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JUNE 11, 2018

U.S. Abortion Attitudes Remain Closely Divided

BY **JEFFREY M. JONES**

STORY HIGHLIGHTS

- 48% identify as pro-choice, 48% as pro-life

- Half continue to say abortion should be legal in some circumstances
- Slightly more say it is morally wrong than morally acceptable

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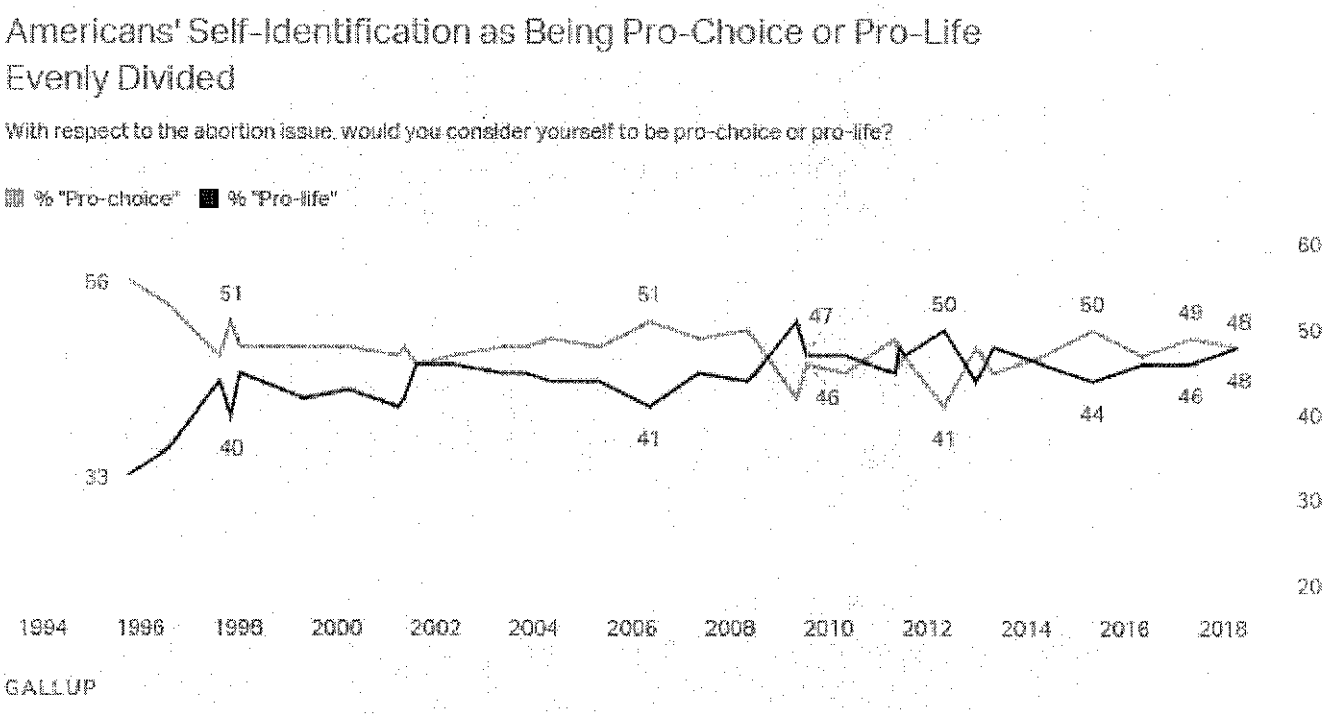
This story is part of a special series on Americans' attitudes toward abortion in 2018.

WASHINGTON, D.C. -- Americans' views on the abortion issue continue to be closely divided. Currently, as many Americans personally identify as "pro-choice" on the issue as say they are "pro-life."



The latest results were measured May 1-10 in Gallup's annual Values and Beliefs poll. They come as the issue has received renewed attention at the state level, with Iowa recently passing a restrictive law that bans nearly all abortions once a doctor can detect a fetal heartbeat, which commonly occurs early in a

pregnancy. A legal challenge to that law has put its planned July 1 implementation on hold. The U.S. Supreme Court also recently allowed an Arkansas ban on abortion pills to stand.

Although there has been some variation in past years, Americans have typically been closely split on whether they consider themselves pro-choice or pro-life, particularly since 2000, when the averages have been 47% pro-choice and 46% pro-life. During the 1990s -- when Gallup first asked the question -- more Americans personally identified as pro-choice than as pro-life by 51% to 40%, on average.

Most Do Not Favor Outright Ban, but Want Limits on Abortions

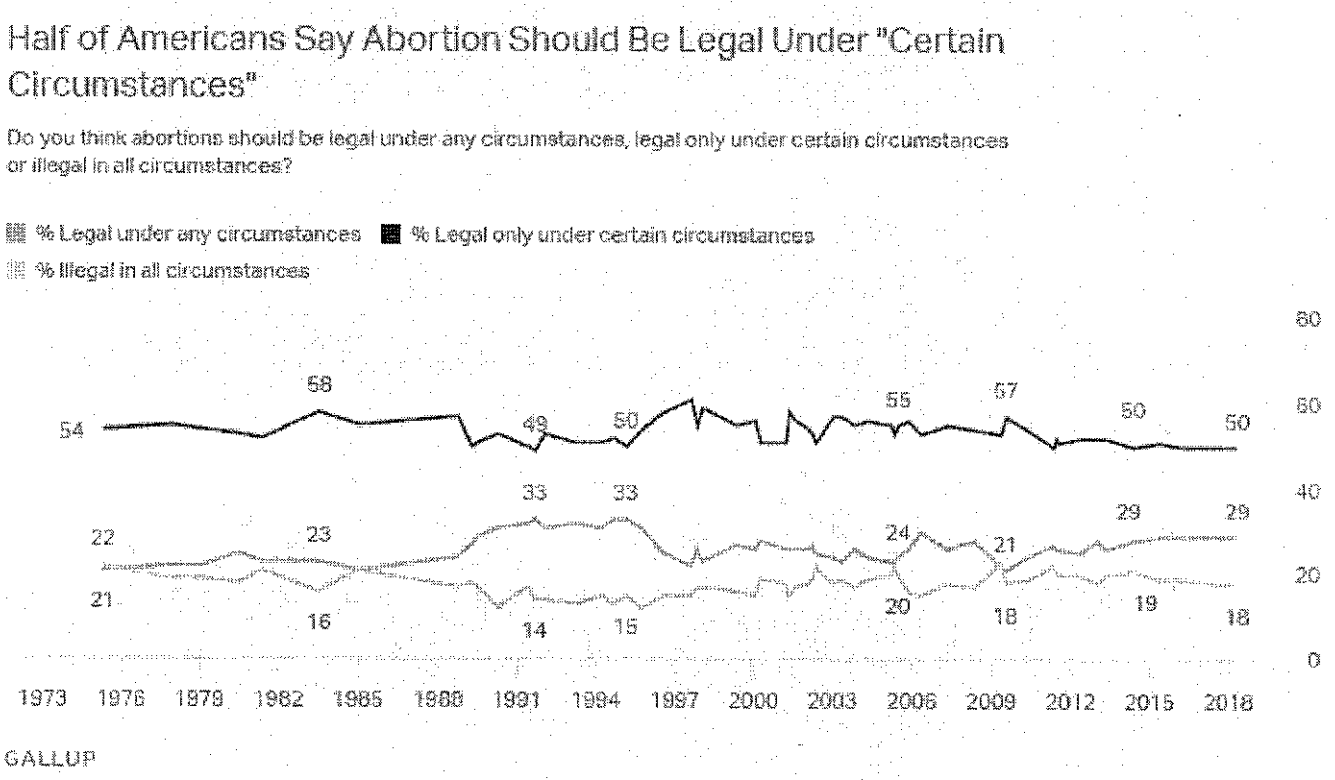
When asked more specifically about their views on the legality of abortion, half of Americans adopt a middle-of-the-road position, saying abortion should be legal "only under certain circumstances." Americans with more absolute positions tend to come down on the side of abortion being legal under any circumstances (29%) than being illegal in all circumstances (18%).

Historically, Americans have been most likely to favor the middle position -- abortion being legal under certain circumstances. Rarely has the percentage saying abortion should sometimes be legal fallen below 50%, averaging 53% since it was first asked in 1975.

There has been a slight uptick in the percentage saying abortion should always be legal, from 21% in 1975 -- two years after the *Roe v. Wade* decision legalized abortion nationwide -- to 29% today. This percentage has varied in the interim,

peaking at 33% in 1991, 1994 and 1995, but reverting to 21% as recently as 2009, and averaging 27%.

In the 1975 poll, 22% of Americans said abortion should be illegal in all circumstances. The 18% who currently hold this view matches the average over the past 43 years.



Although close to eight in 10 Americans believe abortion should be legal in all or some circumstances, further probing of their attitudes finds the public favoring more restrictive rather than less restrictive laws. In a follow-up question asked of those in the middle "legal under certain circumstances" group, most of these respondents say it should be legal "only in a few" rather than in "most" circumstances.

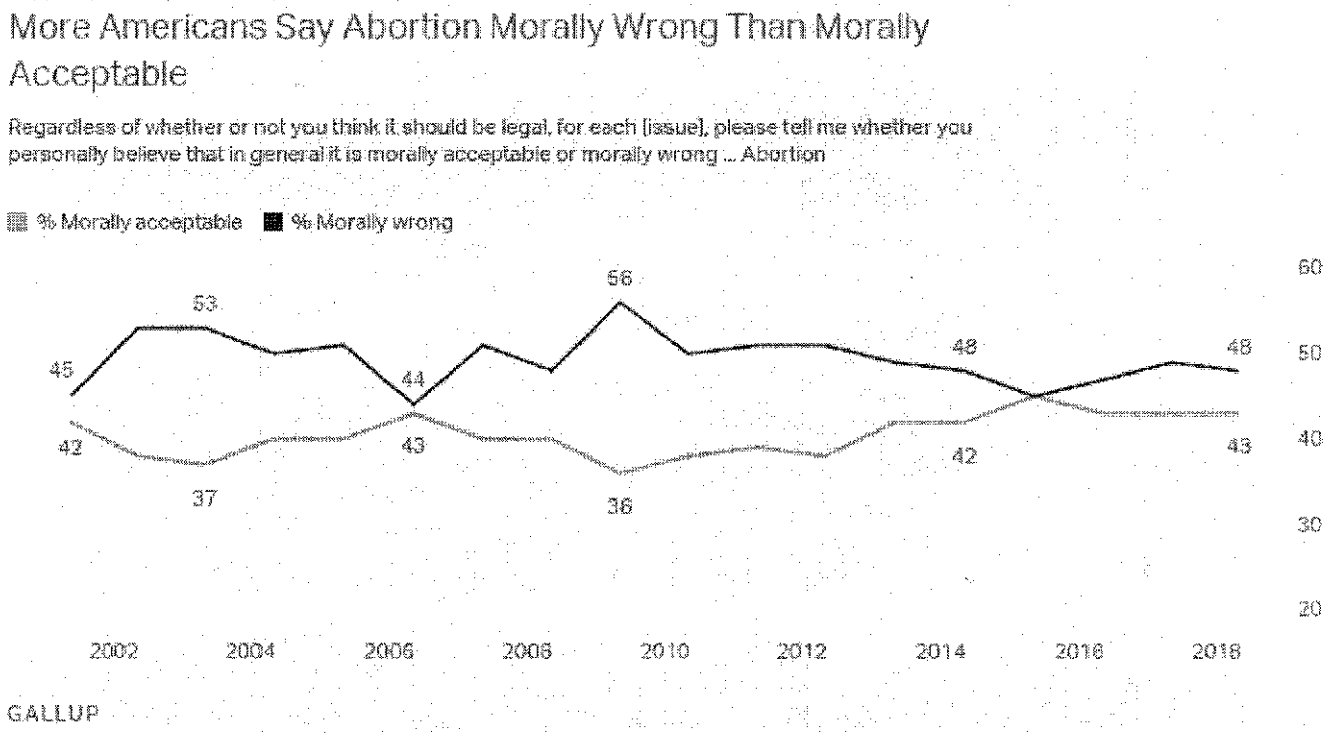
The result is that 43% of Americans say abortion should be legal in all (29%) or most (14%) circumstances, while a majority of 53% say it should be legal in only a few (35%) or no circumstances (18%). No fewer than 51% of Americans have favored more restrictive abortion laws since 1994, when Gallup first asked the follow-up probe of those saying abortion should be legal under certain circumstances.

Slightly More Americans Regard Abortion as Morally Wrong Than as Acceptable

A separate question in the survey asks Americans whether abortion, along with 22 other behaviors and practices, is morally acceptable or morally wrong. By a slim five-percentage-point margin, 48% to 43%, Americans believe abortion is wrong from a moral perspective. In fact, abortion is the moral issue among those tested on which the public is most closely divided.

The 43% who believe abortion to be morally acceptable matches the percentage who say it should be legal in all or most circumstances.

Since Gallup first measured attitudes about the morality of abortion in 2001, an average of 41% have regarded it as acceptable and 49% as wrong. Though attitudes have fluctuated, at no point have more Americans said abortion is morally acceptable than have said it is morally wrong.



Abortion is also one of a more limited number of moral issues about which Americans' views have not become more liberal over the past two decades.

Implications

Abortion has long been a divisive issue in U.S. politics, and Americans are no closer to reaching a consensus on it than they were in the initial years after the practice became legal in the U.S. more than 40 years ago. The issue continues to be fought in state legislatures and in state and federal courts. Pro-life activists and legislators are trying to pass legislation that would make abortions harder to get and to weaken the legal guarantees afforded by the *Roe* decision.

While relatively few Americans appear to favor making abortion illegal, a slim majority appear sympathetic to taking steps to limit the circumstances under which abortions are permitted.

In the coming days, Gallup will take a closer look at public opinion on abortion, including Americans' views on when and under what circumstances Americans believe abortion should be permissible, as well as looking at some of the major trends in opinion on abortion by key demographic groups.

SURVEY METHODS

Results for this Gallup poll are based on telephone interviews conducted May 1-10, 2018, with a random sample of 1,024 adults, aged 18 and older, living in all 50 U.S. states and the District of Columbia. For results based on the total sample of national adults, the margin of sampling error is ±4 percentage points at the 95% confidence level. All reported margins of sampling error include computed design effects for weighting.

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View survey methodology, complete question responses and trends.

Learn more about how the Gallup Poll Social Series works.

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JUNE 13, 2018

Trimesters Still Key to U.S. Abortion Views

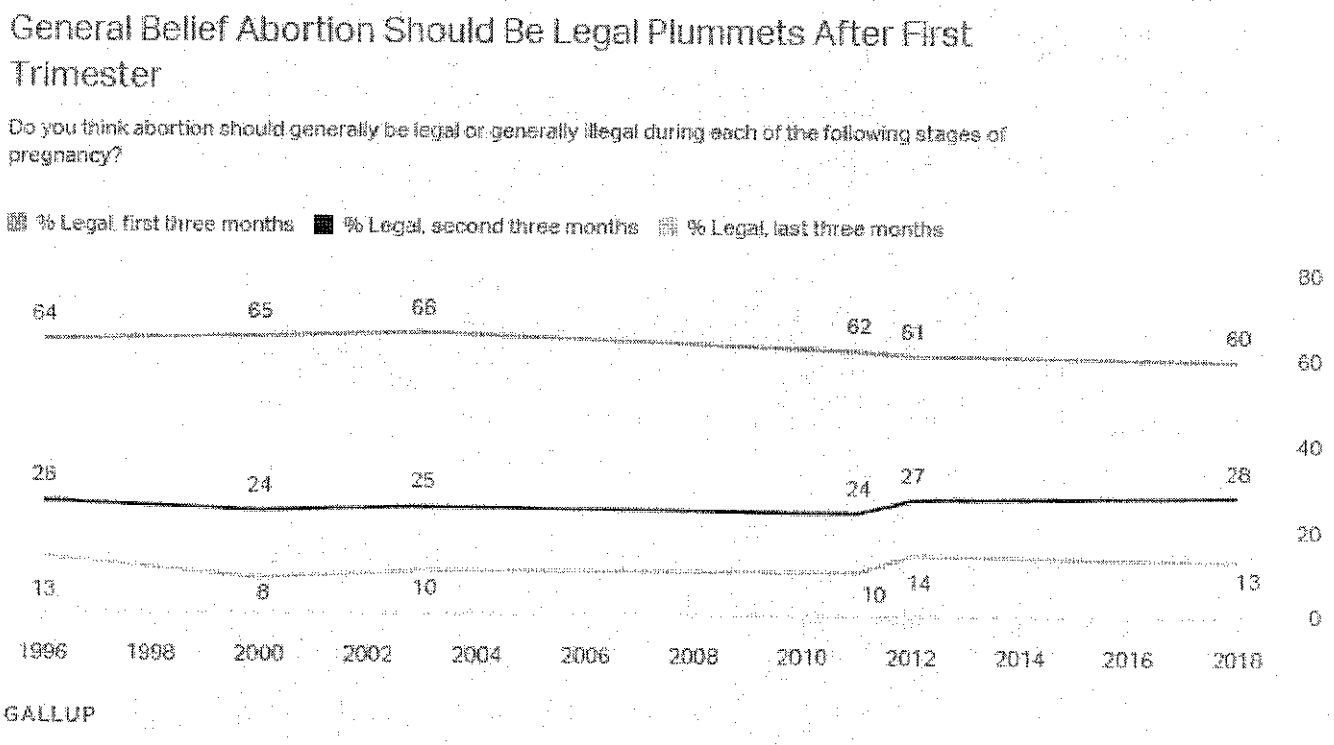
BY **LYDIA SAAD**

STORY HIGHLIGHTS

- Six in 10 Americans broadly support abortion rights in first trimester
- Support shrinks to less than one-third in second trimester, further in third
- Americans divided on aborting because of Down syndrome

This story is part of a special series on Americans' attitudes toward abortion in 2018.

WASHINGTON, D.C. -- Americans' support for the legality of abortion varies sharply when they are asked to evaluate it on a trimester basis, which is consistent with the pattern Gallup has found for more than 20 years. Six in 10 U.S. adults think abortion should generally be legal in the first three months of pregnancy. However, support drops by about half, to 28%, for abortions conducted in the second three months, and by half again, to 13%, in the final three months.



Current abortion attitudes, from Gallup's May 1-10 Values and Beliefs poll, are similar to the prior update, in 2012, as well as to Gallup's first measure of this question, in 1996.

Men and women have similar support for abortion by trimester. However, as seen in the table at the end of this report, support differs by age, education level and party identification. Young adults, college-educated adults and Democrats are more accepting than their counterparts of abortions in the first and second trimesters, while the differences are slighter with respect to third-trimester abortions.

Americans Back Medically Motivated Abortions in First Trimester

As Gallup reported earlier this week, the vast majority of Americans want abortion to be legally available in all or certain circumstances, even while, in answer to a separate question, they are evenly divided at 48% each in identifying their overall position as "pro-choice" or "pro-life."

But Americans' views on the issue are even more complicated than that. Support for elective abortion depends on the specific reason a woman seeks the procedure. And that, in turn, varies by whether it occurs early or late in the pregnancy.

