ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8072

10888 HOUSE JUDICIARY

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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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 affects 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

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.

carolyn V. Brown, M.D., MPH

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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@keaconnect.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 the protects the right of individuals to engage in whatever activity they please as long as it does no harm to anyone else. This right is the whole basis of our system. It is not the business of legislators to restrict or eliminate individual choice. It is not the business of legislators to determine what is, or is not, morally right or wrong. Abortion legislation does both, and I will try to illustrate why. HB 292 and SB 30, in particular, definitely restrict the choice of both women, who would *choose* an abortion, and physicians, who would *choose* to provide this service! Those who propose these bills have used the term *unborn child* which is an arbitrary judgement declaring the fetus a person, which *has not been determined* and indicates a bias! Those who propose these bills are a select group who feel that abortion is a sin. They, and others who pursue the use of the term *unborn child,* are interested in establishing the *personhood* of the fetus which opens the door to the consideration of fetal injury as a crime and, eventually, to the reversal of Roe vs. Wade. I was in practice in Kodiak before the passage of Roe vs. Wade. At that time, women who became pregnant and did not want children, had no alternative. Unwanted children fared poorly. Many were abused. Most became wards of the State. I applauded the legalization of abortion which, after passage, was quickly adopted by the States, indicating that it was sorely needed. I have subsequently done approximately 700 abortions, and my experience does not support many of the problems that those who oppose the procedure would lead you to believe.<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />

I am retired and have nothing to gain by speaking against this kind of legislation. My purpose in writing to you, is to prevent obstacles being placed before women who, for multiple reasons, feel they need an abortion.I appeared to testify on HB 292 last year, at which time the committee spent about 30 minutes discussing various aspects of the bill.During this process, Senator Dyson appeared and cautioned the *house* committee *not to entertain objections* to the term *unborn child,* which clearly indicated his bias, not to mention his obvious *conflict of interest.*This was to have been a hearing, not a discussion of the bill or testimony of the committee in favor of the bill, which it became apparent that it was.Because of this only two were able to testify that afternoon.

My experience with abortion is not exceptional. Each of my patients was presented with options available for them in addition to an abortion.Each was told as much as they wanted to know about the procedure, the risks and the outcomes.Each was scheduled for a follow up visit two weeks after the procedure. Only two

of my patients developed post-abortion depression requiring treatment, which is less than the incidence of post-partum depression. Both of these recovered.None lost enough blood to require a transfusion.Two had minor post-abortion infections, which responded promptly to treatment.Those, who so desired, went on to have normal pregnancies.I saw no fertility problems associated with abortion.

There is no indication for this kind of legislation. Legislators have no business telling patients what they must know, in spite of what advice they receive or from whom.It is an insult to the intelligence of women who, in my opinion, know exactly what they want to know and, if encouraged, will make sure their physician tells them.Do you think that physicians are not familiar with their responsibility to explain the options, risks, benefits and procedural details of any treatment?

This legislation places more obstacles in the path of those who need an abortion.It, along with much inaccurate publicity, complicates the decision and tends—indeed, *intends,* I believe—to make women who elect to have an abortion feel guilty.I think the occasional suicide I have heard mentioned in connection with abortion is a direct result of this.

Ladies and Gentlemen, I ask you. Should anyone have the right to make decisions for others regarding their choice? Should anyone have the right to set up rules of procedure for others that serve as an impediment to their exercise of choice? Should anyone have the right to determine what is, or is not, morally right, for someone else? In the name of compassion for women who cannot manage to bear or raise a child, for whatever reason, I implore you to reject any legislation that has to do with abortion.

Sincerely.

Dr. Bob Johnson

Alaska State Legislature

Please enter into the record my testimony to the ~~House H&SS Comm.~~ Judiciary
Committee name

Committee on INFORMED CONSENT for ABORTION dated 5-12-03
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
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357-6535
Phone number

February 19, 2004

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

Re: House Bill 292

Dear Honorable McGuire, Anderson, Holm, Ogg, Samuels, 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 me 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, Cesarean 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 Cesarean 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 Cesarean 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.

*4115 Lake Otis Parkway * Alaska Women's Health Services * Anchorage, AK 99508 * (907) 563-2228*

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 insists 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

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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, <u>all</u> 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 <u>not</u> 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 Health, Education and Social 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: Jacalyn Ann Lewis
Testifier

Representing (Optional)

Address

907 ~~[illegible]~~ 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>,"Gara, 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.u 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.

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: RE: 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

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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

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

carolyn V. Brown, M.D., MPH
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1640 Second Street
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obstetrics-gynecology
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women's health

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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

LEGISLATIVE RESEARCH REPORT

FEBRUARY 4, 2004

REPORT NUMBER 04.093

ABORTION LAWS IN THE UNITED STATES AND ALASKA

PREPARED FOR REPRESENTATIVE LESIL MCGUIRE

BY ROGER WITHINGTON, LEGISLATIVE ANALYST

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

ABORTION LAWS IN THE UNITED STATES

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

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

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

465-3991
907-465-3908 (fax)

Alaska Legislature
Legislative Research Services
w3.legis.state.ak.us/Research/research_home.htm

State Capitol
Juneau, AK 99801

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

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

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

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

ABORTION LAWS IN ALASKA

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

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

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

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

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

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

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

In 1981, the Alaska Attorney General concluded that the requirement that all abortions be performed in a hospital or other approved facility is invalid since it does not exclude the first trimester of pregnancy (Opinion of the Attorney General, No. J-66-816-81, October 7, 1981, citing *Sendak v. Arnold*, 429 U.S. 968, 1976). In 1984, the Alaska Attorney General further stated that the regulation of other aspects of first trimester abortions is "obviously problematic" (Opinion of the Attorney General, No. 360-028-85, July 24, 1984).

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

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

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

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

[5] 7 AAC 12.370.

