

PLANNED PARENTHOOD OF SOUTHEASTERN
PENNSYLVANIA v. CASEY

505 U.S. 833 (1992)

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

I.

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

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982 as amended in 1988 and 1989. . . . 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. 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. 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. The Act exempts compliance with these three requirements in the event of a "medical emergency." . . . In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services.

. . . [W]e acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding. . . . State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

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

II.

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. . . . Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, at least since *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." . . .

It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight

amendments to the Constitution. But of course this Court has never accepted that view.

It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See *Michael H. v. Gerald D.*, n.[f] (opinion of Scalia, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*. [N]either 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., Amend. 9.

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 to expression as a simple rule. . . .

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

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International*, afford constitutional protection. We have no doubt as to the correctness of those decisions. They support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. . . .

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 pre-natal 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.

... [T]he 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.

III.

[I]t is common wisdom that the rule of stare decisis is not an "inexorable command," and certainly it is not such in every constitutional case. 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 proved to be intolerable simply in defying practical workability; 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; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; 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.

So in this case we may inquire 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 the rule in question; 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.

Although *Roe* has engendered opposition, it has in no sense proven "unworkable," representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, required judicial assessment of state laws ... and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

2.

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.

While neither respondents nor their amici in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior may appear to justify no reliance claim. . . .

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

3.

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

Roe . . . may be seen not only as an exemplar of [the liberty protected by] *Griswold* but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990). Finally, one could classify *Roe* as sui generis. If the case is so viewed, then there clearly has been no erosion of its central determination. . . . Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty. . . .

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). . . .

4.

[T]ime has overtaken some of *Roe's* factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier. But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual 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 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 inquiry to this point shows *Roe's* underpinnings unweakened in any way affecting its central holding. [Within] the bounds of normal stare decisis analysis then . . . the stronger argument is for affirming *Roe's* central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

B.

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

The first example is that line of cases identified with *Lochner v. New York*, which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes' view, the theory of laissez-faire. The *Lochner* decisions were exemplified by *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923), in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signalled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench, "The older world of laissez-faire was

recognized everywhere outside the Court to be dead.” R. Jackson, *The Struggle for Judicial Supremacy* 85 (1941). The facts upon which the earlier case had premised a constitutional resolution of social controversy had proved to be untrue, and history’s demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing the separate-but-equal rule for applying the Fourteenth Amendment’s equal protection guarantee. They began with *Plessy v. Ferguson* (1896), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The *Plessy* Court considered “the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, this understanding of the implication of segregation was the stated justification for the Court’s opinion. But this understanding of the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education* (1954)....

The Court in *Brown*... observ[ed] that whatever may have been the understanding in *Plessy*’s time of the power of segregation to stigmatize those who were segregated with a “badge of inferiority,” it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. Society’s understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, we must also recognize that the *Plessy* Court’s explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court’s response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible 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 case before us presents 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 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. . . .

c.

The examination of the conditions justifying the repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by *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 case, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis 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. . . .

The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

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

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

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.

The country's loss of confidence in the judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people

who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible.

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

IV.

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

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.

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*. . . . Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe's* statement that the State has a legitimate interest in promoting the life or potential life of the unborn, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. [T]he 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. 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. . . . 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. 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. [T]he weight to be 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. [Y]et 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." That portion of the decision in *Roe* has been given too little acknowledgement 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. 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.

. . . The trimester framework [established by *Roe*] no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. . . .

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.

"[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." *Webster v. Reproductive Health Services*, 492 U.S., at 511. It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with *Roe's* central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case. A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the

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

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote.

The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. . . .

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." All abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy. . . . 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. . . . The trimester framework . . . does not fulfill *Roe's* own promise that the State has an interest in protecting fetal life or potential life. . . . [Because] there is a substantial state interest in potential life throughout pregnancy . . . 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. . . .

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. 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. . . .