Gallup examines these distinctions in the new poll by repeating an experiment first conducted 15 years ago. Half of respondents were asked whether abortion should be legal for each of several reasons during the *first* trimester of

pregnancy. The other half were asked about the same reasons in the *third* trimester. The situations (including a new one this year focusing on Down syndrome) are:

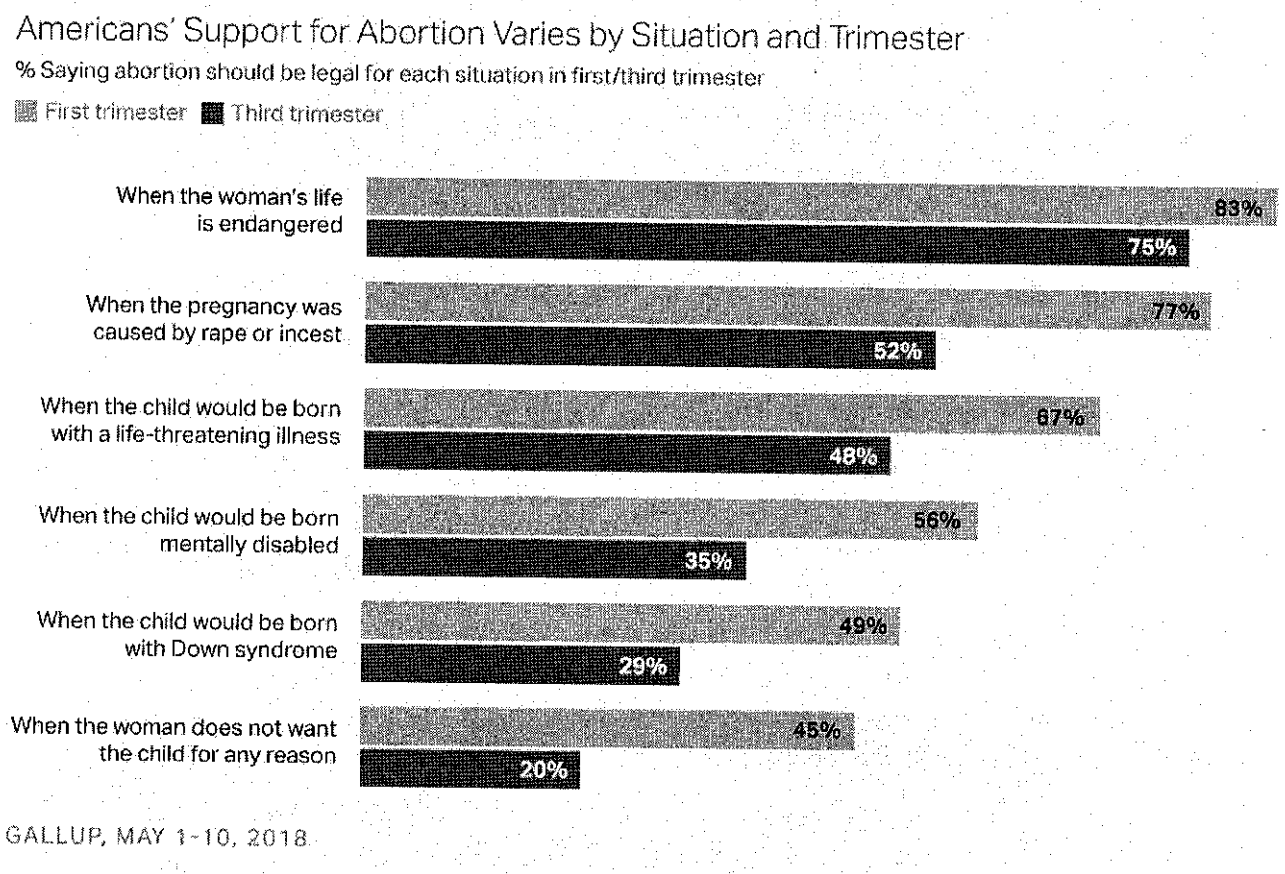
- when the woman's life is endangered
- when the pregnancy was caused by rape or incest
- when the child would be born with a life-threatening illness
- when the child would be born mentally disabled
- when the child would be born with Down syndrome
- when the woman does not want the child for any reason

The most widely accepted reason for performing abortions, with little difference in support depending on the timing, is when the woman's life is endangered: 83% think this should be legal in the first trimester and 75% in the third. Majorities also think abortion should be legal in both trimesters if done because the pregnancy was caused by rape or incest, although support falls from 77% in the first trimester to barely half (52%) in the third.

Abortions done because the child would be born with medical problems -- either a life-threatening illness or a mental disability -- receive majority support when done in the first trimester, but less than majority support when occurring in the third.

Americans are divided about terminating a pregnancy in the first trimester when Down syndrome is detected, with 49% in favor; but support drops to 29% for abortions done for this reason in the third trimester. The Centers for Disease Control and Prevention identify Down syndrome as "the most common chromosomal disorder," affecting about one in every 700 babies born in the U.S.

Less than half of Americans support abortions conducted in the first or the third trimester when the woman doesn't want the child "for any reason," although there is a sizable falloff in support for this from the first trimester (45%) to the third (20%).



As with overall support for abortion by trimester, some demographic differences are also evident in these attitudes in the expected direction by age and party ID, in terms of both first- and third-trimester abortions.

Women and men have similar abortion views in most of the circumstances, but men are more supportive when it comes to aborting in the first trimester when the child would be born mentally disabled (62% of men vs. 51% of women say

this should be legal in the first trimester), or when the child would be born with Down syndrome (56% vs. 44%).

Bottom Line

Most Americans generally see some reason for abortion to be legal, but far more think it should be legal in the first trimester than in the second or third. This conforms with the actual rate of abortions in the U.S. by trimester. According to the Guttmacher Institute, which tracks abortion statistics, late-trimester abortions are rare -- only 1.3% are conducted later than 20 weeks, whereas 89% are performed within the first 12 weeks.

Importantly, public opinion also mirrors the conceptual framework used in the 1973 landmark *Roe v. Wade* abortion decision. Under that historic ruling, the interests of the mother are paramount in the first trimester, but the state has an interest in protecting the fetus after viability. In the words of the decision: "For the stage subsequent to viability the State, in promoting its interest in the

potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

The wording of *Roe v. Wade* aligns almost perfectly with where Americans stand on late-term abortions -- keep them legal to save the life of the mother and in cases of rape and incest, but not for other reasons. Where Americans seem to depart from the decision is in supporting certain restrictions on first-term abortions, particularly those performed because of Down syndrome or solely at the woman's discretion.

Roe v. Wade took the power of outlawing abortion out of states' hands, making it legal throughout the country. But its invitation to regulate abortion in ways focused on the health of the mother, as well as to protect the "potentiality of human life" after viability, has enabled states to pass numerous laws limiting how and when abortion can be legally performed. Many of these restrictions are likely consistent with Americans' sensitivities to abortion, but that alignment could change.

Several recently passed laws, including one in Iowa that prohibits abortion after a fetal heartbeat is detected (which often occurs at six weeks), are aimed at having the Supreme Court revisit the decision. Any federal ruling that curtails legal abortion in the first trimester could spark significant public resistance.

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Americans Who Say Abortion Should Generally Be Legal in Each Trimester, by Key Demographic Group

	First trimester	Second trimester	Third trimester
	%	%	%
U.S. adults	60	28	13
Gender			
Men	60	31	14
Women	60	26	12
Age			
18 to 34	66	33	14
35 to 54	63	26	12
55+	54	27	12
Education			
College graduates	72	40	19
Some college	63	22	10
No college	49	24	9
Party ID			
Republicans	42	12	6
Independents	60	27	13
Democrats	77	46	18

GALLUP, MAY 1-10, 2018

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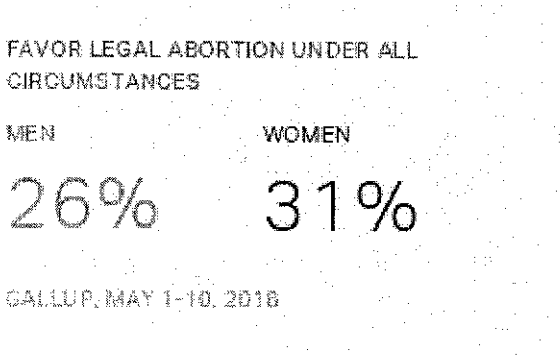
JUNE 14, 2018

Men, Women Generally Hold Similar Abortion Attitudes

BY **FRANK NEWPORT**



STORY HIGHLIGHTS

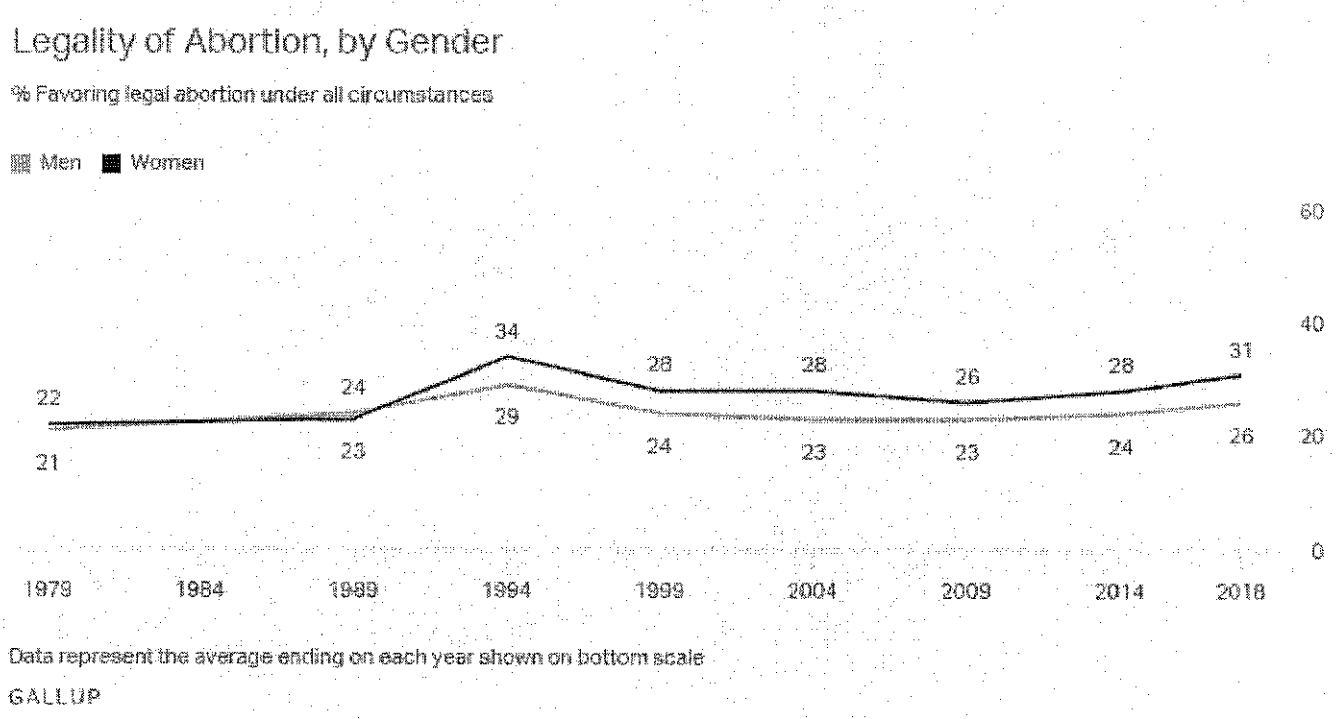
- 19% of both men and women say abortion should be totally illegal
- 31% of women and 26% of men want abortion to be totally legal
- 42% of female college graduates want abortion to be totally legal

WASHINGTON, D.C. -- Many U.S. political leaders may think of abortion as a key "women's issue," but it is not an issue about which women have substantially different attitudes than men. A Gallup analysis shows that differences in views on the legality of abortion between men and women have been relatively narrow for decades, going back to the 1970s. Additionally, there are only slight differences in men's and women's descriptions of themselves as pro-choice or pro-life.

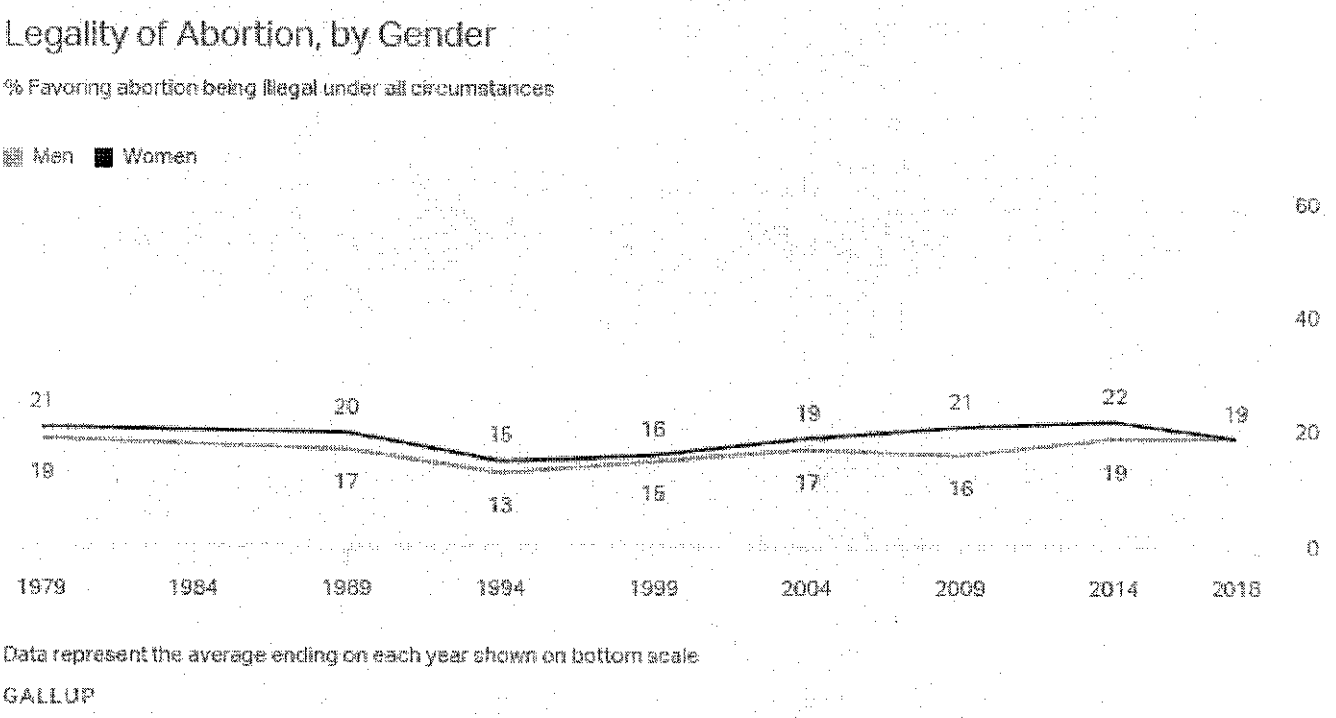
Gallup's 2010 comprehensive analysis of gender differences in views of abortion concluded, "Over the past three decades, men and women have consistently held similar views about the extent to which abortion should be legal." The current update, adding in data for the years 2010-2018, shows a continuation of this same general pattern.

Gallup's long-term trend question on this issue offers three choices on abortion: legal in all circumstances, illegal in all circumstances or legal in only certain circumstances.

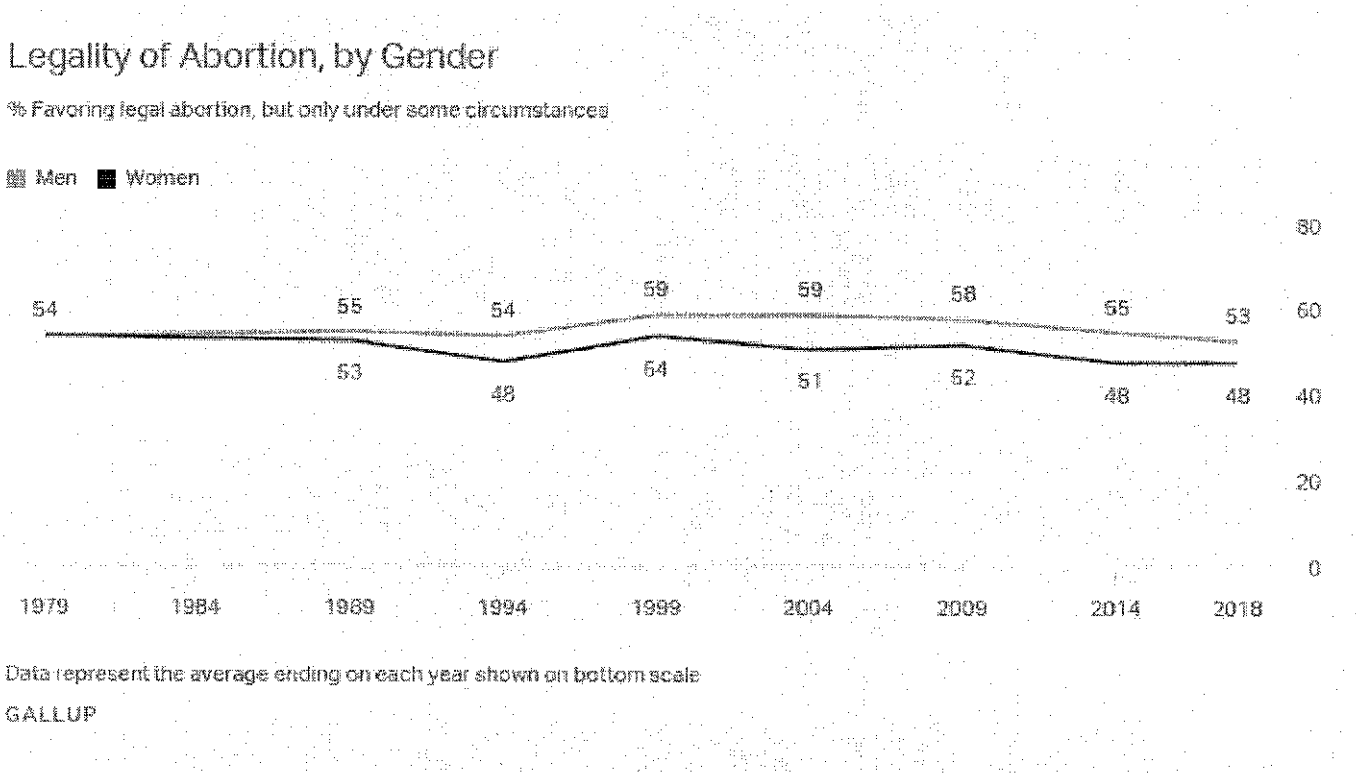
Since 1990, the average gender difference in the view that abortion should be legal in all circumstances is four percentage points, with women more likely than men to hold that attitude. For the past four years, an average of 31% of women and 26% of men have held this view.



Gender differences in the view that abortion should be *illegal* in all circumstances are even smaller, with an average gap of two points since 1990. For the past four years, there has been no difference, with 19% of both men and women saying that abortion should be totally illegal.

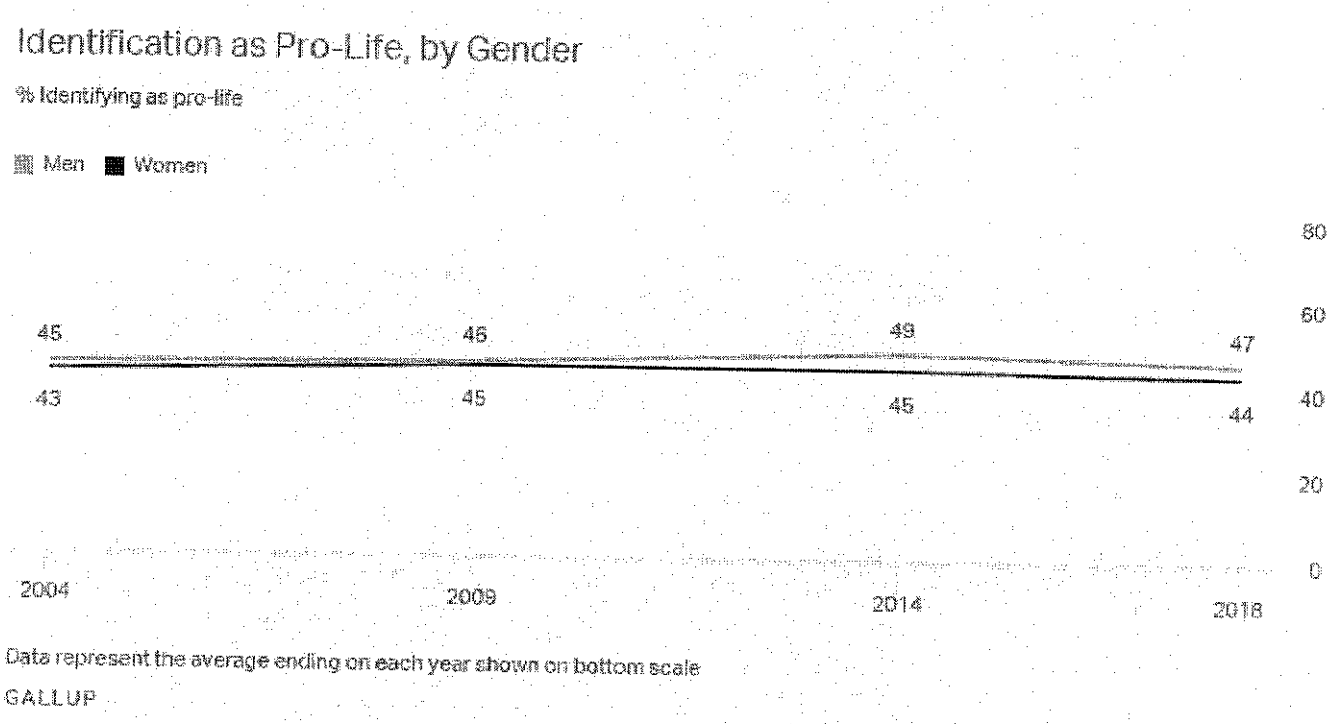


The modal choice for both men and women is the view that abortion should be legal, but only in certain circumstances. Men have been slightly more likely than women to hold this view since the 1980s, including by a five-point average difference over the past four years.