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

effect and ordered the state to continue to pay for medically necessary abortions (*Planned Parenthood of Alaska, Inc. v. Livey*, No. 3-AN-98-07004, August 19, 2002).[7]

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

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

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

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

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

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

LIST OF ATTACHMENTS

Attachment A

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

Attachment B

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

Attachment C

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

Attachment D

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

Attachment E

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

Attachment F

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

Attachment A

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

THE HENRY J. KAISER FAMILY FOUNDATION

Update Issue Update

Abortion Policy and Politics

October 2002

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

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

While the debate over abortion has not abated, the abortion rate—the number of induced abortions per 1,000 women aged 15-44—in the U.S. is at an historic low. In 1998, the most current year for which data is available, there were 17 abortions per 1,000 women of reproductive age, the lowest level in two decades.[1] Even with these declines, abortion remains one of the most commonly performed surgical procedures in the U.S.: Based on 1992 rates, an estimated 43 percent of women will have had an abortion by age 45.[2]

History and Overview of Abortion

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

Beginning in 1970, a handful of states started considering legislation to allow abortion in certain circumstances. The U.S. Supreme Court decriminalized abortion nationwide in 1973 in two companion cases, *Roe v. Wade* and *Doe v. Bolton* (see box on Key Supreme Court Cases on Abortion). The Court asserted that the fundamental constitutional right to privacy encompasses a woman's decision to terminate a pregnancy before the point of viability, that is, when the fetus can survive outside of the woman's body. As a result, legislation regulating abortion during the first two trimesters of pregnancy had to satisfy a "compelling" state interest—a tough legal standard that many restrictions passed after *Roe* did not meet. Abortions could still be banned after viability—with exceptions to protect a woman's life and health.

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

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

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

Public Supports Legal Abortion, With Restrictions

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

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

The Current Policy Framework of Abortion

Public Health Programs and Private Insurance

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

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

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

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

Policies Affecting Patients

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

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

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

Policies Affecting Medical Practitioners

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

"Partial-birth Abortion" Bans

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

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

Attachment B

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

THE HENRY J. KAISER FAMILY FOUNDATION

Facts Fact Sheet

January 2003

Abortion in the U.S.

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

In 2000, the Alan Guttmacher Institute (AGI) estimates that a total of 1.31 million U.S. pregnancies ended in abortion – down from an all-time annual high of 1.61 million in 1990.[2] The most recent national data available from the Centers for Disease Control and Prevention (CDC) indicate that, between 1992 and 1997, the number of abortions performed each year nationwide dropped from 1.5 million to about 1.2 million (see Abortion Statistics box for differences in these data sets).[3]

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

Incidence and Trends

- According to AGI, the 2000 abortion rate (the number of abortions per 1,000 women aged 15-44) was 21.3, reflecting a five percent (5%) decline since 1996.2 The CDC estimates that the national abortion rate decreased from 26 per 1,000 in 1992 to 20 per 1,000 in 1997.[1]
- In 2000, the annual abortion ratio (the proportion of pregnancies that end in abortion) was 24.5.[2]
- It is estimated that 39 million abortions have been performed since the procedure was legalized in 1973,[3,4] and that at least one in three women in the U.S. will have an abortion by age 45.[5]
- Abortion rates vary significantly throughout the world. The most recent estimates – from 1996 – range from a low of 6.5 in the Netherlands to a high of 77.7 in Cuba. While the U.S. abortion rate has historically been higher than that in many western European countries, the 2000 rate of 21.3 is now within the range of other developed nations such as Sweden (18.7) and Australia (22.2).[2,6]

Methods

- There are two general abortion types available to U.S. women: surgical and non-surgical or "medical" abortions.
- Most abortions (94-99%) performed in the U.S. are surgical.[3,7] The most common surgical methods include vacuum aspiration, dilation and curettage (D&C), and dilation and evacuation (D&E).8 A much less common surgical method used for later abortions is dilation and extraction (D&X), a D&E variant.
- In September 2000, the Food and Drug Administration (FDA) approved mifepristone, the first drug specifically designed for use as a method of medical abortion. Medical abortions can also be initiated through the "off-label" use of a drug called methotrexate, which has been approved by the FDA for other purposes.
- During the first six months of 2001, one-third of all abortion providers reported performing at least one early medical abortion. Among abortions that took place outside of hospitals, six percent (6%, or about 35,300) were medical abortions. Seventy-two percent (72%) of these abortions used mifepristone.[2]
- The U.S. distributor of mifepristone estimates that a total of 130,000 women have obtained an abortion using mifepristone in the two years since FDA approval.[9]

Safety and Effectiveness

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

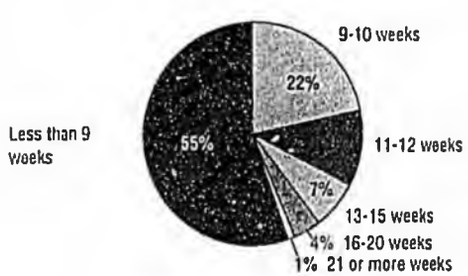
Timing

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

Chart 1

WHEN WOMEN HAVE ABORTIONS

Eighty-eight percent of abortions occur in the first 12 weeks of pregnancy



Source: The Alan Guttmacher Institute, calculations based on CDC data, 1998.

