September 2017 Pupillage Team

Ruth Bader Ginsburg American Inn of Court

September 20, 2017

Doneen Douglas Jones
Kelli Price

Allie Ah Loy
Valerie Baker
Shannon Bickham
Adam Bush
Heather Cook
Fallon Elliott
Robert Don Evans Jr.
Christina Gelona-Hendricks
Sarah Glick
Whitney Scimeca-Herzog
Krista Hodges-Eckhoff
Joanne Horn
April Kelso
Dakota Low
Maria Maule
Shawna Landeros
Faythe McMillin
Michael Mullins
Linda Pizzini
Sara Potts
Kellie Reidlinger
Laura Sams
Anna Scott
Monica Ybarra

NAME THAT SUPREME

Begin program with game show logo and Supremes' song: You Keep Me Hangin' On.

Host will enter stage and make opening remarks similar to attached introduction and explain how game works. Audience guesses the Justice at any time during the Q&A session.

During intro play "No Girls Allowed" video spoof on Supreme Court.

Justice Roberts will enter and take a sit.

Q&A of Justice Roberts

If guess is correct, hold up face of Justice Roberts in front of your face. Distribute prizes to winning table. Still complete information if audience guesses Justice early from clues.

Summary of *National Federation of Independent Business b. Sebelius*, 132 S.Ct. 2566 (2012), a portion of which is attached.

Background during summary will be graphics showing pictures of Justice Roberts

Justice Roberts sound byte using M&M reference during SCOTUS questioning.

Commercial Break – Trivia – Most often quoted pop icon in SCOTUS opinions.

Bob Dylan will enter and sing parts of songs quoted in opinions.

During Dylan's performance Justice Marshall will quietly enter and be seated

Q&A Justice Marshall

If guess is correct, hold up face of Justice Marshall in front of your face. Distribute prizes to winning table. Still complete information if audience guesses Justice early from clues.

Summary of *Furman v. Georgia*, 92 S.Ct. 2726 (1972), a portion of which is attached.

Background during summary will be graphics showing pictures of Justice Marshall

Justice Marshall sound byte describing how he learned that he had been nominated to SCOTUS

2nd Commercial Break – SCOTUS trivia

Justice O'Connor enters and takes seat during commercial break

Q&A Justice O'Connor

If guess is correct, hold up face of Justice O'Connor in front of your face. Distribute prizes to winning table. Still complete information if audience guesses Justice early from clues.

Summary of *Planned Parenthood of Southeastern Penn v. Casey,* 112 S.Ct. 2791 (1992), a portion of which is attached.

Background during summary will be graphics showing pictures of Justice O'Connor

Sound byte of Justice O'Connor

Final remarks by Host

Q&A on Justice Roberts

1. Did you play any sports in high school?

A. Yes. At my Catholic boarding school, I played football and was captain of the team. I also wrestled and won the regional championship.

2. What active hobby do you enjoy now?

A. I dance! My wife, Jane, introduced me to traditional Irish dancing. We have visited Ireland many times and have a share in a cottage in County Limerick. I dance the ceili, a highly choreographed dance where the partners link arms and form lines.

3. You gave a somewhat controversial graduation speech to the 9th grade class at Cardigan Mountain School in New Hampshire – Could we hear a part of that?

A. From time to time in the years to come, I hope you will be treated unfairly so that you will come to know the value of justice. I hope that you will suffer betrayal because that will teach you the importance of loyalty. Sorry to say, but I hope you will be lonely from time to time so that you don't take friends for granted. I wish you bad luck, again, from time to time so that you will be conscious of the role of chance in life and understand that your success is not completely deserved and that the failure of others is not completely deserved either.

4. What happened the first time you were nominated by President George H.W. Bush to serve on the Court of Appeals?

A. Bill Clinton became president and my nomination expired without a vote. Later President George W. Bush nominated me and I was confirmed.

5. In your Senate confirmation hearing, you were asked about your comprehensive judicial philosophy. What was your answer?

A. I responded that I did not have a comprehensive judicial philosophy. I put it this way: "[I]t's my job to call balls and strikes, not to pitch or bat."

6. Why did almost half of the democrats vote against your confirmation?

A. Well you know it's pretty simple. I am pro-life and they thought that I would vote to overturn *Roe v. Wade.*

7. Can you tell us about your connection to Justice Rehnquist?

A. I clerked for Justice Rehnquist and two days after his death was nominated to SCOTUS to become Chief Justice and was nominated to take over my former boss's position as U.S. Chief Justice. If Chief Justice Rehnquist had lived another month or two, I would have become the first ever Supreme Court Justice to have clerked for one of his fellow Supreme Court justices.

8. What time were you the swing vote on a liberal vs conservative decision?

A. You know I wrote the majority opinion on that one but it certainly surprised a lot of people. "Put simply, Congress may tax and spend. Does anyone out there know the name of that decision.

National Federation of Independent Business v. Sebelius. Popular name - Obamacare

9. Who were you to originally replace on SCOTUS.

A. Sandra Day O'Connor

10. What was one of the most interesting cases.

A. While on the Court of Appeals for the District of Columbia, a 12 year old girl was arrested, search and handcuffed by Washington Metro police for eating a French fry on the metro. Although no one was happy about the events that led to the arrest, we affirmed the arrest because the question wasn't whether the policy was a bad idea but whether the police violated her 4th and 5th Amendment rights. *Hedgepeth v. Washington Metropolitan Area Transit*

I am Chief Justice John Roberts. I was born in Buffalo, NY in 1955, but grew up in Indiana. I attended Harvard for both undergrad ('76) and law school ('79). I married my wife, Jane, when we were both 41, and we adopted two children, Josephine and Jack.

I clerked for the Second Circuit after law school and for Supreme Court Justice William Rehnquist after that. After my time as a clerk, I worked for the DOJ and the White House Counsel's office (under Ronald Regan). I then worked in private practice at Hogan and Hartson (now Hogan Lovells) during most of the 90s. While there, I argued 39 cases to the US Supreme Court; I won 25 of them. When I was appointed to the D.C. Circuit Court of Appeals in 2003, I took an 82% pay cut (from $1M to $171,800, annually).

I assumed my duties as the 17th Chief Justice of the US Supreme Court on September 29, 2005. In 2009, I administered the Oath of Office to President Barack Obama, who opposed my confirmation as a Senator. This marked the first time a president was sworn in by someone whose confirmation he opposed.

While on the Supreme Court I have authored the following high-profile majority opinions:

- *Parents Involved in Community Schools v. Seattle School District No. 1* (race-conscious objectives to achieve diversity in schools may be acceptable, but public schools may not use race as the sole determining factor for assigning students to schools);
- *Shelby County v. Holder* (Section 4(b) of the Voting Rights Act of 1965 held unconstitutional because the coverage formula was based on data over 40 years old, making it no longer responsive to current needs and therefore an impermissible burden on federalism and state sovereignty) and
- *National Federation of Independent Business v. Sebelius* (upholding Congress' power to enact most provisions of the Affordable Care Act (ACA), a/k/a Obamacare; the individual mandate to buy health insurance is a constitutional exercise of Congress' taxing power)

I also authored a blistering dissent in the 2015 *Windsor* case, which legalized same sex marriage in all 50 states. I made it clear that I believed SCOTUS had overstepped its bounds and that the decision did not have anything to do with the Constitution. My dissent is perhaps made all the more interesting by the fact that while I was in private practice I did pro bono work on the 1996 case of *Romer v. Evans*, which challenged the constitutionality of a Colorado law that allowed discrimination against people on the basis of their orientation.

POLITICS

Dylan Citings in Court

By ADAM LIPTAK FEB. 22, 2016

Bob Dylan's pointed and versatile lyrics are cited in judicial opinions more than those of any other songwriter. A sampling:

Expert Witnesses

Los Angeles Unified School District v. Superior Court (Court of Appeals of California, 2014)

Courts have often eschewed the need for expert testimony when matters are within common knowledge and experience. Both Federal and California state courts have explained the essence of this rule by citing singer-songwriter Bob Dylan: "You don't need a weatherman to know which way the wind blows."

Consumer Fraud

Kinkopf v. Triborough Bridge & Tunnel Authority (New York City Civil Court, 2003)

Rather than provide any documentation to support his contention, such as showing that his vehicles were elsewhere at those times and places, claimant offers the Bob Dylan "It Ain't Me, Babe" plea.

Sex Discrimination

Los Angeles Unified School District v. Superior Court (Court of Appeals of California, 2014)

The Civil Rights Act of 1964 was the culmination of decades of debate and political maneuvering over various civil rights proposals. It was in this time that Bob Dylan warned, "Come senators, congressmen, please heed the call. Don't stand in the doorway, don't block up the hall." Bob Dylan, "The Times They Are a-Changin' " on "The Times They Are a-Changin' " (Sony Music Entertainment /Columbia Records, 1964).

Chief justice explains his Bob Dylan quote and the reason for a missing 'ain't'

POSTED FEBRUARY 22, 2016, 11:54 AM CST

BY DEBRA CASSENS WEISS (HTTP://WWW.ABAJOURNAL.COM/AUTHORS/4/)

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Bob Dylan is the most cited songwriter in judicial opinions, and the reason may be traced to Chief Justice John G. Roberts Jr.

Dylan quotations increased after Roberts wrote a 2008 dissent arguing that parties in the litigation did not have standing, the New York Times reports in a Sidebar column (http://nyti.ms/1QbrH42). Roberts asserted that the parties didn't have a direct, personal stake in the litigation to justify standing, and he quoted Dylan (http://www.abajournal.com/news/article/chief_justice_cites_bob_dylan_but_corrects_the_grammar/) this way: "When you got nothing, you got nothing to lose."

Dylan actually sings "When you ain't got nothing, you got nothing to lose." The lyrics are from "Like a Rolling Stone" from the *Highway 61 Revisited* album.

Roberts was asked about the Dylan quote during a Feb. 3 appearance at New England Law in Boston, the Sidebar column points out.

"Bob Dylan captured the whole notion behind standing," Roberts said. "In that case, the party didn't have anything at stake in the case and had nothing to lose, and the case should have been thrown out on that basis."

The interviewer, New England law dean John O'Brien, asked about the missing "ain't." Roberts said "ain't" is in the song "as performed" but "the liner notes show that it doesn't have the 'ain't in it."

"I'm a bit of a textualist," Roberts explained.

The Sidebar column says it's true that Dylan's website posts the lyric as used by Roberts. The liner notes, though, did not have the lyrics, according to the Times. "The back cover was instead devoted to an extended surrealistic poem from Mr. Dylan that seemed aimed at confounding the intelligent layperson," the story reports.

Justice Thurgood Marshall

1. Did I or did I not ever greet Chief Justice Warren as ""What's shaking, chiefy baby?"
    a. Answer: TRUE

2. Who was my controversial replacement?
    a. Answer: Clarence Thomas replaced me on SCOTUS.

3. When asked how I think I will go, did I say, "I have a lifetime appointment and I intend to serve it. I expect to die at 110, shot by a jealous husband."
    a. Answer, True

4. How old was I when I successfully argued my first case before SCOTUS.
    a. Answer: 32 years old

5. Who was my nominating President that said it was "the right thing to do, the right time to do it, the right man, and the right place."
    a. Answer: President Lyndon B. Johnson.

6. Did I contemplate a career as a veterinarian or dentist?
    a. Answer, Marshall was originally planning on being a dentist.

7. I famously stated the following after an Oklahoma case opinion: "[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process…"
    a. Can you name the Oklahoma Case.? Answer: *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), Majority Opinion.

8. Have I or another justice on stage argued more cases before the SCOTUS than any other one person in history?

    a. Answer-T. Marshall

9. In 1930, was I rejected from joining the University School of Law at Maryland or Harvard, because of race?
    a. Answer, University School of Law at Maryland

10. Name the case I litigated the ground breaking case that determined segregated public schools was unconstitutional?
    a. Answer. (Brown v. Brd of Education).

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Thurgood Marshall Biography.com

"Thurgood Marshall stands alongside Martin Luther King Jr. and Malcolm X as one of the greatest and most important figures of the American Civil Rights Movement. And although he may be the least popularly celebrated of the three, Marshall was arguably the most instrumental in the movement's achievements toward racial equality. Marshall's strategy of attacking racial inequality through the courts represented a third way of pursuing racial equality, more pragmatic than King's soaring rhetoric and less polemical than Malcolm X's strident separatism. In the aftermath of Marshall's death, an obituary read: "We make movies about Malcolm X, we get a holiday to honor Dr. Martin Luther King, but every day we live with the legacy of Justice Thurgood Marshall.""

Source: https://www.biography.com/people/thurgood-marshall-9400241

- Thurgood Marshall was born July 2, 1908 in Baltimore, Maryland;
- Education: Howard University School of Law, Lincoln University, Colored High and Training School (Frederick Douglass High School)
- Marshall married Vivian "Buster" Burey in 1929, and they remained married until her death in 1955. Marshall later married Cecilia Suyat. They had two sons, Thurgood Jr. and John Marshall.
- He and his wife moved in with his parents, and his mother sold her wedding ring to help pay for his law school.
- After graduating from Howard University School of Law, Thurgood Marshall denied a postgraduate scholarship to Harvard and briefly attempted

to establish his own practice in Baltimore. A few people came to him for help, unable to pay. Marshall turned none of them away.

- In 1934, he began working for the Baltimore branch of the National Association for the Advancement of Colored People.. As counsel to the NAACP, he championed equality for African Americans. In 1954, he won the *Brown v. Board of Education* case, in which the Supreme Court ended racial segregation in public schools.
- In 1967, Thurgood Marshall became the first African-American justice of the Supreme Court. He served for 24 years.
- Marshall joined a liberal Supreme Court headed by Chief Justice Earl Warren. As a Supreme Court justice, Marshall consistently supported rulings upholding a strong protection of individual rights and liberal interpretations of controversial social issues.
- In the 1972 case *Furman v. Georgia*, Marshall wrote a concurring opinion, articulating that the death penalty was unconstitutional in all circumstances. For a time this led to a de facto moratorium on the death penalty until a gradually more conservative court later reinstated the death penalty.
- Marshall retired from the Supreme Court in 1991.
- He died in Maryland on January 24, 1993.

Summary of *Furman v. Georgia*, 408 U. S. 238 (1972): In the case of an accidental burglary death, the Court found that the death penalty constituted cruel and unusual punishment.

Facts of the case:
Furman was discovered while he was in the process of burglarizing a private home. As he attempted to flee, he tripped and fell and the gun that he was carrying went off and killed a resident of the home. Furman was convicted of murder and sentenced to death. Heard collectively by the Court along with Furman, two other death penalty cases were decided: Jackson v. Georgia and Branch v. Texas, which concerned the constitutionality of the death sentence for rape and murder convictions, respectively.

Question:
Does the imposition and carrying out of the death penalty in these cases constitute a violation of the Eighth and Fourteenth Amendments as cruel and unusual punishment?

Conclusion:
Yes. The Court issued a one-page per curiam opinion holding that the imposition of the death penalty in these cases constituted cruel and unusual punishment in violation the Constitution. In separate concurrences and dissents, the justices articulated their views on this controversial subject. While Justices Brennan and Marshall believed the death penalty to be unconstitutional in all instances, other concurrences focused on the arbitrary nature with which death sentences had been imposed, often indicating a racial bias against black defendants.

In his concurrence, Justice Marshall developed a four-pronged test where anyone of the following would constitute a "cruel and unusual punishment"

1. Great physical pain is experienced;
2. Previous punishments that are inhumane
3. Excessive and serves no "legislative purpose" (such as retribution, deterrence, prevention of criminal acts, encouragement of guilty pleas, eugenics, and economy).
4. If public perceives they are "cruel and unusual"

Marshall found that all four of these prongs applied to the death penalty and the "legislative purposes" listed were either ineffective or invalid. Therefore, he said, the death penalty is, per se, invalid.

The Court overturned Furman's execution, stating that unless a uniform policy of determining who is eligible for capital punishment exists, the death penalty will be regarded as "cruel and unusual punishment."

The Court found 39 of the 40 state death penalty statutes to be unconstitutional and forced states and the national legislature to rethink and revamp their statutes for capital offenses in order to assure that the death penalty would not be administered in a capricious or discriminatory manner.

Sources:
"Furman v. Georgia." *Oyez,* 12 Sep. 2017, www.oyez.org/cases/1971/69-5030.;
http://www.casebriefsummary.com/furman-v-georgia/; and
https://search.proquest.com/docview/275681992

Justice Sandra Day O'Connor clues (hardest to easiest):

Question #1: Shortly after joining the court, you made clear that gender equality applied to men as well as women. Can you tell us about that case?

Answer: In 1982, I wrote the majority opinion in *Mississippi University for Women v. Hogan*, in which the court ruled 5-4 that a state nursing school had to admit men after traditionally having been a women's-only institution.

Question #2: You cast the deciding vote in many cases during your tenure on the Court. In what 2003 case did you cast the deciding vote which had far-reaching impact on university admissions policies?

Answer: I cast the deciding vote in *Grutter v. Bollinger* (2003), a case which affirmed that state colleges and universities could use affirmative action in their admissions policies to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. In looking toward a brighter future, I stated, "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Question #3: What was your first job after law school.

Answer: After graduating from Stanford University with a degree in economics, I attended Stanford Law. Following law school, I had very limited opportunities in the legal field, so I struggled to find a job and worked without pay for the county attorney of California's San Mateo region just to get my foot in the door.

Question #4: After retiring from the Supreme Court, you were appointed to a prestigious position in academia. What was that position?

Answer: In 2005, I was named the twenty-third Chancellor of the College of William & Mary in Williamsburg, Virginia, a position formerly held by Justice Warren Burger.

Question #5: Where were you born?

Answer: I was born in El Paso, Texas, and grew up on a cattle ranch hunting jackrabbits for food. The confidence I learned during my youth, took me from the high desert to the highest court in the land.

Question #6: What interactive computer-based program did you start in 2008 to get children more engaged in civics?

Answer: I spearheaded development of the website iCivics, a free program for students to learn about the US court system. It allows students to investigate and argue actual cases and to participate in realistic government simulations.

Question #7: Your love life involved a legal love triangle that actually started in law school. Tell us about that.

Answer: During law school I briefly dated a classmate and fellow law review member, who would later become my colleague on the Court—William Rehnquist. Although our friendship and respect for each other lasted a lifetime, our brief romance did not. Ultimately, I married a different law school classmate and law review member—John. John and I were married for 55 years, when he was diagnosed with Alzheimer's disease. His disease progressed to the point that he did not know me or our children. I stepped down from the Court in 2006 to care for him, only to discover that he had begun a new relationship with a fellow patient in the nursing home. Far from being bitter, I was thrilled that he found happiness despite his progressing disease.

Question #8: Your nomination to the Supreme Court sparked outrage for many reasons, but which Oklahoma senator was particularly opposed to your nomination?

Answer: Oklahoma senator Don Nickles personally called the White House to express his discontent over my nomination because he suspected (correctly) that I would not vote to overturn *Roe v. Wade.*

Question #9: Although your appointment broke the gender barrier and made history, you worked hard to focus attention on your work, not your gender. Can you remind us of some of your famous quotes in that regard?

Answer: I wanted to ensure that my legacy and influence were defined by my abilities and intellect. I am quoted as saying, "The power I exert on the court depends on the power of my arguments, not my gender." And "I've always said that at the end of the day, on a legal issue, I think a wise old woman and a wise old man are going to reach the same conclusion."

Question #10: In 2009, you received a special honor fro

Answer: I received the Presidential Medal of Freedom from President Barak Obama on August 12, 2009, along with Desmond Tutu, Stephen Hawking, Sidney Poitier, and twelve others. The certificate I received that said: "Sandra Day O'Connor has paved the way for millions of women to achieve their dreams. Completing law school [at Stanford] in just two years, she graduated third in her class at a time when women rarely entered the legal profession. With grace and humor, tenacity and intelligence, she rose to become the first woman on the United States Supreme Court. Her historic 25-term tenure on the Court was defined by her integrity and independence, and she has earned the Nation's lasting gratitude for her invaluable contributions to history and the law."

Justice O'Connor Case Info
RBG Inn of Court
September 2017 Pupillage Group
Prepared by Shannon E. Bickham

Justice O'Connor was the first female justice appointed to the Supreme Court. She served on the Court for 25 years.

She was considered a federalist and moderate Republican.

Justice O'Connor tended to approach each case narrowly without arguing for sweeping precedents.

She more frequently sided with the conservative bloc (82 times) but sided with the liberal bloc only 28 times. Later in her tenure, she was the swing opinion in many cases. Many of her concurring opinions limited the reach of the majority holding.

In her first year on the Court, she received more that 60,000 letters from the public. This is the most received by any justice in history.

One of Justice O'Connor most famous cases, in which she joined with the majority, was:

1. **Planned Parenthood v. Casey (1992)**

Landmark United States Supreme Court case in 1992, in which the constitutionality of several Pennsylvania state statutory provisions regarding abortion was challenged.

The Court's plurality opinion, in which Justice O'Connor joined, reaffirmed the central holding of *Roe v. Wade* stating that "matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."

The Court's plurality opinion upheld the constitutional right to have an abortion while altering the standard for analyzing restrictions on that right, crafting the "undue burden" standard for abortion restrictions.

Planned Parenthood v. Casey differs from *Roe,* however, because under *Roe* the state could not regulate abortions in the first trimester whereas under *Planned Parenthood v. Casey* the state can regulate abortions in the first trimester, or any point before the point of viability, and beyond as long as that regulation does not pose an undue burden on women's fundamental right to an abortion. Applying this new standard of review, the Court upheld four regulations and invalidated the requirement of spousal notification.

"Liberty finds no refuge in a jurisprudence of doubt," began Justice O'Connor and Justices Souter and Kennedy in the plurality opinion.

They also said "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."

2. Other Notable Opinions:

- **Bush v. Gore (2000)**: Justice O'Connor acted as the swing vote in the historic 5-4 decision to uphold the Florida secretary of state's original certification of Florida's electoral votes—effectively naming George W. Bush our 43rd president. Asked by Wolf Blitzer in 2010 "if the right man was selected," she responded: "Well, the man who got the most votes. That's what it comes down to at the end of the day."

- **Hamdi v. Rumsfeld (2004)**: Justice O'Connor penned the court's opinion declaring, in a reversal of Bush administration policy, that even citizens designated "enemy combatants" have the right to challenge their imprisonment "before a neutral decision maker," asserting that "a state of war is not a blank check ... when it comes to the rights of the Nation's citizens."

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Huang v. City of Los Angeles, 9th Cir.(Cal.), February 18, 2016

132 S.Ct. 2566
Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS et al., Petitioners,
v.
Kathleen SEBELIUS, Secretary of Health and Human Services, et al.
Department of Health and Human Services, et al., Petitioners,
v.
Florida, et al.
Florida, et al., Petitioners,
v.
Department of Health and Human Services et al.

Nos. 11–393, 11–398, 11–400.
|
Argued March 26, 27, 28, 2012.
|
Decided June 28, 2012.

*** Start Section
... was a "tax" that was within Congress's taxing powers;

[4] statutory provision giving Secretary of Health and Human Services (HHS) the authority to penalize States that chose not to participate in Act's expansion of Medicaid program exceeded Congress's power under the Spending Clause; and

[5] the penalization provision was severable.

Affirmed in part and reversed in part.

Justice Ginsburg filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Justice Sotomayor joined, and in which Justices Breyer and Kagan joined in part.

Justices Scalia, Kennedy, Thomas, and Alito filed a dissenting opinion.

Justice Thomas filed a dissenting opinion.

West Headnotes (37)

[1] **States** ⇐ Powers Reserved to States

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.

20 Cases that cite this headnote

[2] **Constitutional Law** ⇦ United States Constitution

The Federal Government is acknowledged by all to be one of enumerated powers, that is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers.

7 Cases that cite this headnote

[3] **Constitutional Law** ⇦ United States Constitution

The Constitution's enumeration of powers for the Federal Government is also a limitation of powers, because the enumeration presupposes something not enumerated.

7 Cases that cite this headnote

[4] **Constitutional Law** ⇦ United States Constitution

The Constitution's express conferral of some powers for the Federal Government makes clear that it does not grant others, and the Federal Government can exercise only the powers granted to it.

3 Cases that cite this headnote

...

In exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions; these offers may well induce the States to adopt policies that the Federal Government itself could not impose. U.S.C.A. Const. Art. 1, § 8, cl. 1.

6 Cases that cite this headnote

[13] **Constitutional Law** ⇦ Clearly, positively, or unmistakably unconstitutional

Constitutional Law ⇦ Invalidation, annulment, or repeal of statutes

Proper respect for a co-ordinate branch of the government requires that the court strike down an Act of Congress only if the lack of constitutional authority to pass the act in question is clearly demonstrated.

8 Cases that cite this headnote

[14] **Constitutional Law** ⇦ Policy

Constitutional Law ⇦ Encroachment on Executive

Federal Courts ⇦ Jurisdiction, powers, and authority in general

Members of the Supreme Court are vested with the authority to interpret the law, but they possess neither the expertise nor the prerogative to make policy judgments; those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them, and it is not the Court's job to protect the people from the consequences of their political choices.

18 Cases that cite this headnote

[15] **Constitutional Law** ⇦ Policy

Constitutional Law ⇦ Encroachment on Executive

The Supreme Court's deference to the Nation's elected leaders in matters of policy cannot become abdication in matters of law, and the Court's respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed.

2 Cases that cite this headnote

[16] **Constitutional Law** ⇦ Invalidation, annulment, or repeal of statutes

It is the responsibility of the Supreme Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits.

1 Cases that cite this headnote

[17] **Internal Revenue** ⇦ Taxes and Suits Within Statutory Prohibition

Internal Revenue ⇦ Nature, form and exclusiveness of remedy

The Anti–Injunction Act protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes, and because of the Anti–Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund. 26 U.S.C.A. § 7421(a).

25 Cases that cite this headnote

...

*** Start Section
... Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage by 2014 to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. § 1396a(a)(10)(A)(i)(VIII). The Act increases federal funding to cover the States' costs in expanding Medicaid coverage. § 1396d(y)(1). But if a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. § 1396c.

Twenty-six States, several individuals, and the National Federation of Independent Business brought suit in Federal District Court, challenging the constitutionality of the individual mandate and the Medicaid expansion. The Court of Appeals for the Eleventh Circuit upheld the Medicaid expansion as a valid exercise of Congress's spending power, but concluded that Congress lacked authority to enact the individual mandate. Finding the mandate severable from the Act's other provisions, the Eleventh Circuit left the rest of the Act intact.

Held: The judgment is affirmed in part and reversed in part.

648 F.3d 1235, affirmed in part and reversed in part.

1. Chief Justice ROBERTS delivered the opinion of the Court with respect to Part II, concluding that the Anti–Injunction Act does not bar this suit.

The Anti–Injunction Act...

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... Congress the power "to pay the Debts and provide for the ... general Welfare of the United States." Art. I, § 8, cl. 1. Congress may use this power to establish cooperative state-federal Spending Clause programs. The legitimacy of Spending Clause legislation, however, depends on whether a State voluntarily and knowingly accepts the terms of such programs. *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York, supra,* at 178, 112 S.Ct. 2408, 120 L.Ed.2d 120. When Congress threatens to terminate other grants as a means of pressuring the States to accept a Spending Clause program, the legislation runs counter to this Nation's system of federalism. Cf. *South Dakota v. Dole,* 483 U.S. 203, 211, 107 S.Ct. 2793, 97 L.Ed.2d 171. Pp. 2633 – 2637.

(b) Section 1396c gives the Secretary of Health and Human Services the authority to penalize States that choose not to participate in the Medicaid expansion by taking away their existing Medicaid funding. 42 U.S.C. § 1396c. The threatened loss of over 10 percent of a State's overall budget is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion. The Government claims that the expansion is properly viewed as only a modification of the existing program, and that this modification is permissible because Congress reserved the "right to alter, amend, or repeal any provision" of Medicaid. § 1304....

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... of the Court with respect to Parts I, II, and III–C, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined; an opinion with respect to Part IV, in which BREYER and KAGAN, JJ., joined; and an opinion with respect to Parts III–A, III–B, and III–D. GINSBURG, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to Parts I, II, III, and IV. SCALIA, KENNEDY, THOMAS, and ALITO, JJ., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion.

Attorneys and Law Firms

Paul D. Clement, for Petitioners.

Edwin S. Kneedler, for Respondents.

H. Bartow Farr, III, appointed by this Court, as amicus curiae.

Michael A. Carvin, for respondents National Federation of Independent Business.

Donald B. Verrilli, Jr., Solicitor General, Washington, D.C., for Respondents.

Karen R. Harned, Washington, Randy E. Barnett, Washington, DC, Michael A. Carvin, Gregory G. Katsas, C. Kevin Marshall, Hashim M. Mooppan, Yaakov M. Roth, Jones Day, Washington, DC, for Private Petitioners.

**2576 Pamela Jo Bondi, Attorney General of Florida, Scott D. Makar, Solicitor General, Louis F. Hubener, Timothy D. Osterhaus, Blaine H. Winship, Tallahassee, FL, Paul D. Clement, Erin E. Murphy, Bancroft PLLC, Washington, DC, Greg Abbott, Attorney General of Texas, Austin, TX, Alan Wilson, Attorney General of South Carolina, Columbia, SC, Luther Strange, Attorney General of Alabama, Montgomery, AL, Bill Schuette, Attorney General of Michigan,...