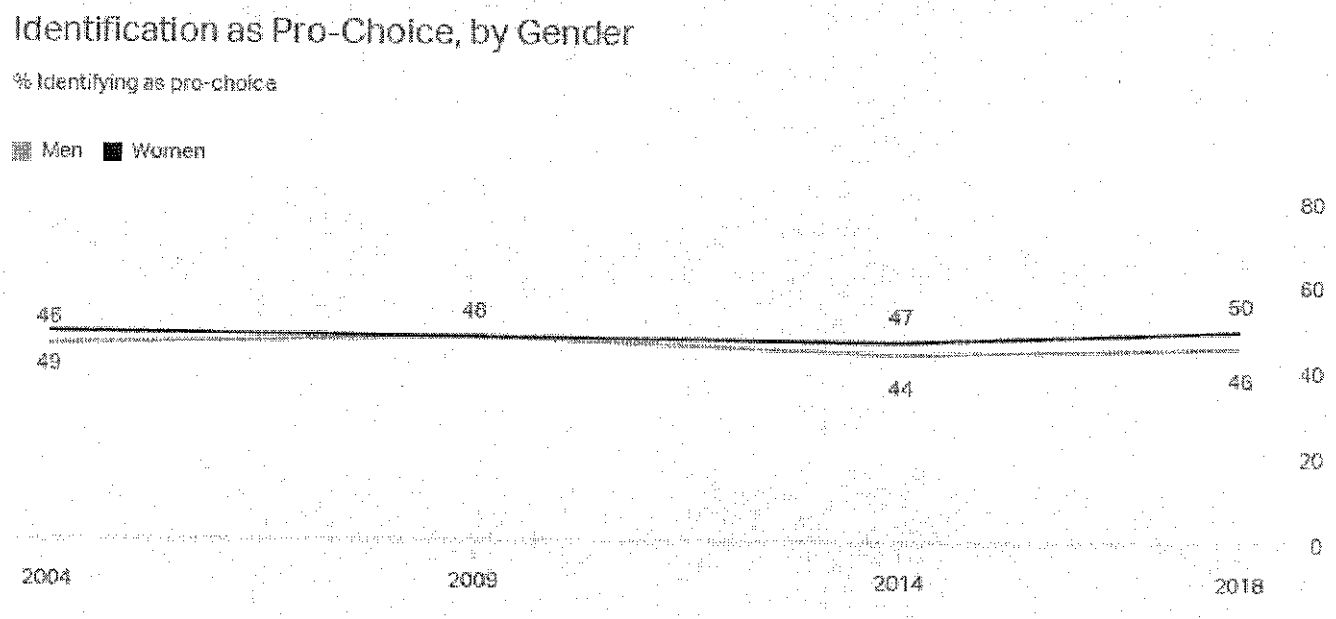


Only Small Gender Differences in Self-Described Pro-Choice, Pro-Life

There is a narrow gender gap in Americans' descriptions of themselves as either pro-choice or pro-life. Gallup began asking this question annually in 2001 as part of Gallup's Values and Beliefs survey, and since that time, men have been slightly more likely than women to choose the pro-life descriptor. The gap has been between three and four points since 2010 -- including the most recent period from 2015-2018, with 47% of men and 44% of women choosing the pro-life label.



The slight male edge in identification as pro-life reflects women becoming slightly more pro-choice in recent years, with 50% of women and 46% of men choosing the pro-choice label over the past four years. Similarly small differences were evident in previous years, including an even tie in self-descriptions as pro-choice between 2005 and 2009.

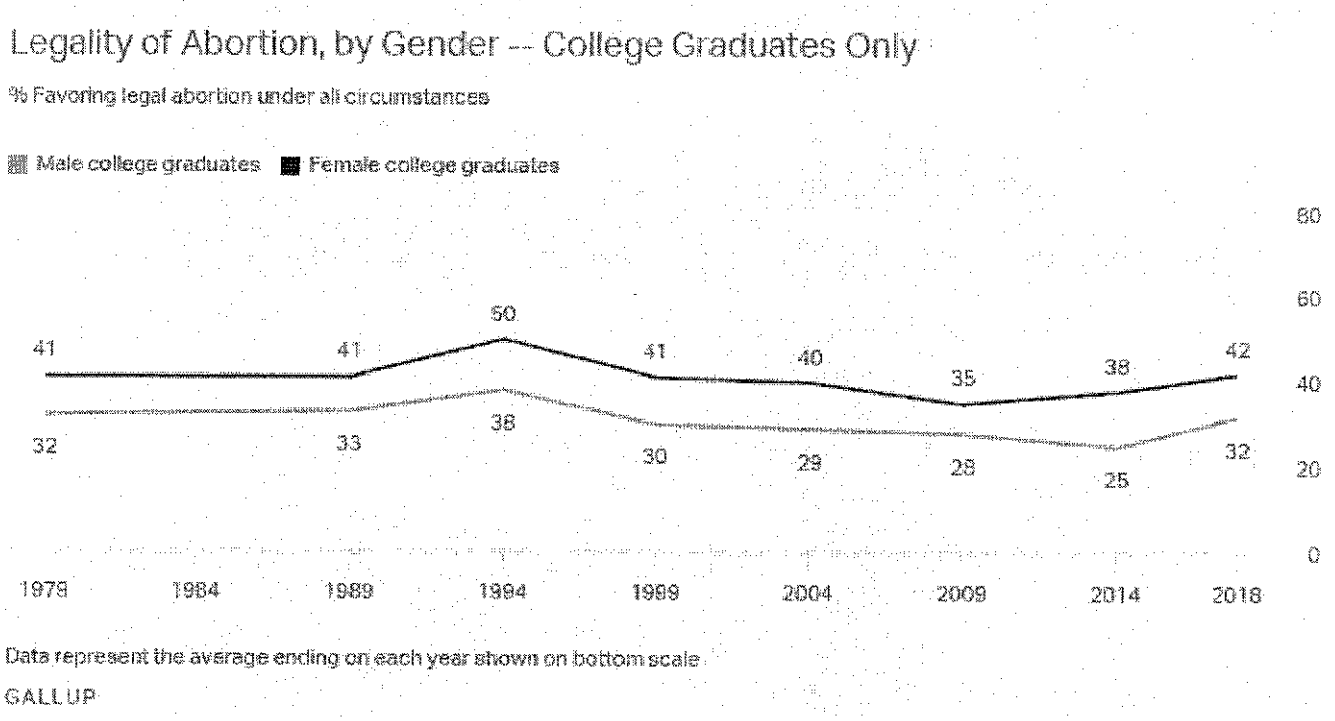


The net result of these attitudes is that men are divided in their self-identification -- 47% pro-life and 46% pro-choice, while women tilt toward describing themselves as pro-choice, 50% to 44%.

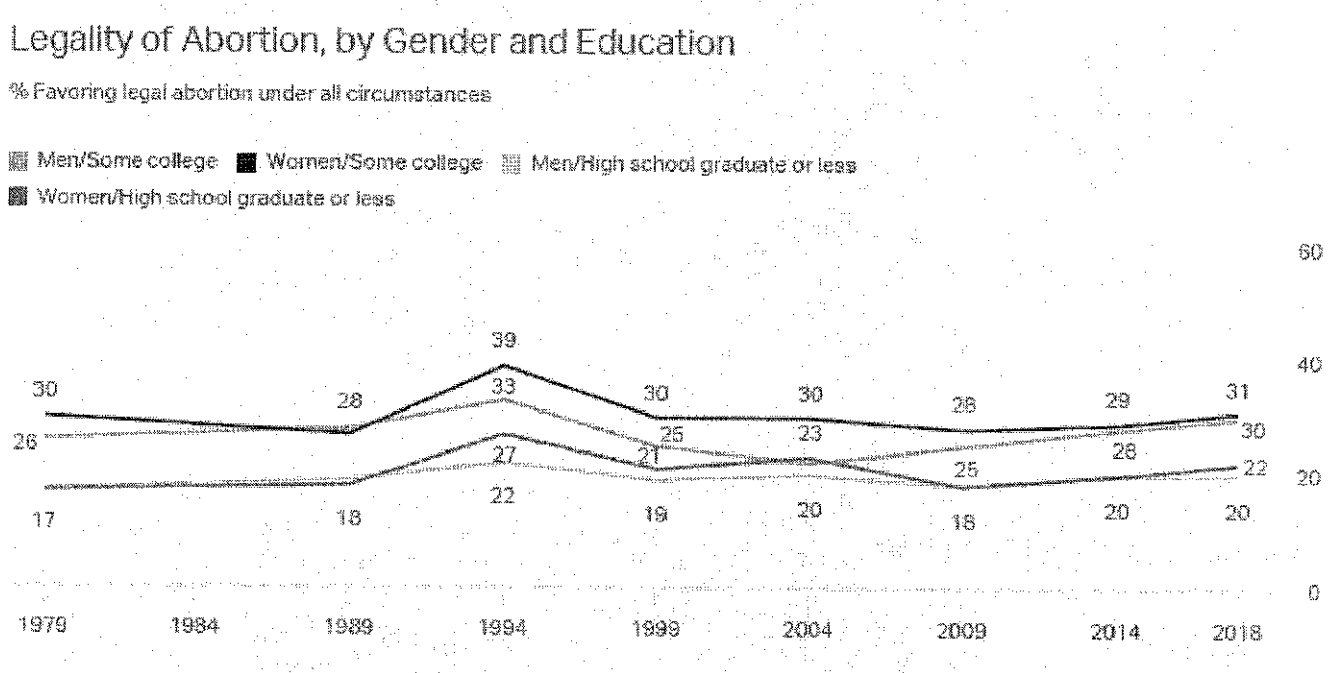
Among College Graduates, Women More Likely to Favor Abortion Being Legal

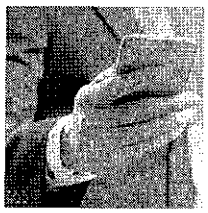
Educational attainment is a significant predictor of Americans' position on abortion, with college graduates more likely than those with less education to favor abortion being legal in all circumstances.

There has been and continues to be a significant gender gap on this measure among college graduates, with female graduates more likely than male graduates to favor abortion being legal in all circumstances. This pattern has been constant over the past decades, despite modest fluctuations in the overall percentages favoring legalized abortion. Most recently, over the past four years, 42% of female college graduates have chosen the "legal in all" alternative, versus 32% of male college graduates.



Over the past four years, only one or two points have separated the percentages of men and women with some college education, as well as men and women with a high school education or less, who support abortion being legal in all circumstances. In prior years, the gap was slightly larger.





Implications

There are significant gender gaps on a number of political and social issues in American society today, including political party identification, presidential job approval, views of the death penalty, and views of the moral acceptability of pornography, stem cell research, marijuana and cloning animals -- but abortion is not one of these issues. Women are slightly more likely to favor abortion

being completely legal and slightly more likely to personally identify as pro-choice than men are, but these differences are quite small -- as has generally been the case for decades.

One exception to this pattern occurs within the ranks of Americans with college degrees, with female college graduates over the years consistently more likely than male graduates to favor completely legal abortion. Gender differences among those with less formal education are much smaller.

Other research shows that abortion attitudes differ significantly along political and ideological dimensions, and by age, the latter the topic of a forthcoming Gallup analysis.

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Learn more about how the Gallup U.S. Poll works.

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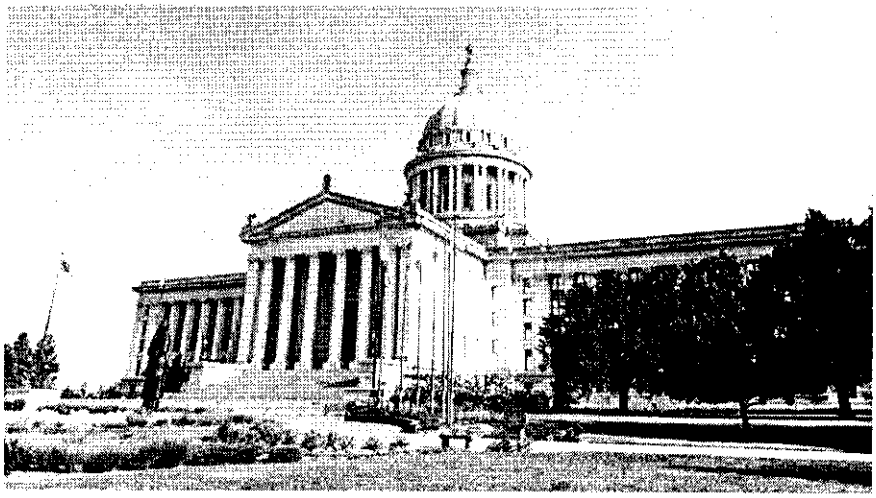
Oklahoma House declares abo murder

BY REID WILSON - 05/09/17 09:44 AM EDT

18,454 SHARES



(Getty Images)

The Oklahoma House of Representatives passed a resolution Monday declaring abortion to be murder and criticizing the U.S. Supreme Court for decisions that have allowed women to seek elective abortions.

The resolution, passed on a voice vote without any debate, carries no force of law. But it takes the remarkable step of specifically accusing the Supreme Court of "overstepp[ing] its authority and jurisdiction" in Roe v. Wade and Planned Parenthood v. Casey, two landmark decisions that protected a woman's right to seek an abortion.

The measure calls on public officials to "stop the murder of innocent unborn children by abortion." It also orders the Oklahoma Supreme Court to stay out of any future cases involving state abortion law.

Oklahoma has already enacted strict rules aimed at limiting abortions performed in the state.

A woman seeking an abortion must undergo counseling and wait 72 hours before getting an abortion. Health insurance plans offered under the Affordable Care Act may only cover abortions performed if the mother's life is in danger. Parents of minors seeking abortions must be notified before the procedure takes place. And abortions performed after 20 weeks are banned unless the woman's life is at risk.

Just In...

Trump lawyer: Stormy Daniels book renders her lawsuit 'moot'
ADMINISTRATION — 16M 6S AGO

Watch live: Trump participates in Kavanaugh swearing-in ceremony
ADMINISTRATION — 16M 16S AGO

Alaska GOP weighs reprimanding Murkowski over Kavanaugh vote
SENATE — 30M 22S AGO

Group begins 'Nuns on the Bus' tour to protest Trump tax law ahead of midterms
FINANCE — 31M 3S AGO

Ford planning layoffs as part of reorganization plan
TRANSPORTATION — 41M 37S AGO

'Minibus' investments in early childhood are investments in our national defense
OPINION — 46M 17S AGO

Corker says US will 'respond accordingly' to countries targeting journalists amid columnist's disappearance
SENATE — 46M 24S AGO

UK Uber drivers to stage 24-hour strike

over pay and conditions
TRANSPORTATION 58M 54S AGO

VIEW ALL

There are only five medical facilities that provide abortion services in Oklahoma, according to the Guttmacher Institute, a pro-abortion rights group that tracks state laws.

Anti-abortion groups have helped shepherd new restrictions through state legislatures this year in Kentucky and Iowa. Ohio Gov. John Kasich (R) signed a 20-week abortion ban into law late last year, and Tennessee Gov. Bill Haslam (R) is considering a similar ban passed by the legislature last week.

Pro-abortion rights groups are exploring their legal options in several states, a step that some anti-abortion groups welcome. Those groups say they hope to pass new, more restrictive laws that will create a lawsuit that could make it to the Supreme Court, where they hope justices will reconsider the Roe and Casey decisions.

WIKIPEDIA

Abortion in Oklahoma

Abortion in Oklahoma is legal under United States law, subject to the US Supreme Court decisions of *Roe v. Wade* (1973),[1] and *Planned Parenthood v. Casey* (1992). In accordance with *Planned Parenthood v. Casey*, states cannot place legal restrictions posing an undue burden for "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[2]

Abortion is a major political issue in Oklahoma. 2016 was the first legislative session in over a decade (http://ocrj.org/anti-choice-measures-in-oklahoma-legislature-since-2004/) that did not see an abortion restriction pass. In 2016, Oklahoma legislators approved Senate Bill 1118, which would criminalize abortion providers and charge them with first degree murder.[3][4] The felony would be punishable by up to three years imprisonment, and the doctor would lose their medical license.[5] Critics denounce the bill as breaking federal law that permits women to seek an abortion.[5] If enacted, opponents of the measure have promised to challenge its constitutionality in the courts.[6] On May 20, 2016, Governor Mary Fallin vetoed the bill before it could become law, citing its wording as too vague to withstand a legal challenge.[7]

In 2016, a law called the Humanity of the Unborn Act, which would have approved government mandated signage in public women's restrooms (http://www.news9.com/story/34044450/anti-abortion-signs-to-appear-in-ok-bathrooms) across the state, was revised only to require additional signage in abortion clinics. State Rep. Justin Humphrey (https://www.okhouse.gov/District.aspx?District=19) proposed legislation that would require a pregnant woman to ask her sexual partner for permission (http://abcnews.go.com/US/oklahoma-bill-force-women-seeking-abortions-permission-babys/story?id=45490040) to access abortion care. State Rep. George Faught authored legislation to ban abortion in the event of fetal genetic abnormalities, without exceptions for rape or incest. Faught defended the bill, saying, in reference to rape and incest, "God can bring beauty from ashes." His comments drew further criticism from opponents in the Oklahoma House.[8]

In December 2016, the Oklahoma Supreme Court struck down a state law requiring doctors who perform abortions to have admitting privileges at a hospital near their clinic, stating the measure "places an undue burden on a women's access to abortion."[9]

Oklahoma Abortion Providers

Currently, the state of Oklahoma has three abortion providing clinics: Abortion Surgery Center, South Wind Women's Center and Reproductive Services. Planned Parenthood Great Plains had provided medical abortions in Oklahoma City but no longer has a physician on site so there are no abortions performed by Planned Parenthood in Oklahoma.

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U.S.
DECEMBER 13, 2016 / 3:41 PM / 2 YEARS AGO

Oklahoma court strikes down abortion restriction as unconstitutional

Jon Herskovitz

(Reuters) - The Oklahoma Supreme Court on Tuesday struck down a state law requiring doctors who perform abortions to have admitting privileges at a hospital near their clinic, saying the measure "places an undue burden on a women's access to abortion."

Oklahoma Republican Governor Mary Fallin makes remarks before the opening of the National Governors Association Winter Meeting in Washington, DC, U.S. on February 22, 2014. REUTERS/Mike Theiler/File Photo

The court said the 2014 law violates the state's constitution and if it remained on the books, it would have left the state of about 4 million people with only one abortion clinic.

Its decision comes after the U.S. Supreme Court in June struck down a similar restriction in neighboring Texas. Abortion providers challenged the Texas law, saying the requirement it stipulated was medically unnecessary and specifically intended to shut clinics. [nL1N19J0NI]

"We find there is no evidence to support defendants' position that this legislation protects and advances women's health," the Oklahoma court wrote.

Oklahoma Republican lawmakers who backed the law said requiring admitting privileges would ensure continuity of care if there were complications from an abortion. Abortion rights advocates said complications are rare and could be treated at any emergency room.

"I'm disappointed to see another pro-life law struck down by the courts," Oklahoma Governor Mary Fallin, a Republican, said in a statement.

"Like many bills passed in Oklahoma, this bill was designed to protect the health and welfare of the mother along with the life of the unborn, which always should be among our society's priorities," she said.

