South Carolina	5591 (11.38)	5458 (11.13)	0.98 (0.94-1.01)	0.78 (0.73-0.83)
Georgia	13 110 (13.40)	12 518 (12.73)	0.85 (0.93-0.97)	0.80 (0.75-0.85)
Nonwhite adults, ≥20 y§				
Mississippi	2978 (15.37)	2749 (13.98)	0.91 (0.86-0.96)	...
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)	762 (13.62)	0.78 (0.71-0.85)	...
South Carolina	1789 (22.74)	1573 (20.34)	0.89 (0.84-0.96)	0.87 (0.77-0.97)
Georgia	3302 (21.67)	3188 (20.98)	0.97 (0.92-1.02)	0.80 (0.72-0.89)
Nonwhite teens, ≤19 y¶				
Mississippi	885 (20.15)	911 (18.58)	0.92 (0.84-1.01)	...
South Carolina	1431 (28.06)	1219 (23.88)	0.85 (0.79-0.92)	1.08 (0.96-1.22)
Georgia	3612 (45.96)	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 19 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.^{6,4}

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 (1.62-2.08)
Georgia	1438 (11.0)	1321 (10.6)	0.96 (0.90-1.03)	1.61 (1.42-1.80)
Nonwhite adults, ≥20 y§				
Mississippi	339 (11.4)	382 (14.3)	1.25 (1.08-1.44)	...
South Carolina	280 (6.1)	299 (6.8)	1.08 (0.92-1.26)	1.16 (0.95-1.37)
Georgia	1763 (12.8)	1886 (13.2)	1.03 (0.97-1.08)	1.22 (1.07-1.36)
White teens, ≤19 y 				
Mississippi	86 (8.7)	112 (14.7)	1.69 (1.29-2.20)	...
South Carolina	143 (8.0)	139 (8.8)	1.11 (0.88-1.38)	1.52 (1.18-1.87)
Georgia	557 (16.9)	540 (16.9)	1.00 (0.90-1.12)	1.68 (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 (0.061)	-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 1993.¹⁶ 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 59 to 55 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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My name is Sara Chambers, I live at 4382 Taku Boulevard in Juneau, and I am here to speak in opposition to Senate Bill 30 and House Bill 292.

I am a voter, the mother of a 16-week-old son, and—as a woman of childbearing age—have given a great deal of thought to the pro-choice/pro-life debate. During consideration of each side, one constant has remained: the belief that if a woman is informed of the medical consequences of her decision to terminate her pregnancy, she will make the decision against abortion.

This belief, though, is predicated by the concept of **free**, meaning **unforced**, access to **unbiased** information developed and governed by professional medical science. The bills you are considering **do not meet** those two criteria; they are dangerous because they put the Alaska State Legislature in ultimate control over the medical information provided to the public. The medical staff selected to serve on the governing board put forth by this legislation will **ultimately be beholden to the legislature**, and perhaps more disturbingly, the party that holds the majority at any given time—most of whom, as far as I am aware, are not medical doctors.

I find these bills to further be disturbing because they would **coerce one small segment of the population** into listening to this potentially biased advice. When I became pregnant a year ago, as an Alaskan, I had the ability to choose to receive medical care—or not. I could choose the level of medical care provided during my child's birth—at home, at a birthing center, or at a hospital. The State never contacted me to discuss my options, my prenatal care, or the health of the fetus. I, like all Americans, was free to learn all I wanted about my medical condition: to consult a doctor, a free clinic, or one of perhaps thousands of medical and lay Web sites and books. Or to do none of these things. These bills propose to discriminate between classes of pregnant women, which is an offensive, if not unconstitutional, practice.

Furthermore, I am not sure why the State would wish to spend funds to create a "medical" Web site when many, many already exist. This is a redundant and wasteful use of our much-needed public dollars—particularly in such a time of fiscal crisis in our state. Surely there are more efficient ways to help Alaskan families than by the creation of yet another Web site offering government-controlled pseudo-medical advice.

The most alarming aspect of these bills, however, is the statement being made by any legislator supporting this legislation that he or she believes it is acceptable for the government to force its citizens to receive biased government "advice" on any medical procedure. This is **not** the role of government, and I find it frightening that our legislators would want to place what should be a private discussion between a doctor and patient under public duress. This is a slippery slope, and I would urge you to think about this message and its consequences before you vote.

Senate Bill 30 and House Bill 292 are dangerous proposals because they would **force** Alaskans to listen to biased information that is not ultimately rooted in science but party politics, they ensure a waste of precious public dollars at a time of fiscal crisis, and they place you—our legislators—between a patient and a doctor or other freely-chosen medical professional.

Please vote against these bills. Thank you.

Celia Rozen
3711 Amber Bay Loop
Anchorage, Alaska 99515

House Judiciary Committee
Representative Lesil McGuire, Chair

To Committee members:

I would like to state my opposition to HB 292. This bill purposely discriminates against women. Abortion is just one of many medical procedures a human being may be faced with in terms of a lifetime of medical care. Many other procedures are potentially life-changing or serious. However, the government has not chosen to intervene in the decision-making process of citizens facing these choices. The choice to terminate a pregnancy has been uniquely singled out as one requiring government intervention in the decision-making process. This is because abortion is a politically charged issue and this bill is nothing less than a tactic to delay or discourage women from choosing abortion as a solution to an unwanted or harmful pregnancy. *In statute form of a*

For instance, this bill in section (a)(7) mandates that "objective, unbiased information" be made available about the "possible psychological effects that have been associated with having an abortion." However, many studies published in peer-reviewed professional psychology journals analyze multiple year data in detail on this topic. Many of these studies indicate the incidence of psychological damage from an abortion decision is very low. In one case (Major, et al, 2000), as low as 1% in terms of post-traumatic stress disorder⁽¹⁾. The notion that this information would be "unbiased" is entirely contradictory, as it results from policy that is not "unbiased". This proposed statutory provision presupposes that the incidence of psychological damage is sufficiently high to warrant the necessity of a government-mandated program. Where is the scientific evidence for such a policy decision? If clear peer-reviewed scientific evidence does not exist, what is the justification for the mandate, unless the government's real intent is to forestall a women's decision to choose an abortion.

This bill has the potential to carry forward the work of those groups whose mission is to limit women's reproductive choices, and to stall important decisions with its one-day waiting period. It is insulting to women who in most cases, are capable of performing their own research and come to this decision prepared. Doctors already spend a great deal of time with patients discussing pregnancy options, and to counsel women who choose abortion. This is not a duty of the state. This bill is full of bias against women having reproductive freedom. The choice of the term "unborn child" in the bill is a biased expression of the term "fetus." This is not mere semantics, it is a well-recognized attempt to undermine the legal protections for abortion afforded by Roe v. Wade.

For the record, I'd like to state that I am also opposed to the parental consent provision of HB 292, as in cases of non-consent, the use of illegal or self-induced abortion could be the only recourse, again compromising reproductive freedom afforded by Roe v. Wade.