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... the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, an opinion with respect to Part IV, in which Justice BREYER and Justice KAGAN join, and an opinion with respect to Parts III–A, III–B, and III–D.

*530 Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum *531 level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies *532 sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

[1] *533 In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of *534 the powers actually granted" to the Federal Government " is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. Maryland,* 4 Wheat. 316, 405, 4 L.Ed. 579 (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

[2] [3] [4] The Federal Government...

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... street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does *536 not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." See, *e.g., United States v. Morrison,* 529 U.S. 598, 618–619, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

[8] [9] "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States,* 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States,* 564 U.S. 211, 222, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011).

[10] This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison, supra,* at 609, 120 S.Ct. 1740 (internal quotation marks omitted). The power over activities that substantially affect interstate commerce can be expansive. That power has been held to *537 authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his **2579 livestock, and a loan shark's extortionate collections from a neighborhood butcher shop. See *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed....

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... their drinking age to 21).

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, § 8, cl.

18. We have long read this provision to give Congress great latitude in exercising its powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch,* 4 Wheat., at 421.

[13] **[14]** Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's ***538** elected leaders. "Proper respect for a coordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States v. Harris,* 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

[15] **[16]** Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."...

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... as tax penalties, such as the penalty for claiming too large an income tax refund. 26 U.S.C. § 5000A(g)(1). The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. § 5000A(g)(2). And some individuals who are subject to the mandate are nonetheless exempt ***540** from the penalty—for example, those with income below a certain threshold and members of Indian tribes. § 5000A(e).

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs—who are both respondents and petitioners here, depending on the issue—were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress's powers under Article I of the Constitution. The District Court agreed, holding that Congress lacked constitutional power to enact the individual mandate. 780 F.Supp.2d 1256 (N.D.Fla.2011). The District Court determined that the individual mandate could not be severed from the remainder of the Act, and therefore struck down the Act in its entirety. *Id.,* at 1305–1306.

The Court of Appeals for the Eleventh Circuit affirmed in part and reversed in ****2581** part. The court affirmed the District Court's holding that the individual mandate exceeds Congress's power. 648 F.3d 1235 (2011). The panel unanimously agreed that the...

*** Start Section
... activity have tremendous potential to ... reduce health care costs").

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures —joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." The Federalist No. 45, at 293. While Congress's authority under the Commerce Clause has of course expanded with the growth of the national

economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland v. Wirtz,* 392 U.S. 183, 196, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968). The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist ***555** No. 48, at 309 (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government. [6]

To an economist, perhaps, there is no difference...

*** Start Section
... a federal tax on employers that was abated if the businesses paid into a state unemployment plan that met certain federally specified conditions. An employer sued, alleging that the tax was impermissibly "driv[ing] the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." 301 U.S., at 587, 57 S.Ct. 883. We acknowledged the danger that the Federal Government might employ its taxing power to exert a "power akin to undue influence" upon the States. *Id.,* at 590, 57 S.Ct. 883. But we observed ***579** that Congress adopted the challenged tax and abatement program to channel money to the States that would otherwise have gone into the Federal Treasury for use in providing national unemployment services. Congress was willing to direct businesses to instead pay the money into state programs only on the condition that the money be used for the same purposes. Predicating tax abatement on a State's adoption of a particular type of unemployment legislation was therefore a means to "safeguard [the Federal Government's] own treasury." *Id.,* at 591, 57 S.Ct. 883. We held that "[i]n such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power." *Ibid.*

In rejecting the argument that the federal law was a "weapon[ ] of coercion, destroying or impairing the autonomy of the states," the Court noted that there was no reason to suppose that the State in that case acted other than through "her unfettered will." ...

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... 1388–166 (extending eligibility, and conditioning old and new funds).

The Medicaid expansion, however, accomplishes a shift in kind, not merely degree. The original program was designed to cover medical services for four particular categories of the needy: the disabled, ****2606** the blind, the elderly, and needy families with dependent children. See 42 U.S.C. § 1396a(a)(10). Previous amendments to Medicaid eligibility merely altered and expanded the boundaries of these categories. Under the Affordable Care Act, Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level. It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage. [14]

***584** Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program. Congress created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion. While Congress pays 50 to 83 percent of the costs of covering individuals currently enrolled in Medicaid, § 1396d(b), once the expansion is fully implemented Congress will pay 90 percent of the costs for newly eligible persons, § 1396d(y)(1). The conditions on use of the different funds are also distinct. Congress mandated that newly...

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... women and increasing the number of eligible children. *Ibid.* But this modification can hardly be described as a major change in a program that—from its inception—provided health care for "families with dependent children." Previous Medicaid amendments simply do not fall into the same category as the one at stake here.

The Court in *Steward Machine* did not attempt to "fix the outermost line" where persuasion gives way to coercion. 301 U.S., at 591, 57 S.Ct. 883. The Court found it "[e]nough for present purposes that wherever the line may be, this statute is within it." *Ibid.* We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply **2607 "conscript state [agencies] into the national bureaucratic army," *FERC v. Mississippi,* 456 U.S. 742, 775, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part), and that is what it is attempting to do with the Medicaid expansion.

B

[35] **[36]** **[37]** Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. Section 1396c gives the Secretary of Health and Human Services the authority to do just that. It allows her to withhold *all* "further...

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... Justice SOTOMAYOR joins, and with whom Justice BREYER and Justice KAGAN join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part.
I agree with THE CHIEF JUSTICE that the Anti–Injunction Act does not bar the Court's consideration of these cases, and that the minimum coverage provision is a proper exercise of Congress' taxing power. I therefore join Parts I, II, and III–C of THE CHIEF JUSTICE's opinion. Unlike THE CHIEF JUSTICE, however, I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

I

The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to THE CHIEF JUSTICE, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive.

Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *United States v. Darby,* 312 U.S. 100, 115, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (overruling *Hammer v. Dagenhart,* 247 U.S. 251, 38 S.Ct. 529, 62 L.Ed. 1101 (1918), **590** and recognizing that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause"); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("[The commerce] power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it." (internal quotation marks omitted)). THE CHIEF JUSTICE's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. See, *e.g.*, *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362, 368, 55 S.Ct. 758, 79 L.Ed. 1468 (1935) (invalidating compulsory retirement and pension plan for employees of carriers subject to the Interstate Commerce Act; Court found law related essentially "to the social welfare of the worker, and therefore remote from any regulation of commerce as such"). It is a reading that should not have staying power.

A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. 42 U.S.C. § 18091(2)(B) (2006 ed., Supp. IV). Within the next decade, it is anticipated, spending on health care will nearly double. *Ibid.*

**2610 The health-care market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U.S. Adults: National Health Interview *591 Survey 2009, Ser. 10, No. 249, p. 124 (Dec. 2010) (Table 37) (Over 99.5% of adults above 65 have visited a health-care professional.). Most people will do so repeatedly. See *id.*, at 115 (Table 34) (In 2009 alone, 64% of adults made two or more visits to a doctor's office.).

When individuals make those visits, they face another reality of the current market for medical care: its high cost. In 2010, on average, an individual in the United States incurred over $7,000 in health-care expenses. Dept. of Health and Human Services, Centers for Medicare and Medicaid Services, Historic National Health Expenditure Data, National Health Expenditures: Selected Calendar Years 1960–2010 (Table 1). Over a lifetime, costs mount to hundreds of thousands of dollars. See Alemayehu & Warner, The Lifetime Distribution of Health Care Costs, in 39 Health Services Research 627, 635 (June 2004). When a person requires nonroutine care, the cost will generally exceed what he or she can afford to pay. A single hospital stay, for instance, typically costs upwards of $10,000. See Dept. of Health and Human Services, Office of Health Policy, ASPE Research Brief: The Value of Health Insurance 5 (May 2011). Treatments for many serious, though not uncommon, conditions similarly cost a substantial sum. Brief for Economic Scholars as *Amici Curiae* in No. 11–398, p. 10 (citing a study indicating that, in 1998...

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.... Combined, private health insurers and State and Federal Governments finance almost 85% of the medical care administered to U.S. residents. See Congressional Budget Office, CBO's 2011 Long–Term Budget Outlook 37 (June 2011).

Not all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. See Dept. of Commerce, Census Bureau, C. DeNavas–Walt, B. Proctor, & J. Smith, Income, Poverty, and Health Insurance Coverage in the United States: 2009, p. 23, (Sept. 2010) (Table 8). As a group, uninsured individuals **2611 annually consume more than $100 billion in healthcare services, nearly 5% of the Nation's total. Hidden Health Tax: Americans Pay a Premium 2 (2009), available at http://www.familiesusa.org (all Internet materials as visited June 25, 2012, and included in Clerk of Court's case file). Over 60% of those without insurance visit a doctor's office or emergency room in a given year. See Dept. of Health and Human Services, National Center for Health Statistics, Health—United States —2010, p. 282, (Feb. 2011) (Table 79).

B

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. See 42 U.S.C. § 18091(2). As just noted, the cost of emergency care or treatment for a serious illness generally exceeds what an individual can afford to pay on her own. Unlike markets for most products, however, the inability to

*593 pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient's ability to pay. See, *e.g.*, 42 U.S.C. § 1395dd; Fla. Stat. § 395.1041(3)(f) (2010); Tex. Health & Safety Code Ann. §§ 311.022(a) and (b) (West 2010); American Medical Association, Council on Ethical and Judicial Affairs, Code of Medical Ethics,...

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... year and will receive medical care despite their inability to pay. In anticipation of this uncompensated care, health-care companies raise their prices, and insurers their premiums. In other words, because any uninsured person may need medical care at any moment and because health-care companies must account for that risk, every uninsured person impacts the market price of medical care and medical insurance.

The failure of individuals to acquire insurance has other deleterious effects on the health-care market. Because those without insurance generally lack access to **2612 preventative care, they do not receive treatment for conditions—like hypertension and diabetes—that can be successfully and affordably treated if diagnosed early on. See Institute of Medicine, National Academies, Insuring America's Health: Principles and Recommendations 43 (2004). When sickness finally drives the uninsured to seek care, once treatable conditions have escalated into grave health problems, requiring more costly and extensive intervention. *Id.*, at 43–44. The extra time and resources providers spend serving the uninsured lessens the providers' ability to care for those who do have insurance. See Kliff, High Uninsured Rates Can Kill You—Even if You Have Coverage, Washington Post (May 7, 2012) (describing a study of California's health-care market which found that, when hospitals divert time and resources to provide uncompensated care, the quality of care the hospitals deliver to those with insurance drops significantly), available at...

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... on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors." *Davis,* 301 U.S., at 644, 57 S.Ct. 904. See also Brief for Health Care for All, Inc., et al. as *Amici Curiae* in No. 11–398, p. 4 ("[O]ut-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts hospitals, limiting the State's efforts to improve its health care system through the elimination of uncompensated care."). Facing that risk, individual States are unlikely to take the initiative in addressing the problem of the uninsured, even though solving that problem is in all States' best interests. Congress' intervention was needed to overcome this collective-action impasse.

D

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers *596 and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. See **2613 26 U.S.C.§ 5000A (2006 ed., Supp. IV) (the minimum coverage provision). As explained below, by employing...

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... insurers from New York's individual [insurance] market."); Brief for Barry Friedman et al. as *Amici Curiae* in No. 11–398, p. 17 ("In Kentucky, all but two insurers (one State-run) abandoned the State.").

Massachusetts, Congress was told, cracked the adverse selection problem. By requiring most residents to obtain insurance, see Mass. Gen. Laws, ch. 111M, § 2 (West 2011), *599 the Commonwealth ensured that insurers would not

be left with only the sick as customers. As a result, federal lawmakers observed, Massachusetts succeeded where other States had failed. See Brief for Commonwealth of Massachusetts as *Amicus Curiae* in No. 11–398, at 3 (noting that the Commonwealth's reforms reduced the number of uninsured residents to less than 2%, the lowest rate in the Nation, and cut the amount of uncompensated care by a third); 42 U.S.C. § 18091(2)(D) (2006 ed., Supp. IV) (noting the success of Massachusetts' reforms). [2] In coupling the minimum coverage provision with guaranteed-issue and community-rating prescriptions, Congress followed Massachusetts' lead.

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U.S. residents **2615 who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

II

A

The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem that gave rise to the Constitution itself." *EEOC v. Wyoming,* 460 U.S. 226, 244, 245, n. 1, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (Stevens, J., concurring) (citing sources). Under the Articles of Confederation, the Constitution's *600 precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole. See Vices of the Political System of the United States, in James Madison: Writings 69, 71, ¶ 5 (J. Rakove ed. 1999) (As a result of the "want of concert in matters where common interest requires it," the "national dignity, interest, and revenue [have] suffered."). [3]

What was needed was a "national Government ... armed with a positive & compleat authority in all cases where uniform measures are necessary." See Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 Papers of James Madison 368, 370 (R. Rutland ed. 1975). See also Letter from George Washington to James Madison (Nov. 30, 1785), in 8 *id.,* at 428, 429 ("We are either a United people, or we are not. If the former, let us, in all matters of general concern act as a nation, which ha[s] national objects to promote, and a national character to support."). The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent." 2 Records of the Federal Convention of 1787, pp. 131–132, ¶ 8 (M. Farrand rev. 1966). See also *North American Co. v. SEC,* 327 U.S. 686, 705, 66 S.Ct. 785, 90 L.Ed. 945 (1946) ("[The commerce power] is an affirmative power commensurate with the national needs.").

*601 The Framers understood that the "general Interests of the Union" would change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a "great outlin[e]," not a detailed blueprint, see *McCulloch v. Maryland,* 4 Wheat. 316, 407, 4 L.Ed. 579 (1819), and that its provisions included broad concepts, to be "explained by the context or by the facts of the case," Letter from James Madison to N.P. Trist (Dec. 1831), in 9 Writings of James Madison 471, 475 (G. Hunt ed. 1910). "Nothing ... can be more fallacious," Alexander Hamilton emphasized, " than to infer the extent of any power, proper to be lodged in the national government, from ... its immediate necessities. **2616 There ought to be a CAPACITY to provide for future contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." The Federalist No. 34, pp. 205, 206 (John Harvard Library ed. 2009). See also *McCulloch,* 4 Wheat., at 415 (The Necessary and Proper Clause

is lodged "in a constitution[,] intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs.").

B

Consistent with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent upon "practical" considerations, including "actual experience." *Jones & Laughlin Steel Corp.*, 301 U.S., at 41–42, 57 S.Ct. 615; see *Wickard v. Filburn*, 317 U.S. 111, 122, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *United States v. Lopez*, 514 U.S. 549, 573, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring) (emphasizing "the Court's definitive commitment to the practical conception of the commerce power"). See also *North American Co.*, 327 U.S., at 705, 66 S.Ct. 785 ("Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities." (citation omitted)). We afford Congress the leeway "to undertake to solve national ***602** problems directly and realistically." *American Power & Light Co. v. SEC*, 329 U.S. 90, 103, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. See *ibid.* See also *Wickard*, 317 U.S., at 125, 63 S.Ct. 82 ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce." (emphasis added)); *Jones & Laughlin Steel Corp.*, 301 U.S., at 37, 57 S.Ct. 615.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. See *Raich*, 545 U.S., at 17, 125 S.Ct. 2195. See also *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) ("[S]trong deference [is] accorded legislation in the field of national economic policy."); *Hodel v. Indiana*, 452 U.S. 314, 326, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) ("This [C]ourt will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent." (internal quotation marks omitted)). When appraising such legislation, we ask only (1) whether Congress had a "rational basis" for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a "reasonable connection between the regulatory means selected and the asserted ends." *Id.*, at 323–324, 101 S.Ct. 2376. See also *Raich*, 545 U.S., at 22, 125 S.Ct. 2195; *Lopez*, 514 U.S., at 557, 115 S.Ct. 1624; *Hodel v. Virginia Surface Mining &...*

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....S. 144, 152–153, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). In answering these questions, we presume the statute under review is constitutional and may strike it down only on a "plain showing" that Congress acted irrationally. *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

C

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. See *supra*, at 2610. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive

care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care. See *supra,* at 2611 – 2612.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. See *supra,* at 2610 – 2612. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent...

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..., at 128, 63 S.Ct. 82 ("It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and *practices affecting such prices*." (emphasis added)).

***604** The minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. See *supra,* at 2611 – 2612. Moreover, an insurance-purchase requirement limited to those in need of immediate care simply could not work. Insurance companies would either charge these individuals prohibitively expensive premiums, or, if community-rating regulations were in place, close up shop. See *supra,* at 2612 – 2614. See also Brief for State of Maryland et al. as *Amici*...

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... the effect of compelling farmers to purchase wheat in the open market. *Id.,* at 127–129, 63 S.Ct. 82. "[F]orcing some farmers into the market to buy what they could provide for themselves" was, the Court held, a valid means of regulating commerce. *Id.,* at 128–129, 63 S.Ct. 82. In another context, this Court similarly upheld Congress' authority under the commerce power to compel an " inactive" landholder to submit to an unwanted sale. See *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 335–337, 13 S.Ct. 622, 37 L.Ed. 463 (1893) ("[U]pon *the [great] power to regulate commerce* [,]" Congress has the authority to mandate the sale of real property to the Government, where the sale is essential to the improvement of a navigable waterway (emphasis added)); *Cherokee Nation v. Southern Kansas R. Co.,* 135 U.S. 641, 657–659, 10 S.Ct. 965, 34 L.Ed. 295 (1890) (similar reliance on the commerce power regarding mandated sale of private property for railroad construction).

****2622** In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, THE CHIEF JUSTICE views the Clause as a "technical legal conception," precisely what our case law tells us not to do. *Wickard,* 317 U.S., at 122, 63 S.Ct. 82 (internal quotation marks omitted). See also *supra,* at 2615 – 2617. This Court's former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal...

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.... While an insurance-purchase mandate may be novel, THE CHIEF JUSTICE's argument certainly is not. "[I]n almost every instance of the exercise of the [commerce] power differences are asserted from previous exercises of it and made a ground of attack." *Hoke v. United States,* 227 U.S. 308, 320, 33 S.Ct. 281, 57 L.Ed. 523 (1913). See, *e.g.,* Brief for Petitioner in *Perez v. United States,* O.T. 1970, No. 600, p. 5 ("unprecedented exercise of power"); Supplemental Brief for

Appellees in *Katzenbach v. McClung,* O.T. 1964, No. 543, p. 40 ("novel assertion of federal power"); Brief for Appellee in *Wickard v. Filburn,* O.T. 1941, No. 59, p. 6 ("complete departure"). For decades, the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing "economic and financial realities." See *supra,* at 2616. Hindering Congress' ability to do so is shortsighted; if history is any guide, today's constriction ***618** of the Commerce Clause will not endure. See *supra,* at 2621 – 2623.

III

A

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. See Part II, *supra.* When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer.

The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation." *Raich,* 545 U.S., at 39, 125 S.Ct. 2195 (SCALIA, J., concurring...

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... reliance on cases in which this Court has *affirmed* Congress' "broad authority to enact federal legislation" under the Necessary and Proper Clause, *Comstock,* 560 U.S., at 133, 130 S.Ct., at 1956, is underwhelming.

***621** Nor does THE CHIEF JUSTICE pause to explain *why* the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, see, *e.g., United States v. Fox,* 95 U.S. 670, 672, 24 L.Ed. 538 (1878); the power to imprison, including civil imprisonment, see, *e.g., Comstock,* 560 U.S., at 129–130, 130 S.Ct., at 1954; and the power to create a national bank, see *McCulloch,* 4 Wheat., at 425. See also *Jinks,* 538 U.S., at 463, 123 S.Ct. 1667 (affirming Congress' power to alter the way a state law is applied in state court, where the alteration "promotes fair and efficient operation of the federal courts"). [10]

In failing to explain why the individual mandate threatens our constitutional order, THE CHIEF JUSTICE disserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an "independent power," *ante,* at 2591, or merely a "derivative" one, *ante,* at 2592. Whether the power used is "substantive," *ante,* at 2592, or just "incidental," ****2628** *ante,* at 2592? The instruction THE CHIEF JUSTICE, in effect, provides lower courts: You will know it...

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... not operate "in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign." *Lopez,* 514 U.S., at 564, 115 S.Ct. 1624. ***622** As evidenced by Medicare, Medicaid, the Employee Retirement Income Security Act of 1974, and the Health Insurance Portability and Accountability Act of 1996, the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator.

Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. See *supra,* at 2614 – 2616. The crisis created by the large number of U.S. residents who lack health insurance is one of national dimension that States are "separately incompetent" to handle. See *supra,* at 2611 – 2612, 2615. See also Maryland Brief 15–26 (describing "the impediments to effective state policymaking that flow from the interconnectedness of each state's healthcare economy" and emphasizing that "state-level reforms cannot fully address the problems associated with

uncompensated care"). Far from trampling on States' sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States. See *id.*, at 31–36 (explaining and illustrating how the ACA affords States wide latitude in implementing key...

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..., is essentially this: To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law? The answer should be that Congress may expand by amendment the classes of needy persons entitled to Medicaid benefits. A ritualistic requirement that Congress repeal and reenact spending legislation in order to enlarge the population served by a federally funded program would advance no constitutional principle and would scarcely serve the interests of federalism. To the contrary, such a requirement would rigidify Congress' efforts to empower States by partnering with them in the implementation of federal programs.

***625** Medicaid is a prototypical example of federal-state cooperation in serving the Nation's general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs, so long as they remain within bounds set by federal law. In shaping ****2630** Medicaid, Congress did not endeavor to fix permanently the terms participating States must meet; instead, Congress reserved the "right to alter, amend, or repeal" any provision of the Medicaid Act. 42 U.S.C. § 1304. States, for their part, agreed to amend their own Medicaid plans consistent with changes from time to time made in the federal law. See 42 CFR § 430.12(c)(i) (2011). And from 1965 to the present, States have regularly conformed to Congress' alterations of the Medicaid Act.

THE CHIEF JUSTICE acknowledges that Congress may "condition the receipt of...

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... federal poverty level, children up to age 6 at the same income levels, and children ages 6 to 18 with family incomes up to 100% of the poverty level. See 42 U.S.C. §§ 1396a(a)(10)(A)(i), 1396a(*l*); ***628** Medicare Catastrophic Coverage Act of 1988, § 302, 102 Stat. 750; Omnibus Budget Reconciliation Act of 1989, § 6401, 103 Stat. 2258; Omnibus Budget Reconciliation Act of 1990, § 4601, 104 Stat. 1388–166. These amendments added millions to the Medicaid-eligible population. Dubay & Kenney, Lessons From the Medicaid Expansions for Children and Pregnant Women 5 (Apr. 1997).

Between 1966 and 1990, annual federal Medicaid spending grew from $631.6 million to $42.6 billion; state spending rose to $31 billion over the same period. See Dept. of Health and Human Services, National Health Expenditures by Type of Service and Source of Funds: Calendar Years 1960 to 2010 (Table).[14] And between 1990 and 2010, federal spending increased to $269.5 billion. *Ibid.* Enlargement of the population and services covered by Medicaid, in short, has been the trend.

Compared to past alterations, the ACA is notable for the extent to which the Federal Government will pick up the tab. Medicaid's 2010 expansion is financed ****2632** largely by federal outlays. In 2014, federal funds will cover 100% of the costs for newly eligible beneficiaries; that rate will gradually decrease before settling at 90% in 2020. 42 U.S.C. § 1396d(y) (2006 ed., Supp. IV). By comparison, federal contributions toward the care of beneficiaries eligible pre-ACA range from 50% to 83%...

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... spending. The Congressional Budget Office (CBO) projects that States will spend 0.8% more than they would have, absent the ACA. See CBO, Spending & Enrollment Detail for CBO's March 2009 Baseline. But see *ante*, at 2601 ***629** ("[T]he Act dramatically increases state obligations under Medicaid."); *post*, at 2666 (joint opinion of SCALIA, KENNEDY, THOMAS, and ALITO, JJ.) ("[A]cceptance of the [ACA expansion] will impose very substantial costs

on participating States."). Whatever the increase in state obligations after the ACA, it will pale in comparison to the increase in federal funding. [15]

Finally, any fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act. Far from "conscript[ing] state agencies into the national bureaucratic army," *ante,* at 2607 (citing *FERC v. Mississippi,* 456 U.S. 742, 775, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part); some brackets and internal quotation marks omitted), Medicaid "is designed to advance cooperative federalism." *Wisconsin Dept. of Health and Family Servs. v. Blumer,* 534 U.S. 473, 495, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002) (citing *Harris v. McRae,* 448 U.S. 297, 308, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980)). Subject to its basic requirements, the Medicaid Act empowers States to "select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover (or not to cover) a range of particular procedures and therapies. States have leveraged this policy discretion to generate a myriad of dramatically different Medicaid programs over the past several decades." Ruger, Of Icebergs and Glaciers, 75 Law & Contemp. Prob. 215, 233 (2012) (footnote omitted). The ACA does not jettison this approach. States, as first-line administrators, will continue to guide the distribution of substantial resources among their needy populations.

***630** The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization. [16] In 1965, Congress elected to nationalize health coverage for seniors through Medicare. ****2633** It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner in the program's administration and development. Absent from the nationalized model, of course, is the state-level policy discretion and experimentation that is Medicaid's hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance. See Caminker, State Sovereignty and Subordinacy, 95 Colum. L. Rev. 1001, 1002–1003 (1995) (cooperative federalism can preserve "a significant role for state discretion in achieving specified federal goals, where the alternative is complete federal preemption of any state regulatory role"); Rose–Ackerman, Cooperative Federalism and Co-optation, 92 Yale L.J. 1344, 1346 (1983) ("If the federal government begins to take full responsibility for social welfare spending and preempts the states, the result is...

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... the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds. See *infra,* at 2638 (describing ****2634** *Bennett v. Kentucky Dept. of Ed.,* 470 U.S. 656, 659–660, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985) (enforcing restriction added five years after adoption of educational program)).

Yes, there are federalism-based limits on the use of Congress' conditional spending power. In the leading decision ***632** in this area, *South Dakota v. Dole,* 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987), the Court identified four criteria. The conditions placed on federal grants to States must (1) promote the "general welfare," (2) "unambiguously" inform States what is demanded of them, (3) be germane "to the federal interest in particular national projects or programs," and (4) not "induce the States to engage in activities that would themselves be unconstitutional." *Id.,* at 207–208, 210, 107 S.Ct. 2793 (internal quotation marks omitted). [18]

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement ... so coercive as to pass the point at which 'pressure turns into compulsion.' " *Id.,* at 211, 107 S.Ct. 2793 (quoting *Steward Machine Co. v. Davis,* 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937)). Prior to today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.

Dole involved the National Minimum Drinking Age Act, 23 U.S.C. § 158, enacted in 1984. That Act directed the Secretary of Transportation to withhold 5% of the federal highway funds otherwise payable to a State if the State permitted

purchase of alcoholic beverages by persons less than 21 years old. Drinking age was not within the authority of Congress to regulate, South Dakota argued, because the Twenty–First Amendment gave the States exclusive power to control the manufacture, transportation, and consumption of alcoholic beverages. The small percentage of highway-construction funds South Dakota stood to lose by adhering to 19 as the age of eligibility to purchase 3.2% beer, however, was not enough to qualify as coercion, the Court concluded.

***633** This litigation does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. In *Dole,* the condition—set 21 as the minimum drinking age—did not tell the States how to use funds Congress provided for highway construction. Further, in view of the Twenty–First Amendment, it was an open question whether Congress could directly impose a national minimum drinking age.

The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care. See *supra,* at 2632.

That is what makes this such a simple case, and the Court's decision so unsettling. Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards. The principal standard the ACA sets is that the...

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... were inclined to second-guess Congress' conception of the character of its legislation, how would reviewing judges divine whether an Act of Congress, purporting to amend a law, is in reality not an amendment, but a new creation? At what point does an extension become so large that it "transforms" the basic law?

Endeavoring to show that Congress created a new program, THE CHIEF JUSTICE cites three aspects of the expansion. First, he asserts that, in covering those earning no more than 133% of the federal poverty line, the Medicaid expansion, unlike pre-ACA Medicaid, does not "care for the neediest among us." *Ante,* at 2606. What makes that so? ***636** Single adults earning no more than $14,856 per year—133% of the current federal poverty level—surely rank among the Nation's poor.

Second, according to THE CHIEF JUSTICE, "Congress mandated that newly eligible persons receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package." *Ante,* at 2606. That less comprehensive benefit package, however, is not an innovation introduced by the ACA; since 2006, States have been free to use it for many of their Medicaid beneficiaries. [20] The level of benefits offered therefore does not set apart post-ACA Medicaid recipients from all those entitled to benefits pre-ACA.

Third, THE CHIEF JUSTICE correctly notes that the reimbursement rate for participating States is different regarding individuals who became Medicaid-eligible through the ACA. *Ibid.* But the rate differs only in its generosity to participating...

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... show, *Pennhurst* 's rule demands that conditions on federal funds be unambiguously clear at the time a State receives and uses the money—not at the time, perhaps years earlier, when Congress passed the law establishing the program. See also *Dole,* 483 U.S., at 208, 107 S.Ct. 2793 (finding *Pennhurst* satisfied based on the clarity of the Federal Aid Highway Act as amended in 1984, without looking back to 1956, the year of the Act's adoption).