The Oklahoma court cited the views of the Oklahoma State Medical Association, a leading group of medical professionals, which opposed the measure on the grounds that it did nothing to advance or protect women's health and the regulation was not in the best interest of patients.

Since the law on admitting privileges was passed in late 2013 in Texas, the number of abortion clinics in the state with about 27 million people, had dropped to 19 from 41, court documents

show.

"Evidence matters and the evidence shows that there was no compelling public health interest for the measure," said Elizabeth Nash, senior state issues associate for the Guttmacher Institute, an abortion rights group whose data is used by both sides in the debate.

Lawmakers in Texas, Oklahoma and several other Republican-led states have been lining up a new series of restrictions on abortions for legislative sessions that start next year.

Abortion rights advocates believe that many Republican lawmakers feel emboldened by the upcoming presidency of Republican Donald Trump and view his administration as supporting their restrictions on the procedure.

Reporting by Jon Herskovitz; Editing by Lisa Shumaker and Sandra Maler

Our Standards: The Thomson Reuters Trust Principles.

HEALTH NEWS
MAY 19, 2016 / 11:59 AM / 2 YEARS AGO

Oklahoma bill to jail abortion doctors heads to governor

Heide Brandes

OKLAHOMA CITY (Reuters) - An Oklahoma bill that could send any doctor who performs an abortion to jail headed to the governor on Thursday, with opponents saying the measure is unconstitutional and promising a legal battle against the cash-strapped state if it is approved.

An oil drilling rig is seen near a parking lot in front of the state capitol building in Oklahoma City, Oklahoma U.S. March 9, 2016. REUTERS/Luc Cohen

The bill to make abortion a felony punishable by up to three years in prison was approved by the Republican-dominated Senate on Thursday. Governor Mary Fallin, a Republican opposed to abortion, has not indicated whether she will sign it.

The bill also calls on state medical boards to revoke licenses for the "performance of an abortion" but allows an exemption for abortion necessary to preserve the life of the mother.

"This is our proper function, to protect life," Republican Nathan Dahm, an author of the bill, said during a debate. Supporters have said the bill could withstand a legal challenge because the state was within its rights to set licensing requirement for doctors.

Democratic Senator John Sparks said the bill would not stand up in court and would lead to expensive legal battles.

"This measure is harmful, discriminatory, clearly unconstitutional, and insulting to Oklahoma women and their families," the Center for Reproductive Rights, an abortion rights group, said in a letter to Fallin.

Several abortion rights groups have promised a court fight if Fallin signs the bill, which they expect to happen as she has approved more than a dozen pieces of legislation restricting abortion since taking office in 2011. The state has been one of the leaders in adding restrictions to abortions.

Oklahoma City University constitutional law professor Andrew Spiropoulos said the bill, if approved, may be on shaky legal ground because the U.S. Supreme Court has ruled that abortion is legal in the United States.

"When there is a conflict between a state law and federal law, it is the federal law that prevails," he said.

Lawmakers have faced criticism for not doing enough to plug a projected $1.3 billion state budget shortfall next year, which has caused Oklahoma to cut back on funding for schools and services.

Reporting by Heide Brandes, writing by Jon Herskovitz; editing by Marguerita Choy and Dan Grebler

This is an archived article and the information in the article may be outdated. Please look at the time stamp on the story to see when it was last updated.

OKLAHOMA CITY – One day after lawmakers passed a bill that would make performing an abortion a felony, Gov. Mary Fallin decided to veto the measure.

Mary Fallin

On Thursday, the Oklahoma Legislature has passed a bill that would make performing an abortion a felony punishable by up to three years in prison.

The bill would restrict any physician who performs an abortion from obtaining or renewing a license to practice medicine in Oklahoma.

On Friday, Gov. Mary Fallin vetoed the measure, saying the bill was "vague" and "would not withstand a criminal constitutional legal challenge."

"The bill is so ambiguous and so vague that doctors cannot be certain what medical circumstances would be considered 'necessary to preserve the life of the mother," Fallin said. "The absence of any definition, analysis or medical standard renders this exception vague, indefinite and vulnerable to subjective interpretation and application."

"While I consistently have and continue to support a re-examination of the United States Supreme Court's decision in Roe v. Wade, this legislation cannot accomplish that re-examination," Fallin wrote. "In fact, the most direct path to a re-examination of the United States Supreme Court's ruling in Roe v. Wade is the appointment of a conservative, pro-life justice to the United States Supreme Court."

Pro-choice groups have said the bill is unconstitutional, but the author of the bill, Sen. Nathan Dahm, said he hoped it would challenge Roe v. Wade.

The New York Times

EDITORIAL

Oklahoma's Unabashed Attack on Abortion

By The Editorial Board

April 25, 2016

Give Oklahoma lawmakers points, at least, for honesty. They wanted to ban abortion, so they voted effectively to do just that — without offering any pretense of trying to protect women's health, as supporters of other virulent anti-choice laws in states like Texas have done.

Last Thursday, the Oklahoma House of Representatives voted overwhelmingly to bar doctors from performing abortions in all cases except to save the woman's life. A doctor who violates the law would be committing a felony, punishable by up to three years in prison and the loss of his or her medical license.

If the House bill gets final approval from the State Senate, which passed an earlier version in March, it will be sent to Gov. Mary Fallin, a Republican, who has signed several other measures to reduce women's access to abortion and reproductive health care in Oklahoma, where only two abortion clinics remain.

This legislation is plainly unconstitutional, and would be struck down as quickly as earlier attempts to ban abortion outright — which Utah and Louisiana tried in 1991. Since Roe v. Wade, the Supreme Court has repeatedly upheld a woman's right to an abortion before the fetus is viable.

Anti-abortion activists outside the Oklahoma Senate chambers last month.
Sue Ogrocki/Associated Press

While other states haven't attempted an outright ban in recent years, they have managed to shut down clinics that offer abortion by imposing expensive and unnecessary staffing and facilities standards and requiring their doctors to have admitting privileges at local hospitals. Those laws, and others like them, have left millions of mostly lower-income women without access to abortion and other reproductive health services. The Supreme Court in March heard arguments over the Texas law, which has already forced the closing of about half the roughly 40 clinics in the state; the court is expected to issue a decision by the end of June.

The Oklahoma Legislature has chosen a different tack to block women from exercising their constitutional right. And though the bill appears to criminalize only the actions of doctors, it is by no means clear that women would escape prosecution. For example, around the country, women who attempt to perform abortions on themselves have been charged with crimes, including murder.

For years, anti-abortion forces have relied on onerous regulations on providers to limit abortion services and lied about their true purpose because they know that a vast majority of Americans support a woman's right to choose and that the Supreme Court has affirmed that right for more

than four decades. Governor Fallin would save everyone the time and expense of litigation by vetoing the bill.

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A version of this article appears in print on April 25, 2016, on Page A22 of the New York edition with the headline: Oklahoma's Unabashed Attack on Abortion

The Washington Post

Acts of Faith

Oklahoma lawmaker defends pregnancy from rape and incest as 'beauty from ashes'

By Kristine Phillips
March 25, 2017

In defending his controversial antiabortion legislation, Oklahoma state Rep. George Faught said that even in pregnancies that result from rape or incest, "God can bring beauty from ashes."

Faught made the statement during a debate on the Oklahoma House floor earlier this week. Faught's bill, which overwhelmingly passed the House on Tuesday, would outlaw abortions sought by women based solely on a diagnosis of Down syndrome or other genetic abnormalities. A fellow lawmaker criticized the Republican from Muskogee for not including an exception for pregnancies that resulted from rape and incest.

In a heated exchange, Rep. Cory Williams (D-Stillwater) asked Faught whether rape or incest is the "will of God."

"Well, you know, if you read the Bible, there's actually a couple of circumstances where that happened. And the Lord uses all circumstances. I mean, you can get on that path, but you know it's a reality, unfortunately," Faught said, adding that rape and incest have nothing to do with his legislation.

Williams fired back, saying that because Faught is "proffering divine intervention" as the reasons he won't include exceptions for rape and incest, fellow lawmakers deserve to know whether he believes that such acts are God's will.

"You know, it's a great question to ask," Faught responded. "And obviously if it happens in someone's life, it may not be the best thing that ever happened. ... So you're saying that God is not sovereign with every activity that happens in someone's life and can't use anything and everything in someone's life, and I disagree with that."

Faught's remarks have drawn criticisms on social media. In tweeting a story about the bill, the Center for Reproductive Rights wrote: "Our job is to make sure a woman's deeply personal decision is never at the mercy of lawmakers like this."

"Then by his logic, murder is an act of God, all religious beliefs should be kept out of law making," a Twitter user wrote in response to the center's tweet.

Efforts to reach Faught for comment Saturday were unsuccessful.

H.B. 1549, which would create the Prenatal Nondiscrimination Act of 2017, would penalize doctors for performing abortions sought because of Down syndrome or other abnormalities. Doctors' medical licenses would be suspended or revoked, and they would face steep fines: $10,000 for the first violation, $50,000 for the second, and $100,000 for the third and succeeding violations.

Women who sought abortions would not be held liable.

Faught during the debate on Tuesday said he introduced the legislation because of his belief about "protecting life."

"For me, the pressure doesn't come from the party; it comes from my heart, and what I believe about God and what I believe about life," Faught said. " ... Do we value life, or do we just value a perfect life?

"God can bring beauty out of ashes, as he has time and time again," he added, addressing questions about rape and incest.

The debate on the bill lasted for almost two hours. Democrats argued that the bill is not only unconstitutional but also a waste of the legislature's time.

"Please start doing something that is more than a bumper sticker. Do something that makes an impact," Williams said in his closing statement, adding that state lawmakers have continually failed to address other issues, such as services for people with disabilities. "Truly I tell you, how you treat the least among us is how you've treated the God that you profess to worship."

Rep. Emily Virgin (D-Norman) argued that challenges such as discrimination, lack of employment and lack of services that children with Down syndrome face after they are born are far more pressing and deserving of government action.

Faught said the private sector, including community groups and ministries, are already providing services to children with Down syndrome.

"We've spent a lot of time on a lot of issues," Faught said. "I think there's a lot of people in this body that think this is an important issue: protecting life."

One of those people is Rep. John Bennett (R-Sallisaw), who invoked the Bible in his impassioned speech supporting the bill.

"Wow, I mean really? I heard statements — 'Why are we wasting our time on a pro-life bill up here? We need to worry about the budget,'" Bennett said. "Well, let me ask you this. Which is more important to you? Money or life? I mean, come on. The argument shouldn't even be there. Life is the most important thing that we can work on up here."

H.B. 1549 passed the House 67 to 16 and is now in the Senate.

North Dakota was the first to ban abortions based on genetic anomalies in 2013.

Indiana followed last year, when then-Gov. Mike Pence signed similar legislation into law as doctors grappled with how the measures could affect their patients, The Washington Post's Danielle Paquette wrote.

"It will require a woman, during one of the most devastating times in her life after learning of a fetal anomaly, to prolong her pregnancy even if against her wishes, and to potentially assume the greater health risks associated with doing so," Brownsyne Tucker Edmonds, an obstetrician-gynecologist in Indiana, said in a statement last year.

Pence called the Indiana legislation "a comprehensive pro-life measure that affirms the value of all human life."

Shortly after the Indiana legislation became law, a federal judge blocked it from going into effect, finding that it would violate Supreme Court precedents that protect a woman's right to choose abortion, the Indianapolis Star reported.

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The poor 'just don't want health care': Republican congressman faces backlash over comments

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GUTTMACHER INSTITUTE YEARS

FACT SHEET

State Facts About Abortion: Oklahoma

NATIONAL BACKGROUND AND CONTEXT

Each year, a broad cross section of U.S. women obtain abortions. As of 2014, some 60% of women having abortions were in their 20s; 59% had one or more children; 86% were unmarried; 75% were economically disadvantaged; and 62% reported a religious affiliation.[1] No racial or ethnic group made up a majority: Some 39% of women obtaining abortions were white, 28% were black, 25% were Hispanic and 9% were of other racial or ethnic backgrounds.[1]

Contraceptive use is a key predictor of whether a woman will have an abortion. In 2011, the very small group of American women who were at risk of experiencing an unintended pregnancy but were not using contraceptives accounted for the majority of abortions.[2] Many of these women did not think they would get pregnant or had concerns about contraceptive methods.[2] A minority of abortions occured among the much larger group of women who were using contraceptives in the month they became pregnant. Many women who fall into this category have reported difficulty using contraceptives consistently.[3]

Abortion is one of the safest surgical procedures for women in the United States. Fewer than 0.05% of women obtaining abortions experience a complication.[4]

Since recognizing a woman's constitutional right to abortion in 1973 in *Roe v. Wade*, the U.S. Supreme Court has in subsequent decisions reaffirmed that right. The Court has held that a state cannot ban abortion before viability (the point at which a fetus can survive outside the uterus), and that any restriction on abortion after viability must contain exceptions to protect the life and health of the woman. Furthermore, any previability abortion restriction cannot create an "undue burden" on a woman seeking an abortion. This "undue burden" standard was established in *Planned Parenthood v. Casey* in 1992 and clarified in the 2016 decision in *Whole Woman's Health v. Hellerstedt*. The latter held that scientific evidence must be considered when evaluating the constitutionality of abortion restrictions.[5] Some of the most common state-level abortion restrictions are parental notification or consent requirements for minors, limitations on public funding, mandated counseling designed to dissuade a woman from obtaining an abortion, a mandated waiting period before an abortion, and unnecessary and overly burdensome regulations on abortion facilities.

Since 2010, the U.S. abortion landscape has grown increasingly restrictive as more states become hostile to abortion rights. Between 2010 and 2016, states enacted 338 new abortion restrictions, which account for nearly 30% of the 1,142 abortion restrictions enacted by states since the 1973 Supreme Court decision in *Roe v. Wade*.

PREGNANCIES AND THEIR OUTCOMES

•In 2011, the 63 million U.S. women of reproductive age (15–44) had six million pregnancies. Sixty-seven percent of these pregnancies resulted in live births and 18% in abortions; the remaining 15% ended in miscarriage.[6]

•Approximately 926,200 abortions occurred in the United States in 2014. The resulting abortion rate of 14.6 abortions per 1,000 women of reproductive age represents a 14% decrease from the 2011 rate of 16.9 per 1,000 women.[7]

• In 2014, some 5,330 abortions were provided in Oklahoma, though not all abortions that occurred in Oklahoma were provided to state residents, as some patients may have traveled from other states; likewise, some individuals from Oklahoma may have traveled to another state for an abortion. There was a 12% decline in the abortion rate in Oklahoma between 2011 and 2014, from 7.9 to 7.0 abortions per 1,000 women of reproductive age. Abortions in Oklahoma represent 0.6% of all abortions in the United States.[7]

WHERE WOMEN OBTAIN ABORTIONS

•In 2014, there were 1,671 facilities providing abortion in the United States, representing a 3% decrease from the 1,720 facilities in 2011. Sixteen percent of facilities in 2014 were abortion clinics (i.e., clinics where more than half of all patient visits were for abortion), 31% were nonspecialized clinics, 38% were hospitals and 15% were private physicians' offices. Fifty-nine percent of all abortions were provided at abortion clinics, 36% at nonspecialized clinics, 4% at hospitals and 1% at physicians' offices.[7]

•There were 5 abortion-providing facilities in Oklahoma in 2014, and 3 of those were clinics. These numbers represent no change since 2011 in overall providers, and no change in clinics from 2011, when there were 5 abortion providers overall, of which 3 were clinics.[7]

•In 2014, 90% of U.S. counties had no clinics providing abortions. Some 39% of women of reproductive age lived in those counties and would have had to travel elsewhere to obtain an abortion.[7] Of patients obtaining abortions in 2008, one-third had to travel more than 25 miles one way to reach a facility.[8]

•In 2014, some 96% of Oklahoma counties had no clinics that provided abortions, and 54% of Oklahoma women lived in those counties.[7]

RESTRICTIONS ON ABORTION

In Oklahoma, the following restrictions on abortion were in effect as of May 1, 2018:

- A woman must receive state-directed counseling that includes information designed to discourage her from having an abortion, and then wait 72 hours before the procedure is provided.
- Private insurance policies cover abortion only in cases of life endangerment, unless individuals purchase an optional rider at an additional cost.
- Health plans offered in the state's health exchange under the Affordable Care Act can only cover abortion if the woman's life is endangered, unless individuals purchase an optional rider at an additional cost.
- Abortion is covered in insurance policies for public employees only in cases of life endangerment, unless individuals purchase an optional rider at an additional cost.
- The use of telemedicine to administer medication abortion is prohibited.
- The parent of a minor must consent and be notified before an abortion is provided.
- Public funding is available for abortion only in cases of life endangerment, rape or incest.
- The state prohibits abortions performed for the purpose of sex selection.

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FACT SHEET
Induced Abortion in the United States

RESEARCH ARTICLE
Abortion Incidence and Service Availability In the United States, 2011

STATE FACTS ABOUT ABORTION

News > Nation & World

Oklahoma abortion bill: Pregnant woman (or 'host') must get man's permission

By **THE ASSOCIATED PRESS** |
PUBLISHED: February 14, 2017 at 10:34 am | UPDATED: February 14, 2017 at 11:02 am

OKLAHOMA CITY (AP) — A Republican lawmaker who defended his description of pregnant women as "hosts" has won approval for his bill that would require women seeking an abortion to receive written consent from the father.

The House Public Health Committee voted 5-2 in favor of the bill by Rep. Justin Humphrey, despite objections from opponents that the measure is unconstitutional. It now proceeds to the full House.

Humphrey acknowledged that the bill may not pass constitutional muster, but says he wanted to ensure fathers have a role in the abortion process.

"I understand that they feel like that is their body," he said of women. "I feel like it is a separate — what I call them is, is you're a host. And you know when you enter into a relationship you're going to be that host and so, you know, if you pre-know that, then take all precautions and don't get pregnant. ... After you're irresponsible then don't claim, well, I can just go and do this with another body, when you're the host and you invited that in."

A spokeswoman for the abortion rights group Planned Parenthood Great Plains described the bill as a "waste of taxpayer money."

The same committee also approved a separate measure prohibiting abortions based on the diagnosis of a fetal abnormality or Down syndrome.

OKLAHOMA

Oklahoma State Department of Health

Induced Termination of Pregnancy (ITOP)

The Oklahoma State Department of Health (OSDH) began routine abortion surveillance in 2000 to document the number and characteristics of women obtaining legal induced abortions, also known as induced termination of pregnancy (ITOP). Abortion surveillance provides the data necessary to examine the trend in total numbers, as well as the demographic characteristics of women who obtain legal induced abortions and to increase the awareness of an additional aspect in the spectrum of pregnancy outcomes. These data are necessary to improve the health and well being of both women and infants.

In Oklahoma, "abortion" is defined as the purposeful termination of a human pregnancy, by any person with an intention other than to produce a live birth or to remove a dead unborn child (63 O.S. Section 1-730). Abortion may legally be performed if the unborn child is less than 24 weeks which at which point the law defines unborn child as viable (63 O.S. Section 1-738).

Reporting of abortions is required by Oklahoma statute (63 O.S. Section 1-738). These reports are legal records maintained by the Oklahoma State Department of Health and are designed to collect information for statistical and research purposes only.

For convenience and in accordance with Oklahoma statute (63 O.S. Section 1-738) the following document has been provided which contains all Oklahoma Statues and regulations directly related to abortion. Abortion Statutes (PDF, 688 KB)

On November 1, 2010 law was added and went into effect March 1, 2012 that requires any physician performing abortions to fully complete and submit, electronically, an "Individual Abortion Form" to the State Department of Health by the last business day of the calendar month following the month in which the physician performs an abortion, for each abortion the physician performs. This law also provided the information that shall be collected on the form. Additionally, law went into effect that requires any physician practicing in Oklahoma who encounters an illness or injury that a reasonably knowledgeable physician would judge is related to an induced abortion shall complete and submit, electronically or by regular mail, a "Complications of Induced Abortion Report" to the Department as soon as is practicable after the encounter with the induced-abortion-related illness or injury, but in no case more than sixty (60) days after such an encounter. Copies of the forms can be found below. These sample documents outline all of the information collected on the official form which shall be completed and filed electronically. For access to the official forms, please register using the registration form below.