[W]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that

goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

[W]e give this summary:

- (a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.
- (b) We reject the rigid trimester framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These 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. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.
- (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.
- (e) We also reaffirm *Roe's* holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

V.

A.

Because it is central to the operation of various other requirements, we begin with the [Pennsylvania] statute's definition of medical emergency. Under the statute, a medical emergency is "[t]hat condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function."

Petitioners argue that the definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks. 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 from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health.

... [The Court of Appeals stated that it] "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." ... We ... conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right.

B.

We next consider the informed consent requirement. 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 been provided them if she chooses to view them.

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

We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. . . . We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself. . . . Our prior cases also suggest that the "straitjacket," *Thornburgh*, of particular information which must be given in each case interferes with a constitutional right of privacy between a pregnant woman and her physician. As a preliminary matter, it is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions "if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." In this respect, the statute does not prevent the physician from exercising his or her medical judgment. . . .

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

The Pennsylvania statute also requires us to reconsider the holding in *Akron I* that the State may not require that a physician, as opposed to a qualified assistant, provide information relevant to a woman's informed consent. Since there is no evidence on this record that requiring a doctor to give the information as provided

by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden. . . .

Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement. . . . 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 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 anti-abortion protestors demonstrating outside a clinic." 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."

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. . . . [U]nder 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 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 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. 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.

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 else to inflict bodily injury upon her. A physician who performs an abortion on 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 consult their husbands prior to deciding to terminate their pregnancy....

...

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

...

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

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

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

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

285. Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the battering can cover a broad range of actions and be gruesome and tortuous....

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

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

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

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

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

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

...

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

295. Marital rape is rarely discussed with others or reported to law enforcement authorities, and of those reported only a 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 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 whether the section applies to them.

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 their wives during 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. . . . 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. In families where wife-beating takes place, moreover, child abuse is often present as well.

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. Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. Returning to one's abuser can be dangerous. Recent Federal Bureau of Investigation statistics disclose that 8.8% of all homicide victims in the United States are killed by their spouse. Thirty percent of female homicide victims are killed by their male partners.

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.

This information and the District Court's findings reinforce what common sense would suggest. In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. . . . And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault, §3209(b)(3), because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins. If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by §3209.

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

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

the statute cannot be invalid on its face. We disagree with respondents' basic method of analysis.

The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

... The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which §3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women.

We recognize that a husband has a "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying." *Danforth*. With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody. If [our precedents] concerned the State's ability to require the mother to notify the father before taking some action with respect to a living 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*. 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*. 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. . . . 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 (1872), three Members of this Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as

her head and 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 (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 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. 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.

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 husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs. And if a husband's interest justifies notice in any of these cases, one might reasonably argue that it justifies exactly what the *Danforth* Court held it did not justify—a requirement of the husband's consent as well. A State may not give to a man the kind of dominion over his wife that parents exercise over their children. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family. These considerations confirm our conclusion that §3209 is invalid.

D.

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

We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. . . . [I]n our view, the one-parent consent requirement and judicial bypass procedure are constitutional. . . .

E.

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

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

In *Danforth*, we held that recordkeeping and reporting provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." We think that under this standard, all the provisions at issue here except that relating to spousal notice are constitutional. Although they do not relate to the State's interest in informing the woman's choice, they do relate to health. The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

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. 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.

Justice STEVENS, concurring in part and dissenting in part. . . .

II.

[T]he interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest in . . . minimizing . . . offense [to people opposed to abortion]. The State may also have a broader interest in expanding the population. [Under] these principles, §§3205(a)(2)(i)-(iii) are unconstitutional. Those sections require a physician or counselor to provide the woman with a range of materials clearly designed to persuade her to choose not to undergo the abortion. While the State is free to produce and disseminate such material, the State may not inject such information into the woman's deliberations just as she is weighing such an important choice.