In any event, from the start, the Medicaid Act put States on notice that the program could be changed: "The right to alter, amend, or repeal any provision of [Medicaid]," the statute has read since 1965, "is hereby reserved to the Congress." 42

U.S.C. § 1304. The "effect of these few simple words" has long been settled. See *National Railroad Passenger Corporation v. Atchison, T. & S.F.R. Co.*, 470 U.S. 451, 467–468, n. 22, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985) (citing *Sinking Fund Cases*, 99 U.S. 700, 720, 25 L.Ed. 496 (1879)). By reserving the right to "alter, amend, [or] repeal" a spending program, Congress "has given special notice of its intention to retain ... full and complete power to make such alterations and amendments ... as come within the just scope of legislative power." *Id.*, at 720.

Our decision in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 51–52, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), is ***640** guiding here. As enacted in 1935, the Social Security Act did not cover state employees. *Id.*, at 44, 106 S.Ct. 2390. In response to pressure from...

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... Care Admin., State Plan Under Title XIX of the Social Security Act Medical Assistance Program § 7.1, p. 86 (Oct. 6, 1992).

THE CHIEF JUSTICE insists that the most recent expansion, in contrast to its predecessors, "accomplishes a shift in kind, not merely degree." *Ante*, at 2605. But why was Medicaid altered only in degree, not in kind, when Congress required States to cover millions of children and pregnant women? See *supra*, at 2631 – 2632. Congress did not "merely alte[r] and expan[d] the boundaries of" the Aid to Families with Dependent Children program. But see *ante*, at 2605 – 2607. Rather, Congress required participating States to provide coverage tied to the federal poverty level (as it later did in the ACA), rather than to the AFDC program. See Brief for National Health Law Program et al. as *Amici Curiae* 16–18. In short, given § 1304, this Court's construction of § 1304's language in *Bowen*, and the enlargement of Medicaid in the years since 1965,[23] a State would be hard put to complain that it lacked fair notice when, in 2010, Congress altered Medicaid to embrace a larger portion of the Nation's poor.

3

***642** THE CHIEF JUSTICE ultimately asks whether "the financial inducement offered by Congress ... pass[ed] the point at which pressure turns into compulsion." *Ante*, at 2604 (internal quotation marks omitted). The financial inducement Congress employed here, he concludes, crosses ****2640** that threshold: The threatened withholding of "existing Medicaid funds" is "a gun to the head" that forces States to acquiesce. *Ante*, at 2604 (citing 42 U.S.C. § 1396c).[24]

THE CHIEF JUSTICE sees no need to "fix the outermost line," *Steward Machine*, 301 U.S., at 591, 57 S.Ct. 883, "where persuasion gives way to coercion," *ante*, at 2606. Neither do the joint dissenters. See *post*, at 2661, 2662.[25] Notably, the decision on ***643** which they rely, *Steward Machine*, found the statute at issue inside the line, "wherever the line may be." 301 U.S., at 591, 57 S.Ct. 883.

When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? *Ante*, at 2602. Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's—or States'—budget is determinative: the lead plaintiff, all challenging States (26 in this litigation, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue?[26] ***644** Or that the ****2641** coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. See *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Even commentators sympathetic to robust enforcement of *Dole*

's limitations, see *supra,* at 2633, have concluded that conceptions of "impermissible coercion" premised on States' perceived inability to decline federal funds "are just too amorphous to be judicially...

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... the only relevant sense, not true. It is true enough that everyone consumes "health care," if the term is taken to include the purchase of a bottle of aspirin. But the health care "market" that is the object of the Individual Mandate not only includes but principally consists of goods and services that the young people primarily affected by the Mandate *do not purchase.* They are quite simply not participants in that market, and cannot be made so (and thereby subjected to regulation) by the simple device of defining participants to include all those who will, later in their lifetime, probably purchase the goods or services covered by the mandated insurance.[2] Such a definition of market participants is unprecedented, and were it to be a premise for the exercise of national power, it would have no principled limits.

In a variation on this attempted exercise of federal power, the Government points out that Congress in this Act has purported to regulate "economic and financial decision[s] to forego health insurance coverage and [to] attempt to self-insure," 42 U.S.C. § 18091(2)(A), since those decisions have ***657** "a substantial and deleterious effect on interstate commerce," Petitioners' Minimum Coverage Brief 34. But as the discussion above makes clear, the decision to forgo participation in an interstate market is not itself commercial activity (or indeed any activity at all) within Congress' power to regulate. It is true that, at the end of the day, it is inevitable that each American will affect commerce and become a part...

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... in "the self-insurance market," *ibid.*, seems to us wordplay. By parity of reasoning the failure to buy a car can be called participation in the non-private-car-transportation market. Commerce becomes everything.

The dissent claims that we "fai[l] to explain why the individual mandate threatens our constitutional order." *Ante,* at 2627. But we have done so. It threatens that order because it gives such an expansive meaning to the Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers. Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government. The dissent protests that the Necessary and Proper Clause has been held to include "the power to enact criminal laws, ... the power to imprison, ... and the power to create a national bank," *ibid,.* Is not the power to compel purchase of health insurance much lesser? No, not if (unlike those other dispositions) its application rests upon a theory that everything is within federal control simply because it exists.

***659** The dissent's exposition of the wonderful things the Federal Government has achieved through exercise of its assigned powers, such as "the provision of old-age and survivors' benefits" in the Social Security Act, *ante,* at 2609, is quite beside the point. The issue here is whether the Federal Government can impose the Individual Mandate through the Commerce Clause. And the relevant history is not that Congress has achieved wide and wonderful results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce.[3] The dissent ****2650** treats the Constitution as though it is an enumeration of those problems that the Federal Government can address—among which, it finds, is "the Nation's course in the economic and social welfare realm," *ibid.,* and more specifically "the problem of the uninsured," *ante,* at 2612. The Constitution is not that. It enumerates not federally soluble *problems,* but federally available *powers.* The Federal Government can address ***660** whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce. None of our cases say anything else. Article I contains no whatever-it-takes-to-solve-a-national-problem power.

The dissent dismisses the conclusion that the power to compel entry into the health-insurance market would include the power to compel entry into the new-car or broccoli markets. The latter purchasers, it says, "will be obliged to pay at the counter before receiving the vehicle or nourishment," whereas those refusing to purchase health-insurance will ultimately get treated anyway, at others' expense. *Ante,* at 2619. "[T]he unique attributes of the health-care market ... give rise to a significant free-riding problem that does not occur in other markets." *Ante,* at 2623. And "a vegetable-purchase mandate" (or a car-purchase mandate) is not "likely to have a substantial effect on the health-care costs" borne by other Americans. *Ante,* at 2624. Those differences make a very good argument by the dissent's own lights, since they show that the failure to purchase health insurance, unlike the failure to purchase cars or broccoli, creates a national, social-welfare problem that is (in the dissent's view) included among the unenumerated "problems" that the Constitution authorizes the Federal Government to solve. But those differences do not show that the failure to enter the health-insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can "regulate." (Of course one day the failure of some of the public to purchase American cars may endanger the existence of domestic automobile manufacturers; or the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us—in which case, under the theory of Justice GINSBURG's dissent,...

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... to this argument, the Government contends that any congressional assumption about uniform state participation ***673** was based on the simple fact that the offer of federal funds associated with the expanded coverage is such a generous gift that no State would want to turn it down.

To evaluate these arguments, we consider the extent of the Federal Government's power to spend money and to attach conditions to money granted to the States.

A

No one has ever doubted that the Constitution authorizes the Federal Government to spend money, but for many years the scope of this power was unsettled. The Constitution grants Congress the power to collect taxes "to ... provide for the ... general Welfare of the United States," Art. I, § 8, cl. 1, and from "the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase" "the general welfare." *Butler,* 297 U.S., at 65, 56 S.Ct. 312. Madison, it has been said, thought that the phrase "amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section," while Hamilton "maintained the clause confers a power separate and distinct from those later enumerated [and] ****2658** is not restricted in meaning by the grant of them." *Ibid.*

The Court resolved this dispute in *Butler.* Writing for the Court, Justice Roberts opined that the Madisonian view would make Article I's grant of the spending power a "mere tautology." *Ibid.* To avoid that, he adopted Hamilton's approach and found that "the power of Congress...

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...," *Davis v. Monroe County Bd. of Ed.,* 526 U.S. 629, 654, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (KENNEDY, J., dissenting) (internal quotation marks omitted), is "limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed,' " *Dole, supra,* at 217, 107 S.Ct. 2793 (O'Connor, J., dissenting) (quoting *Butler, supra,* at 78, 56 S.Ct. 312). "[T]he Spending Clause power, if wielded without concern for the federal balance ***676** , has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the

Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis, supra,* at 654–655, 57 S.Ct. 883 (KENNEDY, J., dissenting).

Recognizing this potential for abuse, our cases have long held that the power to attach conditions to grants to the States has limits. See, *e.g., Dole,* 483 U.S., at 207–208, 107 S.Ct. 2793; *id.*, at 207, 107 S.Ct. 2793 (spending power is "subject to several general restrictions articulated in our cases"). For one thing, any such conditions must be unambiguous so that a State at least knows what it is getting into. See *Pennhurst, supra,* at 17, 101 S.Ct. 1531. Conditions must also be related "to the federal interest in particular national projects or programs," *Massachusetts v. United States,* 435 U.S. 444, 461, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978) (plurality opinion), and the conditional grant of federal funds may not "induce the States to engage in activities that would themselves be unconstitutional," *Dole, supra,* at 210, 107 S.Ct. 2793; see *Lawrence County v. Lead–Deadwood School Dist. No. 40–1,* 469 U.S. 256, 269–270, 105 S.Ct. 695, 83 L.Ed.2d 635 (1985). Finally, while Congress may seek to induce States to accept conditional grants, Congress may not cross the "point at which pressure turns into compulsion, and ceases to be inducement." *Steward Machine,* 301 U.S., at 590, 57 S.Ct. 883. Accord, *College Savings Bank, supra,* at 687, 119 S.Ct. 2219; *Metropolitan Washington Airports Authority...*

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... not exist is the fact that it would not preserve other congressional dispositions, but would leave it up to the Court what the "validated" legislation will contain. The Court today opts for permitting the cut-off of only incremental Medicaid funding, but it might just as well have permitted, say, the cut-off of funds that represent ***691** no more than *x* percent of the State's budget. The Court severs nothing, but simply revises § 1396c to read as the Court would desire.

We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to retain their pre-existing Medicaid funds. Worse, the Government's remedy, ****2668** now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court.

V

Severability

The Affordable Care Act seeks to achieve "near-universal" health insurance coverage. § 18091(2)(D) (2006 ed., Supp. IV). The two pillars of the Act are the Individual Mandate and the expansion of coverage under Medicaid. In our view, both these central provisions of the Act—the Individual Mandate and Medicaid Expansion—are invalid. It follows, as some of the parties urge, that all other provisions of the Act must fall as well. The following section explains the severability principles that require this conclusion. This analysis also shows how closely interrelated the...

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... an unconstitutional provision from the Judiciary ***692** Act of 1789. And while the Court has sometimes applied "at least a modest presumption in favor of ... severability," C. Nelson, Statutory Interpretation 144 (2011), it has not always done so, see, *e.g., Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 190–195, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999).

An automatic or too cursory severance of statutory provisions risks "rewrit [ing] a statute and giv[ing] it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd. v. Alton R. Co.,* 295 U.S. 330, 362, 55 S.Ct. 758, 79 L.Ed. 1468 (1935). The Judiciary, if it orders uncritical severance, then assumes the legislative

function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact. That can be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset.

The Court has applied a two-part guide as the framework for severability analysis. The test has been deemed "well established." *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). First, if the Court holds a statutory provision unconstitutional, it then determines whether the now truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. See *id.*...

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...—*i.e.,* the insurance regulations and taxes, the reductions in federal reimbursements to hospitals and other Medicare spending reductions, the exchanges and their federal subsidies, and the employer responsibility assessment—cannot remain once the Individual Mandate and Medicaid Expansion are invalid. That result follows from the undoubted inability of the other major provisions to operate as Congress intended without the Individual Mandate and Medicaid Expansion. Absent the invalid portions, the other major provisions could impose enormous risks of unexpected burdens on patients, the ***698** health-care community, and the federal budget. That consequence would be in absolute conflict with the ACA's design of "shared responsibility," and would pose a threat to the Nation that Congress did not intend.

a

Insurance Regulations and Taxes

Without the Individual Mandate and Medicaid Expansion, the Affordable Care Act's insurance regulations and insurance taxes impose risks on insurance companies and their customers that this Court cannot measure. Those risks would undermine Congress' scheme of "shared responsibility." ****2672** See 26 U.S.C. § 4980I (2006 ed., Supp. IV) (high-cost insurance plans); 42 U.S.C. §§ 300gg(a)(1) (2006 ed., Supp. IV), 300gg–4(b) (community rating); §§ 300gg–1, 300gg–3, 300gg–4(a) (guaranteed issue); § 300gg–11 (elimination of coverage limits); § 300gg–14(a) (dependent children up to age 26); ACA §§ 9010, 10905, 124 Stat. 865, 1017 (excise tax); HCERA § 1401, 124 Stat. 1059 (excise tax).

The Court has been...

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... health insurance premiums." 42 U.S.C. § 18091(2)(F) (2006 ed., Supp. IV). Higher costs also could threaten the survival of health-insurance companies, despite ***699** the Act's goal of " effective health insurance markets." § 18091(2)(J).

The actual cost of the regulations and taxes may be more or less than predicted. What is known, however, is that severing other provisions from the Individual Mandate and Medicaid Expansion necessarily would impose significant risks and real uncertainties on insurance companies, their customers, all other major actors in the system, and the government treasury. And what also is known is this: Unnecessary risks and avoidable uncertainties are hostile to economic progress and fiscal stability and thus to the safety and welfare of the Nation and the Nation's freedom. If those risks and uncertainties are to be imposed, it must not be by the Judiciary.

b

Reductions in Reimbursements to Hospitals and Other Reductions in Medicare Expenditures

The Affordable Care Act reduces payments by the Federal Government to hospitals by more than $200 billion over 10 years. See 42 U.S.C. §§ 1395ww(b)(3)(B)(xi)-(xii) (2006 ed., Supp. IV); § 1395ww(q); § 1395ww(r); § 1396r–4(f)(7).

The concept is straightforward: Near-universal coverage will reduce uncompensated care, which will increase hospitals' revenues, which will offset the government's reductions in Medicare and Medicaid reimbursements to hospitals. Responsibility will be shared, as burdens and benefits balance each other. This is typical of the whole dynamic of the Act.

...

4 Justice GINSBURG suggests that "at the time the Constitution was framed, to 'regulate' meant, among other things, to require action." *Post,* at 2621 (citing *Seven–Sky v. Holder,* 661 F.3d 1, 16 (C.A.D.C.2011); brackets and some internal quotation marks omitted). But to reach this conclusion, the case cited by Justice GINSBURG relied on a dictionary in which "[t]o order; to command" was the fifth-alternative definition of "to direct," which was itself the second-alternative definition of "to regulate." See *id.,* at 16 (citing S. Johnson, Dictionary of the English Language (4th ed. 1773) (reprinted 1978)). It is unlikely that the Framers had such an obscure meaning in mind when they used the word "regulate." Far more commonly, "[t]o regulate" meant "[t]o adjust by rule or method," which presupposes something to adjust. 2 *id.,* at 1619; see also *Gibbons,* 9 Wheat., at 196 (defining the commerce power as the power "to prescribe the rule by which commerce is to be governed").

5 Justice GINSBURG cites two eminent domain cases from the 1890s to support the proposition that our case law does not "toe the activity versus inactivity line." *Post,* at 2621 (citing *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 335–337, 13 S.Ct. 622, 37 L.Ed. 463 (1893), and *Cherokee Nation v. Southern Kansas R. Co.,* 135 U.S. 641, 657–659, 10 S.Ct. 965, 34 L.Ed. 295 (1890)). The fact that the Fifth Amendment requires the payment of just compensation when the Government exercises its power of eminent domain does not turn the taking into a commercial transaction between the landowner and the Government, let alone a government-compelled transaction between the landowner and a third party.

6 In an attempt to recast the individual mandate as a regulation of commercial activity, Justice GINSBURG suggests that "[a]n individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance." *Post,* at 2622. But "self-insurance" is, in this context, nothing more than a description of the failure to purchase insurance. Individuals are no more "activ[e] in the self-insurance market" when they fail to purchase insurance, *ibid.,* than they are active in the "rest" market when doing nothing.

...

14 Justice GINSBURG suggests that the States can have no objection to the Medicaid expansion, because "Congress could have repealed Medicaid [and,] [t]hereafter, ... could have enacted Medicaid II, a new program combining the pre–2010 coverage with the expanded coverage required by the ACA." *Post,* at 2636; see also *post,* at 2629. But it would certainly not be that easy. Practical constraints would plainly inhibit, if not preclude, the Federal Government from repealing the existing program and putting every feature of Medicaid on the table for political reconsideration. Such a massive undertaking would hardly be "ritualistic." *Ibid.* The same is true of Justice GINSBURG's suggestion that Congress could establish Medicaid as an exclusively federal program. *Post,* at 2632.

1 According to one study conducted by the National Center for Health Statistics, the high cost of insurance is the most common reason why individuals lack coverage, followed by loss of one's job, an employer's unwillingness to offer insurance or an insurers' unwillingness to cover those with preexisting medical conditions, and loss of Medicaid coverage. See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for the U.S. Population: National Health Interview Survey—2009, Ser. 10, No. 248, p. 71, (Dec. 2010) (Table 25). "[D]id not want or need coverage" received too few responses to warrant its own category. See *ibid.,* n. 2.

2 Despite its success, Massachusetts' medical-care providers still administer substantial amounts of uncompensated care, much of that to uninsured patients from out-of-state. See *supra,* at 2611 – 2612.

* * *

3 Alexander Hamilton described the problem this way: "[Often] it would be beneficial to all the states to encourage, or suppress[,] a particular branch of trade, while it would be detrimental ... to attempt it without the concurrence of the rest." The Continentalist No. V, in 3 Papers of Alexander Hamilton 75, 78 (H. Syrett ed. 1962). Because the concurrence of all States was exceedingly difficult to obtain, Hamilton observed, "the experiment would probably be left untried." *Ibid.*

4 See Dept. of Health and Human Services, National Center for Health Statistics, Summary Health Statistics for U.S. Adults: National Health Interview Survey 2009, Ser. 10, No. 249, p. 124 (Dec. 2010) (Table 37).

5 Echoing THE CHIEF JUSTICE, the joint dissenters urge that the minimum coverage provision impermissibly regulates young people who "have no intention of purchasing [medical care]" and are too far "removed from the [health-care] market." See *post,* at 2646, 2647. This criticism ignores the reality that a healthy young person may be a day away from needing health care. See *supra,* at 2610. A victim of an accident or unforeseen illness will consume extensive medical care immediately, though scarcely expecting to do so.

6 THE CHIEF JUSTICE's reliance on the quoted passages of the Constitution, see *ante,* at 2586 – 2587, is also dubious on other grounds. The power to "regulate the Value" of the national currency presumably includes the power to increase the currency's worth—*i.e.,* to create value where none previously existed. And if the power to "[r]egulat [e] ... the land and naval Forces" presupposes "there is already [in existence] something to be regulated," *i.e.,* an Army and a Navy, does Congress lack authority to create an Air Force?

7 THE CHIEF JUSTICE's characterization of individuals who choose not to purchase private insurance as "doing nothing," *ante,* at ——, is similarly questionable. A person who self-insures opts against prepayment for a product the person will in time consume. When aggregated, exercise of that option has a substantial impact on the health-care market. See *supra,* at 2610 – 2612, 2616 – 2618.

8 Some adherents to the joint dissent have questioned the existence of substantive due process rights. See *McDonald v. Chicago,* 561 U.S. 742, 811, 130 S.Ct. 3020, 3062, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring) (The notion that the Due Process Clause "could define the substance of th[e] righ[t to liberty] strains credulity."); *Albright v. Oliver,* 510 U.S. 266, 275, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (SCALIA, J., concurring) ("I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties[.]"). Given these Justices' reluctance to interpret the Due Process Clause as guaranteeing liberty interests, their willingness to plant such protections in the Commerce Clause is striking.

...

13 Medicaid was "plainly an extension of the existing Kerr–Mills" grant program. Huberfeld, Federalizing Medicaid, 14 U. Pa. J. Const. L. 431, 444–445 (2011). Indeed, the "section of the Senate report dealing with Title XIX"—the title establishing Medicaid—"was entitled, 'Improvement and Extension of Kerr–Mills Medical Assistance Program.' " R. Stevens & R. Stevens, Welfare Medicine in America 51 (1974) (quoting S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 9 (1965)). Setting the pattern for Medicaid, Kerr–Mills reimbursed States for a portion of the cost of health care provided to welfare recipients if States met conditions specified in the federal law, *e.g.,* participating States were obliged to offer minimum coverage for hospitalization and physician services. See Huberfeld, *supra,* at 443–444.

14 Available online at http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpend Data/NationalHealthAccountsHistorical.html.

15 Even the study on which plaintiffs rely, see Brief for Petitioners in No. 11–400, p. 10, concludes that "[w]hile most states will experience some increase in spending, this is quite small relative to the federal matching payments and low relative to the costs of uncompensated care that [the States] would bear if the[re] were no health reform." See Kaiser Commission on Medicaid & the Uninsured, Medicaid Coverage & Spending in Health Reform 16 (May 2010). Thus there can be no objection to the ACA's expansion of Medicaid as an "unfunded mandate." Quite the contrary, the program is impressively well funded.

16 In 1972, for example, Congress ended the federal cash-assistance program for the aged, blind, and disabled. That program previously had been operated jointly by the Federal and State Governments, as is the case with Medicaid today. Congress

replaced the cooperative federal program with the nationalized Supplemental Security Income program. See *Schweiker v. Gray Panthers,* 453 U.S. 34, 38, 101 S.Ct. 2633, 69 L.Ed.2d 460 (1981).

17 THE CHIEF JUSTICE and the joint dissenters perceive in cooperative federalism a "threa[t]" to "political accountability." *Ante,* at 2602; see *post,* at 2660 – 2661. By that, they mean voter confusion: Citizens upset by unpopular government action, they posit, may ascribe to state officials blame more appropriately laid at Congress' door. But no such confusion is apparent in this case: Medicaid's status as a federally funded, state-administered program is hardly hidden from view.

18 Although plaintiffs, in the proceedings below, did not contest the ACA's satisfaction of these criteria, see 648 F.3d 1235, 1263 (C.A.11 2011), THE CHIEF JUSTICE appears to rely heavily on the second criterion. Compare *ante,* at 2605, 2606, with *infra,* at 2637 – 2638.

...

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Neal v. Puckett, 5th Cir.(Miss.), March 15, 2002

92 S.Ct. 2726
Supreme Court of the United States

William Henry FURMAN, Petitioner,
v.
State of GEORGIA.
Lucious JACKSON, Jr., Petitioner,
v.
State of GEORGIA.
Elmer BRANCH, Petitioner,
v.
State of TEXAS.

Nos. 69-5003, 69-5030, 69-5031.
|
Argued Jan. 17, 1972.
|
Decided June 29, 1972.

Certiorari was granted to review decisions of the Supreme Court of Georgia, 225 Ga. 253, 167 S.E.2d 628, and 225 Ga. 790, 171 S.E.2d 501, affirming imposition of death penalty on defendants convicted of murder and rape, and to review judgment of the Court of Criminal Appeals of Texas, 447 S.W.2d 932, affirming imposition of death penalty on defendant convicted of rape. The Supreme Court held that imposition and carrying out of death penalty in cases before court would constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments.

Judgment in each case reversed in part and cases remanded.

Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White and Mr. Justice Marshall filed separate opinions in support of judgments.

Mr. Chief Justice Burger, Mr. Justice Blackmum, Mr. Justice Powell and Mr. Justice Rehnquist filed separate dissenting opinions.

Opinion on remand, 229 Ga. 731, 194 S.E.2d 410.

West Headnotes (1)

[1] **Constitutional Law** ⇦ Capital Punishment;Death Penalty
Constitutional Law ⇦ Proceedings
Constitutional Law ⇦ Execution of Sentence
Sentencing and Punishment ⇦ Death Penalty as Cruel or Unusual Punishment

Imposition and carrying out of death penalty in cases before court would constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments. Code Ga. §§ 26-1005, 26-1302; Vernon's Ann.Tex.P.C. art. 1189; U.S.C.A.Const. Amends. 8, 14.

825 Cases that cite this headnote

Attorneys and Law Firms

**2727 *238 Anthony G. Amsterdam, Stanford, Cal., for petitioner Furman.

Jack Greenberg, New York City, for petitioner Jackson.

Melvyn Carson Bruder, Dallas, Tex., for petitioner Branch.

Dorothy T. Beasley, Atlanta, Ga., for respondent State of Georgia.

Charles Alan Wright, Austin, Tex., for respondent State of Texas.

Willard J. Lassers and Elmer Gertz, Chicago, Ill., for amici curiae.

Opinion

*239 PER CURIAM.

Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga.Code Ann. s 26-1005 (Supp.1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S.E.2d 628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga.Code Ann. s 26-1302 (Supp.1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S.E.2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Vernon's Tex.Penal Code, Art. 1189 (1961). 447 S.W.2d 932 (Ct.Crim.App.1969). Certiorari was granted limited to the following question: 'Does the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?' 403 U.S. 952, 91 S.Ct. 2287, 29 L.Ed.2d 863 (1971). The Court holds that the imposition *240 and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered.

Judgment in each case reversed in part and cases remanded.

Mr. Justice DOUGLAS, Mr. Justice BRENNAN, Mr. Justice STEWART, Mr. Justice WHITE, and Mr. Justice MARSHALL have filed separate opinions in support of the judgments.

THE CHIEF JUSTICE, Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice REHNQUIST have filed separate dissenting opinions.

Mr. Justice DOUGLAS, concurring.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute 'cruel and unusual punishment' within

the meaning of the Eighth Amendment as applied to the States by the Fourteenth. [1] I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments.

*241 That the requirements of due process ban cruel and unusual punishment is now settled. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, and 473-474, 67 S.Ct. 374, 376, and 381, **2728 91 L.Ed. 422 (Burton, J., dissenting); Robinson v. California, 370 U.S. 660, 667, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758. It is also settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature. Weems v. United States, 217 U.S. 349, 378-382, 30 S.Ct. 544, 553-555, 54 L.Ed. 793.

Congressman Bingham, in proposing the Fourteenth Amendment, maintained that 'the privileges or immunities of citizens of the United States' as protected by the Fourteenth Amendment included protection against 'cruel and unusual punishments:'
'(M)any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.' Cong.Globe, 39th Cong., 1st Sess., 2542.

Whether the privileges and immunities route is followed, or the due process route, the result is the same.

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. In re Kemmler, 136 U.S. 436, 447, 10 S.Ct. 930, 933, 34 L.Ed. 519. It is also said in our opinions *242 that the proscription of cruel and unusual punishments 'is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.' Weems v. United States, supra, 217 U.S. at 378, 30 S.Ct., at 553. A like statement was made in Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630, that the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'

The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature: [2]
'Following the Norman conquest of England in 1066, the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary *243 amercement. Although amercement's discretionary character allowed the circumstances of each case to be taken into account and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines.
'The problem of excessive amercements became so prevalent that three **2729 chapters of the Magna Carta were devoted to their regulation. Maitland said of Chapter 14 that 'very likely there was no clause in the Magna Carta more grateful to the mass of the people.' Chapter 14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments:

"A free man shall not be amerced for a trivial offense, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood."

The English Bill of Rights, enacted December 16, 1689, stated that 'excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' [3] These were the words chosen for our Eighth Amendment. A like provision had been in Virginia's Constitution of 1776 [4] and in the constitutions ***244** of seven other States. [5] The Northwest Ordinance, enacted under the Articles of Confederation, included a prohibition cruel and unusual punishments. [6] But the debates of the First Congress on the Bill of Rights throw little light on its intended meaning. All that appears is the following: [7]

'Mr. Smith, of South Carolina, objected to the words 'nor cruel and unusual punishments;' the import of them being too indefinite.

'Mr. Livermore: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.'

The words 'cruel and unusual' certainly include penalties ***245** that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is 'cruel and unusual' to apply the death penalty-or any other penalty-selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board. [8] Judge Tuttle, indeed, made ****2730** abundantly clear in Novak v. Beto, 5 Cir., 453 F.2d 661, 673-679 (CA5) (concurring in part and dissenting in part), that solitary confinement may at times be 'cruel and unusual' punishment. Cf. Ex parte Medley, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835; Brooks v. Florida, 389 U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643.

The Court in McGautha v. California, 402 U.S. 183, 198, 91 S.Ct. 1454, 1462, 28 L.Ed.2d 711, noted that in this country there was almost from the beginning a 'rebellion against the common-law rule imposing a mandatory death sentence on all convicted ***246** murderers.' The first attempted remedy was to restrict the death penalty to defined offenses such as 'premeditated' murder. [9] Ibid. But juries 'took the ***247** law into their own hands' and refused to convict on the capital offense. Id., at 199, 91 S.Ct., at 1463.

'In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact.' Ibid.