Individual Abortion Form - Mar. 1, 2012 to Oct. 31, 2013 (PDF, 104 KB)

Individual Abortion Form - effective Nov. 1, 2013 (PDF, 440 KB)

Complication of Induced Abortion Report (PDF, 82 KB)

Registration

If you are a provider who performs abortions as defined by Oklahoma statute or needing to complete and file an "Individual Abortion Form" and/or a "Complication of Induced Abortion Report" as required by Oklahoma statute please register by clicking Registration Form.

Other Forms

Physician Medical Emergency Affidavit (PDF, 440 KB)

Parental Consent Form (PDF, 82 KB)

Consent of a Minor & Parental Consent Statement (PDF, 551 KB)

Unborn Child Pain Awareness Prevention Act - Annual Online Physician Reporting Form

- Unborn Child Pain Awareness Reporting Form Final (PDF, 72 KB)

ITOP Reports

The Abortion Surveillance in Oklahoma 2002-2017 (PDF, 438 KB) report contains data about legally induced terminations of pregnancy in Oklahoma during 2002-2017.

The Abortion Surveillance in Oklahoma 2002-2016 (PDF, 821 KB) report contains data about legally induced terminations of pregnancy in Oklahoma during 2002-2016.

The Abortion Surveillance in Oklahoma 2002-2015 (PDF, 378 KB) report contains data about legally induced terminations of pregnancy in Oklahoma during 2002-2015.

The Abortion Surveillance in Oklahoma 2002-2014 (PDF, 388 KB) report contains data about legally induced terminations of pregnancy in Oklahoma during 2002-2014. Due to errors identified in the initial release of the "Abortion Surveillance in Oklahoma, 2002-2014 Summary Report" a corrected report has been provided. Revisions were made to Table 1, Table 5, Table 6, Table 7, Table 8 and to the related text.

The Abortion Surveillance in Oklahoma 2002-2013 (PDF, 371 KB) report contains data about legally induced terminations of pregnancy in Oklahoma during 2002-2013.

The Abortion Surveillance in Oklahoma 2002-2012 (PDF, 336 KB) report contains data about legally induced terminations of pregnancy in Oklahoma during 2002-2012.

Detailed statistics are available on OK2SHARE by year from 2002 to Present, by county, select demographics, type of procedure and gestational age. In addition, certain reports are available by year and county.

The Abortion Surveillance in Oklahoma 2002-2007 (PDF, 395 KB) report contains data about legally induced terminations of pregnancy in Oklahoma during 2002-2007.

The 2005 Induced Termination of Pregnancy (PDF, 165 KB) report contains the 2000 -2004 Oklahoma Abortion Surveillance trends.

Contact Information

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Creating a State of Health

OKLAHOMA

Oklahoma
Abortion Statutes
November 1, 2017

Oklahoma State Department of Health
Health Care Information
1000 NE 10th Street
Oklahoma City, OK 73117-1207

Introduction/Background

This information has been put together as a convenient reference to Oklahoma Abortion laws and regulations. It has been taken directly from Oklahoma Statutes Title 63 which can be found on the Oklahoma State Courts Network website http://www.oscn.net/applications/oscn/index.asp?ftdb=STOKST&level=1.

For your information, a few definitions

- **Laws/Statutes**: These are the laws which are passed by the legislature and often provide broad overarching guidance to implement programs and address specific items of interest. Often you will find this assigning responsibility for the implementation of a program to a particular group, a mission statement, implementation timelines, and possibly funding sources. Most of OSDH related legislation is found under Title 63 which covers Public Health and Safety.

- **Regulation/Rules**: These have the same effect as law and are passed by the Board of Health and then in turned are reviewed by the legislature. Here you will find the detail on how a program should be implemented, interpreted, enforced or administered. OSDH related regulation can be found under Title 310.

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ABORTION
RELATED LICENSING
Title 63, Article 7 Hospitals and Related Facilities

LICENSING – HOSPITALS AND RELATED FACILITIES
63 § 1-701. Definitions

For the purposes of this article:

1. "Hospital" means any institution, place, building or agency, public or private, whether organized for profit or not, devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care of patients admitted for overnight stay or longer in order to obtain medical care, surgical care, obstetrical care, or nursing care for illness, disease, injury, infirmity, or deformity. Except as otherwise provided by paragraph 5 of this subsection, places where pregnant females are admitted and receive care incident to pregnancy, **abortion** or delivery shall be considered to be a "hospital" within the meaning of this article, regardless of the number of patients received or the duration of their stay. The term "hospital" includes general medical surgical hospitals, critical access and emergency hospitals, and birthing centers;

2. "General medical surgical hospital" means a hospital maintained for the purpose of providing hospital care in a broad category of illness and injury;

3. "Specialized hospital" means a hospital maintained for the purpose of providing hospital care in a certain category, or categories, of illness and injury.

4. "Critical access hospital" means a hospital determined by the State Department of Health to be a necessary provider of health care services to residents of a rural community;

5. "Emergency hospital" means a hospital that provides emergency treatment and stabilization services on a 24-hour basis that has the ability to admit and treat patients for short periods of time;

6. "Birthing center" means any facility, place or institution, which is maintained or established primarily for the purpose of providing services of a certified midwife or licensed medical doctor to assist or attend a woman in delivery and birth, and where a woman is scheduled in advance to give birth following a normal, uncomplicated, low-risk pregnancy. Provided, however, licensure for a birthing center shall not be compulsory; and

7. "Day treatment program" means nonresidential, partial hospitalization programs, day treatment programs, and day hospital programs as defined by subsection A of Section 175.20 of Title 10 of the Oklahoma Statutes.

Added by Laws 1963, c. 325, art. 7, § 701.
Amended by Laws 1978, c. 207, § 1, eff. Oct. 1, 1978;
Laws 1991, c. 306, § 7, emerg. eff. June 4, 1991;
Laws 1995, c. 231, § 5, eff. Nov. 1, 1995;
Amended by Laws 1999, HB 1184, c. 93, § 1, eff. November 1, 1999

63 § 1-702. Licenses Required – Practice of Healing Arts or Medicine

A. It shall be unlawful for any person to establish, operate or maintain in the State of Oklahoma a hospital without first obtaining a license therefor in the manner hereinafter provided. Hospitals operated by the federal government, the Department of Corrections, state mental hospitals, and community-based structured crisis centers as defined in Section 3-317 of Title 43A of the Oklahoma Statutes, shall be exempt from the provisions of this article.

B. A hospital may be licensed as a general medical surgical hospital with one or more specialty services or combination of specialty services in a single license.

C. Nothing in this article shall authorize any person to engage, in any manner, in the practice of the healing arts.

Added by Laws 1963, c. 325, art. 7, § 702, operative July 1, 1963.
Amended by Laws 1996, c. 354, § 49, eff. Nov. 1, 1996;
Amended by Laws 1999, HB 1184, c. 93, § 2, eff. November 1, 1999
Amended by Laws 2016, SB 884, c. 95, § 1, eff. November 1, 2016

63 § 1-707. Rules and Standards

A. The State Board of Health, upon the recommendation of the State Commissioner of Health and with the advice of the Oklahoma Hospital Advisory Council, **shall promulgate rules and standards as it deems to be in the public interest for hospitals**, on the following:

1. Construction plans and location, including fees not to exceed Two Thousand Dollars ($2,000.00) for submission or resubmission of architectural and building plans, and procedures to ensure the timely review of such plans by the State Department of Health. Said assessed fee shall be used solely for the purposes of processing approval of construction plans and location by the State Department of Health;

2. Physical plant and facilities;

3. Fire protection and safety;

4. Food service;

5. Reports and records;

6. Staffing and personal service;

7. Surgical facilities and equipment;

8. Maternity facilities and equipment;

9. Control of communicable disease;

10. Sanitation;

11. Laboratory services;

12. Nursing facilities and equipment; and

13. Other items as may be deemed necessary to carry out the purposes of this article.

B. 1. The State Board of Health, upon the recommendation of the State Commissioner of Health and with the advice of the Oklahoma Hospital Advisory Council and the State Board of Pharmacy, shall promulgate rules and standards as it deems to be in the public interest with respect to the storage and dispensing of drugs and medications for hospital patients.

2. The State Board of Pharmacy shall be empowered to inspect drug facilities in licensed hospitals and shall report violations of applicable statutes and rules to the State Department of Health for action and reply.

C. 1. The Commissioner shall appoint an Oklahoma Hospital Advisory Council to advise the Board, the Commissioner and the Department regarding hospital operations and to recommend actions to improve patient care.

2. The Advisory Council shall have the duty and authority to:

a. review and approve in its advisory capacity rules and standards for hospital licensure,

b. evaluate, review and make recommendations regarding Department licensure activities, provided however, the Advisory Council shall not make recommendations regarding scope of practice for any health care providers or practitioners regulated pursuant to Title 59 of the Oklahoma Statutes, and

c. recommend and approve:

(1) quality indicators and data submission requirements for hospitals, to include:

(a) Agency for Healthcare Research and Quality (AHRQ) Patient Safety Indicators Available as part of the standard inpatient discharge data set, and

(b) for acute care intensive care unit patients, ventilator-associated pneumonia and device-related blood stream infections, and

(2) the indicators and data to be used by the Department to monitor compliance with licensure requirements, and

d. to publish an annual report of hospital performance to include the facility specific quality indicators required by this section.

D. 1. The Advisory Council shall be composed of nine (9) members appointed by the Commissioner with the advice and consent of the Board. The membership of the Advisory Council shall be as follows:

a. two members shall be hospital administrators of licensed hospitals,

b. two members shall be licensed physicians or practitioners who have current privileges to provide services in hospitals,

c. two members shall be hospital employees, and

d. three members shall be citizens representing the public who:

(1) are not hospital employees,

(2) do not hold hospital staff appointments, and

(3) are not members of hospital governing boards.

2. a. Advisory Council members shall be appointed for three-year terms except the initial terms after November 1, 1999, of one hospital administrator, one licensed physician or practitioner, one hospital employee, and one public member shall be one (1) year. The initial terms after the effective date of this act of one hospital administrator, one licensed physician or practitioner, one hospital employee, and one public member shall be two (2) years. The initial terms of all other members shall be three (3) years. After initial appointments to the Council, members shall be appointed to three-year terms.

b. Members of the Advisory Council may be removed by the Commissioner for cause.

E. The Advisory Council shall meet on a quarterly basis and shall annually elect from among its members a chairperson. Members of the Council shall serve without compensation but shall be reimbursed by the Department for travel expenses related to their service as authorized by the State Travel Reimbursement Act.

Laws 1963, SB 26, c. 325, art. 7, § 707, emerg. eff. July 1, 1963
Amended by Laws 1968, SB 346, c. 86, § 1, emerg. eff. April 1, 1968
Amended by Laws 1999, HB 1184, c. 93, § 6, eff. November 1, 1999
Amended by Laws 1999, HB 1188, c. 213, § 2, emerg. eff. July 1, 1999 Amended by Laws 2006, HB 2842, c. 315, § 16, emerg. eff. June 9, 2006

ABORTION
63 § 1-730. Definitions

A. As used in this article:

1. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to remove an ectopic pregnancy, or to remove a dead unborn child who died as the result of a spontaneous miscarriage, accidental trauma, or a criminal assault on the pregnant female or her unborn child;

2. "Attempt to perform an abortion" means an act, or an omission of a statutorily required act, that under the circumstances as the actor believes them to be constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion;

3. "Certified technician" means a Registered Diagnostic Medical Sonographer who is certified in obstetrics and gynecology by the American Registry for Diagnostic Medical Sonography (ARDMS) or a Nurse Midwife or Advance Practice Nurse Practitioner in Obstetrics with certification in obstetrical ultrasonography;

4. "Unborn child" means the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus;

5. "Unemancipated minor" means any person less than eighteen (18) years of age who is not or has not been married or who is under the care, custody, and control of the person's parent or parents, guardian, or juvenile court of competent jurisdiction;

6. "Viable" means potentially able to live outside of the womb of the mother upon premature birth, whether resulting from natural causes or an abortion;

7. "Conception" means the fertilization of the ovum of a female individual by the sperm of a male individual;

8. "Health" means physical or mental health;

9. "Department" means the State Department of Health; and

10. "Inducing an abortion" means the administration by any person, including the pregnant woman, of any substance designed or intended to cause an expulsion of the unborn child, effecting an abortion as defined above.

B. Nothing contained herein shall be construed in any manner to include any birth control device or medication or sterilization procedure.

Added by Laws 1978, HB 1813, c. 207, § 2, eff. October 1, 1978;
Amended by Laws 2007, SB 139, c. 161, § 1, eff. November 1, 2007;
Amended by Laws 2009, HB 1595, c. 227, § 1, eff. November 1, 2009.

63 § 1-731. Persons Who May Perform Abortions - Violations - Penalties

A. No person shall perform or induce an abortion upon a pregnant woman unless that person is a physician licensed to practice medicine in the State of Oklahoma. Any person violating this section shall be guilty of a felony punishable by imprisonment for not less than one (1) year nor more than three (3) years in the State Penitentiary.

B. No person shall perform or induce an abortion upon a pregnant woman subsequent to the end of the first trimester of her pregnancy, unless such abortion is performed or induced in a general hospital.

Laws 1978, c. 207, § 3, eff. Oct. 1, 1978;
Amended by Laws 1997, c. 133, § 523, Effective Date Amended to July 1, 1999 by Laws 1998, c. 2 (First Extraordinary Session), §§ 23-26, effective June 19, 1998;
Amended by H.B. 1009X (1st Ex. Sess. 1999), § 379, emerg. eff. July 1, 1999.

63 § 1-731.2. Abortion Solely on Account of Sex of Unborn Child – Penalties – Civil Action – Anonymity of the Female

A. As used in this section:

1. "Attempt to perform an abortion" means an act, or an omission of a statutorily required act, that under the circumstances as the actor believes them to be constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion; and

2. "Unemancipated minor" means any person less than eighteen (18) years of age who is not or has not been married or who is under the care, custody, and control of the person's parent or parents, guardian, or juvenile court of competent jurisdiction.

B. No person shall knowingly or recklessly perform or attempt to perform an abortion with knowledge that the pregnant female is seeking the abortion solely on account of the sex of the unborn child. Nothing in this section shall be construed to proscribe the performance of an abortion because the unborn child has a genetic disorder that is sex-linked.

C. Any person who knowingly or recklessly violates a provision of this section shall be liable for damages as provided in this subsection and may be enjoined from such acts in accordance with this section in an appropriate court.

1. A cause of action for injunctive relief against any person who has knowingly or recklessly violated a provision of this section may be maintained by:

a. the female upon whom an abortion was performed or attempted to be performed in violation of this section,

b. any person who is the spouse, parent, sibling, or guardian of, or current or former licensed health care provider of, the female upon whom an abortion has been performed in violation of this section,

c. a district attorney with appropriate jurisdiction, or

d. the Attorney General.

2. The injunction shall prevent the abortion provider from performing further abortions in violation of this section in this state.

3. Any person who knowingly violates the terms of an injunction issued in accordance with this section shall be subject to civil contempt and shall be fined Ten Thousand Dollars ($10,000.00) for the first violation, Fifty Thousand Dollars ($50,000.00) for the second violation, and One Hundred Thousand Dollars ($100,000.00) for the third violation and for each succeeding violation. The fines shall be the exclusive penalties for civil contempt pursuant to this paragraph. Each performance or attempted performance of an abortion in violation of the terms of an injunction is a separate violation. These fines shall be cumulative. No fine shall be assessed against the female upon whom an abortion is performed or attempted.

4. A pregnant female upon whom an abortion has been performed in violation of this section, or the parent or legal guardian of the female if she is an unemancipated minor, may commence a civil action against the abortion provider for any knowing or reckless violation of this section for actual and punitive damages.

D. An abortion provider who knowingly or recklessly performed an abortion in violation of this section shall be considered to have engaged in unprofessional conduct for which the certificate or license of the provider to provide health care services in this state shall be suspended or revoked by the State Board of Medical Licensure and Supervision or the State Board of Osteopathic Examiners.

E. In every proceeding or action brought under this section, the anonymity of any female upon whom an abortion is performed or attempted shall be preserved unless she gives her consent to such disclosure. The court, upon motion or sua sponte, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard the female's identity from public disclosure. In the absence of written consent of the female upon whom an abortion has been performed or attempted, anyone who brings an action under subsection B of this section shall do so under a pseudonym.

Added by Laws 2010, SB 1890, c. 46, § 1, emerg. eff. April 2, 2010.

63 § 1-732. Viable Fetus – Grounds to Abort - Procedure

A. No person shall perform or induce an abortion upon a pregnant woman after such time as her unborn child has become viable unless such abortion is necessary to prevent the death of the pregnant woman or to prevent impairment to her health.

B. An unborn child shall be presumed to be viable if more than twenty-four (24) weeks have elapsed since the probable beginning of the last menstrual period of the pregnant woman, based upon either information provided by her or by an examination by her attending physician. If it is the judgment of the attending physician that a particular unborn child is not viable where the presumption of viability exists as to that particular unborn child, then he shall certify in writing the precise medical criteria upon which he has determined that the particular unborn child is not viable before an abortion may be performed or induced.

C. No abortion of a viable unborn child shall be performed or induced except after written certification by the attending physician that in his best medical judgment the abortion is necessary to prevent the death of the pregnant woman or to prevent an impairment to her health. The physician shall further certify in writing the medical indications for such abortion and the probable health consequences if the abortion is not performed or induced.

D. The physician who shall perform or induce an abortion upon a pregnant woman after such time as her unborn child has become viable shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child, unless he shall first certify in writing that in his best medical judgment such method or technique shall present a significantly greater danger to the life or health of the pregnant woman than another available method or technique.

E. An abortion of a viable unborn child shall be performed or induced only when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for the child. During the performance or inducing of the abortion, the physician performing it, and subsequent to it, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the child, in the same manner as if the child had been born naturally or spontaneously. The requirement of the attendance of a second physician may be waived when in the best judgment of the attending physician a medical emergency exists and further delay would result in a serious threat to the life or physical health of the pregnant woman. Provided that, under such emergency circumstances and waiver, the attending physician shall have the duty to take all reasonable steps to preserve the life and health of the child before, during and after the abortion procedure, unless such steps

shall, in the best medical judgment of the physican, present a significantly greater danger to the life or health of the pregnant woman.

F. Any person violating subsection A of this section shall be guilty of homicide.

63 § 1-733. Self-induced Abortions

No woman shall perform or induce an abortion upon herself except under the supervision of a duly licensed physician. Any physician who supervises a woman in performing or inducing an abortion upon herself shall fulfill all the requirements of this article which apply to a physician performing or inducing an abortion.

Laws 1978, c. 207, § 5, eff. Oct. 1, 1978;
Amended by Laws 1997, c. 133, § 525, Effective Date Amended to July 1, 1999 by Laws 1998, c. 2 (First Extraordinary Session), §§ 23-26, effective June 19, 1998.

63 § 1-734. Live-Born Fetus - Care and Treatment

A. No person shall purposely take the life of a child born as a result of an abortion or attempted abortion which is alive when partially or totally removed from the uterus of the pregnant woman.

B. No person shall purposely take the life of a viable child who is alive while inside the uterus of the pregnant woman and may be removed alive therefrom without creating any significant danger to her life or health.

C. Any person who performs, induces, or participates in the performance or inducing of an abortion shall take all reasonable measures to preserve the life of a child who is alive when partially or totally removed from the uterus of the pregnant woman, so long as the measures do not create any significant danger to her life or health.

D. Any person violating this section shall be guilty of homicide.

Laws 1978, c. 207, § 6, eff. Oct. 1, 1978;
Amended by Laws 1998, c. 133, § 526, Effective Date Amended to July 1, 1999 by Laws 1998, c. 2 (First Extraordinary Session), §§ 23-26, effective June 19, 1998.

63 § 1-735. Sale of Child, Unborn Child or Remains of Child - Experiments

A. No person shall sell a child, an unborn child or the remains of a child or an unborn child resulting from an abortion. No person shall experiment upon a child or an unborn child resulting from an abortion or which is intended to be aborted unless the experimentation is therapeutic to the child or unborn child.

B. No person shall experiment upon the remains of a child or an unborn child resulting from an abortion. The term "experiment" does not include autopsies performed according to law.