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Attachment C

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

NARAL
Pro-Choice America Foundation

U.S. Supreme Court Decisions Concerning Reproductive Rights 1965-2003

Griswold v. Connecticut, 381 U.S. 479 (1965)	By a vote of 7-2, the Supreme Court invalidated a Connecticut statute that prohibited the use of contraceptives, holding that the statute violated the constitutional right to marital privacy.
Eisenstadt v. Baird, 405 U.S. 438 (1972)	By a vote of 6-1, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried people, holding that the constitutional right to privacy extends to the reproductive decisions of both married and unmarried people.
Roe v. Wade, 410 U.S. 113 (1973)	By a vote of 7-2, the Court invalidated a Texas law prohibiting abortions not necessary to save the woman's life. The Court held that the fundamental right to privacy extends to a woman's decision whether or not to have an abortion and that any governmental interference with that right is subject to strict judicial scrutiny. The Court recognized two compelling state interests sufficient to justify restrictions on a woman's right to choose. States may regulate the abortion procedure after the first trimester of pregnancy in ways necessary to promote women's health. After the point of fetal viability -- approximately 24 to 28 weeks -- a state may, to protect the potential life of the fetus, prohibit abortions not necessary to preserve the woman's life or health.
Doe v. Bolton, 410 U.S. 179 (1973)	Decided with *Roe v. Wade.* By a vote of 7-2, the Court invalidated provisions of a Georgia law that required that: (1) any abortion be performed in a hospital; (2) a woman secure the approval of three physicians and a hospital committee before obtaining an abortion; and (3) a woman seeking to obtain an abortion be a resident of the state.
Bigelow v. Virginia, 421 U.S. 809 (1975)	By a vote of 7-2, the Court invalidated the application of a Virginia statute that prohibited the advertisement of abortion services.

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

492 U.S. 490 (1989)	perform tests concerning gestational age, weight and lung maturity when he or she has reason to believe a woman to be 20 weeks or more pregnant. For the first time in the sixteen years since *Roe v. Wade*, only a minority of the Justices on the Court -- four Justices -- voted to reaffirm *Roe*.
Hodgson v. Minnesota, 497 U.S. 417 (1990)	By a vote of 5-4, the Court invalidated as having no rational basis a Minnesota law requiring notification of both parents without a procedure for judicial waiver of the notice requirement. However, by a vote of 5-4, the Court upheld another provision that required two-parent notification but included a procedure for judicial waiver, as well as a 48-hour waiting period for minors.
Ohio v. Akron Center for Reproductive Health [Akron II], 497 U.S. 502 (1990)	By a vote of 6-3, the Court upheld an Ohio statute that required a minor woman to notify one parent or obtain a judicial waiver, rejecting a facial challenge alleging that the burdensome judicial procedure did not fulfill the constitutional requirement of a meaningful bypass procedure.
Rust v. Sullivan, 500 U.S. 173 (1991)	By a vote of 5-4, the Court upheld federal regulations prohibiting health care professionals at family planning clinics that receive Title X funds from counseling or referring women regarding abortion, or even informing a pregnant patient that abortion is a legal option.
Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)	By a vote of 5-4, the Court "retained and once again reaffirmed" the "essential holding" of *Roe v. Wade*. The 5-4 majority also struck down a spousal notification provision of Pennsylvania's Abortion Control Act. However, by a vote of 7-2, the Court upheld provisions of the Act that required (1) physicians to provide patients with anti-abortion information, including pictures of fetuses at various stages of development, to discourage women from obtaining abortions; (2) a mandatory 24-hour delay following these lectures; and (3) a one-parent consent requirement for minors with a judicial bypass. By a vote of 8-1 (Blackmun was the sole dissenter), the Court upheld a provision that required the filing of reports, available for public inspection and copying, including the name and location of any facility performing abortions that receives any state funds. Most significantly, the three-justice plurality opinion (authored by O'Connor, Kennedy, and Souter), abandoned *Roe*'s trimester framework and the strict scrutiny standard of review applied to fundamental rights, implementing the less protective "undue burden" standard of review for pre-viability abortions. The plurality explicitly overruled portions of *Akron* and *Thornburgh* that had limited states' ability to restrict the right to choose, deeming them "inconsistent with

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

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

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

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

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

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

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

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

January 1, 2004

Attachment D

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

LEXSEE 410 U.S. 113

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

No. 70-18

SUPREME COURT OF THE UNITED STATES

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

December 13, 1971, Argued
January 22, 1973, Decided

SUBSEQUENT HISTORY:

Reargued October 11, 1972. Rehearing denied by *Roe v. Wade, 410 U.S. 959, 35 L. Ed. 2d 694, 93 S. Ct. 1409, 1973 U.S. LEXIS 3282 (1973)*
Related proceeding at *McCorvey v. Hill, 2003 U.S. Dist. LEXIS 12986* (N.D. Tex., June 19, 2003)

PRIOR HISTORY:

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

DISPOSITION:

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

LexisNexis (TM) HEADNOTES- Core Concepts:

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

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

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

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

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

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

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

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

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

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

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

I

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

n1 "Article 1191. Abortion

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

"Art. 1192. Furnishing the means

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

"Art. 1193. Attempt at abortion

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

"Art. 1194. Murder in producing abortion

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

"Art. 1196. By medical advice

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

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

"Art. 1195. Destroying unborn child

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

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

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

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

n5 These names are pseudonyms.

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

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to **[***160]** *28 U. S. C. § 1253,* have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. *402 U.S. 941 (1971).* **[*123]** III

[*HR1]** It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in *Mitchell v. Donovan, 398 U.S. 427 (1970),* and *Gunn v. University Committee, 399 U.S. 383* **[**712]** *(1970),* are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See *Carter v. Jury Comm'n, 396 U.S. 320 (1970); Florida Lime Growers v. Jacobsen, 362 U.S. 73, 80-81 (1960).* It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. *Doe* v. *Bolton, post,* p. 179.

IV

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

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

conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels v. Mackell, supra,* and in *Younger v.* **[*127]** *Harris, 401 U.S. 37 (1971); Boyle v. Landry, 401 U.S. 77* **[**714]** *(1971); Perez v. Ledesma, 401 U.S. 82 (1971);* and *Byrne v. Karalexis, 401 U.S. 216 (1971).* See also *Dombrowski v. Pfister, 380 U.S. 479 (1965).* We note, in passing, that *Younger* and its companion cases were decided after the three-judge District Court decision in this case.