The Court concluded: 'In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the ****2731** jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.' Id., at 207, 91 S.Ct., at 1467.

The Court refused to find constitutional dimensions in the argument that those who exercise their discretion to send a person to death should be given standards by which that discretion should be exercised. Id., at 207-208, 91 S.Ct., at 1467-1468.

A recent witness at the Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 2d Sess., Ernest van den Haag, testifying on H.R. 8414 et al., [10] stated:
'Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The *248 vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.' Id., at 116-117. (Emphasis supplied.)

But those who advance that argument overlook McGautha, supra.

We are now imprisoned in the McGautha holding. Indeed the seeds of the present cases are in McGautha. Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die. [11]

*249 Mr. Justice Field, dissenting in O'Neil v. Vermont, 144 U.S. 323, 340, 12 S.Ct. 693, 700, 36 L.Ed. 450, said, 'The state may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass, and make thereby a thousand offenses, and thus extend the punishment for drinking the single **2732 glass of liquor to an imprisonment of almost indefinite duration.' What the legislature may not do for all classes uniformally and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.

There is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments. 'A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily.' [12] The same authors add that '(t)he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness.' [13] The President's Commission on Law Enforcement and Administration of Justice recently concluded: [14]
'Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the *250 poor, the Negro, and the members of unpopular groups.'

A study of capital cases in Texas from 1924 to 1968 reached the following conclusions: [15]

'Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.

*251 'Seventy-five of the 460 cases involved codefendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.

'Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.'

**2733 Warden Lewis E. Lawes of Sing Sing said: [16]

'Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically

impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.'

Former Attorney General Ramsey Clark has said, 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.'[17] One searches our chronicles *252 in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death.

Jackson, a black, convicted of the rape of a white woman, was 21 years old. A court-appointed psychiatrist said that Jackson was of average education and average intelligence, that he was not an imbecile, or schizophrenic, or phychotic, that his traits were the product of environmental influences, and that he was competent to stand trial. Jackson had entered the house after the husband left for work. He held scissors against the neck of the wife, demanding money. She could find none and a struggle ensued for the scissors, a battle which she lost; and she was then raped, Jackson keeping the scissors pressed against her neck. While there did not appear to be any long-term traumatic impact on the victim, she was bruised and abrased in the struggle but was not hospitalized. Jackson was a convict who had escaped from a work gang in the area, a result of a three-year sentence for auto theft. He was at large for three days and during that time had committed several other offenses-burglary, auto theft, and assault and battery.

Furman, a black, killed a householder while seeking to enter the home at night. Furman shot the deceased through a closed door. He was 26 years old and had finished the sixth grade in school. Pending trial, he was committed to the Georgia Central State Hospital for a psychiatric examination on his plea of insanity tendered by court-appointed counsel. The superintendent reported that a unanimous staff diagnostic conference had concluded 'that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder.' The physicians agreed that 'at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his *253 defense'; and the staff believed 'that he is in need of further psychiatric hospitalization and treatment.'

Later, the superintendent reported that the staff diagnosis was Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder. He concluded, however, that Furman was 'not psychotic at present, knows right from wrong and is able to cooperate with his counsel in preparing his defense.'

Branch, a black, entered the rural home of a 65-year-old widow, a white, while she slept and raped her, holding his arm against her throat. Thereupon he demanded money and for 30 minutes or more the widow searched for money, finding little. As he left, Jackson said if the widow told anyone what happened, he would return and kill her. The record is barren of any medical or psychiatric **2734 evidence showing injury to her as a result of Branch's attack.

He had previously been convicted of felony theft and found to be a borderline mental deficient and well below the average IQ of Texas prison inmates. He had the equivalent of five and a half years of grade school education. He had a 'dull intelligence' and was in the lowest fourth percentile of his class.

We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Irving Brant has given a detailed account of the Bloody Assizes, the reign of terror that occupied the *254 closing years of the rule of Charles II and the opening years of the regime of James II (the Lord Chief Justice was George Jeffreys): 'Nobody knows how many hundreds of men, innocent or of unproved guilt, Jeffreys sent to their deaths in the pseudo trials that followed Monmouth's feeble and stupid attempt to seize the throne. When the ordeal ended, scores had been executed and 1,260 were awaiting the hangman in three counties. To be absent from home during the uprising was

evidence of guilt. Mere death was considered much too mild for the villagers and farmers rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver, 'a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters' along the highways. One could have crossed a good part of northern England by their guidance.

'The story of The Bloody Assizes, widely known to Americans, helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishents. But in the polemics that led to the various guarantees of freedom, it had no place compared with the tremendous thrust of the trial and execution of Sidney. The hundreds of judicial murders committed by Jeffreys and his fellow judges were totally inconceivable in a free American republic, but any American could imagine himself in Sidney's place-executed for putting on paper, in his closet, words that later on came to express the basic principles of republican government. Unless barred by fundamental law, the legal rulings that permitted this ***255** result could easily be employed against any person whose political opinions challenged the party in power.' The Bill of Rights 154-155 (1965).

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. Id., at 155-163. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment.

In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect [18] of law enforcement. ****2735** Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law a Brahman was exempt from capital punishment, [19] and under that law, '(g)enerally, in the law books, punishment increased in severity as social status diminished.' [20] We have, I fear, taken in practice the same position, partially as a result of making the death penalty ***256** discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice [21] has no more sanctity than a law which in terms provides the same.

Thus, these discretionary statutes are unconstitutional ***257** in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a ****2736** harsher one

on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

I concur in the judgments of the Court.

Mr. Justice BRENNAN, concurring.

The question presented in these cases is whether death is today a punishment for crime that is 'cruel and unusual' and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict. [1]

***258** Almost a century ago, this Court observed that '(d)ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.' Wilkerson v. Utah, 99 U.S. 130, 135-136, 25 L.Ed. 345 (1879). Less than 15 years ago, it was again noted that '(t)he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court.' Trop v. Dulles, 356 U.S. 86, 99, 78 S.Ct. 590, 597, 2 L.Ed.2d 630 (1958). Those statements remain true today. The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to our scheme of government. And we know also that the Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, '(t)hat issue confronts us, and the task of resolving it is inescapably ours.' Id., at 103, 78 S.Ct., at 599.

I

We have very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights. The absence of such a restraint from the body of the Constitution was alluded to, so far as we now know, in the debates of only two of the state ratifying conventions. In the Massachusetts convention, Mr. Holmes protested:
'What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, ***259** what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restraining from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.' 2 J. Elliot's Debates 111 (2d ed. 1876).

Holmes' fear that Congress would have unlimited power to prescribe punishments for crimes was echoed by Patrick Henry at the Virginia convention:
'. . . Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence-petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put ****2737** on the virtue of representatives. What says our (Virginia) bill of rights?-'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to . . . define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more-you depart from the genius of your country. . . .

'In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your (Virginia) declaration of rights. What has distinguished our ancestors?- ***260** That they would not admit of tortures, or cruel and barbarous punishment.' 3 id., at 447. [2]

These two statements shed some light on what the Framers meant by 'cruel and unusual punishments.' Holmes referred to 'the most cruel and unheard-of punishments,' Henry to 'tortures, or cruel and barbarous punishment.' It does not follow, however, that the Framers were exclusively concerned with prohibiting torturous punishments. Holmes and Henry were objecting to the absence of a Bill of Rights, and they cited to support their objections the unrestrained legislative power to prescribe punishments for crimes. Certainly we may suppose that they invoked the specter of the most drastic punishments a legislature might devise.

In addition, it is quite clear that Holmes and Henry focused wholly upon the necessity to restrain the legislative power. Because they recognized 'that Congress have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes,' they insisted that Congress must be limited in its power to punish. Accordingly, they ***261** called for a 'constitutional check' that would ensure that 'when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.'[3]

****2738** The only further evidence of the Framers' intent appears from the debates in the First Congress on the adoption of the Bill of Rights.[4] As the Court noted in Weems v. United States, 217 U.S. 349, 368, 30 S.Ct. 544, 549, 54 L.Ed. 793 (1910), ***262** the Cruel and Unusual Punishments Clause 'received very little debate.' The extent of the discussion, by two opponents of the Clause in the House of Representatives, was this:

'Mr. Smith, of South Carolina, objected to the words 'nor cruel and unusual punishments;' the import of them being too indefinite.

'Mr. Livermore.-The (Eighth Amendment) seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . .. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by and declaration of this kind.

'The question was put on the (Eighth Amendment), and it was agreed to by a considerable majority.' 1 Annals of Cong. 754 (1789).[5]

Livermore thus agreed with Holmes and Henry that the Cruel and Unusual Punishments Clause imposed a limitation upon the legislative power to prescribe punishments. ***263** However, in contrast to Holmes and Henry, who were supporting the Clause, Livermore, opposing it, did not refer to punishments that were considered barbarous and torturous. Instead, he objected that the Clause might someday prevent the legislature from inflicting what were then quite common and, in his view, 'necessary' punishments-death, whipping, and earcropping.[6] The only inference to be drawn from Livermore's statement is that the 'considerable majority' was prepared to run that risk. No member of the House rose to reply that the ****2739** Clause was intended merely to prohibit torture.

Several conclusions thus emerge from the history of the adoption of the Clause. We know that the Framers' concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon 'cruel and unusual punishments' precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes. Yet we cannot now know exactly what the Framers thought 'cruel and unusual punishments' were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that only torturous punishments were to be outlawed. As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered 'cruel and unusual' at the time. The 'import' of the Clause is, indeed, 'indefinite,' and for good reason. A constitutional provision 'is enacted, it is true, from an experience of evils, but its

general language *264 should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.' Weems v. United States, 217 U.S., at 373, 30 S.Ct., at 551.

It was almost 80 years before this Court had occasion to refer to the Clause. See Pervear v. Commonwealth, 5 Wall. 475, 479-480, 18 L.Ed. 608 (1867). These early cases, as the Court pointed out in Weems v. United States, supra, 217 U.S., at 369, 30 S.Ct., at 550, did not undertake to provide 'an exhaustive definition' of 'cruel and unusual punishments.' Most of them proceeded primarily by 'looking backwards for examples by which to fix the meaning of the clause;' id., at 377, 30 S.Ct., at 553, concluding simply that a punishment would be 'cruel and unusual' if it were similar to punishments considered 'cruel and unusual' at the time the Bill of Rights was adopted. [7] In Wilkerson v. Utah, 99 U.S., at 136, for instance, the Court found it 'safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden.' The 'punishments of torture,' which the Court labeled 'atrocities,' were cases where the criminal 'was embowelled alive, beheaded, and quartered,' and cases 'of public dissection . . . and burning alive.' Id., at 135. Similarly, in *265 In re Kemmler, 136 U.S. 436, 446, 10 S.Ct. 930, 933, 34 L.Ed. 519 (1890), the Court declared that 'if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.' The Court then observed, commenting upon the passage just quoted from Wilkerson v. Utah, supra, and applying the 'manifestly cruel and unusual' test, that '(p) unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and **2740 barbarous,-something more than the mere extinguishment of life.' 136 U.S., at 447, 10 S.Ct., at 933.

Had this 'historical' interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights. As the Court noted in Weems v. United States, supra, 217 U.S., at 371, 30 S.Ct., at 551, this interpretation led Story to conclude 'that the provision 'would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.'' And Cooley in his book, Constitutional Limitations, said the Court, 'apparently in a struggle between the effect to be given to ancient examples and the inconsequence of a dread of them in these enlightened times, . . . hesitate(d) to advance definite views.' Id., at 375, 30 S.Ct., at 552. The result of a judicial application of this interpretation was not surprising. A state court, for example, upheld the constitutionality of the whipping post: 'In comparison with the 'barbarities of quartering, hanging in chains, castration, etc.,' it was easily reduced to insignificance.' Id., at 377, 30 S.Ct., at 553.

*266 But this Court in Weems decisively repudiated the 'historical' interpretation of the Clause. The Court, returning to the intention of the Framers, 'rel(ied) on the conditions which existed when the Constitution was adopted.' And the Framers knew 'that government by the people, instituted by the Constitution, would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men.' Id., at 375, 30 S.Ct., at 552. The Clause, then, guards against '(t)he abuse of power'; contrary to the implications in Wilkerson v. Utah, supra, and In re Kemmler, supra, the prohibition of the Clause is not 'confine(d) . . . to such penalties and punishment as were inflicted by the Stuarts.' 217 U.S., at 372, 30 S.Ct., at 551. Although opponents of the Bill of Rights 'felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation(,)' ibid., the Framers disagreed:

'(Patrick) Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their (jealousy) of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they *267 might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was

the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the (Stuarts',) or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.' Id., at 372-373, 30 S.Ct., at 551.

The Court in Weems thus recognized that this 'restraint upon legislatures' possesses an 'expansive and vital character' that is "essential . . . to the rule of law and the maintenance of individual freedom." Id., at 377, 30 S.Ct., at 553. Accordingly, the responsibility lies with the courts to make certain **2741 that the prohibition of the Clause is enforced. [8] Referring to cases in which 'prominence (was) given to the power of the legislature to define crimes and their punishment,' the Court said:
'We concede the power in most of its exercises. We disclaim the right to assert a judgment *268 against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked.' Id., at 378, 30 S.Ct., at 553. [9]

In short, this Court finally adopted the Framers' view of the Clause as a 'constitutional check' to ensure that 'when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.' That, indeed, is the only view consonant with our constitutional form of government. If the judicial conclusion that a punishment is 'cruel and unusual' 'depend(ed) upon virtually unanimous condemnation of the penalty at issue,' then, '(l)ike no other constitutional provision, (the Clause's) only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom.' We know that the Framers did not envision 'so narrow a role for this basic guaranty of human rights.' Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1782 (1970). The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, 'may not be submitted to vote; (it) depend(s) on the outcome of no elections.' 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied *269 by the courts.' West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights. The difficulty arises, rather, in formulating the 'legal principles to be applied by the courts' when a legislatively prescribed punishment is challenged as 'cruel and unusual.' In formulating those constitutional principles, we must avoid the insertion of 'judicial conception(s) of . . . wisdom or propriety,' Weems v. United States, 217 U.S., at 379, 30 S.Ct., at 554, yet we must not, in the guise of 'judicial restraint,' abdicate our fundamental responsibility to enforce the Bill of Rights. Were we to do so, the 'constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value **2742 and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.' Id., at 373, 30 S.Ct., at 551. The Cruel and Unusual Punishments Clause would become, in short, 'little more than good advice.' Trop v. Dulles, 356 U.S., at 104, 78 S.Ct., at 599.

II

Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century. Our task today is more complex. We know 'that the words of the (Clause) are not precise, and that their scope is not static.' We know, therefore, that the Clause 'must draw its meaning from the evolving standards of decency that mark the progress *270 of a maturing society.' Id., at 100-101, 78 S.Ct., at 598. [10] That knowledge, of course, is but the beginning of the inquiry.

In Trop v. Dulles, supra, at 99, 78 S.Ct., at 597, it was said that '(t)he question is whether (a) penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the (Clause).' It was also said that a challenged punishment must be examined 'in light of the basic prohibition against inhuman treatment' embodied in the Clause. Id., at 100 n. 32, 78 S.Ct., at 598. It was said, finally, that:
'The basic concept underlying the (Clause) is nothing less than the dignity of man. While the State has the power to punish, the (Clause) stands to assure that this power be exercised within the limits of civilized standards.' Id., at 100, 78 S.Ct., at 597.

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.

This formulation, of course, does not of itself yield principles for assessing the constitutional validity of particular punishments. Nevertheless, even though '(t)his Court has had little occasion to give precise content to the (Clause),' ibid., there are principles recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports with human dignity.

***271** The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. See Weems v. United States, 217 U.S., at 366, 30 S.Ct., at 549.[11] Yet the Framers also knew 'that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.' Id., at 372, 30 S.Ct., at 551. Even though '(t)here may be involved no physical mistreatment, no primitive torture,' Trop v. Dulles, supra, 356 U.S. at 101, 78 S.Ct., at 598, severe mental pain may be inherent in the infliction of a particular punishment. See Weems v. United States, supra, 217 U.S., at 366, 30 S.Ct., at 549.[12] ****2743** That, indeed, was one of the conclusions underlying the holding of the plurality in Trop v. Dulles that the punishment of expatriation violates the Clause.[13] And the ***272** physical and mental suffering inherent in the punishment of cadena temporal, see nn. 11-12, supra, was an obvious basis for the Court's decision in Weems v. United States that the punishment was 'cruel and unusual.'[14]

More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like,' are, of course, 'attended with acute pain and suffering.' O'Neil v. Vermont, 144 U.S. 323, 339, 12 S.Ct. 693, 699, 36 L.Ed. 450 (1892) (Field, J., dissenting). When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat ***273** members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

The infliction of an extremely severe punishment, then, like the one before the Court in Weems v. United States, from which '(n)o circumstance of degradation (was) omitted,' 217 U.S., at 366, 30 S.Ct., at 549, may reflect the attitude that the person punished is not entitled to recognition as a fellow human being. That attitude may be apparent apart from the severity of the punishment itself. In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 67 S.Ct. 374, 376, 91 L.Ed. 422 (1947), for example, the unsuccessful electrocution, although it caused 'mental anguish and physical pain,' was the result of 'an unforeseeable accident.' Had the failure been intentional, however, the punishment would have been, like torture, so degrading ****2744** and indecent as to amount to a refusal to accord the criminal human status. Indeed, a punishment may be degrading to human dignity solely because it is a punishment. A State may not punish a person for being 'mentally ill, or a leper, or . . . afflicted with a veneral disease,' or for being addicted to narcotics. Robinson v. California, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758 (1962). To inflict punishment for having a disease is to treat the individual as a diseased thing rather than as a sick human being. That the punishment is not severe, 'in

the abstract,' is irrelevant; '(e)ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.' Id., at 667, 82 S.Ct., at 1421. Finally, of course, a punishment may be degrading simply by reason of its enormity. A prime example is expatriation, a 'punishment more primitive than torture,' Trop v. Dulles, 356 U.S., at 101, 78 S.Ct., at 598, for it necessarily involves a *274 denial by society of the individual's existence as a member of the human community. [15]

In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause-that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause [16] reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, 'Nor Cruel and Unusual Punishments inflicted:' The Original Meaning, 57 Calif.L.Rev. 839, 857-860 (1969). [17]

*275 This principle has been recognized in our cases. [18] In **2745 Wilkerson v. Utah, 99 U.S., at 133-134, the Court reviewed various treatises on military law in order to demonstrate that under 'the custom of war' shooting was a common method of inflicting the punishment of death. On that basis, the Court concluded:
'Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to (treatises on military law) are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that *276 category, within the meaning of the (Clause). Soldiers convicted of desertion or other capital military offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fulness by the writers upon the subject of courts-martial.' Id., at 134-135.
The Court thus upheld death by shooting, so far as appears, solely on the ground that it was a common method of execution. [19]

As Wilkerson v. Utah suggests, when a severe punishment is inflicted 'in the great majority of cases' in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is 'something different from that which is generally done' in such cases, Trop v. Dulles, 356 U.S., at 101 n. 32, 78 S.Ct., at 598, [20] there is a **2746 substantial *277 likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. This principle is especially important today. There is scant danger, given the political processes 'in an enlightened democracy such as ours,' id., at 100, 78 S.Ct., at 598, that extremely severe punishments will be widely applied. The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction.

A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible. [21] *278 Thus, for example, Weems v. United States, 217 U.S., at 380, 30 S.Ct., at 554, and Trop v. Dulles, 356 U.S., at 102-103, 78 S.Ct., at 598-599, suggest that one factor that may be considered is the existence of the punishment in jurisdictions other than those before the Court. Wilkerson v. Utah, supra, suggests that another factor to be considered is the historic usage of the punishment. [22] Trop v. Dulles, supra, 356 U.S., at 99, 78 S.Ct., at 597, combined present acceptance with past usage by observing that 'the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.' In Robinson v. California, 370 U.S., at 666, 82 S.Ct., at 1420, which involved the infliction of punishment for narcotics addiction, the Court went a step further, concluding simply that 'in the light of contemporary human knowledge, a law which made a criminal offense of such disease would doubtless be universally thought to be an infliction of cruel and unusual punishment.'

The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial *279 task is to review the history of a challenged punishment and to examine society's present practices **2747 with respect to its use. Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use.

The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, cf. Robinson v. California, supra, at 666, 82 S.Ct., at 1420; id., at 677, 82 S.Ct., at 1426 (Douglas, J., concurring); Trop v. Dulles, supra, 356 U.S., at 114, 78 S.Ct., at 605 (Brennan, J., concurring), the punishment inflicted is unnecessary and therefore excessive.

This principle appeared in our cases in Mr. Justice Field's dissent in O'Neil v. Vermont, 144 U.S., at 337, 12 S.Ct., at 699.[23] He there took the position that:
'(The Clause) is directed, not only against punishments of the character mentioned (torturous punishments), but against all punishments which by *280 their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.' Id., at 339-340, 12 S.Ct., at 699.
Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime,[24] the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment. This view of the principle was explicitly recognized by the Court in Weems v. United States, supra. There the Court, reviewing a severe punishment inflicted for the falsification of an official record, found that 'the highest punishment possible for a crime which may cause the loss of many thousand(s) of dollars, and to prevent which the duty of the state should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account.' Id., at 381, 30 S.Ct., at 554. Stating that 'this contrast shows more than different exercises of legislative judgment,' the Court concluded that the punishment was unnecessarily severe in view of the purposes for which it was imposed. Ibid.[25] **2748 *281 See also Trop v. Dulles, 356 U.S., at 111-112, 78 S.Ct., at 603-604 (Brennan, J., concurring).[26]

There are, then, four principles by which we may determine whether a particular punishment is 'cruel and unusual.' The primary principle, which I believe supplies the essential predicate for the application of the others, is that a punishment must not by its severity be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited. Yet '(i)t is unlikely that any State at this moment in history(,)' Robinson v. California, 370 U.S., at 666, 82 S.Ct., at 1420, would pass a law providing for the infliction of such a punishment. Indeed, no such punishment has ever been before this Court. The same may be said of the other principles. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in wholly arbitrary fashion; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a severe punishment that is clearly and totally rejected throughout society; no legislature would be able even to authorize the infliction of such a punishment. Nor, finally, is it likely that this Court will have to consider a severe punishment that is patently unnecessary; no State today would inflict a severe punishment knowing that there was no reason whatever for doing so. In short, we are unlikely to have occasion to determine that a punishment is fatally offensive under any one principle.

*282 Since the Bill of Rights was adopted, this Court has adjudged only three punishments to be within the prohibition of the Clause. See Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910) (12 years in chains at hard and painful labor); Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (expatriation); Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (imprisonment for narcotics addition). Each punishment, of course,

was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles. Rather, these 'cruel and unusual punishments' seriously implicated several of the principles, and it was the application of the principles in combination that supported the judgment. That, indeed, is not surprising. The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is 'cruel and unusual.' The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

III

The punishment challenged in these cases is death. Death, of course, is a 'traditional' punishment, Trop v. Dulles, supra, 356 U.S., at 100, 78 S.Ct., at 598, one that 'has been employed throughout our history,' id., at 99, 78 S.Ct., at 597, and its constitutional ***283** background is accordingly ****2749** an appropriate subject of inquiry.

There is, first, a textual consideration raised by the Bill of Rights itself. The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections.[27] We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause.[28] Nor is there any indication in the debates on the Clause that a special exception was to be made for death. If anything, the indication is to the contrary, for Livermore specifically mentioned death as a candidate for future proscription under the Clause. See supra, at 2738. Finally, it does not advance analysis to insist that the Framers did not believe that adoption ***284** of the Bill of Rights would immediately prevent the infliction of the punishment of death; neither did they believe that it would immediately prevent the infliction of other corporal punishments that, although common at the time, see n. 6, supra, are now acknowledged to be impermissible.[29]

There is also the consideration that this Court has decided three cases involving constitutional challenges to particular methods of inflicting this punishment. In Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1879), and In re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890), the Court, expressing in both cases the since-rejected 'historical' view of the Clause, see supra, at 2739, approved death by shooting and death by electrocution. In Wilkerson, the Court concluded that shooting was a common method of execution, see supra, at 2744-2745;[30] in Kemmler, the Court held that the Clause did not apply to the States, ****2750** 136 U.S., at 447-449, 10 S.Ct., at 933-934.[31] ***285** In Louisiana ex rel. Francis v. Resweber, supra, the Court approved a second attempt at electrocution after the first had failed. It was said that '(t)he Fourteenth (Amendment) would prohibit by its due process clause execution by a state in a cruel manner,' 329 U.S., at 463, 67 S.Ct., at 376, but that the abortive attempt did not make the 'subsequent execution any more cruel in the constitutional sense than any other execution,' id., at 464, 67 S.Ct., at 376.[32] These three decisions thus reveal that the Court, while ruling upon various methods of inflicting death, has assumed in the past that death was a constitutionally permissible punishment.[33] Past assumptions, however, are not sufficient to limit the scope of our examination of this punishment today. The constitutionality of death itself under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never directly considered it.

The question, then, is whether the deliberate infliction of death is today consistent with the command of the Clause that the State may not inflict punishments that do not comport with human dignity. I will analyze the punishment of death in terms of the principles ***286** set out above and the cumulative test to which they lead: It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard

as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a 'cruel and unusual' punishment.

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. No other punishment has been so continuously restricted, see infra, at 2755-2757, nor has any State yet abolished prisons, as some have abolished this punishment. And those States that still inflict death reserve it for the most heinous crimes. Juries, of course, have always treated death cases differently, as have governors exercising their commutation powers. Criminal defendants are of the same view. 'As all practicing lawyers know, who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty.' Griffin v. Illinois, 351 U.S. 12, 28, 76 S.Ct. 585, 595, 100 L.Ed. 891 (1956) (Burton and Minton, JJ., dissenting). Some legislatures have required particular procedures, such as two-stage trials and automatic appeals, applicable only in death cases. 'It is **2751 the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations.' Ibid. See Williams v. Florida, 399 U.S. 78, 103, 90 S.Ct. 1893, 1907, 26 L.Ed.2d 446 (1970) (all States require juries of 12 in death cases). This Court, too, almost *287 always treats death cases as a class apart. [34] And the unfortunate effect of this punishment upon the functioning of the judicial process is well known; no other punishment has a similar effect.

The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. [35] Since the discontinuance *288 of flogging as a constitutionally permissible punishment, Jackson v. Bishop, 404 F.2d 571 (CA8 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. Cf. Ex parte Medley, 134 U.S. 160, 172, 10 S.Ct. 384, 388, 33 L.Ed. 835 (1890). As the California Supreme Court pointed out, 'the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.' **2752 People v. Anderson, 6 Cal.3d 628, 649, 100 Cal.Rptr. 152, 166, 493 P.2d 880, 894 (1972). [36] Indeed, as Mr. Justice Frankfurther noted, 'the onset of insanity while awaiting *289 execution of a death sentence is not a rare phenomenon.' Solesbee v. Balkcom, 339 U.S. 9, 14, 70 S.Ct. 457, 460, 94 L.Ed. 604 (1950) (dissenting opinion). The 'fate of ever-increasing fear and distress' to which the expatriate is subjected, Trop v. Dulles, 356 U.S., at 102, 78 S.Ct., at 599, can only exist to a greater degree for a person confined in prison awaiting death. [37]

The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. Expatriation, for example, is a punishment that 'destroys for the individual the political existence that was centuries in the development(,)' that 'strips the citizen of his status in the national and international political community (,)' and that puts '(h)is very existence' in jeopardy. Expatriation thus inherently entails 'the total destruction of the individual's status in organized society.' Id., at 101, 78 S.Ct., at 598. 'In short, the expatriate has lost the right to have rights.' Id., at 102, 78 S.Ct., at 598. Yet, demonstrably, expatriation is not 'a fate worse than death.' Id., at 125, 78 S.Ct., at 611 (Frankfurter, J., dissenting). [38] Although death, like expatriation, destroys the *290 individual's 'political existence' and his 'status in organized society,' it does more, for, unlike expatriation, death also destroys '(h)is very existence.' There is, too, at least the possibility that the expatriate will in the future regain 'the right to have rights.' Death forecloses even that possibility.

Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights

to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know **2753 that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see Wither-spoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.' As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'" [39]

*291 In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. I would not hesitate to hold, on that ground alone, that death is today a 'cruel and unusual' punishment, were it not that death is a punishment of longstanding usage and acceptance in this country. I therefore turn to the second principle-that the State may not arbitrarily inflict an unusually severe punishment.

The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime.

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960-1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964. [40] Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline. That rarity is plainly revealed by an examination of the years 1961-1970, the last 10-year period for which statistics are available. During that time, an average of 106 death sentences *292 was imposed each year. [41] Not nearly that number, however, could be carried out, for many were precluded by commutations to life or a term of years, [42] transfers to mental institutions because of insanity, [43] resentences to life or a term of years, grants of new trials and orders for resentencing, dismissals of indictments and reversals of convictions, and deaths by suicide and natural causes. [44] **2754 On January 1, 1961, the death row population was 219; on December 31, 1970, it was 608; during that span, there were 135 executions. [45] Consequently, had the 389 additions to death row also been executed the annual average would have been 52. [46] In short, the country *293 might, at most, have executed one criminal each week. In fact, of course, far fewer were executed. Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two. [47]

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.

Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. However the rate of infliction is characterized-as 'freakishly' or 'spectacularly' rare, or simply as rare-it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be?