Under this same analysis, §§3205(a)(1)(i) and (iii) of the Pennsylvania statute are constitutional. Those sections, which require the physician to inform a woman of the nature and risks of the abortion procedure and the medical risks of carrying to term, are neutral requirements comparable to those imposed in other medical procedures. Those sections indicate no effort by the State to influence the woman's choice in any way. If anything, such requirements enhance, rather than skew, the woman's decisionmaking.

III.

The 24-hour waiting period required by §§3205(a)(1)-(2) of the Pennsylvania statute raises even more serious concerns. Such a requirement arguably furthers the State's interests in two ways, neither of which is constitutionally permissible.

First, it may be argued that the 24-hour delay is justified by the mere fact that it is likely to reduce the number of abortions, thus furthering the State's interest in potential life. But such an argument would justify any form of coercion that placed an obstacle in the woman's path. The State cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right.

Second, it can more reasonably be argued that the 24-hour delay furthers the State's interest in ensuring that the woman's decision is informed and thoughtful. But there is no evidence that the mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the

patient. The mandatory delay thus appears to rest on outmoded and unacceptable assumptions about the decisionmaking capacity of women. While there are well-established and consistently maintained reasons for the State to view with skepticism the ability of minors to make decisions, none of those reasons applies to an adult woman's decisionmaking ability. . . .

In the alternative, the delay requirement may be premised on the belief that the decision to terminate a pregnancy is presumptively wrong. This premise is illegitimate. Those who disagree vehemently about the legality and morality of abortion agree about one thing: The decision to terminate a pregnancy is profound and difficult. No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.

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: A burden may be "undue" either because the burden is too severe or because it lacks a legitimate, rational justification.

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

The counseling provisions are similarly infirm. Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate. In this case, the Pennsylvania statute directs that counselors provide women seeking abortions with information concerning alternatives to abortion, the availability of medical assistance benefits, and the possibility of child-support payments. 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.” This information is of little decisional value in most cases, because 90% of all abortions are performed during the first trimester when fetal age has less relevance than when the fetus nears viability. . . . Accordingly, while I disagree with Parts IV, V-B, and V-D of the joint opinion, I join the remainder of the Court’s opinion.

Justice BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

I join parts I, II, III, V-A, V-C, and VI of the joint opinion of Justices O’Connor, Kennedy, and Souter, ante.

[R]estrictive 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. . . . Further, [such restrictions] deprive[] a woman of the right to make her own decision about reproduction and family planning. . . . The decision to terminate or continue a pregnancy has no less an impact on a woman’s life than decisions about contraception or marriage. Because motherhood has a dramatic impact on a woman’s educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life. For these reasons, “the decision whether or not to beget or bear a child” lies at “the very heart of this cluster of constitutionally protected choices.”

A State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women’s place in society “are no longer consistent with our understanding of the family, the individual, or the Constitution.” . . .

Application of the strict scrutiny standard results in the invalidation of all the challenged provisions. Indeed, as this Court has invalidated virtually identical provisions in prior cases, *stare decisis* requires that we again strike them down.

. . . 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.” . . . I remain unconvinced that there is a vital state need for insisting that the information be provided by a physician rather than a counselor. 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, the physician-only disclosure requirement is not narrowly tailored to serve the Commonwealth’s interest in protecting maternal health.

... [T]he Act further requires that the physician or a qualified non-physician inform the woman that printed materials are available from the Commonwealth that describe the fetus and provide information about medical assistance for childbirth, information about child support from the father, and a list of agencies that provide adoption and other services as alternatives to abortion. *Thornburgh* invalidated biased patient-counseling requirements virtually identical to the one at issue here. What we said of those requirements fully applies in this case: the listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures — as it obviously was intended to do — the dialogue between the woman and her physician. “The requirements . . . that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. Much of this . . . , for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the ‘information’ in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment. . . . Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest.” . . . “That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose.”

The 24-hour waiting period following the provision of the foregoing information is also clearly unconstitutional. The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks, and that it would require two visits to the abortion provider, thereby increasing travel time, exposure to further harassment, and financial cost. Finally, the District Court found that the requirement would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts.