[*HR8]** Dr. Hallford's complaint in intervention, therefore, is to be dismissed. n7 He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief **[***163]** and failed to dismiss his complaint in intervention.

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

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

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

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

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

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

V

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

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

n18 Edelstein 63.

n19 *Id.*, at 64.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion, except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the **[*143]** patient," two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing, **[**722]** " and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40-51 (June 1967).

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

> n38 "Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare and not mere acquiescence to the patient's demand; and
>
> "Whereas, The standards of sound clinical judgment, which, together with informed patient consent should be determinative according to the merits of each individual case; therefore be it
>
> "*RESOLVED*, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further
>
> "*RESOLVED*, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the

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

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

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

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

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

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

"(1)

"(2)

"(3)

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

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

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period.

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

VII

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

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

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

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

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

n47 See discussions in Means I and Means II.

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

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

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

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

VIII

[*HR15] [***HR16] [***HR17]** The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford, 141 U.S. 250, 251 (1891)*, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley v. Georgia, 394 U.S. 557, 564 (1969);* in the Fourth and Fifth Amendments, *Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886),* see *Olmstead v. United States, 277 U.S. 438, 478 (1928)* (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut, 381 U.S., at 484-485;* in the Ninth Amendment, *id., at 486* (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska, 262 U.S. 390, 399 (1923).* These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut, 302 U.S. 319, 325 (1937),* are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities **[***177]** relating to marriage, *Loving v. Virginia, 388 U.S. 1, 12 (1967);* procreation, *Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942);* contraception, *Eisenstadt v. Baird, 405 U.S., at 453-454; id., at 460, 463-465* **[*153]** (WHITE, J., concurring in result); family relationships, *Prince v. Massachusetts, 321 U.S. 158, 166 (1944);* and child rearing and education, *Pierce v. Society of* **[**727]** *Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra.*

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

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

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

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

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

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

[*158] [*180]**

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

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

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

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

of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. n66 Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

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

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

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

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

X

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

[*HR29]** **[***HR30A]** With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical **[**732]** fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible **[***183]** state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

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

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

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

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

XI

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

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

see *post*, p. 221.]

CONCURBY:

STEWART

CONCUR:

[*193contd]**

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

MR. JUSTICE STEWART, concurring.

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

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

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

n2 There is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States, 389 U.S. 347, 350-351* (footnotes omitted).

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

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

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

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

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth **[*173]** Amendment protects, embraces more than the rights found in the Bill of Rights. But that **[**737]** liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical* **[***198]** *Co., 348 U.S. 483, 491 (1955).* The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra.* But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

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

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

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

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

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

1. Alabama — Ala. Acts, c. 6, § 2 (1840).

2. Arizona — Howell Code, c. 10, § 45 (1865).

3. Arkansas — Ark. Rev. Stat., c. 44, div. III,

2. Connecticut (1860).

3. Florida (1868).

4. Idaho (1863).

5. Indiana (1838).

6. Iowa (1843).

7. Maine (1840).

8. Massachusetts (1845).

9. Michigan (1846).

10. Minnesota (1851).

11. Missouri (1835).

12. Montana (1864).

13. Nevada (1861).

14. New Hampshire (1848).

15. New Jersey (1849).

16. Ohio (1841).

17. Pennsylvania (1860).

18. Texas (1859).

19. Vermont (1867).

20. West Virginia (1863).

21. Wisconsin (1858).

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

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down *in toto*, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these self-same statutory limitations on abortion. My understanding of past practice is that a statute found **[*178]** to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins, 118 U.S. 356 (1886); Street v. New York, 394 U.S. 576 (1969).*

For all of the foregoing reasons, I respectfully dissent.

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

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

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

2 Am Jur Trials 171, Investigating Particular Crimes 64

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

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

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

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

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

Annotation References:

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

Attachment E

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

LEXSEE 505 U.S. 833,AT 894

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, ET AL., PETITIONERS 91-744 v. ROBERT P. CASEY, ET AL., ETC. ROBERT P. CASEY, ET AL., ETC., PETITIONERS 91-902 v. PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL.

No. 91-744

SUPREME COURT OF THE UNITED STATES

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

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

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

SUBSEQUENT HISTORY:

As Amended July 2, 1992.

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

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

LexisNexis (TM) HEADNOTES- Core Concepts:

SYLLABUS: At issue are five provisions of the Pennsylvania Abortion Control Act of 1982: § 3205, which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a "medical emergency" that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services. Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision but upholding the others.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Section 3205's requirements are rationally related to the State's legitimate interest in assuring that a woman's consent to an abortion be fully informed. The requirement that a physician disclose certain information about the abortion procedure and its risks and alternatives is not a large burden and is clearly related to maternal health and the State's interest in informed consent. In addition, a State may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the abortion alternatives' medical aspects. The requirement that information be provided about the availability of paternal child support and state-funded alternatives is also related to the State's informed consent interest and furthers the State's interest in preserving unborn life. That such information might create some uncertainty and persuade some women to forgo abortions only demonstrates that it might make a difference and is therefore relevant to a woman's informed choice. In light of this plurality's rejection of *Roe's* "fundamental right" approach to this subject, the Court's contrary holding in *Thornburgh* is not controlling here. For the same reason, this Court's previous holding invalidating a State's 24-hour mandatory waiting period should not be followed. The waiting period helps ensure that a woman's decision to abort is a well-considered one, and rationally furthers the State's legitimate interest in maternal health and in unborn life. It may delay, but does not prohibit, abortions; and both it and the informed consent provisions do not apply in medical emergencies. Pp. 966-970.

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

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

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

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

OPINIONBY: O'CONNOR; KENNEDY; SOUTER

OPINION:

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

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)*, that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*. See Brief for Respondents 104-117; Brief for United States as *Amicus Curiae* 8.