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: Death is inflicted, they say, only in 'extreme' cases.

Informed selectivity, of course, is a value not to be denigrated. Yet presumably the States could make precisely the same claim if there were 10 executions per *294 year, or five, or even if there were but one. That there may be as many as 50 per year does not strengthen the claim. When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily 'extreme.' Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrates the 'extreme,' then nearly all murderers and their murders are also 'extreme.'[48] **2755 Furthermore, our procedures in death cases, *295 rather than resulting in the selection of 'extreme' cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. McGautha v. California, 402 U.S. 183, 196-208, 91 S.Ct. 1454, 1461-1468, 28 L.Ed.2d 711 (1971). In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.

Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother STEWART puts it, 'wantonly and . . . freakishly' inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

When there is a strong probability that an unusually severe and degrading punishment is being inflicted arbitrarily, we may well expect that society will disapprove of its infliction. I turn, therefore, to the third principle. An examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society.

I cannot add to my Brother MARSHALL's comprehensive treatment of the English and American history of *296 this punishment. I emphasize, however, one significant conclusion that emerges from that history. From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement **2756 of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.'[49] It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.

Our practice of punishing criminals by death has changed greatly over the years. One significant change has been in our methods of inflicting death. Although this country never embraced the more violent and repulsive methods employed in England, we did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly *297 more humane methods of electrocution late in the 19th century and lethal gas in the 20th, however, hanging and shooting have virtaully ceased.[50] Our concern for decency however, hanging and shooting have virtually changes in the circumstances surrounding the execution itself. No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.

Also significant is the drastic decrease in the crimes for which the punishment of death is actually inflicted. While esoteric capital crimes remain on the books, since 1930 murder and rape have accounted for nearly 99% of the total executions, and murder alone for about 87%.[51] In addition, the crime of capital murder has itself been limited. As the Court noted in McGautha v. California, 402 U.S., at 198, 91 S.Ct., at 1462, 1463, there was in this country a 'rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers.' Initially, that rebellion resulted in legislative definitions that distinguished between degrees of murder, retaining the mandatory death sentence only for murder in the first degree. Yet '(t)his new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of 'malice aforethought(,)" ibid., the common-law means of separating murder from manslaughter. Not only was the distinction between degrees of murder confusing and uncertain in practice, but even in clear cases of first-degree murder juries continued to take the law into ***298** their own hands: if they felt that death was an inappropriate punishment, 'they simply refused to convict of the capital offense.' Id., at 199, 91 S.Ct., at 1463. The phenomenon of jury nullification thus remained to counteract the rigors of mandatory death sentences. Bowing to reality, 'legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact.' Ibid. In consequence, virtually all death sentences today are discretionarily imposed. Finally, it is significant that nine States no longer inflict the punishment of death under any circumstances,[52] and ****2757** five others have restricted it to extremely rare crimes.[53]

***299** Thus, although 'the death penalty has been employed throughout our history,' Trop v. Dulles, 356 U.S., at 99, 78 S.Ct., at 597, in fact the history of this punishment is one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience. The result of this movement is our current system of administering the punishment, under which death sentences are rarely imposed and death is even more rarely inflicted. It is, of course, 'We, the People' who are responsible for the rarity both of the imposition and the carrying out of this punishment. Juries, 'express(ing) the conscience of the community on the ultimate question of life or death,' Witherspoon v. Illinois, 391 U.S., at 519, 88 S.Ct., at 1775 have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is available. Governors, elected by and acting for us, have regularly commuted a substantial number of those sentences. And it is our society that insists upon due process of law to the end that no person will be unjustly put to death, thus ensuring that many more of those sentences will not be carried out. In sum, we have made death a rare punishment today.

The progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today. The States point out that many legislatures authorize death as the punishment for certain crimes and that substantial segments of the public, as reflected in opinion polls and referendum votes, continue to support it. Yet the availability of this punishment through statutory authorization, as well as the polls and referenda, ***300** which amount simply to approval of that authorization, simply underscores the extent to which our society has in fact rejected this punishment. When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this punishment with substantial doubt.

The final principle to be considered is that an unusually severe and degrading ****2758** punishment may not be excessive in view of the purposes for which it is inflicted. This principle, too, is related to the others. When there is a strong probability that the State is arbitrarily inflicting an unusually severe punishment that is subject to grave societal doubts, it is likely also that the punishment cannot be shown to be serving any penal purpose that could not be served equally well by some less severe punishment.

The States' primary claim is that death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment. The first part of this claim is that the infliction of death is necessary to stop the individuals executed from committing further crimes. The sufficient answer to this is that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate ***301** or minimize the danger while he remains confined.

The more significant argument is that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment. The argument is not based upon evidence that the threat of death is a superior deterrent. Indeed, as my Brother MARSHALL establishes, the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment. The States argue, however, that they are entitled to rely upon common human experience, and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment. Because people fear death the most, the argument runs, the threat of death must be the greatest deterrent.

It is important to focus upon the precise import of this argument. It is not denied that many, and probably most, capital crimes cannot be deterred by the threat of punishment. Thus the argument can apply only to those who think rationally about the commission of capital crimes. Particularly is that true when the potential criminal, under this argument, must not only consider the risk of punishment, but also distinguish between two possible punishments. The concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible.

In any event, this argument cannot be appraised in the abstract. We are not presented with the theoretical question whether under any imaginable circumstances the ***302** threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today. Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administerd the punishment of death is necessary to deter the commission of capital crimes. Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis ****2759** upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment. [54]

***303** There is, however, another aspect to the argument that the punishment of death is necessary for the protection of society. The infliction of death, the States urge, serves to manifest the community's outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community. Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands.

The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment. There is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders. Surely if there were such a danger, the execution of a handful of criminals each year would not prevent it. The assertion that death alone is a sufficiently emphatic denunciation for capital crimes suffers from the same defect. If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted

upon the criminals who commit the crimes. Furthermore, it is certainly doubtful that the infliction of death by the State does in fact strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values. That, after all, is why we no longer carry out public executions. In any event, this claim simply means that one purpose of punishment is to indicate social disapproval of crime. To serve that purpose our ***304** laws distribute punishments according to the gravity of crimes and punish more severely the crimes society regards as more serious. That purpose cannot justify any particular punishment as the upper limit of severity.

There is, then, no substantial reason to believe that the punishment of death, as currently administered, is necessary for the protection of society. The only other purpose suggested, one that is independent of protection for society, is retribution. Shortly stated, retribution in this context means that criminals are put to death because they deserve it.

Although it is difficult to believe that any State today wishes to proclaim adherence to 'naked vengeance,' Trop v. Dulles, 356 U.S., at 112, 78 S.Ct., at 604 (Brennan, J., concurring), the States claim, in reliance upon its statutory authorization, that death is the only fit punishment for capital crimes and that this retributive purpose justifies its infliction. In the past, judged by its statutory authorization, death was considered the only fit punishment for the crime of forgery, for the first federal criminal statute provided a mandatory death penalty for that crime. Act of April 30, 1790, s 14, 1 Stat. 115. ****2760** Obviously, concepts of justice change; no immutable moral order requires death for murderers and rapists. The claim that death is a just punishment necessarily refers to the existence of certain public beliefs. The claim must be that for capital crimes death alone comports with society's notion of proper punishment. As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals. When the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random ***305** few. As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.

In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

IV

When this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative. Since that time successive restrictions, imposed against the background of a continuing moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. 'The state thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime ***306** is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.' Weems v. United States, 217 U.S., at 381, 30 S.Ct., at 554.

I concur in the judgments of the Court.

Mr. Justice STEWART, concurring.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eight and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (Brandeis, J., concurring).

The opinions of other Justices today have set out in admirable and thorough detail the origins and judicial history of **2761 the Eighth Amendmemt's guarantee against the infliction of cruel and unusual punishments,[1] and the origin and judicial history of capital punishment.[2] There *307 is thus no need for me to review the historical materials here, and what I have to say can, therefore, be briefly stated.

Legislatures-state and federal-have sometimes specified that the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct. Congress, for example, has provided that anyone convicted of acting as a spy for the enemy in time of war shall be put to death.[3] The Rhode Island Legislature has ordained the death penalty for a life term prisoner who commits murder.[4] Massachusetts has passed a law imposing the death penalty upon anyone convicted of murder in the commission of a forcible rape.[5] An Ohio law imposes the mandatory penalty of death upon the assassin of the President of the United States or the Governor of a State.[6]

If we were reviewing death sentences imposed under these or similar laws, we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature-state or federal-could constitutionally determine that certain criminal conduct is so atrocious that societys' interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence,[7] only *308 the automatic penalty of death will provide maximum deterrence.

On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy-of self-help, vigilante justice, and lynch law.

The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found **2762 guilty of forcible rape.[8] And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder.[9] In a word, neither State *309 has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses. As Mr. Justice White so tellingly puts it, the 'legislative will is not frustrated if the penalty is never imposed.' Post, at 2763.

Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758. In the first place, it is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793. In the second place, it is equally clear that these sentences are 'unusual' in the sense that the

penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. [10] But I do not rest by conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, [11] many just as reprehensible as these, the petitioners are among a capriciously *310 selected random handful upon whom the sentence of death has in fact been imposed. [12] My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. [13] See **2763 McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L.Ed.2d 222. But racial discrimination has not been proved, [14] and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

For these reasons I concur in the judgments of the Court.

Mr. Justice WHITE, concurring.

The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgments, therefore, I do not at all *311 intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided.

The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist. It is in this context that we must consider whether the execution of these petitioners would violate the Eighth Amendment.

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death *312 for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

Most important, a major goal of the criminal law-to deter others by punishing the convicted criminal-would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. For present purposes I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment. But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, **2764 will make little contribution to deterring those crimes for which it may be exacted.

The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered ***313** under the statutes involved in these cases. Concededly, it is difficult to prove as a general proposition that capital punishment, however administered, more effectively serves the ends of the criminal law than does imprisonment. But however that may be, I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.

I need not restate the facts and figures that appear in the opinions of my Brethren. Nor can I 'prove' my conclusion from these data. But, like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries-a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence-has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the ***314** constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not. Inevitably, then, there will be occasions when we will differ with Congress or state legislatures with respect to the validity of punishment. There will also be cases in which we shall strongly disagree among ourselves. Unfortunately, this is one of them. But as I see it, this case is no different in kind from many others, although it may have wider impact and provoke sharper disagreement.

In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively authorized but ****2765** by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.

I concur in the judgments of the Court.

Mr. Justice MARSHALL, concurring.

These three cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. [1]

***315** In No. 69-5003, Furman was convicted of murder for shooting the father of five children when he discovered that Furman had broken into his home early one morning. Nos. 69-5030 and 69-5031 involve state convictions for forcible rape. Jackson was found guilty of rape during the course of a robbery in the victim's home. The rape was accomplished as

he held the pointed ends of scissors at the victim's throat. Branch also was convicted of a rape committed in the victim's home. No weapon was utilized, but physical force and threats of physical force were employed.

The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But, we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to determine whether or not it violates the Eighth Amendment. The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is 'a punishment no longer consistent with our own self-respect' [2] and, therefore, violative of the Eighth Amendment.

The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint. [3] Hence, we must proceed with caution to answer the question presented. [4] By first examining the historical derivation of the Eighth Amendment and *316 the construction given it in the past by this Court, and then exploring the history and attributes of capital punishment in this country, we can answer the question presented with objectivity and a proper measure of self-restraint.

Candor is critical to such an inquiry. All relevant material must be marshaled and sorted and forthrightly examined. We must not only be precise as to the standards of judgment that we are utilizing, but exacting in examining the relevant material in light of those standards.

Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the **2766 almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.

I

The Eighth Amendment's ban against cruel and unusual punishments derives from English law. In 1583, John Whitgift, Archbishop of Canterbury, turned the High Commission into a permanent ecclesiastical court, and the Commission began to use torture to extract confessions from persons suspected of various offenses. [5] Sir Robert Beale protested that cruel and barbarous torture violated Magna Carta, but his protests were made in vain. [6]

*317 Cruel punishments were not confined to those accused of crimes, but were notoriously applied with even greater relish to those who were convicted. Blackstone described in ghastly detail the myriad of inhumane forms of punishment imposed on persons found guilty of any of a large number of offenses. [7] Death, of course, was the usual result. [8]

The treason trials of 1685-the 'Bloody Assizes'-which followed an abortive rebellion by the Duke of Monmouth, marked the culmination of the parade of horrors, and most historians believe that it was this event that finally spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments. [9] The conduct of Lord Chief Justice Jeffreys at those trials has been described as an 'insane lust for cruelty' which was 'stimulated by orders from the King' (James II). [10] The assizes received wide publicity from Puritan pamphleteers and doubtless had some influence on the adoption of a cruel and unusual punishments clause. But, *318 the legislative history of the English Bill of Rights of 1689 indicates that the assizes may not have been as critical to the adoption of the clause as is widely thought. After William and Mary of Orange crossed the channel to invade England, James II fled. Parliament was summoned into session and a committee was appointed to draft general statements containing 'such things as are absolutely necessary to be considered for the better securing of our religion, laws and liberties.' [11] An initial draft of the Bill of Rights prohibited 'illegal' punishments, but a later draft referred to the infliction by James II of 'illegal and cruel' punishments, and declared 'cruel and unusual' punishments to be **2767 prohibited. [12] The use of the word 'unusual' in the final draft appears to be inadvertent.

This legislative history has led at least one legal historian to conclude 'that the cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments that were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties,'[13] and not primarily a reaction to the torture of the High Commission, harsh sentences, or the assizes.

*319 Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments.[14]

The precise language used in the Eighth Amendment first appeared in America on June 12, 1776, in Virginia's 'Declaration of Rights,' s 9 of which read: 'That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'[15] This language was drawn verbatim from the English Bill of Rights of 1689. Other States adopted similar clauses,[16] and there is evidence in the debates of the various state conventions that were *320 called upon to ratify the Constitution of great concern for the omission of any prohibition against torture or other cruel punishments.[17]

The Virginia Convention offers some clues as to what the Founding Fathers had in mind in prohibiting cruel and unusual punishments. At one point George Mason advocated the adoption of a Bill of Rights, and Patrick Henry concurred, stating:
'By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? **2768 . . . Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence-petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights?-'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more-you depart from the genius of your country. . . .

'In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting *321 cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?-That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany-of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.'[18]

Henry's statement indicates that he wished to insure that 'relentless severity' would be prohibited by the Constitution. Other expressions with respect to the proposed Eighth Amendment by Members of the First Congress indicate that they shared Henry's view of the need for and purpose of the Cruel and Unusual Punishments Clause.[19]

*322 Thus, the history of the clause clearly establishes that it was intended to prohibit cruel punishments. We must now turn to the case law to discover the manner in which courts have given meaning to the term 'cruel.'

II

This Court did not squarely face the task of interpreting the cruel and unusual punishments language for the first time until Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1879), although the language received a cursory examination in several prior cases. See, e.g., Pervear v. Commonwealth, 5 Wall. 475, 18 L.Ed. 608 (1867). In Wilkerson the Court unanimously upheld a sentence of public execution by shooting imposed pursuant to a conviction for premeditated **2769 murder. In his opinion for the Court, Mr. Justice Clifford wrote:
'Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.' 99 U.S., at 135-136.

Thus, the Court found that unnecessary cruelty was no more permissible than torture. To determine whether the punishment under attack was unnecessarily cruel, the Court examined the history of the Utah Territory and the then-current writings on capital punishment, and compared this Nation's practices with those of other countries. It is apparent that the Court felt it could not dispose of the question simply by referring to traditional practices; instead, it felt bound to examine developing thought.

Eleven years passed before the Court again faced a challenge to a specific punishment under the Eighth *323 Amendment. In the case of In re Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890), Chief Justice Fuller wrote an opinion for a unanimous Court upholding electrocution as a permissible mode of punishment. While the Court ostensibly held that the Eighth Amendment did not apply to the States, it is very apparent that the nature of the punishment involved was examined under the Due Process Clause of the Fourteenth Amendment. The Court held that the punishment was not objectionable. Today, Kemmler stands primarily for the proposition that a punishment is not necessarily unconstitutional simply because it is unusual, so long as the legislature has a humane purpose in selecting it. [20]

Two years later in O'Neil v. Vermont, 144 U.S. 323, 12 S.Ct. 693, 36 L.Ed. 450 (1892), the Court reaffirmed that the Eighth Amendment was not applicable to the States. O'Neil was found guilty on 307 counts of selling liquor in violation of Vermont law. A fine of $6,140 ($20 for each offense) and the costs of prosecution ($497.96) were imposed. O'Neil was committed to prison until the fine and the costs were paid; and the court provided that if they were not paid before a specified date, O'Neil was to be confined in the house of corrections for 19,914 days (approximately 54 years) at hard labor. Three Justices-Field, Harlan, and Brewer-dissented. They maintained not only that the Cruel and Unusual Punishments Clause was applicable to the States, but that in O'Neil's case it had been violated. Mr. Justice Field wrote: 'That designation (cruel and unusual), it is true, is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which *324 are attended with acute pain and suffering. . . . The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive . . .' Id., at 339-340, 12 S.Ct., at 699.

In Howard v. Fleming, 191 U.S. 126, 24 S.Ct. 49, 48 L.Ed. 121 (1903), the Court, in essence, followed the approach advocated by the dissenters in O'Neil. In rejecting the claim that 10-year sentences for conspiracy to defraud were cruel and unusual, the Court (per Mr. Justice Brewer) considered the nature of the crime, the purpose of the law, and the length of the sentence imposed.

The Court used the same approach seven years later in the landmark case of **2770 Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). Weems, an officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a 'public and official document.' He was sentenced to 15 years' incarceration at hard labor with chains on his ankles, to an unusual loss of his civil rights,

and to perpetual surveillance. Called upon to determine whether this was a cruel and unusual punishment, the Court found that it was.[21] The Court emphasized that the Constitution was not an 'ephemeral' enactment, or one 'designed to meet passing occasions.'[22] Recognizing that '(t)ime works changes, (and) brings into existence new conditions and purposes(,)'[23] the Court commented that '(i)n the application of a constitution *325 . . . our contemplation cannot be only of what has been, but of what may be.'[24]

In striking down the penalty imposed on Weems, the Court examined the punishment in relation to the offense, compared the punishment to those inflicted for other crimes and to those imposed in other jurisdictions, and concluded that the punishment was excessive.[25] Justices White and Holmes dissented and argued that the cruel and unusual prohibition was meant to prohibit only those things that were objectionable at the time the Constitution was adopted.[26]

Weems is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those that were inherently cruel. Thus, it is apparent that the dissenters' position in O'Neil had become the opinion of the Court in Weems.

Weems was followed by two cases that added little to our knowledge of the scope of the cruel and unusual language, Badders v. United States, 240 U.S. 391, 36 S.Ct. 367, 60 L.Ed. 706 (1916), and United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 41 S.Ct. 352, 65 L.Ed. 704 (1921).[27] Then *326 came another landmark case, Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947).

Francis had been convicted of murder and sentenced to be electrocuted. The first time the current passed through him, there was a mechanical failure and he did not die. Thereafter, Francis sought to prevent a second electrocution on the ground that it would be a cruel **2771 and unusual punishment. Eight members of the Court assumed the applicability of the Eighth Amendment to the States.[28] The Court was virtually unanimous in agreeing that '(t)he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain(,)'[29] but split 5-4 on whether Francis would, under the circumstances, be forced to undergo any excessive pain. Five members of the Court treated the case like In re Kemmler and held that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular case.[30] *327 The four dissenters felt that the case should be remanded for further facts.

As in Weems, the Court was concerned with excessive punishments. Resweber is perhaps most significant because the analysis of cruel and unusual punishment questions first advocated by the dissenters in O'Neil was at last firmly entrenched in the minds of an entire Court.

Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), marked the next major cruel and unusual punishment case in this Court. Trop, a native-born American, was declared to have lost his citizenship by reason of a conviction by court-martial for wartime desertion. Writing for himself and Justices Black, Douglas, and Whittaker, Chief Justice Warren concluded that loss of citizenship amounted to a cruel and unusual punishment that violated the Eighth Amendment.[31]

Emphasizing the Flexibility inherent in the words 'cruel and unusual,' the Chief Justice wrote that '(t)he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'[32] His approach to the problem was that utilized by the Court in Weems: he scrutinized the severity of the penalty in relation to the offense, examined the practices of other civilized nations of the world, and concluded that involuntary statelessness was an excessive and, therefore, an unconstitutional punishment. Justice Frankfurter, dissenting, urged that expatriation was not punishment, and that even if it were, it was not excessive. While he criticized the conclusion arrived at by the Chief Justice, his approach to the Eighth Amendment question was identical.

*328 Whereas in Trop a majority of the Court failed to agree on whether loss of citizenship was a cruel and unusual punishment, four years later a majority did agree in Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), that a sentence of 90 days' imprisonment for violation of a California statute making it a crime to 'be addicted to the use of narcotics' was cruel and unusual. Mr. Justice Stewart, writing the opinion of the Court, reiterated what the Court had said in Weems and what Chief Justice Warren wrote in Trop-that the cruel and unusual **2772 punishment clause was not a static concept, but one that must be continually re-examined 'in the light of contemporary human knowledge.'[33] The fact that the penalty under attack was only 90 days evidences the Court's willingness to carefully examine the possible excessiveness of punishment in a given case even where what is involved is a penalty that is familiar and widely accepted.[34]

We distinguished Robinson in Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), where we sustained a conviction for drunkeness in a public place and a fine of $20. Four Justices dissented on the ground that Robinson was controlling. The analysis in both cases was the same; only the conclusion as to whether or not the punishment was excessive differed. Powell marked the last time prior to today's decision that the Court has had occasion to construe the meaning of the term 'cruel and unusual' punishment.

Several principles emerge from these prior cases and serve as a beacon to an enlightened decision in the instant cases.

*329 III

Perhaps the most important principle in analyzing 'cruel and unusual' punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'[35] Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. A fair reading of Wilkerson v. Utah, supra; In re Kemmler, supra; and Louisiana ex rel. Francis v. Resweber, supra, would certainly indicate an acceptance sub silentio of capital punishment as constitutionally permissible. Several Justices have also expressed their individual opinions that the death penalty is constitutional.[36] Yet, some of these same Justices and others have at times expressed concern over capital punishment.[37] *330 There is no holding directly **2773 in point, and the very nature of the Eighth Amendment would dictate that unless a very recent decision existed, stare decisis would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open.

Faced with an open question, we must establish our standards for decision. The decisions discussed in the previous section imply that a punishment may be deemed cruel and unusual for any one of four distinct reasons.

First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them-e.g., use of the rack, the thumbscrew, or other mont, 144 U.S., at 339, 12 S.Ct., at 699. (Field, J., dissenting). Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it. These are punishments that have been barred since the adoption of the Bill of Rights.

*331 Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense. Cf. United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S., at 435, 41 S.Ct., at 362 (Brandeis, J., dissenting). If these punishments are intended to serve a humane purpose, they may be constitutionally permissible. In re Kemmler, 136 U.S., at 447, 10 S.Ct., at 933-934; Louisiana ex rel. Francis v. Resweber, 329 U.S., at 464, 67 S.Ct., at 376. Prior decisions leave open the question of just how much the word 'unusual' adds to the word 'cruel.' I have previously indicated that use of the word 'unusual' in the English Bill of Rights of 1689 was

inadvertent, and there is nothing in the history of the Eighth Amendment to give flesh to its intended meaning. In light of the meager history that does exist, one would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded. We need not decide this question here, however, for capital punishment is certainly not a recent phenomenon.

Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. Weems v. United States, supra. The decisions previously discussed are replete with assertions that one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties, e.g., Wilkerson v. Utah, 99 U.S., at 134, 25 L.Ed. 345; O'Neil v. Vermont, 144 U.S., at 339-340, 12 S.Ct., at 699-700 (Field, J., dissenting); Weems v. United States, 217 U.S., at 381, 30 S.Ct., at 554-555; Louisiana ex rel. Francis v. Resweber, supra; these punishments are unconstitutional even though popular sentiment may favor them. Both THE CHIEF JUSTICE and Mr. Justice POWELL seek to ignore or to minimize this aspect of the Court's prior decisions. But, since Mr. Justice Field first suggested that '(t)he whole inhibition (of the prohibition against cruel and unusual punishments) ***332** is against that which is excessive(,)' ****2774** O'Neil v. Vermont, 144 U.S., at 340, 12 S.Ct., at 700, this Court has steadfastly maintained that a penalty is unconstitutional whenever it is unnecessarily harsh or cruel. This is what the Founders of this country intended; this is what their fellow citizens believed the Eighth Amendment provided; and this was the basis for our decision in Robinson v. California, supra, for the plurality opinion by Chief Justice Warren in Trop v. Dulles, supra, and for the Court's decision in Weems v. United States, supra. See also W. Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania (1793), reprinted in 12 Am.J.Legal Hist. 122, 127 (1968). It should also be noted that the 'cruel and unusual' language of the Eighth Amendment immediately follows language that prohibits excessive bail and excessive fines. The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.'

Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it. For example, if the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable. A general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment. There are no prior cases in this Court striking down a penalty on this ground, but the very notion of changing values requires that we recognize its existence.

It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or ***333** unnecessary, or because it is abhorrent to currently existing moral values.

We must proceed to the history of capital punishment in the United States.

IV

Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members.[38] Thus, infliction of death as a penalty or objectionable conduct appears to have its beginnings in private vengeance.[39]

As individuals gradually ceded their personal prerogatives to a sovereign power, the sovereign accepted the authority to punish wrongdoing as part of its 'divince right' to rule. Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function.[40] Capital punishment worked its way into the laws of various countries,[41] and was inflicted in a variety of macabre and horrific ways.[42]

It was during the reign of Henry II (1154-1189) that English law first recognized that crime was more than a personal affair between the victim and the perpetrator. ***334** [43] The early history of capital ****2775** punishment in England

is set forth in McGautha v. California, 402 U.S. 183, 197-200, 91 S.Ct. 1454, 1462-1464, 28 L.Ed.2d 711 (1971), and need not be repeated here.

By 1500, English law recognized eight major capital crimes: Treason, petty treason (killing of husband by his wife), murder, larceny, robbery, burglary, rape, and arson.[44] Tudor and Stuart kings added many more crimes to the list of those punishable by death, and by 1688 there were nearly 50.[45] George II (1727-1760) added nearly 36 more, and George III (1760-1820) increased the number by 60.[46]

By shortly after 1800, capital offenses numbered more than 200 and not only included crimes against person and property, but even some against the public peace. While England may, in retrospect, look particularly brutal, Blackstone points out that England was fairly civilized when compared to the rest of Europe.[47]

***335** Capital punishment was not as common a penalty in the American Colonies. 'The Capitall Lawes of New-England,' dating from 1636, were drawn by the Massachusetts Bay Colony and are the first written expression of capital offenses known to exist in this country. These laws make the following crimes capital offenses: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion. Each crime is accompanied by a reference to the Old Testament to indicate its source.[48] It is not known with any certainty exactly when, or even if, these laws were enacted as drafted; and, if so, just how vigorously these laws were enforced.[49] We do know that the other Colonies had a variety of laws that spanned the spectrum of severity.[50]

By the 18th century, the list of crimes became much less theocratic and much more secular. In the average colony, there were 12 capital crimes.[51] This was far fewer than existed in England, and part of the reason was that there was a scarcity of labor in the Colonies.[52] Still, there were many executions, because '(w)ith county jails inadequate and insecure, the criminal population seemed best controlled by death, mutilation, and fines.'[53]

Even in the 17th century, there was some opposition ***336** to capital punishment in some of the colonies. In his 'Great Act' of 1682, William Penn prescribed death only for premeditated murder and ****2776** treason,[54] although his reform was not long lived.[55]

In 1776 the Philadelphia Society for Relieving Distressed Prisoners organized, and it was followed 11 years later by the Philadelphia Society for Alleviating the Miseries of Public Prisons.[56] These groups pressured for reform of all penal laws, including capital offenses. Dr. Benjamin Rush soon drafted America's first reasoned argument against capital punishment, entitled An Enquiry into the Effects of Public Punishments upon Criminals and upon Society.[57] In 1793, William Bradford, the Attorney General of Pennsylvania and later Attorney General of the United States, conducted 'An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania.'[58] He concluded that it was doubtful whether capital punishment was at all necessary, and that until more information could be obtained, it should be immediately eliminated for all offenses except high treason and murder.[59]

The 'Enquiries' of Rush and Bradford and the Pennsylvania movement toward abolition of the death ***337** penalty had little immediate impact on the practices of other States.[60] But in the early 1800's, Governors George and DeWitt Clinton and Daniel Tompkins unsuccessfully urged the New York Legislature to modify or end capital punishment. During this same period, Edward Livingston, an American lawyer who later became Secretary of State and Minister to France under President Andrew Jackson, was appointed by the Louisiana Legislature to draft a new penal code. At the center of his proposal was 'the total abolition of capital punishment.'[61] His Introductory Report to the System of Penal Law Prepared for the State of Louisiana[62] contained a systematic rebuttal of all arguments favoring capital punishment.

Drafted in 1824, it was not published until 1833. This work was a tremendous impetus to the abolition movement for the next half century.