[E]xcept in the case of a medical emergency, §3206 requires a physician to obtain the informed consent of a parent or guardian before performing an abortion on an unemancipated minor or an incompetent woman. Based on evidence in the record, the District Court concluded that, in order to fulfill the informed-consent requirement, generally accepted medical principles would require an in-person visit by the parent to the facility. . . . The requirement of an in-person visit would carry with it the risk of a delay of several days or possibly weeks, even where the parent is willing to consent. While the State has an interest in encouraging parental involvement in the minor’s abortion decision, §3206 is not narrowly drawn to serve that interest.^a

a. The judicial-bypass provision does not cure this violation. *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990)[, which upheld parental-notification requirements, subject to a judicial bypass in special

Finally, the Pennsylvania statute requires every facility performing abortions to report its activities to the Commonwealth. . . . The Commonwealth attempts to justify its required reports on the ground that the public has a right to know how its tax dollars are spent. A regulation designed to inform the public about public expenditures does not further the Commonwealth's interest in protecting maternal health. Accordingly, such a regulation cannot justify a legally significant burden on a woman's right to obtain an abortion.

The confidential reports concerning the identities and medical judgment of physicians involved in abortions at first glance may seem valid, given the State's interest in maternal health and enforcement of the Act. The District Court found, however, that, notwithstanding the confidentiality protections, many physicians, particularly those who have previously discontinued performing abortions because of harassment, would refuse to refer patients to abortion clinics if their names were to appear on these reports. The Commonwealth has failed to show that the name of the referring physician either adds to the pool of scientific knowledge concerning abortion or is reasonably related to the Commonwealth's interest in maternal health. I therefore agree with the District Court's conclusion that the confidential reporting requirements are unconstitutional insofar as they require the name of the referring physician and the basis for his or her medical judgment.

III.

. . . 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. 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.*, where the plurality found no fundamental right to visitation privileges by an adulterous father, or in *Bowers v. Hardwick*, 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." In the Chief Justice's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called "sexual deviates." Given the Chief Justice's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

Even more shocking than the Chief Justice's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental—for the Chief Justice, only women's psychological health is a concern, and only to the extent that he assumes that every

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

woman who decides to have an abortion does so without serious consideration of the moral implications of their decision. In short, the Chief Justice's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

The Chief Justice's narrow conception of individual liberty and *stare decisis* leads him to propose [the abortion regulations be subject to rational basis review and] then further weakens the test by providing an insurmountable requirement for facial challenges: petitioners must "show that no set of circumstances exists under which the [provision] would be valid." [T]he Chief Justice contends that the record lacks any "hard evidence" . . . that a "large fraction" of women who prefer not to notify their husbands involve situations of battered women and unreported spousal assault. Yet throughout the explication of his standard, the Chief Justice never explains what hard evidence is, how large a fraction is required, or how a battered woman is supposed to pursue an as-applied challenge.

Under his standard, States can ban abortion if that ban is rationally related to a legitimate state interest. [This would arguably permit] a prohibition [of all abortions], enforced by criminal penalties, with no exception for the life of the mother. . . . Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or incest? Is there anything arbitrary or capricious about a State's prohibiting the sins of the father from being visited upon his offspring?^b

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

Chief Justice REHNQUIST, with whom Justice White, Justice Scalia, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

The joint opinion, following its newly-minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade*, 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 . . . uphold the challenged provisions of the Pennsylvania statute in their entirety.

b. Justice Scalia urges the Court to "get out of this area" and leave questions regarding abortion entirely to the States. Putting aside the fact that what he advocates is nothing short of an abdication by the Court of its constitutional responsibilities, Justice Scalia is uncharacteristically naive if he thinks that overruling *Roe* and holding that restrictions on a woman's right to an abortion are subject only to rational-basis review will enable the Court henceforth to avoid reviewing abortion-related issues. State efforts to regulate and prohibit abortion in a post-*Roe* world undoubtedly would raise a host of distinct and important constitutional questions meriting review by this Court. For example, does the Eighth Amendment impose any limits on the degree or kind of punishment a State can inflict upon physicians who perform, or women who undergo, abortions? What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel? Does the First Amendment permit States that choose not to criminalize abortion to ban all advertising providing information about where and how to obtain abortions?