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

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

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

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

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

> "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe v.* **[*849]** *Ullman, supra, at 543* (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote these words in addressing an issue the full Court did not reach in *Poe v. Ullman,* but the Court adopted his position four Terms later in *Griswold v. Connecticut, supra.* In *Griswold,* we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed, under the Equal Protection Clause, for unmarried couples. See *Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972).* Constitutional protection was extended **[**2806]** to the sale and distribution of contraceptives in *Carey v. Population Services International, supra.* It is settled now, as it was when the Court heard arguments in *Roe v. Wade,* that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family **[***697]** and parenthood, see *Carey v. Population Services International, supra; Moore v. East Cleveland, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977); Eisenstadt v. Baird, supra; Loving v. Virginia, supra; Griswold v. Connecticut, supra; Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra,* as well as bodily integrity, see, *e. g., Washington v. Harper, 494 U.S. 210, 221-222, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); Winston v. Lee, 470 U.S. 753, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985); Rochin v. California, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952).*

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

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

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

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

While we appreciate the weight of the arguments made on behalf of the State in the cases before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*. We turn now to that doctrine.

[*854] III

A

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

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, see *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-411, 76 L. Ed. 815, 52 S. Ct. 443 (1932)* (Brandeis, J., dissenting). See also *Payne v. Tennessee, 501 U.S. 808, 842, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)* (SOUTER, J., joined by KENNEDY, J., concurring); *Arizona v. Rumsey, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984)*. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham, 382 U.S. 111, 116, 15 L. Ed. 2d 194, 86 S. Ct. 258 (1965)*; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e. g., United States v. Title Ins. & Trust* **[*855]** *Co., 265 U.S. 472, 486 (1924)*; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see *Patterson v. McLean Credit Union, 491 U.S. 164, 173-174, 105 L. Ed. 2d 132,* **[**2809]** *109 S. Ct. 2363 (1989)*; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e. g., Burnet, supra, at 412* (Brandeis, J., dissenting).

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

1

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

2

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

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

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

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

The soundness of this prong of the *Roe* analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions. *E. g., Arnold v. Board of Education of Escambia County, Ala., 880 F.2d 305, 311 (CA11 1989)* (relying upon *Roe* and concluding that government officials violate the Constitution by coercing a minor to have an abortion); *Avery v. County of Burke, 660 F.2d 111, 115 (CA4 1981)* (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait); see also *In re Quinlan, 70 N.J. 10, 355 A.2d 647* (relying on *Roe* in finding a right to terminate medical treatment), cert. denied *sub nom. Garger v. New Jersey, 429 U.S. 922, 50 L. Ed. 2d 289, 97 S. Ct. 319 (1976)).* In any event, because *Roe's* scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications in future cases.

[*860] 4

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

5

The sum of the precedential enquiry to this point shows *Roe's* underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant; [*861] *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe's* central holding, with whatever de-

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

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

C

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

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

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

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

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

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

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

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

The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See *Roe v. Wade, 410 U.S. at 163.* Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, see *supra*, at 860, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

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

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

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

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

(Bellotti I).

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

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

Roe v. Wade was express in its recognition of the State's "important and legitimate interests in preserving and protecting **[*876]** the health of the pregnant woman [and] in protecting the potentiality of human life." *410 U.S. at 162.* The trimester framework, however, does not fulfill *Roe's* own promise that the State has an interest in protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. *Id., at 163.* Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy. Cf. *Webster, 492 U.S. at 519* (opinion of REHNQUIST, C. J.); *Akron I, supra, at 461* (O'CONNOR, J., dissenting).

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

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

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

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

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

[*881] B

[*LEdHR2B]** [2B]We next consider the informed consent requirement. 18 Pa. Cons. Stat. § 3205 (1990). Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has **[**2823]** been provided them if she chooses to view them.

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

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

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

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

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

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

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

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

C

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

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

"273. The vast majority of women con-

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

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

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

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

These findings are supported by studies of domestic violence. The American Medical Association (AMA) has published a summary of the recent research in this field, which indicates that in an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners. In a 1985 survey, women reported that nearly one of every eight husbands had assaulted **[***724]** their wives during **[**2828]** the past year. The AMA views these figures as "marked underestimates," because the nature of these incidents discourages women from reporting them, and because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions or hospitals when the survey is conducted. According to the AMA, "researchers on family violence agree that the true incidence of partner violence is probably *double* the above estimates; or four million severely assaulted women per year. Studies on prevalence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." AMA Council on Scientific Affairs, Violence Against Women 7 (1991) (emphasis in original). Thus on an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault. *Id.*, at 3-4; Shields & Hanneke, Battered Wives' Reactions to Marital Rape, in The Dark Side of Families: Current Family Violence Research 131, 144 (D. Finkelhor, R. Gelles, G. Hataling, & M. Straus eds. 1983). In families where wifebeating takes place, moreover, child abuse is often present as well. Violence Against Women, *supra*, at 12.

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

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

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

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

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

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1872),* three Members of this **[*897]** Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and **[**2831]** representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States." *Id., at 141* (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment). Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. *Hoyt v. Florida, 368 U.S. 57, 62, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961).* These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

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

[*898]

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

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

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

VI

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

* * *

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

It is so ordered.

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

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

18 PA. CONS. STAT. (1990).

"§ 3203. Definitions.

. . . .

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

"§ 3205. Informed consent.

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

> "(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:
>
> > "(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
> >
> > "(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
> >
> > "(iii) The medical risks associated with carrying her child to term.
>
> "(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility [*903] has been delegated by [**2834] either physician, has informed the pregnant woman that:
>
> > "(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.
> >
> > "(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of

her own behalf and the court may appoint a guardian ad litem to assist her. The court shall, however, advise her that she has [*906] a right to court appointed counsel, and shall provide her with such counsel unless she wishes to appear with private counsel or has knowingly and intelligently waived representation by counsel."