During the 1830's, there was a rising tide of sentiment against capital punishment. In 1834, Pennsylvania abolished public executions, [63] and two years later, The Report on Capital Punishment Made to the Maine Legislature was published. It led to a law that prohibited the executive from issuing a warrant for execution within one year after a criminal was sentenced by the courts. The totally discretionary character of the law was at odds with almost all prior practices. The 'Maine Law' resulted in little enforcement of the death penalty, which was not surprising since the legislature's idea in passing the law was that the affirmative burden placed on the governor to issue a warrant one full year ***338** or more after a trial would be an effective deterrent to exercise of his power. [64] The law spread throughout ****2777** New England and led to Michigan's being the first State to abolish capital punishment in 1846. [65]

Anti-capital punishment feeling grew in the 1840's as the literature of the period pointed out the agony of the condemned man and expressed the philosophy that repentance atoned for the worst crimes, and that true repentance derived, not from fear, but from harmony with nature. [66]

By 1850, societies for abolition existed in Massachusetts, New York, Pennsylvania, Tennessee, Ohio, Alabama, Louisiana, Indiaa, and Iowa. [67] New York, Massachusetts, and Pennsylvania constantly had abolition bills before their legislatures. In 1852, Rhode Island followed in the footsteps of Michigan and partially abolished capital punishment. [68] Wisconsin totally abolished the death penalty the following year. [69] Those States that did not abolish the death penalty greatly reduced its scope, and '(f)ew states outside the South had more than one or two . . . capital offenses' in addition to treason and murder. [70]

But the Civil War halted much of the abolition furor. One historian has said that '(a)fter the Civil War, men's finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and ***339** blunted.' [71] Some of the attention previously given to abolition was diverted to prison reform. An abolitionist movement still existed, however. Maine abolished the death penalty in 1876, restored it in 1883, and abolished it again in 1887; Iowa abolished capital punishment from 1872-1878; Colorado began an erratic period of de facto abolition and revival in 1872; and Kansas also abolished it in 1872, and by law in 1907. [72]

One great success of the abolitionist movement in the period from 1830-1900 was almost complete elimination of mandatory capital punishment. Before the legislatures formally gave juries discretion to refrain from imposing the death penalty, the phenomenon of 'jury nullification,' in which juries refused to convict in cases in which they believed that death was an inappropriate penalty, was experienced. [73] Tennessee was the first State to give juries discretion, Tenn. Laws 1837-1838, c. 29, but other States quickly followed suit. Then, Rep. Curtis of New York introduced a federal bill that ultimately became law in 1897 which reduced the number of federal capital offenses from 60 to 3 (treason, murder, and rape) and gave the jury sentencing discretion in murder and rape cases. [74]

By 1917 12 States had become abolitionist jurisdictions. [75] But, under the nervous tension of World War I, ***340** four of these States reinstituted capital punishment and promising movements in other States came grinding to a halt. [76] During the period following the First World War, the abolitionist movement never regained its momentum.

It is not easy to ascertain why the movement lost its vigor. Certainly, ****2778** much attention was diverted from penal reform during the economic crisis of the depression and the exhausting years of struggle during World War II. Also, executions, which had once been frequent public spectacles, became infrequent private affairs. The manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public. [77]

In recent years there has been renewed interest in modifying capital punishment. New York has moved toward abolition,[78] as have several other States.[79] In 1967, a bill was introduced in the Senate to abolish *341 capital punishment for all federal crimes, but it died in committee.[80]

At the present time, 41 States, the District of Columbia, and other federal jurisdictions authorize the death penalty for at least one crime. It would be fruitless to attempt here to categorize the approach to capital punishment taken by the various States.[81] It is sufficient to note that murder is the crime most often punished by death, followed by kidnaping and treason.[82] Rape is a capital offense in 16 States and the federal system.[83]

The foregoing history demonstrates that capital punishment was carried from Europe to America but, once here, was tempered considerably. At times in our history, strong abolitionist movements have existed. But, they have never been completely successful, as no more than one-quarter of the States of the Union have, at any one time, abolished the death penalty. They have had partial success, however, especially in reducing the number of capital crimes, replacing mandatory death sentences with jury discretion, and developing more humane methods of conducting executions.

This is where our historical foray leads. The question now to be faced is whether American society has *342 reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment. To answer this question, we must first examine whether or not the death penalty is today tantamount to excessive punishment.

**2779 V

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. These are considered seriatim below.

A. The concept of retribution is one of the most misunderstood in all of our criminal jurisprudence. The principal source of confusion derives from the fact that, in dealing with the concept, most people confuse the question 'why do men in fact punish?' with the question 'what justifies men in punishing?'[84] Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can correctly be said that breaking the law is the sine qua non of punishment, or, in other words, that we only *343 tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law.

The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. See Trop v. Dulles, 356 U.S., at 111, 78 S.Ct., at 603-604. (Brennan, J., concurring). Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.

Punishment as retribution has been condemned by scholars for centuries,[85] and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

In Weems v. United States, 217 U.S., at 381, 30 S.Ct., at 554, the Court in the course of holding that Weems' punishment violated the Eighth Amendment, contrasted it with penalties provided for other offenses and concluded:

'(T)his contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.' (Emphasis added.)

*344 It is plain that the view of the Weems Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view that the Court could have taken if the 'cruel and unusual' language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But, the fact that some punishment may be imposed does not **2780 mean that any punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would be definition be acceptable means for designating society's moral approbation of a particular act. The 'cruel and unusual' language would thus be read out of the Constitution and the fears of Patrick Henry and the other Founding Fathers would become realities.

To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment.[86] It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times a cry is heard that morality requires vengeance to evidence *345 society's abhorrence of the act.[87] But the Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.

Mr. Justice Story wrote that the Eighth Amendment's limitation on punishment 'would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.'[88]

I would reach an opposite conclusion-that only in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a Constitution.

The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.

B. The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime.[89]

While the contrary position has been argued,[90] it is my firm opinion that the death penalty is a more severe sanction than life imprisonment. Admittedly, there are *346 some persons who would rather die than languish in prison for a lifetime. But, whether or not they should be able to choose death as an alternative is a far different question from that presented here-i.e., whether the State **2781 can impose death as a punishment. Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such.[91]

It must be kept in mind, then, that the question to be considered is not simply whether capital punishment is *347 a deterrent, but whether it is a better deterrent than life imprisonment.[92]

There is no more complex problem than determining the deterrent efficacy of the death penalty. 'Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged.'[93]

This is the nub of the problem and it is exacerbated by the paucity of useful data. The United States is more fortunate than most countries, however, in that it has what are generally considered to be the world's most reliable statistics. [94]

The two strongest arguments in favor of capital punishment as a deterrent are both logical hypotheses devoid of evidentiary support, but persuasive nonetheless. The first proposition was best stated by Sir James Stephen in 1864:
'No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. . . . No one goes to certain ***348** inevitable death except by compulsion. Put the matter the other way. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely ****2782** not. Why is this? It can only be because 'All that a man has will be give for his life.' In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly.' [95]

This hypothesis relates to the use of capital punishment as a deterrent for any crime. The second proposition is that 'if life imprisonment is the maximum penalty for a crime such as murder, an offender who is serving a life sentence cannot then be deterred from murdering a fellow inmate or a prison officer.' [96] This hypothesis advocates a limited deterrent effect under particular circumstances.

Abolitionists attempt to disprove these hypotheses by amassing statistical evidence to demonstrate that there is no correlation between criminal activity and the existence or nonexistence of a capital sanction. Almost all of the evidence involves the crime of murder, since murder is punishable by death in more jurisdictions than are other offenses, [97] and almost 90% of all executions since 1930 have been pursuant to murder convictions. [98]

Thorsten Sellin, one of the leading authorities on capital punishment, has urged that if the death penalty ***349** deters prospective murderers, the following hypotheses should be true:
'(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects-character of population, social and economic condition, etc.-in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states.

'(b) Murders should increase when the death penalty is abolished and should decline when it is restored.

'(c) The deterrent effect should be greatest and should therefore affect murder rates most powerfully in those communities where the crime occurred and its consequences are most strongly brought home to the population.

'(d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it.' [99] (Footnote omitted.)

Sellin's evidence indicates that not one of these propositions is true. This evidence has its problems, however. One is that there are no accurate figures for capital murders; there are only figures on homicides and they, of course, include noncapital killings. [100] A second problem is that certain murders undoubtedly are misinterpreted as accidental deaths or suicides, and there ***350** is no way of estimating the number of such undetected crimes. A third problem is that not all homicides are reported. Despite these difficulties, most authorities have assumed that the proportion of capital

murders in a State's or nation's homicide statistics remains reasonably constant, [101] and that the homicide statistics are therefore useful.

**2783 Sellin's statistics demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction. He compares States that have similar characteristics and finds that irrespective of their position on capital punishment, they have similar murder rates. In the New England States, for example, there is no correlation between executions [102] and homicide rates. [103] The same is true for Midwestern States, [104] and for all others studied. Both the United Nations [105] and Great Britain [106] have acknowledged the validity of Sellin's statistics.

Sellin also concludes that abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various States involved. [107] This conclusion is borne out by others who have made similar *351 in quiries [108] and by the experience of other countries. [109] Despite problems with the statistics, [110] Sellin's evidence has been relied upon in international studies of capital punishment. [111]

Statistics also show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in other communities. [112] In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it. [113] And, while police and law enforcement officers *352 are the strongest advocates of capital punishment, [114] the evidence is overwhelming **2784 that police are no safer in communities that retain the sanction than in those that have abolished it. [115]

There is also a substantial body of data showing that the existence of the death penalty has virtually no effect on the homicide rate in prisons. [116] Most of the persons sentenced to death are murderers, and murderers tend to be model prisoners. [117]

*353 In sum, the only support for the theory that capital punishment is an effective deterrent is found in the hypotheses with which we began and the occasional stories about a specific individual being deterred from doing a contemplated criminal act. [118] These claims of specific deterrence are often spurious, [119] however, and may be more than counterbalanced by the tendency of capital punishment to incite certain crimes. [120]

The United Nations Committee that studied capital punishment found that '(i)t is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime.' [121]

Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject. But, even if further proof were to be forthcoming, I believe there is more than enough evidence presently available for a decision in this case.

In 1793 William Bradford studied the utility of the death penalty in Pennsylvania and found that it probably had no deterrent effect but that more evidence *354 was needed. [122] Edward Livingston reached a similar conclusion with respect **2785 to deterrence in 1833 upon completion of his study for Louisiana. [123] Virtually every study that has since been undertaken has reached the same result. [124]

In light of the massive amount of evidence befure us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect. [125]

*355 C. Much of what must be said about the death penalty as a device to prevent recidivism is obvious-if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release. [126] For the most part, they are first offenders, and when released from prison they are known to become model citizens. [127] Furthermore, most persons who commit capital crimes are not executed. With respect to those who are sentenced to die, it is critical to note that the jury is never asked to determine whether they are likely to be recidivists. In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.

D. The three final purposes which may underlie utilization of a capital sanction-encouraging guilty pleas and confessions, eugenics, and reducing state expenditures-may be dealt with quickly. If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under **2786 the Sixth Amendment to jury trials, it is unconstitutional. *356 United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). [128] Its elimination would do little to impair the State's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency.

Moreover, to the extent that capital punishment is used to encourage confessions and guilty pleas, it is not being used for punishment purposes. A State that justifies capital punishment on its utility as part of the conviction process could not profess to rely on capital punishment as a deterrent. Such a State's system would be structured with twin goals only: obtaining guilty pleas and confessions and imposing imprisonment as the maximum sanction. Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes.

In light of the previous discussion on deterrence, any suggestions concerning the eugenic benefits of capital punishment are obviously meritless. [129] As I pointed out above, there is not even any attempt made to discover which capital offenders are likely to be recidivists, let alone which are positively incurable. No test or procedure presently exists by which incurables can be screened from those who would benefit from treatment. On the one hand, due process would seem to require that we have some procedure to demonstrate incurability before execution; and, on the other hand, equal protection would then seemingly require that all incurables be executed, cf. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). In addition, the 'cruel and unusual' language *357 would require that life imprisonment, treatment and sterilization be inadequate for eugenic purposes. More importantly, this Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them. If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude, as has virtually everyone else who has looked at the problem, [130] that capital punishment cannot be defended on the basis of any eugenic purposes.

As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. [131] Condemned men are not productive members of the prison community, although they could be, [132] **2787 and executions are expensive. [133] Appeals are often automatic, and courts admittedly spend more time with death cases. [134]

*358 At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, [135] and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the State. There are also continual assertions that the condemned prisoner has gone insane. [136] Because there is a formally established policy of not executing insane persons, [137] great sums of money may be spent on detecting and curing mental illness in order to perform the execution. [138] Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. [139] The entire process is very costly.

When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life. [140]

E. There is but one conclusion that can be drawn from all of this-i.e., the death penalty is an excessive and unnecessary punishment that violates the Eighth *359 Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. It is not improper at this point to take judicial notice of the fact that for more than 200 years men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success. Little, if any, evidence has been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment. [141]

**2788 *360 VI

In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.

In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless 'it shocks the conscience and sense of justice of the people.' [142]

*361 Judge Frank once noted the problems inherent in the use of such a measuring stick:
'(The court,) before it reduces a sentence as 'cruel and unusual,' must have reasonably good assurances that the sentence offends the 'common conscience.' And, in any context, such a standard-the community's attitude-is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels. Even a carefully-taken 'public opinion poll' would be inconclusive in a case like this.' [143]

**2789 While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, [144] its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable. [145]

*362 In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

This is not to suggest that with respect to this test of unconstitutionality people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens. [146]

It has often been noted that American citizens know almost nothing about capital punishment. [147] Some of the conclusions arrived at in the preceding section and the supporting evidence would be critical to an informed judgment on the morality of the death penalty: e.g., that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are ***363** rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become lawabiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

This information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. ****2790** This problem arises from the fact that the public's desire for retribution, even though this is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment, might influence the citizenry's view of the morality of capital punishment. The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince ***364** even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system. Each of these facts is considered briefly below.

Regarding discrimination, it has been said that '(i)t is usually the poor, the illiterate, the underprivileged, the member of the minority group-the man who, because he is without means, and is defended by a court-appointed attorney-who becomes society's sacrificial lamb . . ..' [148] Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. [149] Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; [150] 455 persons, including 48 whites and 405 Negroes, were executed for rape. [151] It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. [152] ***365** Racial or other discriminations should not be surprising. In McGautha v. California, 402 U.S., at 207, 91 S.Ct., at 1467, this Court held 'that committing to the untrammeled ****2791** discretion of the jury the power to pronounce life or death in capital cases is (not) offensive to anything in the Constitution.' This was an open invitation to discrimination.

There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. [153] It is difficult to understand why women

have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes. [154]

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the under ***366** privileged members of society. [155] It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation.

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death. [156]

***367** Proving one's innocense after a jury finding of guilt is almost impossible. While reviewing courts are willing to entertain all kinds of collateral attacks where a sentence of death is involved, they very rarely dispute the jury's interpretation of the evidence. This is, perhaps, as it should be. But, if an innocent man has been found guilty, he must then depend on the good faith of the prosecutor's office to help him establish ****2792** his innocence. There is evidence, however, that prosecutors do not welcome the idea of having convictions, which they labored hard to secure, overturned, and that their cooperation is highly unlikely. [157]

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. [158] We have no way of ***368** judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

While it is difficult to ascertain with certainty the degree to which the death penalty is discriminatorily imposed or the number of innocent persons sentenced to die, there is one conclusion about the penalty that is universally accepted-i.e., it 'tends to distort the course of the criminal law.' [159] As Mr. Justice Frankfurter said:
'I am strongly against capital punishment . . .. When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the Judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life.' [160]

***369** The deleterious effects of the death penalty are also felt otherwise than at trial. For example, its very existence 'inevitably sabotages a social or institutional program of reformation.' [161] In short '(t)he presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform and of the treatment of crime and criminals.' [162]

****2793** Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. [163] For this reason alone capital punishment cannot stand.

***370** VII

To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey. The amount of information that we have assembled and sorted is enormous. *371 Yet, I firmly believe that we have not deviated in the slightest from the principles with which we began.

At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a **2794 country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve 'a major milestone in the long road up from barbarism' [164] and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment. [165]

I concur in the judgments of the Court.

*372 APPENDIX I TO OPINION OF MARSHALL J., CONCURRING

ABOLITION OF THE DEATH PENALTY IN THE UNITED STATES: 1846-1968

(States are listed according to year most recent action was taken)

State	Year of partial abolition	Year of complete abolition	Year of restoration	Year of reabolition
New York	1965[1]	-	-	-
Vermont	1965[2]	-	-	-
West Virginia	-	1965	-	-
Iowa	-	1872	1878	1965
Oregon	-	1914	1920	1964
Michigan	1847[3]	1963	-	-
Delaware	-	1958	1961	-
Alaska	-	1957	-	-
Hawaii	-	1957	-	-

South Dakota	-	1915	1939	-
Kansas	-	1907	1935	-
Missouri	-	1917	1919	-
Tennessee	1915[4]	-	1919	-
Washington	-	1913	1919	-
Arizona	1916[5]	-	1918	-
North Dakota	1915[6]	-	-	-
Minnesota	-	1911	-	-
Colorado	-	1897	1901	-
Maine	-	1876	1883	1887
Wisconsin	-	1853	-	-
Rhode Island	1852[7]	-	-	-

**2795 *373 APPENDIX II TO OPINION OF MARSHALL, J., CONCURRING

CRUDE HOMICIDE DEATH RATES, PER 100,000 POPULATION, AND NUMBER OF EXECUTIONS IN CERTAIN AMERICAN STATES: 1920-1955

		N. H.		Vt.		Mass.			Conn.	
Year	Maine*	Rates	Exec.	Rates	Exec.	Rates	Exec.	R. I.*	Rates	Exec.
1920	1.4	1.8		2.3		2.1	1	1.8	3.9	1
1921	2.2	2.2		1.7		2.8		3.1	2.9	2
1922	1.7	1.6		1.1		2.6		2.2	2.9	1
1923	1.7	2.7		1.4		2.8	1	3.5	3.1	
1924	1.5	1.5		.6		2.7	1	2.0	3.5	
1925	2.2	1.3		.6		2.7		1.8	3.7	
1926	1.1	.9		2.2		2.0	1	3.2	2.9	1
1927	1.9	.7		.8		2.1	6	2.7	2.3	2
1928	1.6	1.3		1.4		1.9	3	2.7	2.7	
1929	1.0	1.5		1.4		1.7	6	2.3	2.6	1

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1930.....	1.8	.9		1.4		1.8		2.0	3.2	2
1931.....	1.4	2.1		1.1	1	2.0	2	2.2	2.7	
1932.....	2.0	.2		1.1		2.1	1	1.6	2.9	
1933.....	3.3	2.7		1.6		2.5		1.9	1.8	
1934.....	1.1	1.4		1.9		2.2	4	1.8	2.4	
1935.....	1.4	1.0		.3		1.8	4	1.6	1.9	
1936.....	2.2	1.0		2.1		1.6	2	1.2	2.7	1
1937.....	1.4	1.8		1.8		1.9		2.3	2.0	1
1938.....	1.5	1.8		1.3		1.3	3	1.2	2.1	1
1939.....	1.2	2.3	1	.8		1.4	2	1.6	1.3	
1940.....	1.5	1.4		.8		1.5		1.4	1.8	2
1941.....	1.1	.4		2.2		1.3	1	.8	2.2	
1942.....	1.7	.2		.9		1.3	2	1.2	2.5	
1943.....	1.7	.9		.6		.9	3	1.5	1.6	2
1944.....	1.5	1.1		.3		1.4		.6	1.9	1
1945.....	.9	.7		2.9		1.5		1.1	1.5	1
1946.....	1.4	.8		1.7		1.4	1	1.5	1.6	3
1947.....	1.2	.6		1.1	1	1.6	2	1.5	1.9	
1948.....	1.7	1.0		.8		1.4		2.7	1.7	1
1949.....	1.7	1.5		.5		1.1		.5	1.8	
1950.....	1.5	1.3		.5		1.3		1.5	1.4	
1951.....	2.3	.6		.5		1.0		.9	2.0	
1952.....	1.0	1.5		.5		1.0		1.5	1.7	
1953.....	1.4	.9		.3		1.0		.6	1.5	
1954.....	1.7	.5		1.6	2	1.0		1.3	1.3	
1955.....	1.2	1.1		.5		1.2		1.7	1.3	3

**2796 *374 APPENDIX III TO OPINION OF MARSHALL, J., CONCURRING

CRUDE HOMICIDE DEATH RATES, PER 100,000 POPULATION, AND NUMBER OF EXECUTIONS IN CERTAIN AMERICAN STATES: 1920-1955

	Mich.*	Ohio		Ind.		Minn.*	Iowa		Wis.*	N.D.*	S.D.		Neb.	
Year		Rate	Ex.	Rate	Ex.		Rate	Ex.			Rate	Ex.	Rate	Ex.
1920.....	5.5	6.9	3	4.7	2	3.1	**		1.7	**	**	***	4.2	
1921.....	4.7	7.9	10	6.4		4.4			2.2				4.9	
1922.....	4.3	7.3	12	5.7	2	3.6		3	1.8				4.5	
1923.....	6.1	7.8	10	6.1		2.9	2.1	2	2.2				4.1	
1924.....	7.1	6.9	10	7.3		3.2	2.7	1	1.8	2.1			4.4	
1925.....	7.4	8.1	13	6.6	1	3.8	2.7	2	2.3	2.0			4.0	
1926.....	10.4	8.6	7	5.8	3	2.2	2.3		2.6	1.8			2.7	
1927.....	8.2	8.6	8	6.3	1	2.6	2.4		2.6	1.6			3.5	
1928.....	7.0	8.2	7	7.0	1	2.8	2.3		2.1	1.0			3.7	
1929.....	8.2	8.3	5	7.0	1	2.2	2.6		2.3	1.2			3.0	
1930.....	6.7	9.3	8	6.4	1	3.8	3.2		3.1	3.5	1.9		3.5	
1931.....	6.2	9.0	10	6.5	1	2.9	2.5	1	3.6	2.0	2.3		3.6	
1932.....	5.7	8.1	7	6.7	2	2.9	2.9		2.8	1.2	1.6		3.7	
1933.....	5.1	8.2	11	5.6	3	3.5	2.9		1.9	1.2	1.7		3.2	
1934.....	4.2	7.7	7	7.1	4	3.4	2.3		2.4	1.6	3.0		4.4	
1935.....	4.2	7.1	10	4.4	2	2.6	2.0	3	1.4	2.3	2.0		3.4	
1936.....	4.0	6.6	6	5.2	2	2.3	1.8		1.7	2.0	1.2		2.5	
1937.....	4.6	5.7	1	4.7	5	1.6	2.2		2.2	1.6	.1		2.0	
1938.....	3.4	5.1	12	4.4	8	1.6	1.4	4	2.0	2.4	.9		1.6	
1939.....	3.1	4.8	10	3.8	3	1.6	1.8		1.4	1.2	2.8		2.1	
1940.....	3.0	4.6	2	3.3		1.2	1.3	1	1.3	1.4	2.2		1.0	
1941.....	3.2	4.2	4	3.1	1	1.7	1.3	1	1.4	2.3	1.0		2.1	
1942.....	3.2	4.6	2	3.2	1	1.7	1.2		1.6	1.4	.9		1.8	
1943.....	3.3	4.4	5	2.8		1.2	1.0		1.1	.6	1.4		2.4	

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1944.....	3.3	3.9	2	2.8		1.4	1.7	1	.9	.9	1.6		1.3			
1945.....	3.7	4.9	7	4.0	1	1.9	1.6	1	1.6	1.0	2.0		1.2	1		
1946.....	3.2	5.2	2	3.9	1	1.6	1.8	2	.9	1.5	1.1		2.1			
1947.....	3.8	4.9	5	3.8		1.2	1.9		1.4	.4	1.0	1	2.2			
1948.....	3.4	4.5	7	4.2		1.9	1.4		.9	.9	2.0		2.5	1		
1949.....	3.5	4.4	15	3.2	3	1.1	.9	1	1.3	.7	2.3		1.8			
1950.....	3.9	4.1	4	3.6	1	1.2	1.3		1.1	.5	1.1		2.9			
1951.....	3.7	3.8	4	3.9	1	1.3	1.5		1.1	.5	.9		1.0			
1952.....	3.3	4.0	4	3.8		1.3	1.5	1	1.6	.8	2.3		1.6	1		
1953.....	4.6	3.6	4	4.0		1.5	1.1		1.2	1.1	1.1		2.0			
1954.....	3.3	3.4	4	3.2		1.0	1.0		1.1	.5	1.5		2.3			
1955.....	3.3	3.1		3.1		1.1	1.2		1.1	.8	1.8		1.3			

*375 Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice REHNQUIST join, dissenting.

At the outset it is important to note that only two members of the Court, Mr. Justice BRENNAN and Mr. Justice MARSHALL, have concluded that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances. Mr. Justice DOUGLAS has also determined that the death penalty contravenes the Eighth Amendment, although I do not read his opinion as necessarily requiring final abolition of the penalty. [1] For the reasons set forth in Parts I-IV of this opinion, I conclude that the constitutional prohibition **2797 against 'cruel and unusual punishments' cannot be construed to bar the imposition of the punishment of death.

Mr. Justice STEWART and Mr. Justice WHITE have concluded that petitioners' death sentences must be set aside because prevailing sentencing practices do not comply with the Eighth Amendment. For the reasons set forth in Part V of this opinion, I believe this approach fundamentally misconceives the nature of the Eighth Amendment guarantee and flies directly in the face of controlling authority of extremely recent vintage.

I

It we were possessed of legislative power, I would either join with Mr. Justice BRENNAN and Mr. Justice MARSHALL or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than *376 self-defining, but, of all our fundamental guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command. Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Clinic for Women, Inc. v. Brizzi, Ind., November 23, 2005

112 S.Ct. 2791
Supreme Court of the United States

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, et al., Petitioners,
v.
Robert P. CASEY, et al., etc.
Robert P. CASEY, et al., etc., Petitioners,
v.
PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA et al.

Nos. 91–744, 91–902.
|
Argued April 22, 1992.
|
Decided June 29, 1992.

Abortion clinics and physician challenged, on due process grounds, the constitutionality of the 1988 and 1989 amendments to the Pennsylvania abortion statute. The United States District Court for the Eastern District of Pennsylvania, Daniel H. Huyett, 3d, J., 744 F.Supp. 1323, held that several sections of the statute were unconstitutional. Pennsylvania appealed. The Court of Appeals for the Third Circuit, 947 F.2d 682, affirmed in part and reversed in part. Certiorari was granted. The Supreme Court, Justices O'Connor, Kennedy and Souter held that: (1) the doctrine of stare decisis requires reaffirmance of *Roe v. Wade's* essential holding recognizing a woman's right to choose an abortion before fetal viability; (2) the undue burden test, rather than the trimester framework, should be used in evaluating abortion restrictions before viability; (3) the medical emergency definition in the Pennsylvania statute was sufficiently broad that it did not impose an undue burden; (4) the informed consent requirements, the 24–hour waiting period, parental consent provision, and the reporting and recordkeeping requirements of the Pennsylvania statute did not impose an undue burden; and (5) the spousal notification provision imposed an undue burden and was invalid.

Affirmed in part, reversed in part, and remanded.

Justice Stevens filed an opinion concurring in part and dissenting in part.

Justice Blackmun filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part.

Chief Justice Rehnquist filed an opinion concurring in the judgment in part and dissenting in part, in which Justices White, Scalia and Thomas joined.

Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, in which Chief Justice Rehnquist and Justices White and Thomas joined.

West Headnotes (39)

[1] Abortion and Birth Control ⇐ Fetal age and viability;trimester

Woman has right to choose to have abortion before viability of fetus without undue interference from state; before viability, state's interests are not strong enough to support prohibition of abortion or imposition of substantial obstacle to woman's effective right to elect procedure. U.S.C.A. Const.Amend. 14.

73 Cases that cite this headnote

[2] **Abortion and Birth Control** ⇦ Fetal age and viability;trimester

Abortion and Birth Control ⇦ Health and safety of patient

State has power to restrict abortions after fetal viability, if law contains exceptions for pregnancies that endanger woman's life or health. U.S.C.A. Const.Amend. 14.

28 Cases that cite this headnote

[3] **Abortion and Birth Control** ⇦ Fetal age and viability;trimester

Abortion and Birth Control ⇦ Health and safety of patient

State has legitimate interests from the outset of the pregnancy in protecting health of woman and life of fetus that may become child. U.S.C.A. Const.Amend. 14.

55 Cases that cite this headnote

[4] **Constitutional Law** ⇦ Liberties and liberty interests

Substantive liberties protected by Fourteenth Amendment, which incorporates most of Bill of Rights against states, are not limited to those rights already guaranteed against federal interference by express provisions of first eight amendments to Constitution. U.S.C.A. Const.Amends. 1–8, 14.

140 Cases that cite this headnote

[5] **Constitutional Law** ⇦ Liberties and liberty interests

Substantive liberties protected by Fourteenth Amendment are not limited to those practices, defined at the most specific level, that were protected against government interference by other rules of law when Fourteenth Amendment was ratified. U.S.C.A. Const.Amend. 14.