⁽¹⁾ Citation: Major, B., Cozzarelli, C., Cooper, M. C., Zubek, J., Richards, C., Wilhite, M., & Gramzow, R. H. (2000). Psychological responses of women after first-trimester abortion. Archives of General Psychiatry, 57, 777-784.

Subject: Oppose HB 292 Biased Consent!

Date: 10 Feb 2004 21:24:25 -0000

From: mashburn@gci.net

To: Representative_Lesil_Mcguire@legis.state.ak.us

Representative Lesil McGuire
Alaska State Legislature
State Capitol, MS 3100
Juneau, AK 99801

Dear Representative McGuire,

I strongly urge you to oppose House Bill 292. This legislation discriminates by creating excessive undue burden for the women of Alaska who seek an abortion.

HB 292 includes burdens such as requiring a patient to review State prepared information that uses biased language such as "unborn child", as well as a mandated 24-hour waiting period prior to the procedure. This mandate clearly discriminates against women seeking abortion. Women who decide to carry their pregnancy to term are NOT required to wait 24 hours prior to receiving prenatal care.

In addition, a woman seeking an abortion must be able to prove either that she is a resident or has been physically present in Alaska for the last 30 days. If she does not meet this criteria she will be forced to wait which could possibly put her health at risk. Again, a woman seeking prenatal care need not prove residency prior to receiving prenatal care.

HB 292 not only discriminates but also is unnecessary. Physicians and clinics are already required and DO provide patients the necessary information to ensure that they are able to make an informed decision regarding ANY surgical procedure, including abortion. For the past two legislative sessions when the companion bill to HB 292, SB30, was heard in the Senate, doctors testified on record that physicians already spend a great deal of time counseling their patients and advising them of their options before performing an abortion or any other surgical procedure! HB 292 unjustly singles out the abortion procedure.

The intent of HB 292 is clear. Once again, this bill represents another attempt to interfere with the Doctor-Patient relationship and discriminates solely based on a woman's reproductive choice.

I strongly urge you to vote against HB 292.

Sincerely,

Suzette Mashburn
12800 Alpine Drive
Anchorage, Alaska 99516-3124

Subject: [Fwd: Judiciary Testimony]

Date: Thu, 12 Feb 2004 11:21:51 -0900

From: Lesil Mcguire <Representative_Lesil_Mcguire@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

----- Original Message -----

Subject: Judiciary Testimony

Date: Wed, 11 Feb 2004 21:19:59 -0500

From: Thedaak1@cs.com

To: representative_lesil_mcguire@legis.state.ak.us

Dear Rep. McGuire,

Thank you for the hearing on HB292. The bottom of this message is a copy of my testimony.

Would you please fax me a copy of the AG opinion to 907-258-1559. No need for a cover sheet. Thanks!

Theda S. Pittman

PO Box 241513, Anchorage, AK 99524

Ph 907-229-6225, Fx 907-258-1559, Email thedaak1@cs.com

House Judiciary, February 11, 2004, 1 PM.

Testimony on HB 292.

My name is Theda Pittman, my address is Box 241513, Anchorage.

I would like to address the public policy implications of HB292. Those who testify in favor and those who testify against such laws have strong feelings; laws regulating abortion must strike a balance between two poles -- when is a fetus entitled to legal protection and when is a pregnant woman entitled to make her own decision about terminating a pregnancy?

Finding the appropriate balance for state regulation is complex matter -- you must take into account health issues as well as privacy issues and legal issues.

In the last 5-6 years in Alaska we have seen what happens when lawmakers import model legislation from elsewhere -- Legislation that is designed to challenge the federal standard set out by Roe v. Wade. Time, energy and money are spent in court by the state as well as those who've challenged those laws. (Those who championed such restrictions may have spent some funds filing amicus briefs or monitoring the case but essentially they are free to sit back and watch plaintiffs and the state pay the bills.)

The State does have a legitimate interest in pregnancy and the outcome of pregnancy, but the best place to look for guidance regarding abortion is in Roe v. Wade. This federal decision is condemned by those who might like to see all abortion outlawed -- in some cases those same people would condemn any birth control as destructive of life.

But Roe is very clear -- its use would allow the state to properly assert its position with respect to the balance between the developing life of the fetus and the existing person, the pregnant woman.

Under the terms of Roe, a State may outlaw abortion: after fetal viability, and with exceptions for rape, incest, the health and the life of the pregnant woman.

Such a restriction would adequately cover the myths of women aborting full term pregnancies moments before birth. After viability, a pregnant woman may not want to have a child, but with the exception of those situations described in Roe, will be looking at the question of adoption rather than abortion.

Using Roe as your public policy standard for legislation will not satisfy those who want the State to insist that women be forced to carrying every pregnancy regardless of gestation period, the circumstances of the impregnation or the condition of the fetus.

It will however, allow the State to assert its interest in developing life without trampling over women. With a proposal such as the one before you, you are put in the position of demanding to be present in the examining room. I can't think of anything more like Big Brother and Alaskans cherish their autonomy.

Please put a stop to this proposal about informed consent.

Subject: Re: HB292 - follow-up information
Date: Thu, 12 Feb 2004 10:56:40 -0900
From: Gwen Hall <gwendolyn_hall@gov.state.ak.us>
Organization: Alaska Lt. Governor's Office
To: Vanessa Tondini <vanessa_tondini@legis.state.ak.us>

I did Vanessa - thank you for getting that to me so quickly.

Please do mail me a copy of the bill packet. My address is:
550 W. 7th Ave, Suite 1700
Anchorage, AK 99501

Thank you for the heads up on the meeting next week. Looks like it will be an interesting discussion.

Gwen

Vanessa Tondini wrote:

Hi Gwen,

Hopefully you received the CS that Ryan in our office faxed to you yesterday. The bill packets are too large to fax, so can I mail or pouch all the materials to you? FYI, both HB 292 and SB 30 will be heard again next Wed., 2/18.

Please send me your address and let me know what materials you would like a copy of.

Thanks, Vanessa

Gwen Hall wrote:

Vanessa -

Could you please send me any back-up that was given for this bill including the information Representative Gruenberg requested?

Thank you very much! I really appreciate your help!

Gwen

--

Gwen Hall
Special Assistant - Faith-Based & Community Initiatives
Office of Lieutenant Governor Loren Leman
State of Alaska
(907) 269-7460

--

Gwen Hall
Special Assistant - Faith-Based & Community Initiatives

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

Jennifer Rudinger
Executive Director

carolyn V. Brown, M.D., MPH
PO Box 240289
1640 Second Street
Douglas, Alaska
99824-0289

obstetrics-gynecology
preventive medicine
women's health

907-364-2726
fax 907-364-2727
cvbrown@ptialaska.net

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.

Subject: SB 30 / HB 292

Date: Wed, 18 Feb 2004 09:37:47 -0900

From: Vicki Halcro <vicki.halcro@ppfa.org>

To: Vanessa_Tondini@legis.state.ak.us

Hello!