I.

[I]n *Roe v. Wade*, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation and contraception, abortion "involves the purposeful termination of potential life." The abortion decision must therefore "be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See *Michael H. v. Gerald D.*, n. [d] (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body").

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny." . . .

II.

[The] joint opinion [cannot] bring itself to say that *Roe* was correct as an original matter. . . . Instead, . . . the opinion . . . contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*. *Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. . . . Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle.

In our view, authentic principles of stare decisis do not require that any portion of the reasoning in *Roe* be kept intact. [E]rroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. [W]hen it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question.

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. 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 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. 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 precedent’s sake. . . . But . . . 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. . . .

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. The joint opinion’s assertion of this fact is undeveloped and totally conclusory. . . . Surely it is dubious to suggest that women have reached their “places in society” in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society’s increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.

[T]he joint opinion’s argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have “ordered their thinking and living around” it. As an initial matter, one might inquire how the joint opinion can view the “central holding” of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision’s trimester framework. Furthermore, at various points in the past, the same could have been said about this Court’s erroneous decisions that the Constitution allowed “separate but equal” treatment of minorities, see *Plessy v. Ferguson*, or that “liberty” under the Due Process Clause protected “freedom of contract.” See *Lochner v. New*

York. . . . [T]he simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here.

Apparently realizing that conventional stare decisis principles do not support its position, the joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect the "legitimacy" of this Court. Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests.

But the joint opinion goes on to state that when the Court "resolve[s] the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," its decision is exempt from reconsideration under established principles of stare decisis in constitutional cases. This is so, the joint opinion contends, because in those "intensely divisive" cases the Court has "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and must therefore take special care not to be perceived as "surrender[ing] to political pressure" and continued opposition. This is a truly novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, unless opposition to the original decision has died away.

The first difficulty with this principle lies in its assumption that cases which are "intensely divisive" can be readily distinguished from those that are not. . . . In addition, because the Court's duty is to ignore public opinion and criticism on issues that come before it, its members are in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of stare decisis when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions.

The joint opinion picks out and discusses two prior Court rulings [*Plessy* and *Lochner*], that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to *Roe*. It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose not to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's "legitimacy" principle. . . . There is no reason to think that either *Plessy* or *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 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* 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 by stubbornly refusing to reexamine the *Lochner* rationale, lest it lose legitimacy by appearing to "overrule under fire."

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 protection of contractual freedom contributed to an economy that failed to protect the welfare of all. Surely the joint opinion does not mean to suggest that people saw this Court's failure to uphold minimum wage statutes as the cause of the Great Depression! In any event, the *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simply believed, erroneously, that "liberty" under the Due Process Clause protected the "right to make a contract." 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. . . .

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 "[t]he Constitution does not speak of freedom of contract." 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*. 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" character. To us, adherence to *Roe* today under the guise of "legitimacy" would seem to resemble more closely adherence to *Plessy* on the same ground. Fortunately, the Court did not choose that option in *Brown*, and instead frankly repudiated *Plessy*. The joint opinion concludes that such repudiation was justified only because of newly discovered evidence that segregation had the effect of treating one race as inferior to another. But it can hardly be argued that this was not urged upon those who decided *Plessy*, as Justice Harlan observed in his dissent that the law at issue "puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." It is clear that the same arguments made before the Court in *Brown* were made in *Plessy* as well. The Court in *Brown* simply recognized, as Justice Harlan had recognized beforehand, that the Fourteenth Amendment does not permit racial segregation. The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground alone the Court was justified in properly concluding that the *Plessy* Court had erred.