"§ 3207. Abortion facilities.

. . . .

"(b) Reports. — Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, containing the following information:

"(1) Name and address of the facility.

"(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

"(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility.

The information contained in those reports which are filed pursuant to this [***734] subsection by facilities which receive State-appropriated funds during the 12-calendar-month period immediately preceding a request to inspect or copy such reports shall be deemed public information. Reports filed by facilities which do not receive State-appropriated funds shall only be available to law enforcement officials, the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of $500 for each day it is in violation hereof."

"§ 3208. Printed information.

"(a) General rule. — The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, and shall update on an annual basis, the following easily comprehensible printed materials:

[*907] [**2836] "(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description of the services they offer and a description of the manner, including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall provide information on the availability of medical assistance benefits for prenatal care, childbirth and neonatal care, and state that it is unlawful for any individual to coerce a woman to undergo abortion, that any physician who performs an abortion upon a woman without obtaining her informed consent or without according her a private medical consultation may be liable to her for damages in a civil action at law, that the father of a child is liable to assist in the support of that child, even in instances where the father has offered to pay for an abortion and that the law permits adoptive parents to pay costs of prenatal care, childbirth and neonatal care.

"(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival; provided that any such pictures or drawings must contain the dimensions of the fetus and must be realistic and appropriate for the woman's stage of pregnancy. The materials shall be objective, non-judgmental and designed [*908] to convey only accurate scientific information about the unborn child at the various gestational ages. The material shall also contain objective information describing the methods of abortion [***735] procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with each such procedure and the medical risks commonly associated with carrying a child to term.

"(b) Format. — The materials shall be printed in a

of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed pursuant to section 3211(b)(1).

[**2838] "(9) The weight of the aborted child for any abortion performed pursuant to section 3211(b)(1).

"(10) Basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision of this chapter.

[*911] "(11) The information required to be reported under section 3210(a) (relating to determination of gestational age).

"(12) Whether the abortion was performed upon a married woman and, if so, whether notice to her spouse was given. If no notice to her [***737] spouse was given, the report shall also indicate the reason for failure to provide notice.

. . . .

"(f) Report by facility. — Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. Any report shall be available for public inspection and copying only if the facility receives State-appropriated funds within the 12-calendar-month period immediately preceding the filing of the report. These reports shall be submitted on a form prescribed by the department which will enable a facility to indicate whether or not it is receiving State-appropriated funds. If the facility indicates on the form that it is not receiving State-appropriated funds, the department shall regard its report as confidential unless it receives other evidence which causes it to conclude that the facility receives [***738] State-appropriated funds."

DISSENTBY: STEVENS (In Part); BLACKMUN (In Part); REHNQUIST (In Part); SCALIA (In Part)

DISSENT:

JUSTICE STEVENS, concurring in part and dissenting in part.

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

[*912] I

The Court is unquestionably correct in concluding that the doctrine of *stare decisis* has controlling significance in a case of this kind, notwithstanding an individual Justice's concerns about the merits. n1 The central holding of *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973),* has been a "part of our law" for almost two decades. *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 101, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976)* (STEVENS, J., concurring in part and dissenting in part). It was a natural sequel to the protection of individual liberty established in *Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965).* See also *Carey v. Population Services International, 431 U.S. 678, 687, 702, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977)* (WHITE, J., concurring in part and concurring in result). The societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.

n1 It is sometimes useful to view the issue of *stare decisis* from a historical perspective. In the last 19 years, 15 Justices have confronted the basic issue presented in *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973).* Of those, 11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and JUSTICES BLACKMUN, O'CONNOR, KENNEDY, SOUTER, and myself. Only four — all of whom happen to be on the Court today — have reached the opposite conclusion.

Stare decisis also provides a sufficient basis for my agreement with the joint opinion's reaffirmation of *Roe's* post-viability analysis. Specifically, I accept the proposition that "if the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except [**2839] when it is necessary to preserve the life or health of the mother." *410 U.S. at 163-164;* see *ante, 505 U.S. at 879.*

I also accept what is implicit in the Court's analysis, namely, a reaffirmation of *Roe's* explanation of *why* the State's obligation to protect the life or health of the mother [*913] must take precedence over any duty to the unborn. The Court in *Roe* carefully considered, and rejected, the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."

> control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman's liberty interest. Thus, a state interest in population control could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions.

In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person. See, *e. g., Rochin v. California, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942).* This right is neutral on the question of abortion: The Constitution would be equally offended by an absolute requirement that all women undergo abortions as by an absolute prohibition on abortions. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia, 394 U.S. 557, 565, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969).* The same holds true for the power to control women's bodies.

The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. Cf. *Whalen v. Roe, 429 U.S. 589, 598-600, 51 L. Ed. 2d 64, 97 S. Ct. 869* **[*916]** *(1977).* A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future — perhaps to the salvation of her own immortal soul." *Thornburgh, 476 U.S. at 781.* The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.

[*LEdHR14C]** [14C] **[***LEdHR15C]** [15C]Weighing the State's interest in potential life and the woman's liberty interest, I agree with the joint opinion that the State may """express a preference for normal childbirth,""" that the State may take steps to ensure that a woman's choice "is thoughtful and informed," and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Ante,* **[***741]** *505 U.S. at 872-873.* Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." *Ante, 505 U.S. at 878.* Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to **[**2841]** abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments.