Frequently anti-choice advocates mention the unsubstantiated link between abortion and breast cancer. I have included the latest fact sheet from Planned Parenthood Federation of America regarding this issue for your review. I hope it is of assistance to you and Representative McGuire. Would it be possible to distribute it to the other committee members of Judiciary?

As I side note, yesterday there was an article in the Anchorage Daily News linking women's usage of antibiotics with breast cancer. I really cannot speak to this claim but found it interesting.


Please let me know if I can be of any assistance to you!

Thanks,
Vicki Halcro
Director of Public Affairs and Marketing
Planned Parenthood of Alaska
907.770.9715

Join the March for Women's Lives!

Be a part of history. The time is right for a public demonstration of historic size in support of reproductive freedom. March with over a million others in Washington DC, Sunday, April 25, 2004. www.marchforchoice.org

Meet other Alaskans who are attending the March by signing up for Meet Up at <http://marchforchoice.meetup.com>

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Fact Sheet

Published by the Katharine Dexter McCormick Library
Planned Parenthood Federation of America
434 West 33rd Street, New York, NY 10001
212-261-4779
www.plannedparenthood.org
www.teenwire.com

Current as of February 2004

Anti-choice Claims About Abortion and Breast Cancer

Undaunted by the absence of compelling evidence associating induced abortion with a woman's risk of developing breast cancer, anti-choice extremists insist on making the connection anyway. Once more they are using misinformation as a weapon in their campaign against safe, legal abortion. In the guise of an ostensible concern for women's health, these ideologues point to inconclusive, and at times flawed, studies for alleged evidence of a possible association, while ignoring or dismissing overwhelming evidence that induced abortion does not place women at greater risk of breast cancer. Anti-choice zealots have drawn highly questionable conclusions to develop "public education" campaigns such as the advertisements sponsored by Christ's Bride Ministries that appeared on public transportation vehicles in Philadelphia warning that "women who choose abortion suffer more and deadlier breast cancer" (Slobodzian, 1999). These misinformation campaigns have used many forms of media and advertising to mislead women about abortion, including television, billboards, bumper stickers, and print ads (Simon, 2002). Anti-abortion foes are also lobbying for legislation that would require telling women who are considering abortion that having one would place them at an increased risk for breast cancer (Querido, 1999).

Anti-choice claims linking abortion and breast cancer fly in the face of scientific evidence. The National Cancer Institute (NCI), the American Cancer Society (ACS), and the The American College of Obstetricians and Gynecologists (ACOG) have all refuted the reliability of such an association (ACS, 2003; ACOG, 2003; NCI, 2003).

In February 2003, NCI convened the Early Reproductive Events and Breast Cancer Workshop to "provide an integrated scientific assessment of the association between reproductive events and the risk

of breast cancer." After reviewing the body of scientific literature, NCI concluded that "Induced abortion is not associated with an increase in breast cancer risk" (NCI, 2003).

In August 2003, after conducting its own review of the scientific literature, ACOG issued a committee opinion concluding that "early studies of the relationship between prior induced abortion and breast cancer risk have been inconsistent and are difficult to interpret because of methodologic considerations. More rigorous recent studies argue against a causal relationship between induced abortion and a subsequent increase in breast cancer risk" (ACOG, 2003).

Reproductive Factors and Breast Cancer

While researchers do not know what causes breast cancer, reproductive factors have been associated with risk for the disease since the 17th century, when breast cancer was noted to be more prevalent among nuns. It is known that having a full-term pregnancy early in a woman's childbearing years is protective against breast cancer, and some studies have also indicated that breastfeeding, especially in women who are young when they give birth, may reduce a woman's risk of developing the disease. A woman's age at menarche and menopause also influence her risk for breast cancer, with earlier onset of regular menstrual cycles and later age at menopause associated with higher risk (Kelsey & Gammon, 1991). However, the best available evidence — from large population-based cohort studies — shows no net effect that induced abortion places women at increased risk for developing breast cancer (ACOG, 2003; ACS, 2003; Bartholomew & Grimes, 1998; NCI, 2003).

Hypothesis: Hormones Lead to Breast Cell Differentiation

The theory linking pregnancy termination and breast cancer is based on the hormonal disruption that occurs when a woman's pregnancy is interrupted. Pregnancy initiates a surge of sex hormones (estrogen, progesterone, and prolactin), which leads to differentiation of the cells in the breast glands in preparation for lactation. The changing concentrations of hormones during the second and third trimesters of pregnancy lead to increased differentiation. In a first pregnancy, the results of these hormonal changes permanently alter the structure of the breast. Adherents of this theory claim that interruption of the first trimester of a first pregnancy causes a cessation of cell differentiation that may result in a subsequent increase in the risk of cancerous growth in these tissues (Brumsted & Riddick, 1990; Westhoff, 1997). Attempts to prove this theory, however, have failed.

Many Factors Contribute to Inconclusive Study Results

At least 80 research studies worldwide have collected data about breast cancer and reproductive factors such as childbirth, menstrual cycles, birth control pills, and abortion. Approximately 30 studies have examined the risk of developing breast cancer for women who have had abortions. Researchers at the National Cancer Institute, the American Cancer Society, the Royal College of Obstetricians and Gynecologists, the World Health Organization, and major universities say that the most reliable studies show no increased risk, and they consider the entire body of research inconclusive (ACS, 1999; NCI, 2002; Rosenfield, 1994; RCOG, 2001; WHO, 2000).

A number of factors may render a study unreliable:

- Miscarriages and induced abortion affect a woman's body differently but many studies have not distinguished between them.
- Many women do not report miscarriages because they are unaware they have had them.
- Abortions are often unreported because of the privacy of the decision to terminate a pregnancy.

- Some studies have not examined the possibly different effects of abortion after or before a full-term pregnancy.
- Other studies have not been careful to examine the impact of age at the time of abortion and age at the time of first childbirth.
- Many studies have been too small to be statistically significant. (Wingo *et al.*, 1997; NCI, 2002).

Two of the Strongest Studies Published to Date Show no Overall Relationship Between Induced Abortion and Breast Cancer

One of the most highly regarded studies on abortion and breast cancer was published in the *New England Journal of Medicine* in 1997. This study of 1.5 million women found no overall connection between the two (Melbye *et al.*, 1997). This study benefited from its size — 1.5 million women — and by linking data from the National Registry of Induced Abortions and the Danish Cancer Registry, thereby avoiding one of the pitfalls observed in some case-control studies — that women with breast cancer were more likely to recall having had an induced abortion than women without breast cancer, particularly because abortion had been illegal (Bjody, 1997; Westhoff, 1997). An accompanying editorial on the results of the study led the writer to conclude that, "in short, a woman need not worry about the risk of breast cancer when facing the difficult decision of whether to terminate a pregnancy" (Hartge, 1997).