100 Cases that cite this headnote

[6] **Constitutional Law** ⇦ Personal and bodily rights in general

Constitutional Law ⇦ Families and Children

Constitutional Law ⇦ Parent and Child Relationship

Constitution places limits on state's right to interfere with person's most basic decisions about family and parenthood, as well as bodily integrity. U.S.C.A. Const.Amend. 14.

68 Cases that cite this headnote

[7] **Courts** ⇦ Previous Decisions as Controlling or as Precedents

Courts ⇦ Constitutional questions

Rule of stare decisis is not inexorable command and certainly it is not such in every constitutional case; rather, when Supreme Court reexamines prior holding, its judgment is customarily informed by prudential and

pragmatic considerations designed to test consistency of overruling prior decision with ideal of the rule of law, and to gauge respective costs of reaffirming and overruling prior case.

81 Cases that cite this headnote

[8] **Courts** ⇦ Decisions of Same Court or Co-Ordinate Court

Under doctrine of stare decisis, when Supreme Court reexamines prior holding, it may ask whether rule has proved to be intolerable simply in defying practical workability, whether rule is subject to a kind of reliance that would lend special hardship to consequences of overruling and would add inequity to cost of repudiation, whether related principles of law have so far developed that they have left the old rule no more than a remnant of abandoned doctrine, and whether facts have so changed or come to be seen differently as to have robbed old rule of significant application or justification.

117 Cases that cite this headnote

[9] **Courts** ⇦ Decisions of Same Court or Co-Ordinate Court

Opposition to *Roe v. Wade* did not render decision unworkable and, therefore, doctrine of stare decisis required reaffirmance.

5 Cases that cite this headnote

[10] **Abortion and Birth Control** ⇦ Right to abortion in general;choice

Courts ⇦ Decisions of Same Court or Co-Ordinate Court

Reliance on *Roe v. Wade* rule's limitation on state power required reaffirmance of *Roe's* essential holding under doctrine of stare decisis; for two decades of economic and social developments, people organized intimate relationships and made choices that defined their views of themselves and their places in society in reliance on availability of abortion in event of contraceptive failure.

39 Cases that cite this headnote

[11] **Courts** ⇦ Decisions of Same Court or Co-Ordinate Court

No evolution of legal principle weakened doctrinal footings of *Roe v. Wade* and, therefore, application of stare decisis required reaffirmance, whether *Roe* was viewed as example of right of person to be free from unwarranted governmental intrusion into matters as fundamental as decision whether to bear or beget child, whether it was viewed as rule of personal autonomy and bodily integrity that would limit governmental power to mandate medical treatment or to bar its rejection, or if it was viewed as sui generis.

9 Cases that cite this headnote

[12] **Courts** ⇦ Decisions of Same Court or Co-Ordinate Court

Advances in maternal health care and in neonatal care that may have affected factual assumptions of *Roe v. Wade* did not render *Roe's* central holding obsolete and did not warrant overruling it; those facts had no bearing on validity of *Roe's* central holding that viability marked earliest point at which state's interest in fetal life would be constitutionally adequate to justify legislative ban on nontherapeutic abortions.

7 Cases that cite this headnote

[13] **Courts** ⇦ Decisions of Same Court or Co-Ordinate Court

Neither factual underpinnings of *Roe v. Wade*, nor Supreme Court's understanding of it, had been changed to such a degree that would warrant overruling decision; present doctrinal disposition to reach different result was insufficient to warrant overruling.

1 Cases that cite this headnote

[14] **Courts** ⇦ Erroneous or injudicious decisions

Overruling *Roe v. Wade* in response to divisiveness of abortion issue would address error, if error there was, at cost of profound and unnecessary damage to Supreme Court's legitimacy, and to nation's commitment to rule of law; only the most convincing justification under accepted standards of precedent could suffice to demonstrate that overruling would be anything other than surrender to political pressure and unjustified repudiation of principle.

3 Cases that cite this headnote

[15] **Abortion and Birth Control** ⇦ Fetal age and viability;trimester

Woman's constitutional liberty to terminate her pregnancy is not so unlimited as to prevent state from showing its concern for life of the unborn and, at later point in fetal development, state's interest in life may have sufficient force to allow restrictions on woman's right to terminate pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

39 Cases that cite this headnote

[16] **Abortion and Birth Control** ⇦ Fetal age and viability;trimester

Viability is point of fetal development at which state's interest in life has sufficient force that woman's right to terminate her pregnancy may be restricted; viability is time at which there is realistic possibility of maintaining and nourishing life outside the womb, so that independent existence of second life can in reason and fairness be object of state protection that would override woman's right to terminate her pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

33 Cases that cite this headnote

[17] **Abortion and Birth Control** ⇦ Fetal age and viability;trimester

Rigid trimester framework established in *Roe v. Wade* is not necessary to ensure that woman's right to choose to terminate or continue her pregnancy is not so subordinated to state's interest in fetal life that choice exists in theory but not in fact; rather, *Roe* recognizes state's interest in promoting fetal life and measures aimed at ensuring that woman's choice contemplates consequences for fetus do not necessarily interfere with right to terminate pregnancy, even if those measures would have been inconsistent with trimester framework. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

12 Cases that cite this headnote

[18] **Constitutional Law** ⇦ Protections Provided and Deprivations Prohibited in General

Not every law which makes right more difficult to exercise is, ipso facto, an infringement of that right. U.S.C.A. Const.Amend. 14.

7 Cases that cite this headnote

[19] **Abortion and Birth Control** ⇨ Scope and standard of review

Constitutional Law ⇨ Abortion, Contraception, and Birth Control

Only when state regulation of abortion imposes undue burden on woman's ability to decide whether to terminate pregnancy does power of state reach into heart of liberty protected by due process clause; fact that regulation has incidental effect of making it more difficult or more expensive to procure abortion cannot be enough to invalidate it. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

140 Cases that cite this headnote

[20] **Abortion and Birth Control** ⇨ Scope and standard of review

Abortion and Birth Control ⇨ Public policy and governmental interest

Undue burden standard is appropriate means of reconciling state's interest in human life with woman's constitutionally protected liberty to decide whether to terminate pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

39 Cases that cite this headnote

[21] **Abortion and Birth Control** ⇨ Fetal age and viability;trimester

State regulation imposes "undue burden" on woman's decision whether to terminate pregnancy and, thus, regulation is invalid if it has purpose or effect of placing substantial obstacle in path of woman who seeks abortion of nonviable fetus. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

218 Cases that cite this headnote

[22] **Abortion and Birth Control** ⇨ Fetal age and viability;trimester

Abortion and Birth Control ⇨ Substitution and Bypass;Notice

Regulations which do no more than create structural mechanism by which state, or parent or guardian of minor, may express profound respect for life of unborn are permitted if they are not substantial obstacle to woman's exercise of right to choose to terminate pregnancy before fetal viability; unless regulations are substantial obstacle, state measure designed to persuade woman to choose childbirth over abortion will be upheld if reasonably related to goal of furthering state's interest in fetal life. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

68 Cases that cite this headnote

[23] **Abortion and Birth Control** ⇨ Health and safety of patient

State regulations that are designed to foster health of woman who seeks abortion before fetal viability are valid if they do not constitute undue burden on woman's right to choose. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

30 Cases that cite this headnote

[24] **Abortion and Birth Control** ⇨ Information and consent;counseling

To promote state's profound interest in potential life, throughout pregnancy, state may take measures to ensure that woman's choice is informed, and measures designed to advance that interest will not be invalidated as long as their purpose is to persuade woman to choose childbirth over abortion without placing undue burden on right to terminate pregnancy. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

83 Cases that cite this headnote

[25] **Abortion and Birth Control** ⇦ Health and safety of patient

Unnecessary health regulations that have purpose or effect of presenting substantial obstacle to woman who seeks abortion before viability impose undue burden on that right and are invalid. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

112 Cases that cite this headnote

[26] **Abortion and Birth Control** ⇦ Fetal age and viability;trimester

Regardless of whether exceptions are made for particular circumstances, state may not prohibit any woman from making ultimate decision to terminate her pregnancy before viability. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

8 Cases that cite this headnote

[27] **Abortion and Birth Control** ⇦ Fetal age and viability;trimester

Abortion and Birth Control ⇦ Health and safety of patient

After fetal viability, state in promoting its interest in potentiality of human life may, if it chooses, regulate and even proscribe abortion, except where it is necessary, in appropriate medical judgment, for preservation of life or health of mother. (Per Justices O'Connor, Kennedy and Souter.) U.S.C.A. Const.Amend. 14.

49 Cases that cite this headnote

[28] **Abortion and Birth Control** ⇦ Health and safety of patient

Medical emergency definition in Pennsylvania's abortion statute was sufficiently broad to cover medical conditions of preeclampsia, inevitable abortion, and premature ruptured membrane and, therefore, definition imposed no undue burden on woman's abortion right. 18 Pa.C.S.A. § 3203; U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[29] **Abortion and Birth Control** ⇦ Information and consent;counseling

Informed consent provisions of Pennsylvania's abortion statute that require giving of truthful, nonmisleading information about nature of abortion procedure, about attendant health risks of abortion and of childbirth, and about probable gestational age of fetus do not impose undue burden on woman's right to choose to terminate her pregnancy; overruling *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3205(a); U.S.C.A. Const.Amend. 14.

17 Cases that cite this headnote

[30] **Abortion and Birth Control** ⇨ Information and consent;counseling

Requiring doctors to inform woman who seeks abortion about availability of information related to fetal development and consequences to fetus, and assistance available if woman decides to carry pregnancy to full term, is reasonable measure to ensure informed choice and does not impose undue burden on woman's right to abortion. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3205(a); U.S.C.A. Const.Amend. 14.

23 Cases that cite this headnote

[31] **Abortion and Birth Control** ⇨ Information and consent;counseling

Informed consent provision of Pennsylvania's abortion statute does not prevent physician from exercising his or her medical judgment, and, thus, does not impose undue burden on woman's abortion right; statute does not require physician to comply with informed consent provisions if he or she can demonstrate by preponderance of evidence that he or she reasonably believed that furnishing information would have resulted in severely adverse effect on physical or mental health of patient. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3205(a); U.S.C.A. Const.Amend. 14.

33 Cases that cite this headnote

[32] **Abortion and Birth Control** ⇨ Information and consent;counseling

Constitutional Law ⇨ Health care professions

Informed consent provision of Pennsylvania's abortion statute implicates physician's First Amendment rights not to speak only as part of practice of medicine, which is licensed and regulated by state and, therefore, there is no constitutional infirmity in requirement that physician provide information about risks of abortion in childbirth. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3205(a); U.S.C.A. Const.Amend. 1.

48 Cases that cite this headnote

[33] **Abortion and Birth Control** ⇨ Information and consent;counseling

Informed consent provision of Pennsylvania's abortion statute that requires physician, as opposed to qualified assistant, to provide information relevant to woman's informed consent does not impose undue burden on woman's right to abortion; rather, provision is reasonable means to insure that woman's consent is informed. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3205; U.S.C.A. Const.Amend. 14.

11 Cases that cite this headnote

[34] **Abortion and Birth Control** ⇨ Waiting period;delay

Pennsylvania abortion statute's 24–hour waiting period does not impose undue burden on woman's abortion right, even though waiting period has effect of increasing cost and risk of delayed abortions. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3205(a); U.S.C.A. Const.Amend. 14.

8 Cases that cite this headnote

[35] **Abortion and Birth Control** ⇦ Rights of donor, partner or spouse

Spousal notification provision of Pennsylvania's abortion statute places undue burden on woman's abortion right and is invalid; whether prospect of notification itself deters women who have been abused or women whose children have been abused from seeking abortions, or whether husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining abortion until it is too late, spousal notice requirement would often be tantamount to giving husband veto over decision. 18 Pa.C.S.A. §§ 3209, 3214(a)(12); U.S.C.A. Const.Amend. 14.

22 Cases that cite this headnote

[36] **Abortion and Birth Control** ⇦ Rights of donor, partner or spouse

Fact that spousal notification provision of Pennsylvania's abortion statute may have affected only one percent of women seeking abortions who were married and who would choose not to notify their husbands of their plans did not prevent notification provision from imposing undue burden on woman's decision to terminate pregnancy; provision had to be judged by reference to those for whom it was actual, rather than irrelevant, restriction. 18 Pa.C.S.A. §§ 3209, 3214(a)(12); U.S.C.A. Const.Amend. 14.

28 Cases that cite this headnote

[37] **Abortion and Birth Control** ⇦ Rights of donor, partner or spouse

Husband's deep and proper concern and interest in his wife's pregnancy and in fetus did not justify undue burden imposed by Pennsylvania abortion statute's spousal notification provision; husband's interest in fetus did not permit state to give husband effective veto over abortion decision. 18 Pa.C.S.A. §§ 3209, 3214(a)(12); U.S.C.A. Const.Amend. 14.

10 Cases that cite this headnote

[38] **Abortion and Birth Control** ⇦ Substitution and Bypass;Notice

Abortion and Birth Control ⇦ Approval by court;bypass in general

Pennsylvania abortion statute's one-parent consent requirement and judicial bypass procedure do not impose undue burden on right of unemancipated young woman under age of 18 to obtain abortion. (Per Justices O'Connor, Kennedy and Souter, with the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. § 3206; U.S.C.A. Const.Amend. 14.

20 Cases that cite this headnote

[39] **Abortion and Birth Control** ⇦ Records;confidentiality

Recordkeeping and reporting requirements of Pennsylvania's abortion statute, except for that provision requiring reporting of married woman's reason for failure to provide notice to her husband, do not impose undue burden of woman's abortion right; recordkeeping and reporting requirements do not impose substantial obstacle to woman's choice, but reporting requirement with respect to reason for failure to give notice to husband would provide Pennsylvania with precise information that many women may have pressing reasons not to reveal. (Per Justices O'Connor, Kennedy and Souter, with one Justice joining and the Chief Justice and three Justices concurring in the judgment.) 18 Pa.C.S.A. §§ 3207, 3214, 3214(a)(12); U.S.C.A. Const.Amend. 14.

18 Cases that cite this headnote

**2796 *Syllabus* *

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

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

947 F.2d 682 (CA3 1991): No. 91–902, affirmed; No. 91–744, affirmed in part, reversed in part, and remanded.

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER delivered the opinion of the Court with respect to Parts I, II, and III, concluding that: consideration of the fundamental constitutional question resolved by *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, principles of institutional integrity, and the rule of *stare decisis* require that *Roe*'s essential holding be retained *834 and reaffirmed as to each of its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective **2797 right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. Pp. 2803–2816.

(a) A reexamination of the principles that define the woman's rights and the State's authority regarding abortions is required by the doubt this Court's subsequent decisions have cast upon the meaning and reach of *Roe*'s central holding, by the fact that THE CHIEF JUSTICE would overrule *Roe,* and by the necessity that state and federal courts and legislatures have adequate guidance on the subject. Pp. 2803–2804.

(b) *Roe* determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the Due Process Clause of the Fourteenth Amendment. Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such "liberty." Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society. The Court's decisions have afforded constitutional protection to personal decisions relating to marriage, see, *e.g., Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010, procreation, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655, family relationships, *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, child rearing and education, *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, and contraception, *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, and have recognized the right of the individual

to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child, *Eisenstadt v. Baird,* 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349. *Roe*'s central holding properly invoked the reasoning and tradition of these precedents. Pp. 2804–2808.

(c) Application of the doctrine of *stare decisis* confirms that *Roe*'s essential holding should be reaffirmed. In reexamining that holding, the Court's judgment is informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling the holding with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling. Pp. 2808–2809.

***835** d) Although *Roe* has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable. P. 2809.

(e) The *Roe* rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed. P. 2809.

(f) No evolution of legal principle has left *Roe*'s central rule a doctrinal anachronism discounted by society. If *Roe* is placed among the cases exemplified by *Griswold, supra,* it is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the liberty recognized in such ****2798** cases. Similarly, if *Roe* is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection, this Court's post-*Roe* decisions accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. See, *e.g., Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 278, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224. Finally, if *Roe* is classified as *sui generis,* there clearly has been no erosion of its central determination. It was expressly reaffirmed in *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (*Akron I*), and *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779; and, in *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410, a majority either voted to reaffirm or declined to address the constitutional validity of *Roe*' s central holding. Pp. 2810–2811.

(g) No change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for its overruling. Although subsequent maternal health care advances allow for later abortions safe to the pregnant woman, and post-*Roe* neonatal care developments have advanced viability to a point somewhat earlier, these facts go only to the scheme of time limits on the realization of competing interests. Thus, any later divergences from the factual premises of *Roe* have no bearing on the validity of its central holding, that viability marks the earliest point at which the State's interest in fetal ***836** life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on when viability occurs. Whenever it may occur, its attainment will continue to serve as the critical fact. Pp. 2811–2812.

(h) A comparison between *Roe* and two decisional lines of comparable significance—the line identified with *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937, and the line that began with *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256—confirms the result reached here. Those lines were overruled—by, respectively, *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, and *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873—on the basis of facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. The overruling decisions were comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances. In contrast, because neither the factual underpinnings of

Roe's central holding nor this Court's understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining *Roe* with any justification beyond a present doctrinal disposition to come out differently from the *Roe* Court. That is an inadequate basis for overruling a prior case. Pp. 2812–2814.

(i) Overruling *Roe*'s central holding would not only reach an unjustifiable result under *stare decisis* principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in *Roe,* its decision has a dimension not present in normal cases and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. Moreover, the country's loss of confidence in the Judiciary ****2799** would be underscored by condemnation for the Court's failure to keep faith with those who support the decision at a cost to themselves. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. Pp. 2814–2816.

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER concluded in Part IV that an examination of *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, and ***837** subsequent cases, reveals a number of guiding principles that should control the assessment of the Pennsylvania statute:

(a) To protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in potential life, see *id.,* at 162, 93 S.Ct., at 731, the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

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

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

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

(e) *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" is also reaffirmed. *Id.,* at 164–165, 93 S.Ct., at 732. Pp. 2816–2822.

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

1. As construed by the Court of Appeals, § 3203's medical emergency definition is intended to assure that compliance with the State's abortion regulations would not in any way pose a significant threat to a woman's life or health, and thus does not violate the essential holding of *Roe, supra,* at 164, 93 S.Ct., at 732. Although the definition could be interpreted

in an unconstitutional manner, this Court defers to lower federal court interpretations of state law unless they amount to "plain" error. P. 2822.

2. Section 3209's husband notification provision constitutes an undue burden and is therefore invalid. A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely. The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper focus of constitutional inquiry ***838** is the group for whom the law is a restriction, not the group for whom it is irrelevant. Furthermore, it cannot be claimed that the father's interest in the fetus' welfare is equal to the mother's protected liberty, since it is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband. ****2800** Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to this Court's present understanding of marriage and of the nature of the rights secured by the Constitution. See *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 69, 96 S.Ct. 2831, 2841, 49 L.Ed.2d 788. Pp. 2826–2831.

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER, joined by Justice STEVENS, concluded in Part V–E that all of the statute's recordkeeping and reporting requirements, except that relating to spousal notice, are constitutional. The reporting provision relating to the reasons a married woman has not notified her husband that she intends to have an abortion must be invalidated because it places an undue burden on a woman's choice. Pp. 2832–2833.

Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER concluded in Parts V–B and V–D that:

1. Section 3205's informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy. To the extent *Akron I,* 462 U.S., at 444, 103 S.Ct., at 2500, and *Thornburgh,* 476 U.S., at 762, 106 S.Ct., at 2179, find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled. Requiring that the woman be informed of the availability of information relating to the consequences to the fetus does not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman's position, and does not underlie or override the abortion right. Moreover, the physician's First Amendment rights not to speak are implicated only as part of the practice of medicine, which is licensed and regulated by the State. There is no evidence here that requiring a doctor to give the required information would amount to a substantial obstacle to a woman seeking an abortion. The premise behind *Akron I*'s invalidation of a waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion, 462 U.S., at 450, 103 S.Ct., at 2503, is also wrong. Although § 3205's 24–hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid ***839** on the present record and in the context of this facial challenge. Pp. 2822–2826.

2. Section 3206's one-parent consent requirement and judicial bypass procedure are constitutional. See, *e.g., Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 510–519, 110 S.Ct. 2972, 2978–2983, 111 L.Ed.2d 405. P. 2832.

Justice BLACKMUN concluded that application of the strict scrutiny standard of review required by this Court's abortion precedents results in the invalidation of all the challenged provisions in the Pennsylvania statute, including the reporting requirements, and therefore concurred in the judgment that the requirement that a pregnant woman report her reasons for failing to provide spousal notice is unconstitutional. Pp. 2847, 2850–2851.

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

1. Although *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, is not directly implicated by the Pennsylvania statute, which simply regulates and does not prohibit abortion, a reexamination of the "fundamental right" *Roe* accorded

to a woman's decision to abort a fetus, with the concomitant requirement that any state regulation of abortion survive "strict scrutiny," *id.*, at 154–156, 93 S.Ct., at 727–728, is warranted by the confusing and uncertain state of this Court's **2801 post-*Roe* decisional law. A review of post-*Roe* cases demonstrates both that they have expanded upon *Roe* in imposing increasingly greater restrictions on the States, see *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 783, 106 S.Ct. 2169, 2190, 90 L.Ed.2d 779 (Burger, C.J., dissenting), and that the Court has become increasingly more divided, none of the last three such decisions having commanded a majority opinion, see *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405; *Hodgson v. Minnesota,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344; *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410. This confusion and uncertainty complicated the task of the Court of Appeals, which concluded that the "undue burden" standard adopted by Justice O'CONNOR in *Webster* and *Hodgson* governs the present cases. Pp. 2855–2859.

2. The *Roe* Court reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010; and *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, and thereby deemed the right to abortion to be "fundamental." None of these decisions endorsed an all-encompassing "right of privacy," as *Roe, supra,* 410 U.S., at 152–153, 93 S.Ct., at 726, claimed. Because abortion involves the purposeful termination of potential life, the abortion decision must be recognized as *sui generis,* different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy. And the historical traditions of the American people—as evidenced by the English common *840 law and by the American abortion statutes in existence both at the time of the Fourteenth Amendment's adoption and *Roe*'s issuance—do not support the view that the right to terminate one's pregnancy is "fundamental." Thus, enactments abridging that right need not be subjected to strict scrutiny. Pp. 2859–2860.

3. The undue burden standard adopted by the joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER has no basis in constitutional law and will not result in the sort of simple limitation, easily applied, which the opinion anticipates. To evaluate abortion regulations under that standard, judges will have to make the subjective, unguided determination whether the regulations place "substantial obstacles" in the path of a woman seeking an abortion, undoubtedly engendering a variety of conflicting views. The standard presents nothing more workable than the trimester framework the joint opinion discards, and will allow the Court, under the guise of the Constitution, to continue to impart its own preferences on the States in the form of a complex abortion code. Pp. 2866–2867.

4. The correct analysis is that set forth by the plurality opinion in *Webster, supra*: A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. P. 2867.

5. Section 3205's requirements are rationally related to the State's legitimate interest in assuring that a woman's consent to an abortion be fully informed. The requirement that a physician disclose certain information about the abortion procedure and its risks and alternatives is not a large burden and is clearly related to maternal health and the State's interest in informed consent. In addition, a State may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the abortion alternatives' medical aspects. The requirement that information be provided about the availability of paternal child support and state-funded alternatives is also related to the State's informed consent interest and furthers the **2802 State's interest in preserving unborn life. That such information might create some uncertainty and persuade some women to forgo abortions only demonstrates that it might make a difference and is therefore relevant to a woman's informed choice. In light of this plurality's rejection of *Roe*'s "fundamental right" approach to this subject, the Court's contrary holding in *Thornburgh* is not controlling here. For the same reason, this Court's previous holding invalidating a State's 24–hour mandatory waiting period should not be followed. The waiting period helps ensure that a woman's decision to abort is a well-considered one, and rationally furthers the State's legitimate interest in maternal health and *841 in unborn life. It may delay, but does not prohibit, abortions; and both it and the informed consent provisions do not apply in medical emergencies. Pp. 2867–2868.

6. The statute's parental consent provision is entirely consistent with this Court's previous decisions involving such requirements. See, *e.g., Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733. It is reasonably designed to further the State's important and legitimate interest "in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Hodgson, supra,* 497 U.S., at 444, 110 S.Ct., at 2942. Pp. 2868–2869.

7. Section 3214(a)'s requirement that abortion facilities file a report on each abortion is constitutional because it rationally furthers the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act, while keeping the reports completely confidential. Public disclosure of other reports made by facilities receiving public funds—those identifying the facilities and any parent, subsidiary, or affiliated organizations, § 3207(b), and those revealing the total number of abortions performed, broken down by trimester, § 3214(f)—are rationally related to the State's legitimate interest in informing taxpayers as to who is benefiting from public funds and what services the funds are supporting; and records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. P. 2872.

Justice SCALIA, joined by THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS, concluded that a woman's decision to abort her unborn child is not a constitutionally protected "liberty" because (1) the Constitution says absolutely nothing about it, and (2) the long-standing traditions of American society have permitted it to be legally proscribed. See, *e.g., Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 520, 110 S.Ct. 2972, 2984, 111 L.Ed.2d 405 (SCALIA, J., concurring). The Pennsylvania statute should be upheld in its entirety under the rational basis test. Pp. 2873–2874.

O'CONNOR, KENNEDY, and SOUTER, JJ., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V–A, V–C, and VI, in which BLACKMUN and STEVENS, JJ., joined, an opinion with respect to Part V–E, in which STEVENS, J., joined, and an opinion with respect to Parts IV, V–B, and V–D. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post,* p. 2838. BLACKMUN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, *post,* p. 2843. REHNQUIST, C.J., filed an opinion concurring in the judgment in part and dissenting in part, in which ***842** WHITE, SCALIA, and THOMAS, JJ., joined, *post,* p. 2855. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, ****2803** C.J., and WHITE and THOMAS, JJ., joined, *post,* p. 2873.

Attorneys and Law Firms

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

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

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

† Briefs of *amici curiae* were filed for the State of New York et al. by *Robert Abrams,* Attorney General of New York, *Jerry Boone,* Solicitor General, *Mary Ellen Burns,* Chief Assistant Attorney General, and *Sanford M. Cohen, Donna I.*

Dennis, Marjorie Fujiki, and *Shelley B. Mayer,* Assistant Attorneys General, and *John McKernan,* Governor of Maine, and *Michael E. Carpenter,* Attorney General, *Richard Blumenthal,* Attorney General of Connecticut, *Charles M. Oberly III,* Attorney General of Delaware, *Warren Price III,* Attorney General of Hawaii, *Roland W. Burris,* Attorney General of Illinois, *Bonnie J. Campbell,* Attorney General of Iowa, *J. Joseph Curran, Jr.,* Attorney General of Maryland, *Scott Harshbarger,* Attorney General of Massachusetts, *Frankie Sue Del Papa,* Attorney General of Nevada, *Robert J. Del Tufo,* Attorney General of New Jersey, *Tom Udall,* Attorney General of New Mexico, *Lacy H. Thornburg,* Attorney General of North Carolina, *James E. O'Neil,* Attorney General of Rhode Island, *Dan Morales,* Attorney General of Texas, *Jeffrey L. Amestoy,* Attorney General of Vermont, and *John Payton,* Corporation Counsel of District of Columbia; for the State of Utah by *R. Paul Van Dam,* Attorney General, and *Mary Anne Q. Wood,* Special Assistant Attorney General; for the City of New York et al. by *O. Peter Sherwood, Conrad Harper, Janice Goodman, Leonard J. Koerner, Lorna Bade Goodman, Gail Rubin,* and *Julie Mertus;* for 178 Organizations by *Pamela S. Karlan* and *Sarah Weddington;* for Agudath Israel of America by *David Zwiebel;* for the Alan Guttmacher Institute et al. by *Colleen K. Connell* and *Dorothy B. Zimbrakos;* for the American Academy of Medical Ethics by *Joseph W. Dellapenna;* for the American Association of Profile Obstetricians and Gynecologists et al. by *William Bentley Ball, Philip J. Murren,* and *Maura K. Quinlan;* for the American College of Obstetricians and Gynecologists et al. by *Carter G. Phillips, Ann E. Allen, Laurie R. Rockett, Joel I. Klein, Nadine Taub,* and *Sarah C. Carey;* for the American Psychological Association by *David W. Ogden;* for Texas Black Americans for Life by *Lawrence J. Joyce* and *Craig H. Greenwood;* for Catholics United for Life et al. by *Thomas A. Glessner, Charles E. Rice,* and *Michael J. Laird;* for the Elliot Institute for Social Sciences Research by *Stephen R. Kaufmann;* for Feminists for Life of America et al. by *Keith A. Fournier, John G. Stepanovich, Christine Smith Torre, Theodore H. Amshoff, Jr.,* and *Mary Dice Grenen;* for Focus on the Family et al. by *Stephen H. Galebach, Gregory J. Granitto, Stephen W. Reed, David L. Llewellyn, Jr., Benjamin W. Bull,* and *Leonard J. Pranschke;* for the Knights of Columbia by *Carl A. Anderson;* for the Life Issues Institute by *James Bopp, Jr.,* and *Richard E. Coleson;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius L. Chambers, Ronald L. Ellis,* and *Alice L. Brown;* for the National Legal Foundation by *Robert K. Skolrood;* for National Right to Life, Inc., by Messrs. Bopp and Coleson, *Robert A. Destro,* and *A. Eric Johnston;* for the Pennsylvania Coalition Against Domestic Violence et al. by *Phyllis Gelman;* for the Rutherford Institute et al. by *Thomas W. Strahan, John W. Whitehead, Mr. Johnston, Stephen E. Hurst, Joseph Secola, Thomas S. Neuberger, J. Brian Heller, Amy Dougherty, Stanley R. Jones, David Melton, Robert R. Melnick, William Bonner, W. Charles Bundren,* and *James Knicely;* for the Southern Center for Law & Ethics by *Tony G. Miller;* for the United States Catholic Conference et al. by *Mark E. Chopko, Phillip H. Harris, Michael K. Whitehead,* and *Forest D. Montgomery;* for University Faculty for Life by *Clarke D. Forsythe* and *Victor G. Rosenblum;* for Certain American State Legislators by *Pual Benjamin Linton;* for 19 Arizona Legislators by *Ronald D. Maines;* for Representative Henry J. Hyde et al. by *Albert P. Blaustein* and *Kevin J. Todd;* for Representative Don Edwards et al. by *Walter Dellinger* and *Lloyd N. Cutler;* and for 250 American Historians by *Sylvia A. Law.*

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

I

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

At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. 18 Pa. Cons.Stat. §§ 3203–3220 (1990). Relevant portions of the Act are set forth in the Appendix. *Infra,* at 2833. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and

specifies that she be provided with certain information at least 24 hours before the abortion is performed. § 3205. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. § 3206. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

***845** Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief. Each provision was challenged as unconstitutional on its face. The District Court entered a preliminary injunction against the enforcement of the regulations, and, after a 3–day bench trial, held all the provisions at issue here unconstitutional, entering a permanent injunction against Pennsylvania's enforcement of them. 744 F.Supp. 1323 (ED Pa.1990). The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement. 947 F.2d 682 (1991). We granted certiorari. 502 U.S. 1056, 112 S.Ct. 931, 117 L.Ed.2d 104 (1992).