Laws 1978, c. 207, § 7, eff. Oct. 1, 1978.

63 § 1-736. Hospitals - Advertising of Counseling to Pregnant Women

No hospital in which abortions are performed or induced shall advertise or hold itself out as also providing counseling to pregnant women, unless:

1. The counseling is done by a licensed physician, a licensed registered nurse or by a person holding at least a bachelor's degree from an accredited college or university in psychology or some similarly appropriate field;

2. The counseling includes factual information, including explicit discussion of the development of the unborn child; and

3. The counseling includes a thorough discussion of the alternatives to abortion and the availability of agencies and services to assist her if she chooses not to have an abortion.

Laws 1978, c. 207, § 8, eff. Oct. 1, 1978.

63 § 1-737. Hospitals Which May Perform Abortions

An abortion otherwise permitted by law shall be performed only in a hospital, as defined in this article, which meets standards set by the Department**. The Department shall develop and promulgate reasonable standards relating to abortions.**

Laws 1978, c. 207, § 9, eff. Oct. 1, 1978.

63 § 1-737.4. Requiring Signing in Abortion Facilities

A. Any private office, freestanding outpatient clinic, or other facility or clinic in which abortions, other than abortions necessary to prevent the death of the pregnant female, are performed, induced, prescribed for, or where the means for an abortion are provided shall conspicuously post a sign in a location defined in subsection C of this section so as to be clearly visible to patients, which reads:

Notice: It is against the law for anyone, regardless of his or her relationship to you, to force you to have an abortion. By law, we cannot perform, induce, prescribe for, or provide you with the means for an abortion unless we have your freely given and voluntary consent. It is against the law to perform, induce, prescribe for, or provide you with the means for an abortion against your will. You have the right to contact any local or state law enforcement agency to receive protection from any actual or threatened physical abuse or violence.

There are public and private agencies willing and able to help you carry your child to term, have a healthy pregnancy and a healthy baby and assist you and your child after your child is born, whether you choose to keep your child or place him or her for adoption. The State of Oklahoma strongly encourages you to contact them if you are pregnant.

B. The sign required pursuant to subsection A of this section shall be printed with lettering that is legible and shall be at least three-quarters-of-an-inch boldfaced type.

C. A facility in which abortions are performed, induced, prescribed for, or where the means for an abortion are provided that is a private office or a freestanding outpatient clinic shall post the required sign in each patient waiting room and patient consultation room used by patients on whom abortions are performed, induced, prescribed for, or who are provided with the means for an abortion. A hospital or any other facility in which abortions are performed, induced, prescribed for, or where the means for an abortion are provided that is not a private office or freestanding outpatient clinic shall post the required sign in each patient admission area used by patients on whom abortions are performed, induced, prescribed for, or by patients who are provided with the means for an abortion.

Added by Laws 2010, HB 3075, c. 163, § 1, emerg. eff. April 22, 2010.
Amended by Laws 2017, SB 30, c. 123, § 1, emerg. eff. July 1, 2017

63 § 1-737.5. Failure to Post – Civil Penalty-Emotional Damages for Injuries Caused

A. Any private office, freestanding outpatient clinic or other facility or clinic that fails to post a required sign in knowing, reckless, or negligent violation of this act shall be assessed an administrative fine of Ten Thousand Dollars ($10,000.00). Each day on which an abortion, other than an abortion necessary to prevent the death of the pregnant female, is performed, induced, prescribed for, or where the means for an abortion are provided in a private office, freestanding outpatient clinic or other facility or clinic in which the required sign is not posted during any portion of business hours when patients or prospective patients are present is a separate violation.

B. An action may be brought by or on behalf of an individual injured by the failure to post the required sign. A plaintiff in an action under this subsection may recover damages for emotional distress and any other damages allowed by law.

C. The sanctions and actions provided in this section shall not displace any sanction applicable under other law.

Added by Laws 2010, HB 3075, c. 163, § 2, emerg. eff. April 22, 2010.

63 § 1-737.6. Minors Informed Orally-Records

A. If the pregnant female is a minor, the attending physician shall orally inform the female that no one can force her to have an abortion and that an abortion cannot be performed, induced, prescribed for, or that the means for an abortion cannot be provided unless she provides her freely given, voluntary, and informed consent.

B. The minor female shall certify in writing, prior to the performance of, induction of, receiving the prescription for, or provision of the means for the abortion, that she was informed by the attending physician of the required information in subsection A of this section. A copy of the written certification shall be placed in the minor's file and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

Added by Laws 2010, HB 3075, c. 163, § 3, emerg. eff. April 22, 2010.

Oklahoma Unborn Child Protection from Dismemberment Abortion Act
63 § 1-737.7. Short Title

This act shall be known and may be cited as the "Oklahoma Unborn Child Protection from Dismemberment Abortion Act".

Added by Laws 2015, HB 1721, c. 59, § 1, November 1, 2015.

63 § 1-737.8. Definitions

For the purposes of the Oklahoma Unborn Child Protection from Dismemberment Abortion Act:

1. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device:
   a. to purposely kill the unborn child of a woman known to be pregnant, or
   b. to purposely terminate the pregnancy of a woman known to be pregnant, with a purpose other than:

      (1) after viability to produce a live birth and preserve the life and health of the child born alive, or

      (2) to remove a dead unborn child;

2. "Attempt to perform an abortion" means to do or omit to do anything that, under the circumstances as the actor believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in the actor performing an abortion. Such substantial steps include, but are not limited to:

   a. agreeing with an individual to perform an abortion on that individual or on some other person, whether or not the term "abortion" is used in the agreement, and whether or not the agreement is contingent on another factor such as receipt of payment or a determination of pregnancy, or

   b. scheduling or planning a time to perform an abortion on an individual, whether or not the term "abortion" is used, and whether or not the performance is contingent on another factor such as receipt of payment or a determination of pregnancy.

This definition shall not be construed to require that an abortion procedure actually must be initiated for an attempt to occur;

3. "Dismemberment abortion" means, with the purpose of causing the death of an unborn child, purposely to dismember a living unborn child and extract him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors or similar instruments that, through the convergence of two rigid levers, slice, crush, and/or grasp a portion of the unborn child's body to cut or rip it off. This definition does not include an abortion which uses suction to dismember the body of the developing unborn child by sucking fetal parts into a collection container;

4. "Physician" means a person licensed to practice medicine and surgery or osteopathic medicine and surgery, or otherwise legally authorized to perform an abortion;

5. "Purposely" means the following: A person acts purposely with respect to a material element of an offense when:

   a. if the element involves the nature of his or her conduct or a result thereof, it is his or her conscious objective to engage in conduct of that nature or to cause such a result, and

   b. if the element involves the attendant circumstances, he or she is aware of the existence of such circumstances or he or she believes or hopes that they exist;

6. "Serious health risk to the unborn child's mother" means that in reasonable medical judgment she has a condition that so complicates her medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such condition may be determined to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function; and

7. "Woman" means a female human being whether or not she has reached the age of majority.

Added by Laws 2015, HB 1721, c. 59, § 2, eff. November 1, 2015.

63 § 1-737.9. Dismemberment Abortion Prohibited - Hearing - Liability

A. Notwithstanding any other provision of law, it shall be unlawful for any person to purposely perform or attempt to perform a dismemberment abortion and thereby kill an unborn child unless necessary to prevent serious health risk to the unborn child's mother.

B. A person accused in any proceeding of unlawful conduct under subsection A of this section may seek a hearing before the State Board of Medical Licensure and Supervision on whether the dismemberment abortion was necessary to prevent serious health risk to the unborn child's mother. The Board's findings are admissible on that issue at any trial in which such unlawful conduct is alleged. Upon a motion of the person accused, the court shall delay the beginning of the trial for not more than thirty (30) days to permit such a hearing to take place.

C. No woman upon whom an abortion is performed or attempted to be performed shall be thereby liable for performing or attempting to perform a dismemberment abortion. No nurse, technician, secretary, receptionist or other employee or agent who is not a physician but who acts at the direction of a physician and no pharmacist or other individual who is not a physician but who fills a prescription or provides instruments or materials used in an abortion at the direction of or to a physician shall be thereby liable for performing or attempting to perform a dismemberment abortion.

Added by Laws 2015, HB 1721, c. 59, § 3, eff. November 1, 2015.

63 § 1-737.10. Injunctive Relief

A. A cause of action for injunctive relief against a person who has performed or attempted to perform a dismemberment abortion in violation of Section 3 of this act may be maintained by:

   1. A woman upon whom such a dismemberment abortion was performed or attempted to be performed;

   2. A person who is the spouse, parent or guardian of, or a current or former licensed health care provider of, a woman upon whom such a dismemberment abortion was performed or attempted to be performed; or

3. A prosecuting attorney with appropriate jurisdiction.

B. The injunction shall prevent the defendant from performing or attempting to perform further dismemberment abortions in violation of Section 3 of this act.

Added by Laws 2015, HB 1721, c. 59, § 4, eff. November 1, 2015.

63 § 1-737.11. Cause of Action for Civil Damages

A. A cause of action for civil damages against a person who has performed a dismemberment abortion in violation of Section 3 of this act may be maintained by:

1. Any woman upon whom a dismemberment abortion has been performed in violation of Section 3 of this act; or

2. If the woman had not attained the age of eighteen (18) years at the time of the dismemberment abortion or has died as a result of the abortion, the maternal grandparents of the unborn child.

B. No damages may be awarded a plaintiff if the pregnancy resulted from the plaintiff's criminal conduct.

C. Damages awarded in such an action shall include:

1. Money damages for all injuries, psychological and physical, occasioned by the dismemberment abortion; and

2. Statutory damages equal to three times the cost of the dismemberment abortion.

Added by Laws 2015, HB 1721, c. 59, § 5, eff. November 1, 2015.

63 § 1-737.12. Attorney Fees

A. If judgment is rendered in favor of the plaintiff in an action described in Section 4 or 5 of this act, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant.

B. If judgment is rendered in favor of the defendant in an action described in Section 4 or 5 of this act and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

C. No attorney fee may be assessed against the woman upon whom an abortion was performed or attempted to be performed except in accordance with subsection B of this section.

Added by Laws 2015, HB 1721, c. 59, § 6, eff. November 1, 2015.

63 § 1-737.13. Criminal Penalties

Whoever violates Section 3 of this act shall be fined Ten Thousand Dollars ($10,000.00) or imprisoned for not more than two (2) years or both.

Added by Laws 2015, HB 1721, c. 59, § 7, eff. November 1, 2015.

63 § 1-737.14. Public Disclosure of Identity

In every civil, criminal, or administrative proceeding or action brought under the Oklahoma Unborn Child Protection from Dismemberment Abortion Act, the court shall rule whether the identity of any woman upon whom an abortion has been performed or attempted to be performed shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less-restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or attempted to be performed, anyone other than a public official who brings an action under Section 4 or 5 of this act shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

Added by Laws 2015, HB 1721, c. 59, § 8, eff. November 1, 2015.

63 § 1-737.15. No Recognition of Right to Abortion

Nothing in the Oklahoma Unborn Child Protection from Dismemberment Abortion Act shall be construed as creating or recognizing a right to abortion, nor a right to a particular method of abortion.

Added by Laws 2015, HB 1721, c. 59, § 9, eff. November 1, 2015.

63 § 1-737.16. Severability

If any one or more provisions, sections, subsections, sentences, clauses, phrases or words of this act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed this act, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases or words be declared unconstitutional.

Added by Laws 2015, HB 1721, c. 59, § 10, eff. November 1, 2015.

STATISTICAL REPORTING OF ABORTION ACT

63 § 1-738i. Short Title

This act shall be known and may be cited as the "Statistical Abortion Reporting Act".

Added by Laws 2010, HB 3284, c. 276, § 1, eff. November 1, 2010.

63 § 1-738j. Definitions-Forms and Laws to be Posted on Website of State Department of Health-Electronic Submission of Forms

A. As used in the Statistical Abortion Reporting Act:

1. "Abortion" means the term as defined in Section 1-730 of Title 63 of the Oklahoma Statutes;

2. "Complication" means any adverse physical or psychological condition arising from the performance of an abortion, which includes but is not limited to: uterine perforation, cervical perforation, infection, bleeding, hemorrhage, blood clots, failure to actually terminate the pregnancy, incomplete abortion (retained tissue), pelvic inflammatory disease, endometritis, missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, shock, embolism, coma, placenta previa, preterm delivery in subsequent pregnancies, free fluid in abdomen, adverse reaction to anesthesia and other drugs, and mental and psychological complications such as depression, anxiety, sleeping disorders, psychiatric hospitalization, and emotional problems; and

3. "Stable Internet website" means a website that, to the extent reasonably practicable, is safeguarded from having its content altered other than by the State Department of Health.

B. By March 1, 2012, the State Department of Health shall make available, on its stable Internet website, an **Individual Abortion Form** as required by Section 3 of this act, and a form for a **Complications of Induced Abortion Report** as required by Section 4 of this act.

C. As required by Section 5 of this act, information from a completed Individual Abortion Form or a completed Complications of Induced

Abortion Report shall be combined with information from all other such completed forms and reports submitted for the year. An **Annual Abortion Report** providing statistics for the previous calendar year compiled from all of that year's completed forms and reports submitted in accordance with the Statistical Abortion Reporting Act shall be published annually by the Department on its stable Internet website.

D. No Individual Abortion Forms or Complications of Induced Abortion Reports that have been completed and submitted to the Department by any physician pursuant to subsection B of Section 3 of this act or subsection C of Section 4 of this act shall be posted online.

E. By March 1, 2012, the State Department of Health shall, on its stable Internet website, **provide the language of all Oklahoma Statutes and regulations directly relating to abortion**, and shall promptly update its website to reflect subsequent statutory and regulatory changes. The Department shall also, by March 1, 2012, provide, on its stable Internet website, the **means by which physicians may electronically submit the reports required by the Statistical Abortion Reporting Act.** The Department shall include **instructions** on its stable Internet website regarding electronic submission. The Department shall take all necessary precautions to ensure the **security** of the electronically submitted reports so that the submitted data is able to be accessed only by **specially authorized departmental personnel during and following the process of transmission**.

Added by Laws 2010, HB 3284, c. 276, § 2, eff. November 1, 2010

63 § 1-738k. Individual Abortion Form – Department to Post Individual Abortion Forms on Website

A. Subsections B and C of this section shall become operative on the later of:

1. April 1, 2012; or

2. Thirty (30) calendar days following the date on which the State Department of Health posts on its website the Individual Abortion Form and instructions concerning its electronic submission referenced in this section.

B. The Department shall post the Individual Abortion Form and instructions concerning its electronic submission on its stable Internet website. Nothing in the Individual Abortion Form shall contain the name, address, hometown, county of residence, or any other information specifically identifying any patient. The Department's Individual Abortion Form shall be substantially similar to, but need not be in the specific format, provided in subsection F of this section.

C. Any physician performing abortions shall fully complete and submit, electronically, an Individual Abortion Form to the State Department of Health by the last business day of the calendar month following the month in which the physician performs an abortion, for each abortion the physician performs.

D. In cases in which a physician or the agent of a physician:

1. Mails the printed materials described in Section 1-738.3 of this title to a female specifically to comply with division (1) of subparagraph d of paragraph 2 of subsection B of Section 1-738.2 of this title;

2. Gives or mails the printed materials described in Section 1-738.10 of this title to a female specifically to comply with subsection A of Section 1-738.8 of this title; or

3. Provides notice to a parent in compliance with Section 1-740.2 of this title, but does not subsequently perform an abortion on the female or minor, the physician shall electronically submit a completed Individual Abortion Form to the State Department of Health, and shall mark as "not applicable" those items of information that may accurately be provided only when an abortion is performed. The physician shall not submit such a form if the physician knows that an abortion was subsequently performed on the female or minor by another physician. Individual Abortion Forms required by this subsection shall be submitted by the last business day of the second calendar month following the calendar month in which the physician mails the printed materials or provides notice to a parent.

E. The Individual Abortion Form shall contain a notice containing an assurance that, in accordance with subsection F of Section 1-738m of this title, public reports based on the form submitted will not contain the name, address, hometown, county of residence, or any other identifying information of any individual female, that the State Department of Health will take care to ensure that none of the information included in its public reports could reasonably lead to the identification of any individual female about whom information is reported in accordance with the Statistical Abortion Reporting Act or of any physician providing information in accordance with the Statistical Abortion Reporting Act, and that such information is not subject to the Oklahoma Open Records Act.

F. Individual Abortion Form. The Department's Individual Abortion Form shall be substantially similar to, but need not be in the specific format of, the following form:

Individual Abortion Form

(TO BE COMPLETED FOR EACH ABORTION PERFORMED)

1. Date of abortion: _____

2. County in which the abortion was performed: _____

3. Age of mother: _____

4. Marital status of mother: _____

(specify married, divorced, separated, widowed, or never married)

5. Race of mother: _____

6. Years of education of mother: _____

(specify highest year completed)

7. State or foreign country of residence of mother: _____

8. Total number of previous pregnancies of the mother: _____

Live Births: _____

Miscarriages: _____

Induced Abortions: _____

9. Approximate gestational age in weeks, as measured from the last menstrual period of the mother, of the unborn child subject to abortion: _____

10. Method of abortion used:

Suction Aspiration: _____

Dilation and Curettage: _____

RU 486: _____

Methotrexate: _____

Other drug/chemical/medicine (specify): _____

Dilation and Evacuation: _____

Saline: _____

Urea: _____

Prostaglandins: _____

Partial Birth Abortion: _____

Hysterotomy: _____

Other (specify): _____

11. Was there an infant born alive as a result of the abortion? _____

If yes:

Were life-sustaining measures undertaken? _____

How long did the infant survive? _____

12. Was anesthesia administered to mother? _____

If yes, what type? _____

13. Was anesthesia administered to the fetus? _____

If yes:

What type? _____

How was it administered? _____

14. Method of fetal tissue disposal: _____

15. Unless a medical emergency, as defined in Section 1-738.1A, or as applicable, Section 1-745.2 of Title 63 of the Oklahoma Statutes, exists, the abortion provider or agent shall ask the pregnant female to provide, orally or in writing, the reason(s) she is seeking the abortion. If such a medical emergency exists, the abortion provider or agent shall specify on the form the condition which necessitated the immediate abortion: _____

REASON GIVEN FOR ABORTION (check all applicable):

Having a baby:

Would dramatically change the life of the mother: _____

Would interfere with the education of the mother: _____

Would interfere with the job/employment/career of the mother: _____

Mother has other children or dependents: _____

Mother cannot afford the child: _____

Mother is unmarried: _____

Mother is a student or planning to be a student: _____

Mother cannot afford child care: _____

Mother cannot afford the basic needs of life: _____

Mother is unemployed: _____

Mother cannot leave job to care for a baby: _____

Mother would have to find a new place to live: _____

Mother does not have enough support from a husband or partner: _____

Husband or partner is unemployed: _____

Mother is currently or temporarily on welfare or public assistance: _____

Mother does not want to be a single mother: _____

Mother is having relationship problems: _____

Mother is not certain of relationship with the father of the child: _____

Partner and mother are unable to or do not want to get married: _____

Mother is not currently in a relationship: _____

The relationship or marriage of the mother may soon break up: _____

Husband or partner is abusive to the mother or her children: _____

Mother has completed her childbearing: _____

Mother is not ready for a, or another, child: _____

Mother does not want people to know that she had sex or became pregnant: _____

Mother does not feel mature enough to raise a, or another, child: _____

Husband or partner wants mother to have an abortion: _____

There may be possible problem affecting the health of the fetus: _____

Physical health of the mother is at risk: _____

Parents want mother to have an abortion: _____

Emotional health of the mother is at risk: _____

Mother suffered from a medical emergency as defined in Section 1-738.1A of Title 63 of the Oklahoma Statutes: _____

Mother suffered from a medical emergency as defined in Section 1-745.2 of Title 63 of the Oklahoma Statutes: _____

Mother wanted a child of a different sex: _____

Abortion is necessary to avert the death of the mother: _____

Pregnancy was a result of forcible rape: _____

Pregnancy was a result of incest: _____

Other (specify): _____

Patient was asked why she is seeking an abortion, but she declined to give a reason: _____

16. Method of payment (check one):

Private insurance: _____

Public health plan: _____

Medicaid: _____

Private pay: _____

Other (specify): _____

17. Type of private medical health insurance coverage, if any (check one):

Fee-for-service insurance company: _____

Managed care company: _____

Other (specify): _____

18. Sum of fee(s) collected: _____

19. Time of fee collection (check one):

Full fee for abortion collected prior to or at the time the patient was provided the information required under subsection B of Section 1-738.2 of Title 63 of the Oklahoma Statutes: _____

Partial fee for abortion collected prior to or at the time the patient was provided the information required under subsection B of Section 1-738.2 of Title 63 of the Oklahoma Statutes: _____

Full fee for abortion collected at time the abortion was performed: _____

Other (specify): _____

20. Specialty area of medicine of the physician: _____

At which hospital(s) did the physician have hospital privileges at the time of the abortion?