Another large cohort study was done in Sweden. It followed, for as long as 20 years beginning in 1966, 49,000 women who had received abortions before the age of 30. Not only did the study show no indication of an overall risk of breast cancer after an induced abortion in the first trimester, but it also suggested that there could well be a slightly reduced risk. Among women who had given birth prior to induced abortion, the relative risk for breast cancer was 0.58; for those who had never given birth, the relative risk was 1.09; for the total sample, the relative risk was 0.77 (Lindelfors Harris *et al.*, 1989).

* The risk of disease in one group, here in women who experienced an induced abortion, divided by the risk of disease in a control group. If the relative risk is 1, both groups have the same likelihood of developing the disease. A number higher than 1 indicates an increased risk and a number lower than 1 indicates a decreased risk.

Studies Published During the Past 20 Years Offer Mixed Results

Before Melbye's seminal study appeared in 1997 in the *New England Journal of Medicine*, the body of published research showed inconsistent and inconclusive evidence — some found abortion to have a protective effect, others found a slightly elevated risk. Many of these studies were hindered by the small sample size, others failed to distinguish between induced and spontaneous abortion, and others did not take confounding factors into account (NCI, 1999).

- A 2001 population-based case-control study of women in China sought to determine whether there was an association between induced abortion and breast cancer. Abortion is common and well-accepted in China, so women involved in this study would not be prone to underreporting their abortion histories — a problem which has rendered other studies unreliable. Because of the small number of women in the study who had never had a live birth, only women who had at least one live birth were included in the analysis. The study compared 1,459 women with breast cancer with 1,556 controls. No relation was found between ever having an induced abortion and breast cancer. Additionally, women who had three or more induced abortions were not at greater risk of breast cancer than other women (Sanderson, *et al.*, 2001).
- Another case-control study of women who had at least one child was conducted in Washington State to examine the relationship between induced abortion and breast cancer. A cohort of women who gave birth between 1984 and 1994 were identified. From this cohort, 463 women who developed breast cancer were each matched with five control women. Induced abortion was not found to increase the risk of developing breast cancer — the relative risk for breast cancer was 0.9 among women who had ever had an induced abortion (Tang, *et al.*, 2000).
- A 1999 population-based case-control study examined data from the Carolina Breast Cancer Study to determine what, if any, connections exist between induced abortion and other reproductive events in adolescence and the development of breast cancer later in life. The authors reported that neither induced nor spontaneous abortion during adolescence was connected to an increased risk of breast cancer. They did, however, observe that breastfeeding conferred some protection against breast cancer (Marcus *et al.*, 1999).
- In 1996, Joel Brind and colleagues published a meta-analysis of 28 published reports describing 23 studies on induced abortion and breast cancer. Based on these studies, the authors calculated that induced abortion places women at a slightly increased risk for developing breast cancer (Brind *et al.*, 1996). This analysis has been criticized for attempting to calculate the odds for developing breast cancer from widely varying studies (Blettner *et al.*, 1997), some of which have been criticized for methodological flaws and for failing to calculate their results from the raw data of the original studies (Melbye *et al.*, 1997).
- A 1994 study, published in the *Journal of the National Cancer Institute*, was a case-control study of 845 women in Washington State who were diagnosed with breast cancer from 1983 through 1990, and of 961 controls. The study found that among women who had been pregnant at least once, the risk of breast cancer in those who had experienced an induced abortion was 50 percent higher than among other women. Highest risks were observed when the abortion was done at ages younger than 18. No increased risk was associated with a spontaneous abortion. However, the study was relatively small, lacked objective measures for establishing pregnancy duration, and was susceptible to reporting bias, since a breast cancer diagnosis may influence a woman's recall or disclosure of her reproductive history. The authors reported that the study's limitations "argue against a firm conclusion at this time" and called for further research (Daling *et al.*, 1994). An editorial that accompanied the report said that "it is difficult to see how [the study results] will be informative to the public" (Rosenberg, 1994).
- A 1989 study matched 1,451 women in New York State whose breast cancer was reported from 1976-1980 with controls of equivalent age and residence (Howe *et al.*, 1989). The study examined state health records for the prior incidence of abortion or

miscarriage. An odds ratio[†] of 1.9 was found for cases with a history of only induced abortions, 1.5 for only spontaneous abortions, and 4.0 for repeated interrupted pregnancies with no intervening births. However, the cohort consisted only of women under age 40 and the follow-back search was restricted to events that occurred since 1971. The authors believed that the study was inconclusive.

- In a 1987 study, researchers reported "little relation of breast cancer risk with abortions or miscarriages" (La Vecchia, 1987). Four years later, the same researchers again found no consistent relationship (Parazzini, 1991). Other researchers concluded in 1988 that the data "suggest that the risk of breast cancer is not materially affected by abortion, regardless of whether it occurs before or after the first term birth" (Rosenberg, 1988).
- A 1985 study examined the association between spontaneous abortion prior to a first birth and the risk of breast cancer among 3,315 Connecticut women who gave birth between 1946 and 1965. Among women who experienced one childbirth, a prior miscarriage was associated with a 3.5-fold increase in the risk of breast cancer. While the study concluded that an abortion prior to the first live birth may increase a woman's risk of breast cancer, it examined only spontaneous abortion. Among the questions left open to speculation was whether a hormonal imbalance may have resulted in both the spontaneous abortion and the onset of cancer (Hadjimichael *et al.*, 1986).
- A 1981 study of women in Los Angeles County looked at both oral contraceptive use and early abortion as risk factors. The cohort consisted of 163 women diagnosed with breast cancer between 1972 and 1978. All of the women were aged 32 or younger at the time of diagnosis. The study found that a first-trimester abortion, whether spontaneous or induced, before first full-term pregnancy appeared to cause a relative risk of 2.4 for subsequent development of breast cancer. The extremely small cohort size and the age

restriction of the methodology rendered the results inconclusive (Pike *et al.*, 1981).

Risk Factors for Breast Cancer are Varied

In addition to the reproductive factors that affect a woman's risk of developing breast cancer, a wide variety of other considerations have been the subject of continued research by epidemiologists. Of particular concern are factors related to genetics, nutrition (especially dietary fat intake), age, and the environment (exposure to carcinogens) (Jones, 1990).

- A family history of breast cancer is reported to increase a woman's risk of developing the disease twofold to threefold (Jones, 1990). In one study (Sattin *et al.*, 1985), women with a first-degree relative (a mother or sister) with breast cancer had a relative risk 2.3 times that of women without a family history of breast cancer. For women with both an affected mother and sister, the relative risk was 14.
- Of potential carcinogenic significance is the finding that environmentally derived chemicals are secreted into the breast fluid and concentrated by the alveolar ductal system. For example, five minutes after a woman smokes a cigarette, nicotine appears in her breast secretion. Although smoking has not been linked to breast cancer, the finding shows that almost anything to which a woman is exposed may appear in her breast fluid (Jones, 1990).
- Nutritional considerations have focused on dietary fat, with the exception of monosaturated fat such as olive oil. While Asian women show a lower incidence of breast cancer than women in western countries, women who move from areas of low to high incidence, such as Japanese women moving to Hawaii, show a slow but definite increase in breast cancer over successive generations (Wynder & Rose, 1984). Other research has investigated certain metabolic conversions that are affected by total body weight (Deslepeyre *et al.*, 1985).
- Some studies have found that alcohol consumption may be implicated in breast cancer risk, and that the risk may increase in women who consume greater than three

[†]The odds of having a risk factor if a condition is present divided by the odds of having the risk factor if the condition is not present.

drinks of alcohol per week (Hiatt *et al.*, 1984; Willett *et al.*, 1987; Schatzkin *et al.*, 1987).