This theme runs throughout our decisions concerning reproductive freedom. In general, *Roe's* requirement that restrictions on abortions before viability be justified by the State's interest in *maternal* health has prevented States from interjecting regulations designed to influence a woman's decision. Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. We have, for example, upheld regulations requiring **[*917]** written informed consent, see *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976);* limited recordkeeping and reporting, see *ibid.;* and pathology reports, see *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983);* as well as various licensing and qualification provisions, see, *e. g., Roe, 410 U.S. at 150; Simopoulos v. Virginia, 462 U.S. 506, 76 L. Ed. 2d 755, 103 S. Ct. 2532 (1983).* Conversely, we have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, see *Bigelow v. Virginia, 421 U.S. 809, 44 L. Ed. 2d 600, 95 S. Ct. 2222 (1975),* or by "requiring the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" *Thornburgh, 476 U.S. at 760;* see also *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 442-449, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983).*

In my opinion, the principles established in this long line of cases and the wisdom reflected in Justice Powell's opinion for the Court in *Akron* (and followed by the Court just six years ago in *Thornburgh*) should govern our decision today. Under these principles, Pa. Cons. Stat. §§ 3205(a)(2)(i)-(iii) (1990) of the Pennsylvania statute are unconstitutional. Those sections require a physician or counselor to provide the woman with a range of materials clearly designed to persuade her to choose not to undergo the abortion. While the Commonwealth is free, pursuant to § 3208 of the Pennsylvania law, to produce and disseminate such material, the Commonwealth may not inject such information into the woman's deliberations just as she is weighing such an important choice.

Under this same analysis, §§ 3205(a)(1)(i) and (iii) of the Pennsylvania statute are constitutional. Those sections, which require the physician to inform a woman of the nature and risks of the abortion procedure and the medical risks of carrying to term, are neutral requirements comparable to those imposed in other medical procedures. Those sections indicate no effort by the Commonwealth

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-

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. Botsford, 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-

tecting 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

that we again strike them down.

This Court has upheld informed-and written-consent requirements only where the State has demonstrated that they genuinely further important health-related state concerns. See *Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 65-67, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976).* A State may not, under the guise of securing informed consent, "require the delivery of information 'designed to influence the woman's informed choice between abortion or childbirth.'" *Thornburgh, 476 U.S. at 760,* quoting *Akron, 462 U.S. at 443-444.* Rigid requirements that a specific body of information be imparted to a woman in all cases, regardless of the needs of the patient, improperly intrude upon the discretion of the pregnant woman's physician and thereby impose an "'undesired and uncomfortable straitjacket.'" *Thornburgh, 476 U.S. at 762,* quoting *Danforth, 428 U.S. at 67, n.8.*

Measured against these principles, some aspects of the Pennsylvania informed-consent scheme are unconstitutional. **[*935]** While it is unobjectionable for the Commonwealth to require that the patient be informed of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child, compare Pa. Cons. Stat. §§ 3205(a)(i)-(iii) (1990) with *Akron, 462 U.S. at 446, n.37,* I remain unconvinced that there is a vital state need for insisting that the information be provided by a physician rather than **[***753]** a counselor. *Id., at 448.* The District Court found that the physician-only requirement necessarily would increase costs to the plaintiff clinics, costs that undoubtedly would be passed on to patients. And because trained women counselors are often more understanding than physicians, and generally have more time to spend with patients, see App. 366-387, the physician-only disclosure requirement is not narrowly tailored to serve the Commonwealth's interest in protecting maternal health.

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

> "The listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or **[*936]** comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures — as it obviously was intended to do — the dialogue between the woman and her physician.
>
> "The requirements . . . that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly **[**2851]** disguised elements of discouragement for the abortion decision. Much of this . . ., for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the 'information' in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment . . . . Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest." *476 U.S. at 762-763* (citation omitted).

"This type of compelled information is the antithesis of informed consent," *id., at 764,* and goes far beyond merely describing the general subject matter relevant to the woman's decision. "That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion **[***754]** character of the statute and its real purpose." *Ibid.* n7

n7 While I do not agree with the joint opinion's conclusion that these provisions should be upheld, the joint opinion has remained faithful to principles this Court previously has announced in examining counseling provisions. For example, the joint opinion concludes that the "information the State requires to be made available to the woman" must be "truthful and not misleading." *Ante, 505 U.S. at 882.* Because the State's information must be "cal-

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-

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,

163). And in *Danforth*, the Court held that Missouri could not outlaw the saline amniocentesis method of abortion, concluding that the Missouri Legislature had "failed to appreciate and to consider several significant facts" in making its decision. *428 U.S. at 77.*

Although *Roe* allowed state regulation after the point of viability to protect the potential **[**2858]** life of the fetus, the Court subsequently rejected attempts to regulate in this manner. In *Colautti v. Franklin, 439 U.S. 379, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979),* the Court struck down a statute that governed the determination of viability. *Id., at 390-397.* In the process, we made clear that the trimester framework incorporated only one definition of viability — ours — as we forbade States to decide that a certain objective indicator — "be it weeks of gestation or fetal weight or any other single factor" — should govern the definition of viability. *Id., at 389.* In that same case, we also invalidated a regulation requiring a physician to use the abortion technique offering the best chance for fetal survival when performing postviability abortions. See *id., at 397-401;* see also *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 768-769* (invalidating a similar regulation). In *Thornburgh*, the Court struck down Pennsylvania's requirement that a second physician be present at postviability abortions to help preserve the health of the unborn child, on the ground that it did not incorporate a sufficient medical emergency exception. *Id., at 769-771.* Regulations governing the treatment of aborted fetuses have **[*950]** met a similar fate. In *Akron*, we invalidated a provision requiring physicians performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." *462 U.S. at 451* (internal quotation marks omitted).