_____

21. Was ultrasound equipment used before, during, or after the performance of this abortion?

Before? _____ Vaginal, abdominal, or both? _____

How long prior to the abortion was the ultrasound performed? _____

Was the mother under the effect of anesthesia at the time of the ultrasound? _____

During? _____ Vaginal, abdominal, or both? _____

After? _____ Vaginal, abdominal, or both? _____

If an ultrasound was performed, what was the gestational age of the fetus at the time of the abortion, as determined by the ultrasound? _____

Attach to this form a copy or screenshot of the ultrasound, intact with the date on which the ultrasound was performed, and with the name of the mother redacted; provided, however, such ultrasound shall not be subject to an open records request and shall be subject to HIPAA regulations governing confidentiality and release of private medical records.

21A. If an ultrasound was not performed prior to the abortion, was the reason for not performing an ultrasound a medical emergency necessitating an immediate abortion:

To avert death: _____

To avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy: _____

Other reason: _____

22. If ultrasound equipment was used, was the ultrasound performed by:

The physician performing the abortion: _____

A physician other than the physician performing the abortion: _____

Other (specify): _____

23. Was the information required by paragraph 1 of subsection B of Section 1-738.2 of Title 63 of the Oklahoma Statutes provided to the mother? _____

a. If yes, was it provided:

In person: _____

By telephone: _____

b. Was it provided by:

A referring physician: _____

The physician performing the abortion: _____

An agent of a referring physician: _____

An agent of the physician performing the abortion: _____

24. Was the information required by paragraph 2 of subsection B of Section 1-738.2 of Title 63 of the Oklahoma Statutes provided to the mother? _____

a. If yes, was it provided:

In person: _____

By telephone: _____

b. Was it provided by:

A referring physician: _____

An agent of a referring physician: _____

The physician performing the abortion: _____

An agent of the physician performing the abortion: _____

25. Did the mother avail herself of the opportunity to have the printed materials described in Section 1738.3 of Title 63 of the Oklahoma Statutes mailed to her? _____

26. Were the informed consent requirements of subsection B of Section 1-738.2 of Title 63 of the Oklahoma Statutes dispensed with because of a medical emergency necessitating an immediate abortion:

To avert death: _____

To avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy: _____

27. Was a determination of probable postfertilization age made as required by Section 1-745.5 of Title 63 of the Oklahoma Statutes? _____

a. If no, was the determination of probable postfertilization age dispensed with:

To avert death: _____

To avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy: _____

b. If yes, what was the probable postfertilization age? ____

What was the method and basis of the determination? _____

What was the basis for the determination to perform the abortion:

To avert death: _____

To avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy: ____

Was the method of abortion used one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive? _____

If yes, was there an infant born alive as a result of the abortion? _____

If no, what was the basis of the determination? _____

28. Was the abortion performed within the scope of employment of an Oklahoma state employee or an employee of an agency or political subdivision of the state? _____

29. Was the abortion performed with the use of any public institution, public facility, public equipment, or other physical asset owned, leased, or controlled by this state, its agencies, or political subdivisions? _____

30. If the answer to question 28 or 29 is yes:

a. Was the abortion necessary to save the life of the mother? _____

If yes, what was the life-endangering condition? _____

b. Did the pregnancy result from an act of forcible rape? _____

If yes, list the law enforcement authority to which the rape was reported: _____

List the date of the report: _____

c. Did the pregnancy result from an act of incest committed against a minor? _____

If yes, list the law enforcement authority to which the perpetrator was reported: _____

List the date of the report: _____

THIS PORTION TO BE COMPLETED IN CASE OF MINOR

31. Minor's age at the time the abortion was performed: _____

32. Was a parent of the minor provided notice prior to the abortion as described in Section 1740.2 of Title 63 of the Oklahoma Statutes? _____

a. If yes, how was the notice provided?

In person: _____

By mail: _____

b. If yes, to the best of the reporting physician's knowledge and belief, did the minor go on to obtain the abortion? _____

33. Was informed written consent of one parent obtained as described in Section 1-740.2 of Title 63 of the Oklahoma Statutes? _____

If yes, how was it secured?

In person: _____

Other (specify): _____

34. If no notice was provided nor consent obtained, indicate which of the following apply:

Minor was emancipated: _____

Abortion was necessary to prevent the death of the minor: _____

Medical emergency, as defined in Section 1-738.1A of Title 63 of the Oklahoma Statutes, existed: _____

Minor received judicial authorization to obtain abortion without parental notice or consent: _____

35. If no notice was provided nor consent obtained because a medical emergency existed, indicate:

Whether parent was subsequently notified (state period of time elapsed before notice was given): _____

Whether judicial waiver of notice requirement was obtained: _____

36. If the minor received judicial authorization to obtain an abortion without parental notice or consent, indicate which of the following applies:

Judge ruled that minor was mature enough to give informed consent on her own: _____

Judge ruled that abortion was in the best interest of the minor: _____

37. If the female was a minor at the time of conception, indicate the age of the father of the unborn child at the time of conception: _____

38. If at the time of conception the ages of the mother and father were such that a violation of Section 1111, 1112, 1114 or 1123 of Title 21 or Section 843.5 of Title 21 of the Oklahoma Statutes occurred, was the rape or abuse reported to the proper authorities? _____

39. Were the remains of the fetus after the abortion examined to ensure that all such remains were evacuated from the mother's body? _____

If the remains of the fetus were examined after the abortion, what was the sex of the child, as determined from such examination? _____

Was the sex of the child determined prior to the abortion? _____

If so, by whom? _____

If so, by what method? _____

If the sex of the child was determined prior to the abortion, was the mother given information of the child's sex prior to the abortion? _____

40. If the abortion was performed without surgery but rather as the result of the administration of chemicals, was the physician present in the same room as the woman to whom the chemicals were administered at the time any such chemicals were first administered? _____

4l. Prior to the pregnant woman giving informed consent to having any part of the abortion performed or induced, if the pregnancy was at least eight (8) weeks after fertilization, was the pregnant woman told that it may be possible to make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear? _____

Was the pregnant woman asked if she would like to hear the heartbeat? _____

Was the embryonic or fetal heartbeat of the unborn child made audible for the pregnant woman to hear, using a Doppler fetal heart rate monitor? _____

If the response to any of the questions in this paragraph was anything other than an unqualified YES, how was the abortion performed in compliance with Sections 1-745.12 through 1-745.19 of Title 63 of the Oklahoma Statutes? _____

Filed this ____ day of _____, _____, by:

_____

(Name of physician)

_____

(Physician's license number)

NOTICE: In accordance with subsection F of Section 1-738m of Title 63 of the Oklahoma Statutes, public reports based on this form will not contain the name, address, hometown, county of residence, or any other identifying information of any individual female. The State Department of Health shall take care to ensure that none of the information included in its public reports could reasonably lead to the identification of any individual female about whom information is reported or of any physician providing information in accordance with the Statistical Abortion Reporting Act. Such information is not subject to the Oklahoma Open Records Act.

Be advised that any complication(s) shall be detailed in a "Complications of Induced Abortion Report" and submitted to the Department as soon as is practicable after the encounter with the induced-abortion-related illness or injury, but in no case more than sixty (60) days after such an encounter.

Added by Laws 2010, HB 3284, c. 276, § 3, eff. November 1, 2010;
Amended by Laws 2013, HB 2015, c. 303, § 1, eff. November 1, 2013.

63 § 1-738l Complications of Induced Abortion Report

A. Complications of Induced Abortion Report. By March 1, 2012, the State Department of Health shall prepare and make available, on its stable Internet website, a **Complications of Induced Abortion Report** for all physicians licensed and practicing in the State of Oklahoma.

B. Subsection C of this section shall become operative on the later of:

1. April 1, 2012; or

2. Thirty (30) calendar days following the date on which the State Department of Health posts on its stable Internet website the Individual Abortion Form and instructions concerning its electronic submission referenced in Section 3 of this act.

C. Any physician practicing in Oklahoma who encounters an illness or injury that a reasonably knowledgeable physician would judge is related to an induced abortion shall complete and submit, electronically or by regular mail, a Complications of Induced Abortion Report to the Department as soon as is practicable after the encounter with the induced-abortion-related illness or injury, but in no case more than sixty (60) days after such an encounter. Nothing in the Complications of Induced Abortion Report shall contain the name, address, hometown, county of residence, or any other information specifically identifying any patient. Knowing or reckless unreasonable delay or failure to submit a

Complications of Induced Abortion Report shall be sanctioned according to the provisions of the Statistical Abortion Reporting Act.

D. The Complications of Induced Abortion Report shall contain a notice containing an assurance that in accordance with subsection F of Section 5 of this act, public reports based on the form submitted will not contain the name, address, hometown, county of residence, or any other identifying information of any individual female, that the State Department of Health will take care to ensure that none of the information included in its public reports could reasonably lead to the identification of any individual female about whom information is reported in accordance with the Statistical Abortion Reporting Act, or of any physician providing information in accordance with the Statistical Abortion Reporting Act, and that such information is not subject to the Oklahoma Open Records Act.

E. Complication(s) of Induced Abortion Report. The Complications of Induced Abortion Report shall be substantially similar to, but need not be in the specific format of, the following form:

Complications of Induced Abortion Report

1. Name and specialty field of medical practice of the physician filing the report: _____

2. Did the physician filing the report perform or induce the abortion? _____

3. Name, address, and telephone number of the health care facility where the induced abortion complication was discovered or treated: _____

4. Date on which the complication was discovered: _____

5. Date on which, and location of the facility where, the abortion was performed, if known: _____

6. Age of the patient experiencing the complication: ____

7. Describe the complication(s) resulting from the induced abortion: _____

8. Circle all that apply:

a. Death

b. Cervical laceration requiring suture or repair

c. Heavy bleeding/hemorrhage with estimated blood loss of greater than or equal to 500cc

d. Uterine Perforation

e. Infection

f. Failed termination of pregnancy (continued viable pregnancy)

g. Incomplete termination of pregnancy (Retained parts of fetus requiring re-evacuation)

h. Other (May include psychological complications, future reproductive complications, or other illnesses or injuries that in the physician's medical judgment occurred as a result of an induced abortion. Specify diagnosis.): _____

9. Type of follow-up care, if any, recommended: _____

10. Will the physician filing the Complications of Induced Abortion Report be providing such follow-up care (if not, the name of the medical professional who will, if known)? _____

11. Name and license number of physician filing the Complications of Induced Abortion Report: _____

Added by Laws 2010, HB 3284, c. 276, § 4, eff. November 1, 2010.

63 § 1-738m Annual Abortion Report – Annual Judicial Bypass of Abortion parental Consent Summary

A. Beginning in 2013, by June 1 of each year, the Department shall issue, on its stable Internet website, a public **Annual Abortion Report** providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with the Statistical Abortion Reporting Act.

B. The Department's public report shall also provide statistics for all previous calendar years for which abortion-reporting requirements have been in effect, adjusted to reflect any additional information from late or corrected reports.

C. The Annual Abortion Report shall include, but not be limited to, the following information:

1. The number of induced abortions performed in the previous calendar year, broken down by month and county in which the abortion was performed;

2. The number of abortions classified by:

a. the state or foreign country of residence of the mother,

b. the age, marital status, and race of the mother, and

c. the number of years of education of the mother;

3. The number of abortions classified by:

a. the number of previous pregnancies of the mother,

b. previous live births to the mother,

c. previous miscarriages, and

d. previous induced abortions;

4. The number of abortions by week of gestational age;

5. The number of abortions performed by each reported method;

6. The number of abortions resulting in an infant born alive; of these, the number of cases in which life-sustaining measures were taken; and a statistical summary of the length of survival of such infants;

7. The number of cases in which anesthesia was administered to the mother and the number of each type of anesthesia;

8. The number of cases in which anesthesia was administered to the unborn child, and the number of each type of anesthesia and of each method of administration;

9. The number of each reported method of fetal disposal;

10. The reasons reported for the abortions, and the number of times each reported reason was cited;

11. The number of abortions paid for by:

a. private insurance,

b. public health plan,

c. Medicaid,

d. private pay, or

e. other;

12. The number of abortions in which medical health insurance coverage was under:

a. a fee-for-service insurance company,

b. a managed care company, or

c. other;

13. A statistical summary of the fees collected;

14. Specialty area of medicine of the physician;

15. The number of abortions in which ultrasound equipment was used before, during, or after the abortion, and the number of times vaginal

ultrasound, abdominal ultrasound, or both were used in each of the three circumstances;

16. The number of abortions before which an ultrasound was performed by:

a. the physician performing the abortion,

b. a physician other than the physician performing the abortion, or

c. other;

17. The number of abortions resulting in reported complications, and of those, how many were reported by the physician who performed the abortion, and how many were reported by another physician, the types of reported complications, and the number of each type based on data which shall be compiled and transmitted to the State Department of Health by the State Board of Medical Licensure and Supervision and the State Board of Osteopathic Examiners;

18. The number of abortions resulting in the reported death of the mother;

19. The number of females to whom the physician provided the information in subparagraph a of paragraph 1 of subsection B of Section 1-738.2 of this title; of that number, the number provided by telephone and the number provided in person; and of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion;

20. The number of females to whom physicians or agents of physicians provided the information in paragraph 2 of subsection B of Section 1-738.2 of this title; of that number, the number provided by telephone and the number provided in person; of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion; and of each of those numbers, the number provided by the physician and the number provided by an agent of the physician;

21. The number of females who availed themselves of the opportunity to have a copy of the printed information described in Section 1-738.3 of this title mailed to them; and of that number, the number who, based on the submitted reports, did and did not obtain an abortion;

22. The number of abortions performed by the physician in which information otherwise required to be provided at least seventy-two (72) hours before the abortion was not so provided because an immediate abortion was necessary to avert the death of the female, and the number of abortions in which such information was not so provided because a delay would create serious risk of substantial and irreversible impairment of a major bodily function;

23. The number of females to whom physicians or their agents provided the information described in subsection A of Section 1-738.8 of this title; of that number:

a. the number provided by telephone and the number provided in person; and of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion, or by the agent of such physician, and

b. the number of females who availed themselves of the opportunity to be given or mailed the materials described in Section 1-738.10 of this title, and the number who did not; and of each of those numbers, the number who, to the best of the information and belief of the reporting physician, went on to obtain the abortion;

24. The number of females to whom the information described in subsection A of Section 1-738.8 of this title would have had to be provided but for a medical emergency determination; of that number, the number for whom an immediate abortion was necessary to avert the death of the female, and the number for whom a delay would have created serious risk of substantial and irreversible impairment of a major bodily function;

25. The number of abortions performed within the scope of employment of Oklahoma state employees and employees of an agency or political subdivision of the state, the number of abortions performed with the use of public institutions, facilities, equipment, or other physical assets owned, leased, or controlled by this state, its agencies, or political subdivisions, and for each category:

a. the number of abortions reported as necessary to save the life of the mother, the life-endangering conditions identified, and the number of each such condition reported,

b. the number of abortions reported from pregnancies resulting from forcible rape, the number of such rapes reported to law enforcement authorities, general categories of law enforcement authorities to whom reports were made and the number made to each category, and a statistical summary of the length of time between the dates of reporting to law enforcement authorities and the dates of the abortions, and

c. the number of abortions reported from pregnancies resulting from incest committed against a minor, the number of perpetrators of incest in such cases reported to law enforcement authorities, general categories of law enforcement authorities to whom reports were made and the number made to each category, and a statistical summary of the length of time between the dates of reporting to law enforcement authorities and the dates of the abortions;

26. The number of females to a parent of whom the physician provided notice as required by Section 1-740.2 of this title; of that number, the number provided personally as described in that section, and the number provided by mail as described in that section, and of each of those numbers, the number of females who, to the best of the information and belief of the reporting physician, went on to obtain the abortion;

27. The number of females upon whom the physician performed an abortion without the notice to or consent of the parent of the minor required by Section 1-740.2 of this title; of that number, the number who were emancipated minors and the number who suffered from a medical emergency, and of the latter, the number of cases in which a parent was notified subsequently and the number of cases in which a judicial waiver was obtained. In the case of medical emergencies in which a parent was informed subsequently, a statistical summary of the period of time elapsed before notification;

28. The number of abortions performed after receiving judicial authorization to do so without parental notice and consent;

29. The number of abortions performed on minors after judicial authorizations were granted because of a finding that the minor girl was mature and capable of giving informed consent;

30. The number of abortions performed on minors after judicial authorizations were granted because of a finding that the performance of the abortion without parental notification and consent was in the best interest of the minor;

31. The number of abortions performed after which the remains of the fetus after the abortion were examined to ensure that all such remains were evacuated from the mother's body;

32. The number of male children aborted and female children aborted, as determined from the examination of fetal remains after abortion;

33. The number of male children aborted and female children aborted, as determined by any method other than those reported in paragraph 32 of this subsection;

34. The number of instances in which the mother was informed prior to the abortion that the child to be aborted was a female;

35. The number of abortions performed without surgery but rather as the result of the administration of chemicals;

36. The number of abortions performed as reported in paragraph 35 of this subsection, in which the physician was present in the same room

as the woman to whom the chemicals were administered at the time any such chemicals were first administered;

37. The number of abortions performed for each hospital at which the abortionist had hospital privileges at the time of the abortion;

38. The number of abortions performed at which ultrasound equipment was used before the abortion;

39. The number of abortions reported in paragraph 38 of this subsection, during which the mother was under the effect of anesthesia at the time of the ultrasound;

40. The number of abortions performed at which ultrasound equipment was used during the abortion;

41. The number of abortions reported in paragraph 40 of this subsection, during which the mother was under the effect of anesthesia at the time of the ultrasound;

42. The number of abortions performed at which ultrasound equipment was used after the abortion;

43. The number of abortions reported in paragraph 42 of this subsection, during which the mother was under the effect of anesthesia at the time of the ultrasound;

44. The mean gestational age of the fetus at the time of the abortion, as determined by ultrasounds reported;

45. The number of abortions for which no determination of probable postfertilization age was made as required by Section 1-745.5 of this title; and

46. The number of abortions in which the pregnant woman was told that it may be possible to make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear; the number of abortions in which the pregnant woman was asked if she would like to hear the heartbeat; and the number of abortions in which the embryonic or fetal heartbeat of the unborn child was made audible for the pregnant woman to hear, using a Doppler fetal heart rate monitor.

D. Beginning in 2013, by June 1 of each year, the State Department of Health shall post, on its stable Internet website, a public **Annual Judicial Bypass of Abortion Parental Consent Summary Report** providing statistics which shall be compiled and supplied to the Department by the Administrative Office of the Courts giving the total number of petitions or motions filed under Section 1-740.3 of this title and of that number, the number in which:

1. The court appointed a guardian ad litem;

2. The court appointed counsel;

3. The judge issued an order authorizing an abortion without parental notification or consent, and of those:

a. the number authorized due to a determination by the judge that the minor was mature and capable of giving consent to the proposed abortion, and

b. the number authorized due to a determination by the judge that an abortion was in the best interest of the minor; and

4. The judge denied such an order, and of this, the number of:

a. denials from which an appeal was filed,

b. the appeals that resulted in the denial being affirmed, and

c. appeals that resulted in reversals of the denials.

E. Each Annual Judicial Bypass of Abortion Parental Consent Summary Report shall also provide the statistics for all previous calendar years for which the public statistical report was required to be issued, adjusted to reflect any additional information from late or corrected reports.