Planned Parenthood Promotes Women's Health

As the nation's largest provider of reproductive health services, Planned Parenthood is concerned above all with women's health and the risk factors for reproductive health problems. PPFA health centers adhere to strict, nationwide medical standards. Screening and management of breast conditions are integral components of Planned Parenthood services. All clinicians providing routine reproductive health services perform breast examinations and instruct patients in breast self-examination. Breast exams are performed regularly as part of a patient's initial and annual examination, during an initial prenatal visit, and during other non-routine visits. In 2002, Planned Parenthood health centers provided 1,062,727 breast examinations.

Although most Planned Parenthood centers do not offer mammography, each affiliate must have a physician available who is able to evaluate patients identified with abnormal breast findings who have been referred by clinicians, either on-site or by referral, and each affiliate maintains a list of radiologists and breast disease specialists to whom Planned Parenthood patients can be referred. All Planned Parenthood health centers also provide abortion counseling and referral for or provision of abortion services — in 2000, Planned Parenthood provided 227,375 abortions nationwide.

The Planned Parenthood Position is That Abortion Poses no Demonstrated Health Risks

The link between induced abortion and breast cancer is a theory whose principal promoters oppose abortion regardless of its safety. The theory has not been borne out by research. While Planned Parenthood believes that women should have access to information about all factors that influence the risk of disease, PPFA also believes that women deserve information that is medically substantiated and untainted by a political agenda.

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Eagle Forum Alaska Alaska Eagle Forum Education Foundation



Mrs. Debbie Joslin, President

P.O. Box 377
Delta Jct, AK 99737
907-895-4565 (Ph/FAX)
joslin@wildak.net

February 19, 2004

House Judiciary Committee Members
Senator Fred Dyson
Representative Nancy Dahlstrom
Representative John Coghill

Dear Ladies and Gentlemen:

I am writing to you in regard to comments made yesterday during the House Judiciary Committee hearing for SB30 (HB292). I appreciate the time you have taken on this bill and I am sure you are all trying your best to pass legislation that not only meets constitutional muster but also protects women in our state. I feel I must bring to your attention some inconsistencies that I have noticed during the hearing process on this particular piece of legislation.

First of all, the comment was made yesterday that SB30 is greatly different than the real estate bill you had just looked at as it concerned an industry and SB30 was just citizens who disagreed on a matter. We are currently aborting a million to a million and a half unborn babies (fetuses) a year in America. A cheap, first trimester, no frills, no complications abortion procedure costs about \$300. Do the math! Abortion is an industry! Dr. Colleen Murphy testified that she had just done three abortions and a follow up yesterday alone. How many of the real estate agents who testified had sold three houses yesterday?

There seemed to be a great deal of concern that the real estate profession be operated with integrity and in a way that treats the consumer with respect. Yet not one disgruntled home buyer/seller came to testify that they were dissatisfied. I testified in favor of SB30 because I am a disgruntled consumer. No one told me, and in fact, maybe no one knew in 1976 that there were both immediate and long term risks associated with abortion. Every woman needs to know that even if carrying the baby to term, in the opinion of the doctor, poses health risks that the abortion carries its own risks. To decide that a woman does not need to know that because she is in a high-risk pregnancy is naïve at best and at worst negligent. Further watering down of the 24 hour waiting period puts women at risk of suffering after effects from the abortion procedure. As a legislature, it is your duty to make sure that the medical profession, specifically the abortion industry, fully informs women of their options. This bill MUST dictate that women be told which abortion


~Leaders in the pro-family movement for 33 years~

procedure will be implemented and what the particular risks associated with that procedure are.

Dr. Murphy has indicated on different occasion that she already goes through an informed consent process more than 24 hours in advance of the abortion. At other times she has stated that this bill would necessitate her spending more time with the patient and passing the cost on in terms of higher abortion costs. Whichever it is, this bill must have a 24 hour waiting period so that we do not operate abortion mills in our state where women are herded in, given a hasty five minute counseling session and then subjected to a procedure they are not fully informed about.

It was also implied during the hearing that women who are undergoing a stressful pregnancy due to a fetus with multiple fetal anomalies should not be show photographs of normal fetal development. It was even said that women who are rape or incest victims should not be shown these photographs or given information concerning their options. The implication here is that women are frail of mind and unable to handle stressful situations. I resent that and I would hope that every woman legislator would as well. Women are well able to handle objective, scientific information. It is said that hell hath no fury like a woman scorned. Imagine the fury of a woman who contracts breast cancer or who becomes infertile as a result of an abortion that she was not fully informed about. You have an obligation to make sure that women in Alaska never suffer as a result of your cowardice in telling them the facts.

Respectfully,



Debbie Joslin,

Eagle Forum Alaska

Subject: [Fwd: hb292]

Date: Tue, 17 Feb 2004 09:23:55 -0900

From: Lesil McGuire <Representative_Lesil_Mcguire@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

----- Original Message -----

Subject: hb292

Date: Tue, 17 Feb 2004 08:08:15 -0900

From: carolyn V Brown <cvbrown@ptialaska.net>

To: Representative_Lesil_McGuire@legis.state.ak.us, Representative_Tom_Anderson@legis.state.ak.

I will appreciate your careful consideration of these additional comments about HB 292. Please let me know if there are questions or if I can provide additional information.

Re: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"

This proposed legislation is clearly not in the best interests of patients, the State of Alaska, or physicians and other health care providers.

- A major concern with this legislation is the invasion of physician-patient relationship, confidentiality, and privilege. When this vital aspect of health care is breached, trust is broken and health care is compromised.
- All pregnant women need to have appropriate informed consent. This bill allows the discriminatory treatment of pregnant women. We know that the risk of dying from an abortion related complication is 0.4 deaths/100,000 procedures. We know that the risk of dying as a result of pregnancy and childbirth is 7 deaths/100,000 live births. We must not allow this discrimination in health care for women.
- Physicians already provide informed consent for procedures and managements. To suggest otherwise is to insult our profession and undermine our patient-physician relationships.
- The bureaucratic nightmare of a web site, over-sight, up-dates, costs, patient access, record keeping/reporting, and data base management for all of the entities involved in this (clinics, individuals, pharmacies, and agencies) is well beyond the scope of a \$20,000 fiscal note from the Department of Health and Social Services to effect and carry out the intent of this legislation.

I strongly oppose HB 292 and ask that you do what is necessary to stop this invasion of the legal provision of health and medical care for women in Alaska.