The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards. See 947 F.2d, at 687–698. And at oral argument in this Court, the attorney for the parties challenging the statute took the position that none of the enactments can be upheld without overruling *Roe v. Wade.* Tr. of Oral Arg. 5–6. We disagree with that analysis; but we acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding. Further, THE CHIEF JUSTICE admits that he would overrule the central ****2804** holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. See *post,* at 2855, 2867. 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, ***846** and the rule of *stare decisis,* we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

[1] **[2]** **[3]** It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

II

Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years,

since *Mugler v. Kansas,* 123 U.S. 623, 660–661, 8 S.Ct. 273, 291, 31 L.Ed. 205 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams,* 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986). As Justice Brandeis (joined by Justice Holmes) observed, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth ***847** Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Whitney v. California,* 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (1927) (concurring opinion). "[T]he guaranties of due process, though having their roots in Magna Carta's *'per legem terrae'* and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.' " *Poe v. Ullman,* 367 U.S. 497, 541, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado v. California,* 110 U.S. 516, 532, 4 S.Ct. 111, 119, 28 L.Ed. 232 (1884)).

[4] The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, *e.g., Duncan v. Louisiana,* 391 U.S. 145, 147–148, 88 S.Ct. 1444, 1446, 20 L.Ed.2d 491 (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty ****2805** encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. See *Adamson v. California,* 332 U.S. 46, 68–92, 67 S.Ct. 1672, 1683–1697, 91 L.Ed. 1903 (1947) (Black, J., dissenting). But of course this Court has never accepted that view.

[5] It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See *Michael H. v. Gerald D.,* 491 U.S. 110, 127–128, n. 6, 109 S.Ct. 2333, 2344–2345, n. 6, 105 L.Ed.2d 91 (1989) (opinion of SCALIA, J.). But such a view would be inconsistent with our law. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal ***848** in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 1824, 18 L.Ed.2d 1010 (1967) (relying, in an opinion for eight Justices, on the Due Process Clause). Similar examples may be found in *Turner v. Safley,* 482 U.S. 78, 94–99, 107 S.Ct. 2254, 2265–2267, 96 L.Ed.2d 64 (1987); in *Carey v. Population Services International,* 431 U.S. 678, 684–686, 97 S.Ct. 2010, 2015–2017, 52 L.Ed.2d 675 (1977); in *Griswold v. Connecticut,* 381 U.S. 479, 481–482, 85 S.Ct. 1678, 1680–1681, 14 L.Ed.2d 510 (1965), as well as in the separate opinions of a majority of the Members of the Court in that case, *id.,* at 486–488, 85 S.Ct., at 1682–1683 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (expressly relying on due process), *id.,* at 500–502, 85 S.Ct., at 1690–1691 (Harlan, J., concurring in judgment) (same), *id.,* at 502–507, 85 S.Ct., at 1691–1694 (WHITE, J., concurring in judgment) (same); in *Pierce v. Society of Sisters,* 268 U.S. 510, 534–535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); and in *Meyer v. Nebraska,* 262 U.S. 390, 399–403, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923).

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

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state

needs asserted to justify their abridgment." *Poe v.* **849** *Ullman, supra,* 367 U.S., at 543, 81 S.Ct., at 1777 (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote these words in addressing an issue the full Court did not reach in *Poe v. Ullman,* but the Court adopted his position four Terms later in *Griswold v. Connecticut, supra.* In *Griswold,* we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed, under the Equal Protection Clause, for unmarried couples. See *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). Constitutional protection was extended **2806 to the sale and distribution of contraceptives in *Carey v. Population Services International, supra.* It is settled now, as it was when the Court heard arguments in *Roe v. Wade,* that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, see *Carey v. Population Services International, supra; Moore v. East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Eisenstadt v. Baird, supra; Loving v. Virginia, supra; Griswold v. Connecticut, supra; Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra,* as well as bodily integrity, see, *e.g., Washington v. Harper,* 494 U.S. 210, 221–222, 110 S.Ct. 1028, 1036–1037, 108 L.Ed.2d 178 (1990); *Winston v. Lee,* 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

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

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. **850 The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint." *Poe v. Ullman,* 367 U.S., at 542, 81 S.Ct., at 1776 (opinion dissenting from dismissal on jurisdictional grounds).

See also *Rochin v. California, supra,* 342 U.S., at 171–172, 72 S.Ct., at 209 (Frankfurter, J., writing for the Court) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges").

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

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See, *e.g., Ferguson v. Skrupa,* 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); **2807 *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or

not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. See *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943); *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services International,* 431 U.S., at 685, 97 S.Ct., at 2016. Our cases recognize "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird, supra,* 405 U.S., at 453, 92 S.Ct., at 1038 (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

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

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which *Griswold v. Connecticut, Eisenstadt v. Baird,* and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support ***853** the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of ****2808** creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold, Eisenstadt,* and *Carey.* The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

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

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

*854 III

A

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

[7] [8] Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, see *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–411, 52 S.Ct. 443, 446–449, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). See also *Payne v. Tennessee,* 501 U.S. 808, 842, 111 S.Ct. 2597, 2617–2618, 115 L.Ed.2d 720 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 2310, 81 L.Ed.2d 164 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, *Swift & Co. v. Wickham,* 382 U.S. 111, 116, 86 S.Ct. 258, 261, 15 L.Ed.2d 194 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e.g., United States v. Title Ins. & Trust* *855 *Co.*, 265 U.S. 472, 486, 44 S.Ct. 621, 623, 68 L.Ed. 1110 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see **2809 *Patterson v. McLean Credit Union,* 491 U.S. 164, 173–174, 109 S.Ct. 2363, 2370–2371, 105 L.Ed.2d 132 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification, *e.g., Burnet, supra,* 285 U.S., at 412, 52 S.Ct., at 449 (Brandeis, J., dissenting).

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

1

[9] Although *Roe* has engendered opposition, it has in no sense proven "unworkable," see *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546, 105 S.Ct. 1005, 1015, 83 L.Ed.2d 1016 (1985), 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 affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

2

[10] The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see *Payne v. Tennessee, supra,* 501 U.S., at 828, 111 S.Ct., at 2609–2610, ***856** where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe.*

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

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

****2810 *857** 3

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

It will be recognized, of course, that *Roe* stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). See *Roe,* 410 U.S., at 152–153, 93 S.Ct., at 726. When it is so seen, *Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. See, *e.g., Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Moore v. East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the

protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 278, 110 S.Ct. 2841, 2851, 111 L.Ed.2d 224 (1990); cf., *e.g., Riggins v. Nevada,* 504 U.S. 127, 135, 112 S.Ct. 1810, 1815, 118 L.Ed.2d 479 (1992); *Washington v. Harper,* 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990); see also, *e.g., Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); *Jacobson v. Massachusetts,* 197 U.S. 11, 24–30, 25 S.Ct. 358, 360–363, 49 L.Ed. 643 (1905).

Finally, one could classify *Roe* as *sui generis.* If the case is so viewed, then there clearly has been no erosion of its central determination. The original holding resting on the ***858** concurrence of seven Members of the Court in 1973 was expressly affirmed by a majority of six in 1983, see *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (*Akron I*), and by a majority of five in 1986, see *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779, expressing adherence to the constitutional ruling despite legislative efforts in some States to test its limits. More recently, in *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), although two of the present authors questioned the trimester framework in a way consistent with our judgment today, see *id.,* at 518, 109 S.Ct., at 3056 (REHNQUIST, C.J., joined by WHITE and KENNEDY, JJ.); *id.,* at 529, 109 S.Ct., at 3063 (O'CONNOR, J., concurring in part and concurring in judgment), a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe.* See *Webster,* 492 U.S., at 521, 109 S.Ct., at 3058 (REHNQUIST, C.J., joined by WHITE and KENNEDY, JJ.); *id.,* at 525–526, 109 S.Ct., at 3060–3061 (O'CONNOR, J., concurring in part and concurring in judgment); *id.,* at 537, 553, 109 S.Ct., at 3067, 3075 (BLACKMUN, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); *id.,* at 561–563, 109 S.Ct., at 3079–3081 (STEVENS, J., concurring in part and dissenting in part).

Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the ****2811** recognition afforded by the Constitution to the woman's liberty. The latter aspect of the decision fits comfortably within the framework of the Court's prior decisions, including *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Griswold, supra; Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); and *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), the holdings of which are "not a series of isolated points," but mark a "rational continuum." *Poe v. Ullman,* 367 U.S., at 543, 81 S.Ct., at 1777 (Harlan, J., dissenting). As we described in ***859** *Carey v. Population Services International, supra,* the liberty which encompasses those decisions

> "includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.' " 431 U.S., at 684–685, 97 S.Ct., at 2016 (citations omitted).

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

*860 4

[12] We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see *Akron I, supra,* 462 U.S., at 429, n. 11, 103 S.Ct., at 2492, n. 11, and advances in neonatal care have advanced viability to a point somewhat earlier. Compare *Roe,* 410 U.S., at 160, 93 S.Ct., at 730, with *Webster, supra,* 492 U.S., at 515–516, 109 S.Ct., at 3055 (opinion of REHNQUIST, C.J.); see *Akron I,* 462 U.S., at 457, and n. 5, 103 S.Ct., at 2489, and n. 5 (O'CONNOR, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe* 's central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe,* at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was **2812 decided; which is to say that no change in *Roe* 's factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

5

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

B

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

The first example is that line of cases identified with *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire. *Id.,* at 75, 25 S.Ct., at 546 (dissenting opinion). The *Lochner* decisions were exemplified by *Adkins v. Children's Hospital of District of Columbia,* 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (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, 57 S.Ct. 578, 81 L.Ed. 703 (1937), signaled the demise of *Lochner* by overruling *Adkins.* In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that

the interpretation of contractual freedom protected in *Adkins* rested on fundamentally ***862** false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See *West Coast Hotel Co., supra,* at 399, 57 S.Ct., at 585. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: "The older world of *laissez-faire* was recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing ****2813** the separate-but-equal rule for applying the Fourteenth Amendment's equal protection guarantee. They began with *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The *Plessy* Court considered "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.,* at 551, 16 S.Ct., at 1143. Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, see *id.,* at 557, 562, 16 S.Ct., at 1145, 1147 (Harlan, J., dissenting), this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of ***863** the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (*Brown I*). As one commentator observed, the question before the Court in *Brown* was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid." Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 427 (1960).

The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy* 's time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. 347 U.S., at 494–495, 74 S.Ct., at 691–692. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, see *Plessy, supra,* 163 U.S., at 552–564, 16 S.Ct., at 1143–1148 (Harlan, J., dissenting), we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible ***864** they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of *Roe* 's central holding nor our understanding of it has changed (and because no other indication of

weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the **2814 Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. See, *e.g.*, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636, 94 S.Ct. 1895, 1914, 40 L.Ed.2d 406 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); *Mapp v. Ohio*, 367 U.S. 643, 677, 81 S.Ct. 1684, 1703, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting).

C

[14] 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 cases, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis *865 would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.

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

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

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

In two circumstances, however, the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

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

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown v. Board of Education*, 349 U.S. 294, 300, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955) (*Brown II*) ("[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them").

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results ***868** when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance ****2816** with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

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

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

IV

[15] 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.

[16] *870 We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of *stare decisis.* Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. See *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 759, 106 S.Ct., at 2178; *Akron I,* 462 U.S., at 419–420, 103 S.Ct., at 2487–2488. Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent **2817 with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn, see *infra,* at 2823–2824, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe.* It is that premise which we reaffirm today.

The second reason is that the concept of viability, as we noted in *Roe,* is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See *Roe v. Wade,* 410 U.S., at 163, 93 S.Ct., at 731. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there may be some medical developments that affect the precise point of viability, see *supra,* at 2811, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

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

On the other side of the equation is the interest of the State in the protection of potential life. The *Roe* Court recognized the State's "important and legitimate interest in protecting the potentiality of human life." *Roe, supra,* at 162, 93 S.Ct., at 731. The 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. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.

Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." *Roe, supra,* at 163, 93 S.Ct., at 731. That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. See, *e.g., Akron I, supra,* 462 U.S., at 427, 103 S.Ct., at 2491. 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.

[17] ***872** *Roe* established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the ****2818** fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake. *Roe, supra,* 410 U.S., at 163–166, 93 S.Ct., at 731–733. Most of our cases since *Roe* have involved the application of rules derived from the trimester framework. See, *e.g., Thornburgh v. American College of Obstetricians and Gynecologists, supra; Akron I, supra.*

The trimester framework no doubt was erected to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.

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, 109 S.Ct., at 3053 (opinion of ***873** the Court) (quoting *Poelker v. Doe,* 432 U.S. 519, 521, 97 S.Ct. 2391, 2392, 53 L.Ed.2d 528 (1977)). It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with *Roe*' s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe.* See *Webster v. Reproductive Health Services,* 492 U.S., at 518, 109 S.Ct., at 3056–3057 (opinion of REHNQUIST, C.J.); *id.,* at 529, 109 S.Ct., at 3063 (O'CONNOR, J., concurring in part and concurring in judgment) (describing the trimester framework as "problematic"). Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not

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

[18] As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto,* an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they ***874** wish to vote. *Anderson v. Celebrezze,* 460 U.S. 780, 788, 103 S.Ct. 1564, 1569, 75 L.Ed.2d 547 (1983); *Norman v. Reed,* 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992).

****2819 [19]** 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. See *Hodgson v. Minnesota,* 497 U.S. 417, 458–459, 110 S.Ct. 2926, 2949–2950, 111 L.Ed.2d 344 (1990) (O'CONNOR, J., concurring in part and concurring in judgment in part); *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 519–520, 110 S.Ct. 2972, 2983–2984, 111 L.Ed.2d 405 (1990) (*Akron II*) (opinion of KENNEDY, J.); *Webster v. Reproductive Health Services, supra,* 492 U.S., at 530, 109 S.Ct., at 3063 (O'CONNOR, J., concurring in part and concurring in judgment); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 828, 106 S.Ct., at 2213 (O'CONNOR, J., dissenting); *Simopoulos v. Virginia,* 462 U.S. 506, 520, 103 S.Ct. 2532, 2540, 76 L.Ed.2d 755 (1983) (O'CONNOR, J., concurring in part and concurring in judgment); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 505, 103 S.Ct. 2517, 2532, 76 L.Ed.2d 733 (1983) (O'CONNOR, J., concurring in judgment in part and dissenting in part); *Akron I,* 462 U.S., at 464, 103 S.Ct., at 2510 (O'CONNOR, J., joined by WHITE and REHNQUIST, JJ., dissenting); *Bellotti v. Baird,* 428 U.S. 132, 147, 96 S.Ct. 2857, 2866, 49 L.Ed.2d 844 (1976) (*Bellotti I*).

For the most part, the Court's early abortion cases adhered to this view. In *Maher v. Roe,* 432 U.S. 464, 473–474, 97 S.Ct. 2376, 2382, 53 L.Ed.2d 484 (1977), the Court explained: "*Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." See ***875** also *Doe v. Bolton,* 410 U.S. 179, 198, 93 S.Ct. 739, 750, 35 L.Ed.2d 201 (1973) ("[T]he interposition of the hospital abortion committee is unduly restrictive of the patient's rights"); *Bellotti I, supra,* 428 U.S., at 147, 96 S.Ct., at 2866 (State may not "impose undue burdens upon a minor capable of giving an informed consent"); *Harris v. McRae,* 448 U.S. 297, 314, 100 S.Ct. 2671, 2686, 65 L.Ed.2d 784 (1980) (citing *Maher, supra*). Cf. *Carey v. Population Services International,* 431 U.S., at 688, 97 S.Ct., at 2018 ("[T]he same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely").

These considerations of the nature of the abortion right illustrate that it is an overstatement to describe it as a right to decide whether to have an abortion "without interference from the State." *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 61, 96 S.Ct. 2831, 2837, 49 L.Ed.2d 788 (1976). All abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy. It is, as a consequence, not surprising that despite the protestations contained in the original *Roe* opinion to the effect that the Court was not recognizing an absolute right, 410 U.S., at 154–155, 93 S.Ct., at 727, the Court's experience applying the trimester framework has led to the striking

down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." **2820 *Eisenstadt v. Baird,* 405 U.S., at 453, 92 S.Ct., at 1038. Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe*'s terms, in practice it undervalues the State's interest in the potential life within the woman.

Roe v. Wade was express in its recognition of the State's "important and legitimate interest[s] in preserving and protecting *876 the health of the pregnant woman [and] in protecting the potentiality of human life." 410 U.S., at 162, 93 S.Ct., at 731. The trimester framework, however, does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. *Id.,* at 163, 93 S.Ct., at 731. Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy. Cf. *Webster,* 492 U.S., at 519, 109 S.Ct., at 3057 (opinion of REHNQUIST, C.J.); *Akron I, supra,* 462 U.S., at 461, 103 S.Ct., at 2509 (O'CONNOR, J., dissenting).

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

The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent. See, *e.g., Hodgson v. Minnesota, supra,* 497 U.S., at 459–461, 110 S.Ct., at 2949–2950 (O'CONNOR, J., concurring in part and concurring in judgment); *Akron II, supra,* 497 U.S., at 519–520, 110 S.Ct., at 2983–2984 (opinion of KENNEDY, J.); *Thornburgh v. American College of Obstetricians and Gynecologists, supra,* 476 U.S., at 828–829, 106 S.Ct., at 2214 (O'CONNOR, J., dissenting); *Akron I, supra,* 462 U.S., at 461–466, 103 S.Ct., at 2509–2511 (O'CONNOR, J., dissenting); *Harris v. McRae, supra,* 448 U.S., at 314, 100 S.Ct., at 2686; *Maher v. Roe, supra,* 432 U.S., at 473, 97 S.Ct., at 2382; *Beal v. Doe,* 432 U.S. 438, 446, 97 S.Ct. 2366, 2371, 53 L.Ed.2d 464 (1977); *Bellotti I, supra,* 428 U.S., at 147, 96 S.Ct., at 2866. Because we set forth a standard of general application to which we intend to adhere, it is important to clarify what is meant by an undue burden.

[21] *877 A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard. Cf. *McCleskey v. Zant,* 499 U.S. 467, 489, 111 S.Ct. 1454, 1467, 113 L.Ed.2d 517 (1991) (attempting "to define the doctrine of abuse of the writ with more precision" after acknowledging tension among earlier cases). In our considered judgment, an undue burden is an unconstitutional burden. See *Akron II,* 497 U.S., at 519–520, 110 S.Ct., at 2983–2984 (opinion of KENNEDY, J.). Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed **2821 to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability could be constitutional. See, *e.g., Akron I,* 462 U.S., at 462–463, 103 S.Ct., at 2509–2510 (O'CONNOR, J., dissenting). The answer is no.

[22] [23] Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism

by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. See *infra,* at 2832 (addressing Pennsylvania's parental consent requirement). ***878** Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

[24] [25] [26] [27] Even when jurists reason from shared premises, some disagreement is inevitable. Compare *Hodgson,* 497 U.S., at 482–497, 110 S.Ct., at 2961–2969 (KENNEDY, J., concurring in judgment in part and dissenting in part), with *id.,* at 458–460, 110 S.Ct., at 2949–2950 (O'CONNOR, J., concurring in part and concurring in judgment in part). That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard. We give this summary:

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

(b) We reject the rigid trimester 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.

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

(e) We also reaffirm *Roe*'s holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe v. Wade,* 410 U.S., at 164–165, 93 S.Ct., at 732.

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

V

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

A

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

> "[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." 18 Pa.Cons.Stat. § 3203 (1990).

***880** Petitioners argue that the definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks. If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health. 410 U.S., at 164, 93 S.Ct., at 732. See also *Harris v. McRae,* 448 U.S., at 316, 100 S.Ct., at 2687.

The District Court found that there were three serious conditions which would not be covered by the statute: preeclampsia, inevitable abortion, and premature ruptured membrane. 744 F.Supp., at 1378. Yet, as the Court of Appeals observed, 947 F.2d, at 700–701, it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences. While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase "serious risk" to include those circumstances. *Id.,* at 701. It stated: "[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Ibid.* As we said in *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 499–500, 105 S.Ct. 2794, 2799–2800, 86 L.Ed.2d 394 (1985): "Normally, ... we defer to the construction of a state statute given it by the lower federal courts." Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to "plain" error. *Palmer v. Hoffman,* 318 U.S. 109, 118, 63 S.Ct. 477, 482, 87 L.Ed. 645 (1943). This " 'reflect[s] our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.' " *Frisby v. Schultz,* 487 U.S. 474, 482, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988) (citation omitted). We adhere to that course today, and conclude that, as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion right.

***881** B

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

Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. See *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S., at 67, 96 S.Ct., at 2840. In this respect, the statute is unexceptional. Petitioners challenge the statute's definition of informed consent because it includes the provision of specific information by the doctor and the mandatory 24–hour waiting period. The conclusions reached by a majority of the Justices in the separate opinions filed today and the undue burden standard adopted in this opinion require us to overrule in part some of the Court's past decisions, decisions driven by the trimester framework's prohibition of all previability regulations designed to further the State's interest in fetal life.

[29] In *Akron I,* 462 U.S. 416, 103 S.Ct. 2481, we invalidated an ordinance which required that a woman seeking an abortion be provided by her physician with specific information "designed to influence the woman's informed choice between abortion or childbirth." *Id.,* at 444, 103 S.Ct., at 2500. As we later described ***882** the *Akron I* holding in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 762, 106 S.Ct., at 2179, there were two purported flaws in the Akron ordinance: the information was designed to dissuade the woman from having an abortion and the ordinance imposed "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient...." *Ibid.*

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled. This is clear even on the very terms of *Akron I* and *Thornburgh.* Those decisions, along with *Danforth,* recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. *E.g., Danforth, supra,* 428 U.S., at 66–67, 96 S.Ct., at 2840. It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State 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.

[30] We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. An example illustrates the point. We would think ***883** it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself. A requirement that the physician make available information similar to that mandated by the statute here was described in *Thornburgh* as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." 476 U.S., at 762, 106 S.Ct., at 2179. We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As ****2824** we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

[31] Our prior cases also suggest that the "straitjacket," *Thornburgh, supra,* at 762, 106 S.Ct., at 2179 (quoting *Danforth, supra,* 428 U.S., at 67, n. 8, 96 S.Ct., at 2840, n. 8), of particular information which must be given in each case interferes with a constitutional right of privacy between a pregnant woman and her physician. As a preliminary matter, it is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions "if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely ***884** adverse effect on the physical or mental health of the patient." 18 Pa. Cons.Stat. § 3205 (1990). In this respect, the statute does not prevent the physician from exercising his or her medical judgment.

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

[32] All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe,* 429 U.S. 589, 603, 97 S.Ct. 869, 878, 51 L.Ed.2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

[33] 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. 462 U.S., at 448, 103 S.Ct., at 2502. Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not ***885** an undue burden. Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. See *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Thus, we uphold the provision ****2825** as a reasonable means to ensure that the woman's consent is informed.

[34] Our analysis of Pennsylvania's 24–hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement. In *Akron I* we said: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24–hour delay as a matter of course." 462 U.S., at 450, 103 S.Ct., at 2503. We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24–hour delay does not create any appreciable health risk. In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

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

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of "increasing the cost and risk of delay of abortions," *id.,* at 1378, but the District Court did not conclude that the increased costs and potential

delays amount to substantial obstacles. Rather, applying the trimester framework's strict prohibition of all regulation designed to promote the State's interest in potential life before viability, see *id.*, at 1374, the District Court concluded that the waiting period does not further the state "interest in maternal health" and "infringes the physician's discretion to exercise sound medical judgment," *id.*, at 1378. Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it. In light of the construction given the statute's definition of medical emergency by the Court of Appeals, and the District Court's findings, we cannot say that the waiting period imposes a real health risk.

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

We are left with the argument that the various aspects of the informed consent requirement are unconstitutional because they place barriers in the way of abortion on demand. Even the broadest reading of *Roe,* however, has not suggested that there is a constitutional right to abortion on demand. See, *e.g., Doe v. Bolton,* 410 U.S., at 189, 93 S.Ct., at 746. 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

[35] 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 ***888** a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

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

"273. The vast majority of women 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 ***889** procedures and force women to reveal their most intimate decision-making on pain of criminal sanctions. The confidentiality of these revelations could not be guaranteed, since ****2827** the woman's records are not immune from subpoena....

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

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

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

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

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

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

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

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

. . . . .

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

"295. Marital rape is rarely discussed with others or reported to law enforcement authorities, and of those reported only few are prosecuted....

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

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

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

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

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

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

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

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

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

[36] 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. See Brief for Respondents 83–86. 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, 94 S.Ct. 2831, 41 L.Ed.2d 730 (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.

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

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. See, *e.g., Akron II,* 497 U.S., at 510–519, 110 S.Ct., at 2978–2983; *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (*Bellotti II*); *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S., at 74, 96 S.Ct., at 2843. 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.

[37] 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, supra,* at 69, 96 S.Ct., at 2841. With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody. *Stanley v. Illinois,* 405 U.S. 645, 651–652, 92 S.Ct. 1208, 1213, 31 L.Ed.2d 551 (1972); see also *Quilloin v. Walcott,* 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Caban v. Mohammed,* 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983). If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living ***896** child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.

Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. Cf. *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S., at 281, 110 S.Ct., at 2852–2853. The Court has held that "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Danforth, supra,* 428 U.S., at 71, 96 S.Ct., at 2842. This conclusion rests upon the basic nature of marriage and the nature of our Constitution: "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird,* 405 U.S., at 453, 92 S.Ct., at 1038 (emphasis in original). The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State,* 16 Wall. 130, 21 L.Ed. 442 (1873), three Members of this ***897** Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and ****2831** representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States." *Id.,* at 141 (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment). Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. *Hoyt v. Florida,* 368 U.S. 57, 62, 82 S.Ct. 159, 162, 7 L.Ed.2d 118 (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. 428 U.S., at 69, 96 S.Ct., at 2841. The principles that guided the Court in *Danforth* should be our guides today. For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's

decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth.* The women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

***898** 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.

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[38] 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. See, *e.g., Akron II,* 497 U.S., at 510–519, 110 S.Ct., at 2978–2983; *Hodgson,* 497 U.S., at 461, 110 S.Ct., at 2950–2951 (O'CONNOR, J., concurring in part and concurring in judgment in part); *id.,* at 497–501, 110 S.Ct., at 2969–2971 (KENNEDY, J., concurring in judgment in part and dissenting in part); *Akron I,* 462 U.S., at 440, 103 S.Ct., at 2497; *Bellotti II,* 443 U.S., at 643–644, 99 S.Ct., at 3048 (plurality opinion). Under these precedents, in our view, the one-parent consent requirement and judicial bypass procedure are constitutional.

The only argument made by petitioners respecting this provision and to which our prior decisions do not speak is the contention that the parental consent requirement is invalid because it requires informed parental consent. For the most part, petitioners' argument is a reprise of their argument with respect to the informed consent requirement in general, and we reject it for the reasons given above. Indeed, some of the provisions regarding informed consent have particular force with respect to minors: the waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in ***900** the

context of the values and moral or religious principles of their family. See *Hodgson, supra,* 497 U.S., at 448 –449, 110 S.Ct., at 2944 (opinion of STEVENS, J.).

E

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

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

In *Danforth,* 428 U.S., at 80, 96 S.Ct., at 2846, 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 ***901** is a vital element of medical research, and so it cannot be said that the ****2833** requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

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

VI

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

* * *

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