Dissents in these cases expressed the view that the Court was expanding upon *Roe* in imposing ever greater restrictions on the States. See *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 783* (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent"); *id., at 814* (WHITE, J., dissenting) ("The majority indiscriminately strikes down statutory provisions that in no way contravene the right recognized in *Roe*"). And, when confronted with state regulations of this type in past years, the Court has become increasingly more divided: The three most recent abortion cases have not commanded a Court opinion. See *Ohio v. Akron Center for Reproductive* **[***763]** *Health, 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990); Hodgson v. Minnesota, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990); Webster v. Reproductive Health Services, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989).*

The task of the Court of Appeals in the present cases was obviously complicated by this confusion and uncertainty. Following *Marks v. United States, 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977),* it concluded that in light of *Webster* and *Hodgson*, the strict scrutiny standard enunciated in *Roe* was no longer applicable, and that the "undue burden" standard adopted by JUSTICE O'CONNOR was the governing principle. This state of confusion and disagreement warrants reexamination of the "fundamental right" accorded to a woman's decision to abort a fetus in *Roe*, with its concomitant requirement that any state regulation of abortion survive "strict scrutiny." See *Payne v. Tennessee, 501 U.S. 808, 827-828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)* (observing that reexamination of constitutional decisions is appropriate when those decisions have generated uncertainty and failed to provide clear guidance, because "correction through legislative **[*951]** action is practically impossible" (internal quotation marks omitted)); *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546-547, 557, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985).*

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." *Palko v. Connecticut, 302 U.S. 319, 325, 82 L. Ed. 283, 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);*

meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following *Roe*, such as *Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983)*, and *Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)*, are frankly overruled in part under the "undue burden" standard expounded in the joint opinion. *Ante, 505 U.S. at 881-884.*

In our view, authentic principles of *stare decisis* do not require that any portion of the **[**2861]** reasoning in *Roe* be kept intact. "*Stare decisis* is not . . . a universal, inexorable command," **[***766]** especially in cases involving the interpretation of the Federal Constitution. *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405, 76 L. Ed. 815, 52 S. Ct. 443 (1932)* (Brandeis, J., dissenting). Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for **[*955]** constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depart from a proper understanding" of the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. at 557;* see *United States v. Scott, 437 U.S. 82, 101, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978)* ("'In cases involving the Federal Constitution, . . . the Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function'" (quoting *Burnet v. Coronado Oil & Gas Co., supra, at 406-408* (Brandeis, J., dissenting))); *Smith v. Allwright, 321 U.S. 649, 665, 88 L. Ed. 987, 64 S. Ct. 757 (1944).* Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question. See, *e. g., West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943); Erie R. Co. v. Tompkins, 304 U.S. 64, 74-78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).*

The joint opinion discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe*. Two of these factors are that the main "factual underpinning" of *Roe* has remained the same, and that its doctrinal foundation is no weaker now than it was in 1973. *Ante, 505 U.S. at 857-860.* Of course, what might be called the basic facts which gave rise to *Roe* have remained the same — women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive **[*956]** forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

Nor does the joint opinion faithfully follow this alleged requirement. The opinion frankly concludes that *Roe* and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. *Ante, 505 U.S. at 871-873.* But there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception.

The joint opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for **[***767]** precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "considerations in favor of *stare decisis* are at their acme." *Payne v. Tennessee, 501 U.S. at 828.* But, as the joint opinion apparently agrees, *ante, 505 U.S. at 855-856,* any traditional notion of reliance is not applicable here. The Court today cuts back on the protection afforded by *Roe*, and no one claims that this action defeats any reliance interest in the disavowed trimester framework. Similarly, reliance interests would not be diminished were the Court to go further and acknowledge the full error of *Roe*, as "reproductive planning could take virtually **[**2862]** immediate account of" this action. *Ante, 505 U.S. at 856.*

The joint opinion thus turns to what can only be described as an unconventional — and unconvincing — notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. *Ante, 505 U.S. at 856.* The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in **[*957]** reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market,

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 simple 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

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).

[*LEdHR2C]** [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

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

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 advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act.

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

tradicted *by a text* — an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. See *Loving v. Virginia, 388 U.S. 1, 9, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967)* ("In the case at bar, . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); see also *id., at 13* (Stewart, J., concurring in judgment). The enterprise launched in *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)*, by contrast, sought to *establish* — in the teeth of a clear, contrary tradition — a value found nowhere in the constitutional text.

There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention, *ante, 505 U.S. at 859*, that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

[*931] **[***783]** The Court destroys the proposition, evidently meant to represent my position, that "liberty" includes "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified," *ante, 505 U.S. at 847* (citing *Michael H. v. Gerald D., 491 U.S. 110, 127, n.6, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989)* (opinion of SCALIA, J.)). That is not, however, what *Michael H.* says; it merely observes that, in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," *ibid.* But the Court does not wish to be fettered by any such limitations on its preferences. The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "curb the discretion of federal judges," *ante, 505 U.S. at 847*, is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction — towards systematically eliminating checks upon its own power, and it succumbs.

[*LEdHR2D]** [2D] **[***LEdHR4D]** [4D] **[***LEdHR5E]** [5E]Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have **[**2875]** said before; and applying the rational basis test, I would uphold the Pennsylvania statute in its entirety. I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered. I shall discuss each of them under a quotation from the Court's opinion to which they pertain.

> **"The inescapable fact is that adjudication of substantive due process claims may call upon the Court [*982] in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."** *Ante, 505 U.S. at 849.*

Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying "reasoned judgment," I do not see how that could possibly have produced the answer the Court arrived at in *Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973)*. Today's opinion describes the methodology of *Roe*, quite accurately, as weighing against the woman's interest the State's "'important and legitimate interest in protecting the potentiality of human life.'" *Ante, 505 U.S. at 871* (quoting *Roe, supra*, at 162). But "reasoned judgment" does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." See, *e. g., Roe, supra, at 162; Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 61, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976); Colautti v. Franklin, 439 U.S. 379, 386, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979); Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 428, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983)* **[***784]** *(Akron I); Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 482, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983)*. The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.

[*LEdHR16D]** [16D]The authors of the joint opinion,