There is also a suggestion in the joint opinion that the propriety of overruling a "divisive" decision depends in part on whether "most people" would now agree that it should be overruled. Either the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision. How such agreement would be ascertained, short of a public opinion poll, the joint opinion does not say. But surely even the suggestion is totally at war with the idea of "legitimacy" in whose name it is invoked. The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.

[I]n assuming that the Court is perceived as "surrender[ing] to political pressure" when it overrules a controversial decision, the joint opinion forgets that there are two sides to any controversy. The joint opinion asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to adhere to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those who have demonstrated in favor of the original decision. The decision in *Roe* has engendered large demonstrations, including repeated marches on this Court and on Congress, both in opposition to and in support of that opinion. A decision either way on *Roe* can therefore be perceived as favoring one group or the other. But this perceived dilemma arises only if one assumes, as the joint opinion does, that the Court should make its decisions with a view toward speculative public perceptions. If one assumes instead, as the Court surely did in both *Brown* and *West Coast Hotel*, that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side.

Roe is not this Court's only decision to generate conflict. . . . The joint opinion's message to such protesters appears to be that they must cease their activities in order to serve their cause, because their protests will only cement in place a decision which by normal standards of *stare decisis* should be reconsidered. . . .

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion—the "undue burden" standard. [T]his standard is based even more on a judge's subjective determinations than was the trimester framework, [it] will do nothing to prevent "judges from roaming at large in the constitutional field" guided only by their personal views. 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. But the authors would at the same time strike down Pennsylvania's spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. . . .

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. This may or may not be a correct judgment, but it is quintessentially a legislative one. . . . 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. . . .

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. . . . 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. With this rule in mind, we examine each of the challenged provisions.

III.

A.

[Requiring physicians to provide information about] "[t]he 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" . . . is rationally related to the State's interest in assuring that a woman's consent to an abortion be a fully informed decision. [I]n providing time for reflection and reconsideration, the waiting period helps ensure that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus. . . . [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."

[B]ecause this is a facial challenge to the Act, it is insufficient for petitioners to show that the [spousal] notification provision "might operate unconstitutionally under some conceivable set of circumstances." Thus, it is not enough for petitioners

to show that, in some "worst-case" circumstances, the notice provision will operate as a grant of veto power to husbands. [T]hey must "show that no set of circumstances exists under which the [provision] would be valid."

The question before us is therefore whether the spousal notification requirement rationally furthers any legitimate state interests. We conclude that it does. First, a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. [B]y providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him. This participation might in some cases result in a decision to proceed with the pregnancy.

[The] State also has a legitimate interest in promoting "the integrity of the marital relationship." [I]n our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity. . . . 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) ordinarily does not render the statute unconstitutional or even constitutionally suspect." 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.

[W]e therefore would hold that each of the challenged provisions of the Pennsylvania statute is consistent with the Constitution. It bears emphasis that our conclusion in this regard does not carry with it any necessary approval of these regulations. Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution. If, as we believe, these do, their wisdom as a matter of public policy is for the people of Pennsylvania to decide.

Justice SCALIA, with whom the Chief Justice, Justice White, and Justice Thomas join, concurring in the judgment in part and dissenting in part.

. . . The States may, if they wish, permit abortion-on-demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. . . . A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example—which entire societies of reasonable people disagree with—intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in this case: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion [for] the same reason I reach the conclusion that bigamy is not constitutionally protected—because of two simple facts: (1) the

Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.^a

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.” 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.” But the Court does not wish to be fettered by any such limitations on its preferences. The Court’s statement that it is “tempting” to acknowledge the authoritativeness of tradition in order to “cur[b] the discretion of federal judges,” 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.

... [A]pplying the rational basis test, I would uphold the Pennsylvania statute in its entirety. I must, however, respond to a few of the more outrageous arguments in today’s opinion, which it is beyond human nature to leave unanswered. I shall discuss each of them under a quotation from the Court’s opinion to which they pertain.

“The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.”