[Fwd: hb292]

carolyn V. Brown, M.D., MPH

PO Box 240289

1640 Second Street

Douglas, Alaska

99824-0289

907-364-2726

907-364-2727 fax

cvbrown@ntialaska.net

Subject: [Fwd: Abortion]

Date: Tue, 17 Feb 2004 09:02:05 -0900

From: Lesil Mcguire <Representative_Lesil_Mcguire@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

----- Original Message -----

Subject: Abortion

Date: Mon, 16 Feb 2004 17:51:20 -0900

From: "Dr. Bob Johnson" <dr.bob@keacconnect.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.

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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



Alaska State Legislature

Judiciary

Please enter into the record my testimony to the HOUSE HOUSE COMM.

Committee name

Committee on INFORMED CONSENT FOR ABORTION dated 5-17-03

Bill/Subject

I am very much in favor of this bill. Abortion is so final, that young girls need to be informed about the repercussions of this decision. Parental consent will help girls have a more unemotional person aid in such a decision.

As a grandmother, I would certainly not want my granddaughters to be able to get an abortion without any counseling or the knowledge of their parents.

Signed:

Ellen Lynch

Testifier

Representing (Optional)

751 LANARK, WASILLA AK 99654

Address

357-6535

Phone number



February 19, 2004

Representative Lesil McGuire
Representative Tom Anderson
Representative Jim Holm
Representative Dan Ogg
Representative Ralph Samules
Representative Les Gara
Representative Max Gruenberg

Re: House Bill 292

Dear Honorable McGuire, Anderson, Holm, Ogg, Samules, Gara and Gruenberg:

I wanted to share with you my thoughts about house bill 292 and the companion bill 30. This particular bill has to do with informed consent on pregnancy termination. That is the stated concern of the bill, however, inside the bill a number of new concepts are being introduced including a 24-hour waiting period as mandatory for the attainment of an abortion.

The bill goes to great lengths to explain how informed consent should be explained. It describes a web site where information regarding abortions would be maintained for informed consent for abortion as well as a web site that would be maintained regarding risks of carrying a pregnancy to term. The reference within the bill says that this should be objective, unbiased information.

It is hard to believe that this would be objective and unbiased information. It is of note that in the medical field we are required to obtain informed consent on all procedures that we do. This is true whether I do a hysterectomy, Cesearean section or an abortion. Yet, this bill singles out only the abortion as a procedure that the Legislature feels they must codify into law. Thus, this single procedure has been identified by the Senate and House to be codified into Alaskan State Law. The abortion procedure, according to statistics by the Center of Disease Control, remains one of the safest procedures that is available in the United States today. Yet, the Senate and the House have not taken it upon themselves to require that laws be written about how I would counsel a woman who was about to have a Cesearean section or a hysterectomy. It is clear that the abortion procedure is being singled out in this particular area.

When the Senate and House choose to get involved with how a patient needs to be counseled it introduces the concept that now the Legislative Branch will now advise Physicians on how advised consent needs to be managed with patients. If laws such as this are written, I can only assume in the future that laws may define in the future what risks and benefits I must explain to patients regarding other procedures like a hysterectomy and Cesearean section. I presume also then that Orthopedic surgeons and other fields of medicine would also need to begin explaining in detail written out by the Legislative Branch, how and when to counsel their patients.

This is obviously unnecessary and undesirable. The medical field has already been given and assumed the weight of providing informed consent for all procedures that they do. In addition, malpractice insurance companies also insist upon informed consent for all procedures that we do. This intrusion of informed consent for this solitary procedure makes no sense, whatsoever.

I believe that laws such as this will have a very chilling effect on the medical field when the Legislature begins to dictate what must be said to a patient regarding informed consent on a specific procedure.

In addition, establishing a web site that gives information regarding abortions and carrying a pregnancy to term as well as birth control would be an overwhelming project. This is true because what might be considered appropriate information for that web site will be issues that need to be interpreted by trained professionals and not Legislators. Within trained professionals there will be disagreements regarding what should or shouldn't be allowed or necessary for informed consent. Where would it end?

Most importantly though, I took a vow to keep my patient's best interest at heart and I do not believe that this bill is in the best interest of the patient. If the state is forced to put together a pamphlet that contains photographs of a developing fetus from conception to delivery it will involve somewhere between 18-20 photographs. This material is not appropriate for all women to review.

If a person has become pregnant from rape, incest, is carrying a child with lethal anomalies, or in fact, has some type of medical problem that makes pregnancy a risk for her, these photographs will only serve to cause mental anguish in the patient who seeks an abortion. This can't possibly be considered to increase the quality of patient's care and will only serve to assuage the needs of people who oppose abortion entirely.

While this site and pamphlet is meant to "educate," for a certain segment of people this will represent a horrific experience to go through. There is simply no medical reason why a patient should have to go through such a detailed and graphic description for these circumstances.

It is of note that even the current Attorney General has issued a statement that he feels this bill will not pass judicial review and can be challenged in court. It is a disservice to the women of Alaska to introduce this bill and set up this onerous and expensive system that serves no medical purpose whatsoever. Please consider favorably, opposing this bill and striking it in its entirety.

Sincerely,



Dr. Jan Whitefield
Alaska Women's Health Services

JW/clw
D2/19/2004/19:29
D2/19/2004/18:35

carolyn V. Brown, M.D., MPH
PO Box 240289
1640 Second Street
Douglas, Alaska
99824-0289

obstetrics-gynecology
preventive medicine
women's health

907-364-2726
fax 907-364-2727
cvbrown@ptialaska.net

MEMORANDUM

DATE: February 23, 2004
TO: House Judiciary Committee
FROM: carolyn V. Brown, M.D., MPH
SUBJECT: House CS for CS for Senate Bill 30 (JUD)

In review of House CS for CS for SB 30, I ask that the following comments be considered by the House Judiciary Committee and that these comments be entered into the record.

- To avoid discriminatory care, it would appear that this bill must apply to all pregnant women – regardless of their initial plan to carry a pregnancy to term to terminate the pregnancy – if they are to have informed consent.
- There is no documented evidence that the "scientific information on the Internet" will protect, inform, and promote...choices". This would appear to be clearly erroneous.
- Does the legislation presume to tell physicians what informed consent for abortion is? Will further legislation presume to tell physicians what informed consent is for other procedures? This does not appear to provide equal protection under the law.
- Who will maintain the indexed material, names of agencies-clinics, services, and facilities? This information is dynamic and changes very quickly. Who will do this and who will bear the cost? The \$20,000 fiscal note surely will not do it. Who is the watch dog?
- All facilities that provide or sell contraceptives will have to be included in the "list" of agencies-clinics, services, and facilities? This is equally

dynamic information and changes quickly. Who will do this and who will bear the cost. Who is the watch dog?

- Information about survival statistics for a fetus is extremely problematic and cannot be agreed upon by neonatologists and experts across the nation. How would this Internet information piece presume to keep up with this information in an accurate, scientific, and evidence-based manner?
- Who will decide just what the "accurate scientific information" is?
- The 30-day wait period is a delay tactic and is potentially harmful for the women who choose a pregnancy termination. Does a woman who chooses to carry the pregnancy to term have to wait for 30 days before she gets her first pre-natal care? This is discriminatory.
- Will women be mandated to watch the program or read the material? If a woman refuses, what is the penalty?
- To be non-discriminatory, all women who are pregnant must watch this program or read this information if they are to make an informed consent about their pregnancy.
- How will this bureaucratic nightmare be paid for on an on-going basis? The rule of reasonableness would suggest that the \$20,000 note won't do it.
- What is meant by a "medical emergency"?
- Does a "major bodily function" also include the brain, neurotransmitters, and psychological aspects of pregnancy? This term has no rational meaning for the physical, mental, emotional, and socio-psychological parameters of a pregnancy.

I consider that this bill is clearly not in the best interests of the women of Alaska, health care professionals who provide care, or the State's best interests. I ask that this bill be defeated.

carolyn V. Brown, M.D., MPH
February 23, 2004



Alaska State Legislature

Please enter into the record my testimony to the Judiciary House Committee on Judicial Services
Committee name

Committee on Informed Consent
House Bill No 292 (HES), dated 5-17-03
Bill/Subject

This is an excellent bill for providing information to women prior to abortion. Women need to be informed because many and this is quite recent, have not known what to expect and had no knowledge of the procedure or its side effects. Parental consent should be mandatory.

Signed: Quelish Ann Lewis
Testifier

Representing (Optional)

Address

907 ~~555~~ 745-5983
Phone number

Subject: [Fwd: HB 292/SB30]

Date: Mon, 23 Feb 2004 12:03:30 -0900

From: Lesil McGuire <Representative_Lesil_McGuire@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

----- Original Message -----

Subject: HB 292/SB30

Date: Mon, 23 Feb 2004 11:57:26 -0900

From: "Ozer, Kerry" <KOzer@SouthcentralFoundation.com>

To: <Representative_Tom_Anderson@legis.state.ak.us>,"Cara, Les"
<Representative_Les_Gara@legis.state.ak.us>,"Gruenberg, Max"
<Representative_Max_Gruenberg@legis.state.ak.us>,"Holm, Jim"
<Representative_Jim_Holm@legis.state.ak.us>,<Representative_Lesil_McGuire@legis.state.ak.us>
Dan" <Representative_Dan_Ogg@legis.state.ak.us>,"Samuels, Ralph"
<Representative_Ralph_Samuels@legis.state.ak.us>

This proposed legislation is clearly not in the best interest of patients, the State of Alaska, or physicians and other health care providers.

A major concern with this legislation is the invasion of physician-patient relationship, confidentiality and privilege. When this vital aspect of health care is breached, trust is broken and health care is compromised.

These bills are redundant. Physicians already provide informed consent. To suggest otherwise is to insult our profession and undermine our patient-physician relationships.

The legislature is attempting to micro-manage health care. All pregnant women need to have appropriate informed consent. HB292/SB30 calls for the discriminatory treatment of pregnant women. Physicians know that the risk of dying from an abortion related complication is 0.4 deaths/100,000 procedures. We know that the risk of dying as a result of pregnancy and childbirth is 7 deaths/100,000 live births. These bills warn women about the risk of abortion, but not about the greater risk of carrying a pregnancy to term.

I strongly oppose HB 292/SB30 and ask that you do what is necessary to stop this invasion into the provision of health and medical care for women in Alaska.

Please contact me if you have questions.

[Fwd: RE: HB 292]

Subject: [Fwd: RE: HB 292]
Date: Mon, 23 Feb 2004 10:59:18 -0900
From: Lesil Mcguire <Representative_Lesil_Mcguire@Legis.state.ak.us>
Organization: Alaska State Legislature
To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

For judiciary

----- Original Message -----

Subject: FE: HB 292
Date: Mon, 23 Feb 2004 09:47:13 -0900
From: "rwkeller" <rwkeller@alaska.net>
To: <Representative_Lesil_McGuire@legis.state.ak.us>

Lesil - It sounds from my reading of the bill that the legislature wants/desires some input on the amount/type of informed consent given to patients for a procedure. This is not their job. We are and have been legally responsible for informed consent forever (amount, type, adequacy, method and documentation). Legislative intrusion is unwelcome and unnecessary. Doctors (surgeons esp.) are getting good at this having been sued many times for inadequacy in the courts eyes. Any standard of the legislature adds a burden, may actually lessen the full information given to a patient (i.e. meet the 'law' only). Please vote against this provision. (I suspect you're feelings are in agreement already, but please assist in the fight). Thank you..... R.W. Keller MD (Pediadoc)

3340 Providence Drive #466
Anchorage, Alaska 99508
rwkeller@alaska.net

Subject: [Fwd: HB 292/SB30]

Date: Wed, 25 Feb 2004 08:36:00 -0900

From: Lesil McGuire <Representative_Lesil_McGuire@Legis.state.ak.us>

Organization: Alaska State Legislature

To: Vanessa Tondini <Vanessa_Tondini@legis.state.ak.us>

----- Original Message -----

Subject: HB 292/SB30

Date: Tue, 24 Feb 2004 13:48:58 -0800 (PST)

From: Meghan McKeever <megstar77@yahoo.com>

To:

Representative_Lesil_McGuire@legis.state.ak.us, Representative_Tom_Anderson@legis.state

Date: February 24th 2004

To: House Judiciary Committee.

Re: HB 292/SB30. "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"

This proposed legislation is clearly not in the best interest of patients, the State of Alaska, or physicians and other health care providers.

A major concern with this legislation is the invasion of physician-patient relationship, confidentiality and privilege. When this vital aspect of health care is breached, trust is broken and health care is compromised.

These bills are redundant. Physicians already provide informed consent. To suggest otherwise is to insult our profession and undermine our patient-physician relationships.

The legislature is attempting to micro-manage health care. All pregnant women need to have appropriate informed consent. HB292/SB30 calls for the discriminatory treatment of pregnant women. Physicians know that the risk of dying from an abortion related complication is 0.4 deaths/100,000 procedures. We know that the risk of dying as a result of pregnancy and childbirth is 7 deaths/100,000 live births. These bills warn women about the risk of abortion, but not about the greater risk of carrying a pregnancy to term.

I strongly oppose HB 292/SB30 and ask that you do what is necessary to stop this invasion into the provision of health and medical care for women in Alaska.

Thank you,

Meghan McKeever
Alaska resident and senior Medical Student
University of Washington School of Medicine

=====

Subject: HCS for CS for SB30

Date: Thu, 25 Mar 2004 17:06:31 -0900

From: carolyn V Brown <cvbrown@ptialaska.net>

To: Representative_Lesil_Mcguire@legis.state.ak.us,
Representative_Tom_Anderson@legis.state.ak.us,
Representative_Jim_Holm@legis.state.ak.us, Representative_Dan_Ogg@legis.state.ak.us,
Representative_Ralph_Samuels@legis.state.ak.us, Representative_Les_Gara@legis.state.ak.us,
Representative_Max_Gruenberg@legis.state.ak.us

Your files are attached and ready to send with this message.