The emptiness of the “reasoned judgment” that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in this and other cases, the best the Court can do to explain how it is that the word “liberty” must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in “liberty” because it is among “a person’s most basic decisions”; it involves a “most intimate and personal choic[e]”; it is “central to personal dignity and autonomy”; it “originate[s] within the zone of conscience and belief”; it is “too intimate and personal” for state interference; it reflects “intimate views” of a “deep, personal character”; it involves “intimate relationships,” and notions of “personal autonomy and bodily integrity”; and it concerns a particularly “important decisio[n].” But it is obvious to anyone applying “reasoned judgment” that the same adjectives can be applied to many forms of conduct that this Court . . . has held are not entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide,

a. The Court’s suggestion that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted by a text—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. The enterprise launched in *Roe*, by contrast, sought to establish—in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text. There is, of course, no comparable tradition barring recognition of a “liberty interest” in carrying one’s child to term free from state efforts to kill it . . .

all of which are equally "intimate" and "deep[ly] personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection. . . .

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

The shortcomings of *Roe* did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion — which calls upon federal district judges to apply an "undue burden" standard as doubtful in application as it is unprincipled in origin — is really more than one should have to bear. . . .

The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." An obstacle is "substantial," we are told, if it is "calculated [,] [not] to inform the woman's free choice, [but to] hinder it." [But] [a]ny regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. . . . I have forcefully urged that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, *Employment Division, Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-82 (1990), but that principle does not establish the quite different (and quite dangerous) proposition that a law which directly regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden." It is that, of course, which is at issue here: Pennsylvania has consciously and directly regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1 cent. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a "substantial obstacle" to the exercise of First Amendment rights. The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for this case, to preserve some judicial foothold in this ill-gotten territory. In claiming otherwise, the three Justices show their willingness to place all constitutional rights at risk in an effort to preserve what they deem the "central holding in *Roe*."

. . . And "viability" is no longer the "arbitrary" dividing line previously decried by Justice O'Connor in *Akron I*; the Court now announces that "the attainment of viability may continue to serve as the critical fact."^b It is difficult to maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

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

[W]hat is remarkable about the joint opinion's fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a "substantial obstacle" or an "undue burden." We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue"—subject, of course, to the possibility of being reversed by a Circuit Court or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

To the extent I can discern any meaningful content in the "undue burden" standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the "undue burden" analysis is whether the regulation "prevent[s] a significant number of women from obtaining an abortion"; whether a "significant number of women . . . are likely to be deterred from procuring an abortion"; and whether the regulation often "deters" women from seeking abortions. We are not told, however, what forms of "deterrence" are impermissible or what degree of success in deterrence is too much to be tolerated. . . . [D]espite flowery rhetoric about the State's "substantial" and "profound" interest in "potential human life," and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful. As Justice Blackmun recognizes (with evident hope), the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "express[ing] a preference for childbirth over abortion." Reason finds no refuge in this jurisprudence of confusion.

"While we appreciate the weight of the arguments . . . that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."

The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. . . .

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

rigidity (in sharp contrast to the utter indeterminability of the “undue burden” test) is probably the only reason the Court is able to say, in urging stare decisis, that *Roe* “has in no sense proven ‘unworkable.’” . . .

“Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . . , its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”

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

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

. . . I cannot agree with, indeed I am appalled by, the Court’s suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—against overruling, no less—by the substantial and continuing public opposition the decision has generated. The Court’s judgment that any other course would “subvert the Court’s legitimacy” must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe*. In my history book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford*, 19 How. 393 (1857), an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish*, which produced the famous “switch in time” from the Court’s erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal. . . .

In truth, I am as distressed as the Court is . . . about the “political pressure” directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people,

not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to the cause of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," which turns out to be nothing but philosophical predilection and moral intuition. . . .

What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here — reading text and discerning our society's traditional understanding of that text — the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if . . . our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school — maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. . . .

[T]here is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "cal[1] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

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

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

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.