I understand that the House Judiciary Committee will hold hearings on HCS for CS for SB30 at 1 PM on Friday, March 26th. I cannot be at those hearings because of patient commitments. I wish to provide the attached written testimony for this hearing and ask that it be entered into the record.

Please let me know if I can answer questions or provide additional information. Thank you for this consideration.

carolyn V. Brown, M.D., MPH

PO Box 240289

1640 Second Street


Douglas, Alaska

99824-0289

907-364-2726

907-364-2727 fax

cvbrown@ptialaska.net

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|  HCS for CS for SB30.doc | Name: HCS for CS for SB30.doc
Type: WINWORD File (application/msword)
Encoding: base64
Download Status: Not downloaded with message |
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carolyn V. Brown, M.D., MPH
PO Box 240289
1640 Second Street
Douglas, Alaska
99824-0239

obstetrics-gynecology
preventive medicine
women's health

907-364-2726
fax 907-364-2727
cvbrown@ptialaska.net

MEMORANDUM

DATE: March 25, 2004

TO: House Judiciary Committee

FROM: carolyn V. Brown

SUBJECT: HCS for CS for SB30 "An Act relating to information and services available to pregnant women and other persons; ensuring informed consent before an abortion may be performed; and providing exception to informed consent in certain cases."

I have reviewed previous versions of SB30 and have provided appropriate Committees written comments that I have asked to be entered into the record. I would ask again that those comments be considered in the context of this version of SB30.

I have reviewed HCS for CS for SB30 and have the following comments to offer for your consideration. I ask that these comments be entered into the record.

- This act refers to pregnant women. If all pregnant women are not included in this information and services provision, I believe this is discriminatory.
- Some pregnant women who initially planned a term pregnancy will elect an abortion. Some pregnant women who initially planned an abortion will elect to take the pregnant to term. To be equitable, this information must be provided all pregnant women.
- I continue to ask just what "judicial economy and resources" means?
- Does this legislation presume that physicians do not know what constitutes an informed consent for an abortion? Does the State then presume that physicians do not know what constitutes informed consent

for other procedures as well? This represents discriminatory intervention on the part of the State toward physicians who provide informed consent for a wide variety of issues.

- Just which of the public and private agencies and services are indexed is extremely problematic. What kind of informed consent is this for a woman if services, agencies, clinics, and others can "opt in" or "opt out" of being in the geographically indexed materials? This is clearly detrimental to a woman if she has only some of the resource information and/or if it is biased in the collection, acquisition, or indexing.
- Agencies, services, clinics, and facilities designed to assist with or provide contraceptive options must include pharmacies. Will they then be included in the pool to "opt in" or "opt out" of the geographically indexed material"? Who in the Department of Health and Social Services is going to keep up with all of this?
- Use of "unborn child" in this context is pejorative, erroneous, and not medically correct. The correct term is fetus and that is what should be represented throughout the proposed legislation.
- I would suggest addition of language to Sec.18.05.032 (b) "The Department shall adopt regulations establishing procedures for establishing and maintaining the information under this section in a timely manner and with a science-based assurance.
- In Sec.3.AS.18.16.010 (a)(2), will a physician's office be mandated to have the Department of Health and Social Services approval for pregnancy terminations? What oversight will be required for this and at what cost to the patient, physician, and State? Does the Department have similar mandates for other procedures in physician's offices? This would appear discriminatory by intent for this procedure.
- Why is it necessary for the woman to be domiciled or physically present in Alaska for 30 days? Is this mandated for other health care?
- Why is there apparent discriminatory management provided in Sec. 18.16.060(d) that provides informed consent is not required for medical

emergency, sexual assault, sexual assault of a minor, and incest. If one follows the intent of the legislation, "a pregnancy... is a pregnancy... is a pregnancy... is a pregnancy..."

- In as much as we now have science-based information that physical and psychological functions cannot be separated in a person, it would seem evident that "major bodily function" of the woman would, of necessity, include physical, psychological, and emotional components for a "medical emergency". What is the true intent of this definition?

This proposed legislation would appear to be an effort to impose an unreasonable and unnecessary mandate on the women, health care providers and people of Alaska. The ideologues who propose this legislation do so in their own interests and not in the interests of comprehensive reproductive health for women and their families.

I respectfully ask that HCS for CS for SB30 (Version O) be defeated. Please let me know if I can provide additional information or answer questions you may have.

carolyn V. Brown
March, 2004

4/20/2020 1:00 PM
What will be your legacy left to Alaska Women and the History of Women in Alaska?

In 1769 American colonies based their laws on the English common law, which was summarized in the Blackstone Commentaries. It said, "By marriage, the husband and wife are one person in the law. The very being and legal existence of the woman is suspended during the marriage, or at least is incorporated into that of her husband under whose wing and protection she performs everything."

1777 All states pass laws which take away women's right to vote. ✓

1839 The first state (Mississippi) grants women the right to hold property in their own name, with their husbands' permission. ✓

1875 *Minor v Happersett*, 88 U.S. 162 (1875): The U.S. Supreme Court declares that despite the privileges and immunities clause, a state can prohibit a woman from voting. The court declares women as "persons," but holds that they constitute a "special category of nonvoting citizens."

1890 The first state (Wyoming) grants women the right to vote in all elections. ✓

1916 Margaret Sanger tests the validity of New York's anti-contraception law by establishing a clinic in Brooklyn. The most well-known of birth control advocates, she is one of hundreds arrested over a 40-year period for working to establish women's right to control their own bodies.

1918 *New York v. Sanger*, 222 NY 192, 118 N.E. 637 (Court of Appeals 1917), National Archives, Records of the U.S. Supreme Court, RG 267 (MSDME-CDS C 15:298). Margaret Sanger wins her suit in New York to allow doctors to advise their married patients about birth control for health purposes.

1920 The Nineteenth Amendment to the U.S. Constitution is ratified. It declares: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

1936 *United States v. One Package of Japanese Pessaries*, 13 F. Supp. 334 (E.D.N.Y. 1936) aff'd 86 F.2d 737 (2nd Cir. 1936), won judicial approval of medicinal use of birth control.

1965 In *Griswold v Connecticut*, 381 U.S. 479 (1965), the Supreme Court overturns one of the last state laws prohibiting the prescription or use of contraceptives by married couples.

Read
I asked that this committee recognize and appreciate that their ^{Constituents} ~~fellow citizens~~ of female gender are intelligent enough to make this personal decision on their own and since she had the education, capability and qualifications to elect you as her representative, she most adamantly has the ability to make this decision without state invasion of privacy.

The Alaska history on Privacy is very clear. The State's interest in this invasion must be greater than a woman's right to privacy.

Final Note Websites unnecessary
Please vote against **House CS for CS for Senate Bill 30**

Thank you,

Myrna Gardner

Final note websites costs to state.