F. The Department's public reports shall not contain the name, address, hometown, county of residence, or any other identifying information of any individual female, and shall take care to ensure that none of the information included in its public reports could reasonably lead to the identification of any individual female about whom information is reported in accordance with the Statistical Abortion Reporting Act or of any physician providing information in accordance with the Statistical Abortion Reporting Act. Nor shall the information described in the preceding sentence be subject to the Oklahoma Open Records Act.

Added by Laws 2010, HB 3284, c. 276, § 5, eff. November 1, 2010;
Amended by Laws 2013, HB 2015, c. 303, § 2, eff. November 1, 2013;
Amended by Laws 2015, HB 1409, c. 255, § 6, eff. November 1, 2015.

63 § 1-738n Notice of Act Requirements – Failure to Submit Forms or Reports – Penalties – Compliance - Rules

A. The State Board of Medical Licensure and Supervision and the State Board of Osteopathic Examiners shall notify, by March 1, 2012, all physicians licensed to practice in this state over whom they have licensure authority of the requirements of the Statistical Abortion Reporting Act and of the addresses of the pages on the State Department of Health's secure Internet website providing access to the forms it requires and instructions for their electronic submission. The respective Board shall also notify each physician who subsequently becomes newly licensed to practice in this state, at the same time as an official notification to that physician, that the physician is so licensed.

B. Individual Abortion Forms or Complications of Induced Abortion Reports that are not submitted by the end of a grace period of thirty (30) days following the due date shall be subject to a late fee of Five Hundred Dollars ($500.00) for each additional thirty-day period the forms or reports are overdue. Any monies collected under this **subsection shall be deposited into an account created within the Department,** which shall be used for the administration of the Statistical Abortion Reporting Act. Any physician required to report in accordance with the Statistical Abortion Reporting Act who has not completed and electronically submitted a form or report, or has submitted only an incomplete form or report, more than one (1) year following the due date shall be precluded from renewing his or her license until such fines are paid in full and outstanding forms or reports are submitted, and may, in an action brought by the State Department of Health, be directed by a court of competent jurisdiction to electronically submit completed forms or reports within a period stated by court order or be subject to sanctions for civil contempt.

C. Anyone who knowingly or recklessly fails to submit an Individual Abortion Form or Complications of Induced Abortion Report, or submits false information under the Statistical Abortion Reporting Act, shall be guilty of a misdemeanor.

D. The Department, the State Board of Medical Licensure and Supervision and the State Board of Osteopathic Examiners shall ensure compliance with the Statistical Abortion Reporting Act and **shall verify the data provided by periodic inspections of places where the Department**, the State Board of Medical Licensure and Supervision or the State Board of Osteopathic Examiners know or have reason to believe abortions are performed.

E. The Department may promulgate rules in accordance with the Administrative Procedures Act to alter the dates established by the Statistical Abortion Reporting Act to achieve administrative convenience, fiscal savings, or to reduce the burden of reporting requirements, so long as the forms and reports are made available, on its stable Internet website, to all licensed physicians in this state, and the public reports described in Section 1-738m of this title are issued at least once every year.

F. If the Department fails to issue the public reports described in Section 1-738m of this title, an action pursuant to Chapter 26 of Title 12 of the Oklahoma Statutes may be initiated. If judgment is rendered in favor of

the plaintiff in any action described in this subsection, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

G. If an abortion provider fails to submit any report required pursuant to Section 1-738k of this title, upon the refusal, failure or neglect of **the State Commissioner of Health, within twenty (20) days after written demand signed, verified and served upon the State Department of Health by at least ten registered voters of the state, to institute or diligently prosecute proper proceedings at law or in equity to compel an abortion provider to submit any report required pursuant to Section 1-738k of this title but not yet submitted to the State Department of Health, any resident taxpayer of the state after serving the notice aforesaid may in the name of the State of Oklahoma as plaintiff, institute and maintain any proper action which the State Department of Health might institute and maintain to compel the abortion provider to file such report.** If a court of competent jurisdiction determines the claims to be meritorious, the abortionist shall be compelled to file the report and to pay the fee(s) prescribed in subsection B of this section, with costs and reasonable attorney fees. If all claims stated by the resident taxpayers in the written demand are determined in a court of competent jurisdiction to be frivolous and brought in bad faith, the resident taxpayers who signed such demand and who are parties to the lawsuit in which such claims are determined to be frivolous and brought in bad faith shall be jointly and severally liable for all reasonable attorney fees and court costs incurred by the abortionist.

Added by Laws 2010, HB 3284, c. 276, § 6, eff. November 1, 2010;
Amended by Laws 2013, HB 2015, c. 303, § 3, eff. November 1, 2013.

63 § 1-738o Authority to Intervene by Right

The Oklahoma Legislature, by joint resolution, may appoint one or more of its members who sponsored or cosponsored this act in his or her official capacity to intervene as a matter of right in any case in which the constitutionality of this law is challenged.

Added by Laws 2010, HB 3284, c. 276, § 5, eff. November 1, 2010.

63 § 1-738p Judicial Order Restraining or Enjoining Statistical Abortion Reporting Act

A. Sections 1-738.3a, 1-738.13 and 1-740.4a of Title 63 of the Oklahoma Statutes shall become ineffective and of no binding force on the date specified in subsection B of this section, but if the Statistical Abortion Reporting Act is ever temporarily or permanently restrained or enjoined by judicial order, these sections shall become effective and enforceable; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, these sections shall again become ineffective and of no binding force until or unless an injunction or restraining order against the Statistical Abortion Reporting Act is again in effect. If and to the extent the Statistical Abortion Reporting Act is restrained or enjoined in part, then only those provisions of these sections that neither conflict with nor substantively duplicate the provisions of the Statistical Abortion Reporting Act that are not enjoined shall have effect. As promptly as feasible following the issuance of any restraining order or injunction that enjoins part but not all of the Statistical Abortion Reporting Act, the Attorney General shall issue an opinion specifically identifying those provisions of these sections that are effective and enforceable in accordance with the preceding sentence.

B. The date specified in this subsection is the later of:

1. April 1, 2012; or

2. Thirty (30) calendar days following the date on which the State Department of Health posts on its secure Internet website the Individual Abortion Form and instructions concerning its electronic submission referenced in Section 3 of this act.

Added by Laws 2010, HB 3284, c. 276, § 5, eff. November 1, 2010.

63 § 1-738q. Effect of Temporary or Permanent Judicial Restraining Order or Injunction

If some or all of the provisions of Sections 1-738k, 1-738m and 1-738n of Title 63 of the Oklahoma Statutes, as amended by Sections 1, 2 and 3 of this act, are ever temporarily or permanently restrained or enjoined by judicial order, these sections shall be enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

Added by Laws 2013, HB 2015, c. 303, § 4, eff. November 1, 2013.

63 § 1-738.1A Definitions

As used in this section and Sections 1-738.2 through 1-738.5 of Title 63 of the Oklahoma Statutes:

1. "Abortion" means the term as defined in Section 1-730 of Title 63 of the Oklahoma Statutes;

2. "Attempt to perform an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in this state in violation of this act;

3. "Board" means the State Board of Medical Licensure and Supervision;

4. "Certified technician" means a Registered Diagnostic Medical Sonographer who is certified in obstetrics and gynecology by the American Registry for Diagnostic Medical Sonography (ARDMS), or a nurse midwife or Advance Practice Nurse Practitioner in obstetrics with certification in obstetrical ultrasonography;

5. "Medical emergency" means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the female to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy;

6. "Physician" means a person licensed to practice medicine in this state pursuant to Sections 495 and 633 of Title 59 of the Oklahoma Statutes;

7. "Probable gestational age of the unborn child" means what, in the judgment of the physician, will with reasonable probability be the gestational age of the unborn child at the time the abortion is planned to be performed;

8. "Stable Internet website" means a website that, to the extent reasonably practicable, is safeguarded from having its content altered other than by the State Board of Medical Licensure and Supervision;

9. "Unborn child" means the term as is defined in Section 1-730 of Title 63 of the Oklahoma Statutes; and

10. "Woman" means a female human being whether or not she has reached the age of majority.

Added by Laws 2010, HB 2780, c. 173, § 1.

63 § 1-738.2. Voluntary and Informed Consent - Compliance by Physicians - Confirmation of Receipt of Medical Risk Information

A. No abortion shall be performed in this state except with the voluntary and informed consent of the woman upon whom the abortion is to be performed.

B. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:

1. a. not less than seventy-two (72) hours prior to the performance of the abortion, the woman is told the following, by telephone or in person, by the physician who is to perform the abortion, or by a referring physician, or by an agent of either physician:

(1) the name of the physician who will perform the abortion,

(2) the medical risks associated with the particular abortion procedure to be employed,

(3) the probable gestational age of the unborn child at the time the abortion is to be performed,

(4) the medical risks associated with carrying her child to term, and

(5) that ultrasound imaging and heart tone monitoring that enable the pregnant woman to view her unborn child or listen to the heartbeat of the unborn child are available to the pregnant woman. The physician or agent of the physician shall inform the pregnant woman that the website and printed materials described in Section 1-738.3 of this title, contain phone numbers and addresses for facilities that offer such services at no cost,

b. the information required by this paragraph may be provided by telephone without conducting a physical examination or tests of the woman. If the information is supplied by telephone, the information shall be based on facts supplied to the physician,

c. the information required by this paragraph shall not be provided by a tape recording, but shall be provided during a consultation in which the physician is able to ask questions of the woman and the woman is able to ask questions of the physician,

d. if a physical examination, tests, or other new information subsequently indicates, in the medical judgment of the physician, the need for a revision of the information previously supplied to the woman, that revised information may be communicated to the woman at any time prior to the performance of the abortion, and

e. nothing in subparagraph a of this paragraph may be construed to preclude provision of the required information in a language understood by the woman through a translator;

2. Not less than seventy-two (72) hours prior to the abortion, the woman is informed, by telephone or in person, by the physician who is to perform the abortion, by a referring physician, or by an agent of either physician:

a. that medical assistance benefits may be available for prenatal care, childbirth, and neonatal care,

b. that the father is liable to assist in the support of her child, even in instances in which the father has offered to pay for the abortion,

c. that:

(1) she has the option to review the printed materials described in Section 1-738.3 of this title,

(2) those materials have been provided by the State Board of Medical Licensure and Supervision, and

(3) they describe the unborn child and list agencies that offer alternatives to abortion, and

d. (1) if the woman chooses to exercise her option to view the materials in a printed form, they shall be mailed to her, by a method chosen by the woman, or

(2) if the woman chooses to exercise her option to view the materials via the Internet, the woman shall be informed at least seventy-two (72) hours before the abortion of the specific address of the Internet website where the material can be accessed.

The information required by this paragraph may be provided by a tape recording if provision is made to record or otherwise register specifically whether the woman does or does not choose to review the printed materials;

3. The woman certifies in writing, prior to the abortion, that she has been told the information described in subparagraph a of paragraph 1 of this subsection and in subparagraphs a, b and c of paragraph 2 of this subsection and that she has been informed of her option to review or reject the printed information described in Section 1-738.3 of this title; and

4. Prior to the abortion, the physician who is to perform the abortion or the agent of the physician receives a copy of the written certification prescribed by paragraph 3 of this subsection.

C. The State Board of Medical Licensure and Supervision and the State Board of Osteopathic Examiners shall promulgate rules to ensure that physicians who perform abortions and referring physicians or agents of either physician comply with all the requirements of this section.

D. Before the abortion procedure is performed, the physician shall confirm with the patient that she has received information regarding:

1. The medical risks associated with the particular abortion procedure to be employed;

2. The probable gestational age of the unborn child at the time the abortion is to be performed; and

3. The medical risks associated with carrying the unborn child to term.

Added by Laws 2005, HB 1686, c. 200, § 7, emerg. eff. May 20, 2005;
Amended by Laws 2006, SB 1742, c. 185, § 3, eff. November 1, 2006;
Amended by Laws 2015, HB 1409, c. 255, § 1, eff. November 1, 2015.

63 § 1-738.3. Publication and Availability of Printed Informational Materials

A. Within one hundred twenty (120) days of the effective date of this act, the State Board of Medical Licensure and Supervision shall cause to be published, in English and in Spanish, and shall update on an annual basis, the following printed materials in such a way as to ensure that the information is easily comprehensible:

1. a. geographically indexed materials designed to inform the woman of public and private agencies, including adoption agencies and services that are available to assist a woman through pregnancy, upon childbirth, and while the child is dependent, including:

(1) a comprehensive list of the agencies available,

(2) a description of the services they offer, including which agencies offer, at no cost to the pregnant woman, ultrasound imaging that enables a pregnant woman to view the unborn child or heart tone monitoring that enables the pregnant woman to listen to the heartbeat of the unborn child, and

(3) a description of the manner, including telephone numbers, in which they might be contacted, or

b. at the option of the Board a toll-free, twenty-four-hour-a-day telephone number which may be called to obtain, in a mechanical, automated, or auditory format, a list and description of agencies in the locality of the caller and of the services they offer; and

2. a. materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at

two-week gestational increments from the time when a woman can be known to be pregnant to full term, including:

(1) any relevant information on the possibility of the survival of the unborn child, and

(2) pictures or drawings representing the development of unborn children at two-week gestational increments, provided that the pictures or drawings shall describe the dimensions of the unborn child and shall be realistic and appropriate for the stage of pregnancy depicted,

b. the materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages, and

c. the material shall also contain objective information describing:

(1) the methods of abortion procedures commonly employed,

(2) the medical risks commonly associated with each of those procedures,

(3) the possible detrimental psychological effects of abortion and of carrying a child to term, and

(4) the medical risks commonly associated with carrying a child to term, and

d. the material shall contain the statement "Abortion shall terminate the life of a whole, separate, unique, living human being."

B. 1. The materials referred to in subsection A of this section shall be printed in a typeface large enough to be clearly legible.

2. The materials required under this section shall be available at no cost from the State Board of Medical Licensure and Supervision and shall be distributed upon request in appropriate numbers to any person, facility, or hospital.

C. 1. The Board shall provide on its stable Internet website the information described under subsection A of this section.

2. The website provided for in this subsection shall be maintained at a minimum resolution of 72 PPI.

D. Any facility performing abortions that has a website shall publish an easily identifiable link on the homepage of such website that directly links to the Board's website, www.awomansright.org, that provides informed consent materials under the Woman's Right-to-Know Act. Such link shall read: "The State Board of Medical Licensure and Supervision maintains a website containing information about the development of the unborn child, as well as video of ultrasound images of the unborn child at various stages of development. The Board's website can be reached by clicking here: www.awomansright.org."

Added by Laws 2005, HB 1686, c. 200, § 8, emerg. eff. May 20, 2005; Amended by Laws 2006, SB 1742, c. 185, § 4, eff. November 1, 2006; Amended by Laws 2015, HB 1409, c. 255, § 2, eff. November 1, 2015.

63 § 1-738.3a. Department of Health Web Site - Physician Reporting Requirements - Form for Physician - Notice - Rules

A. By February 1, 2008, the State Department of **Health shall prepare and make available on its stable Internet web site the form described in subsection B of this section. A copy of this act shall be posted on the website.** Physicians performing abortions shall complete and electronically submit the required forms to the Department no later than April 1 for the previous calendar year. Nothing in the report shall contain the name, address, or any other identifying information of any patient.

B. The form for physicians shall contain a listing for the following information:

1. The number of females to whom the physician, or an agent of the physician, provided the information described in Section 1-738.2 of Title 63 of the Oklahoma Statutes; of that number, the number provided the information by telephone and the number provided the information in person; and of each of those numbers, the number provided the information in the capacity of a referring physician and the number provided the information in the capacity of a physician who is to perform the abortion; and of each of those numbers, the number provided the information by the physician and the number provided the information by an agent of the physician;

2. The number of females who availed themselves of the opportunity to obtain a copy of the printed information described in Section 1-738.3 of Title 63 of the Oklahoma Statutes other than on the website, and the number who did not; and of each of those numbers, the number who, to the best of the information and belief of the reporting physician, went on to obtain the abortion; and

3. The number of abortions performed by the physician in which information otherwise required to be provided at least seventy-two (72) hours before the abortion was not so provided because an immediate abortion was necessary to avert the death of the female, and the number of abortions in which the information was not so provided because a delay would cause substantial and irreversible impairment of a major bodily function.

C. The State Department of Health shall ensure that the reporting forms described in subsection B of this section are **posted**, on its stable Internet website, within one hundred twenty (120) days after the effective date of this act. The State Department of Health shall **notify the following of the requirements of this act:**

1. By March 1, 2008, all physicians licensed to practice in this state;

2. Each physician who subsequently becomes newly licensed to practice in this state, at the same time as official notification to that physician that the physician is so licensed; and

3. By December 1 of each year, other than the calendar year in which forms are first made available to all physicians licensed to practice in this state.

D. By February 28 of each year following a calendar year in any part of which this section was in effect, each physician who provided, or whose agent provided, information to one or more females in accordance with Section 1-738.2 of Title 63 of the Oklahoma Statutes during the previous calendar year shall electronically submit to the State Department of Health the form described in subsection B of this section, with the requested data entered accurately and completely.

E. Reports that are not electronically submitted by the end of a grace period of thirty (30) days following the due date shall be subject to a late fee of Five Hundred Dollars ($500.00) for each additional thirty-day period or portion of a thirty-day period the reports are overdue. Any physician required to report in accordance with this section who has not completed and electronically submitted a report, or has electronically submitted only an incomplete report, more than one (1) year following the due date, may, in an action brought by the State Department of Health, be directed by a court of competent jurisdiction to electronically submit a complete report within a period stated by court order or be subject to sanctions for civil contempt.

F. By June 30 of each year, the State Department of Health shall prepare and make available on its stable Internet website **a public report** providing statistics for the previous calendar year compiled from all items listed in subsection B of this section. Each report shall also provide statistics for all previous calendar years, adjusted to reflect any additional information from late or corrected reports. The State Department of Health shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any individual providing or provided information in accordance with subsection B of this section.

G. The State Department of Health may promulgate rules in accordance with the Administrative Procedures Act to alter the dates established by this section or consolidate the form or report described in this section with other forms or reports to achieve administrative convenience, fiscal savings or to reduce the burden of reporting requirements, as long as reporting forms are made available, on its stable Internet website to all licensed physicians in the state, and the report described in this section is issued at least once every year.

Added by Laws 2007, SB 139, c. 161, § 3, eff. November 1, 2007; Amended by Laws 2015, HB 1409, c. 255, § 3, eff. November 1, 2015.

63 § 1-738.3d. Ultrasound Required Prior to Procedure - Written Certification - Medical Emergency Exception

A. Any abortion provider who knowingly performs any abortion shall comply with the requirements of this section.

B. In order for the woman to make an informed decision, at least one (1) hour prior to a woman having any part of an abortion performed or induced, and prior to the administration of any anesthesia or medication in preparation for the abortion on the woman, the physician who is to perform or induce the abortion, or the certified technician working in conjunction with the physician, shall:

1. Perform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly;

2. Provide a simultaneous explanation of what the ultrasound is depicting;

3. Display the ultrasound images so that the pregnant woman may view them;

4. Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus, the presence of cardiac activity, if present and viewable, and the presence of external members and internal organs, if present and viewable; and

5. Obtain a written certification from the woman, prior to the abortion, that the requirements of this subsection have been complied with; and

6. Retain a copy of the written certification prescribed by paragraph 5 of this subsection. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a period of not less than seven (7) years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

C. Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the ultrasound images required to be provided to and reviewed with her. Neither the physician nor the pregnant woman shall be subject to any penalty if she refuses to look at the presented ultrasound images.

D. Upon a determination by an abortion provider that a medical emergency, as defined in Section 1 of this act, exists with respect to a pregnant woman, subsection B of this section shall not apply and the provider shall certify in writing the specific medical conditions that constitute the emergency. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a period of not less than seven (7) years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven (7) years or for five (5) years after the minor reaches the age of majority, whichever is greater.

E. An abortion provider who willfully falsifies a certification under subsection D of this section shall be subject to all penalties provided for under Section 3 of this act.

Added by Laws 2010, HB 2780, c. 173, § 2.

63 § 1-738.3e. Violation of Ultrasound Requirement - Injunctive Relief - Action for Damages - License Suspension

A. An abortion provider who knowingly violates a provision of Section 2 of this act shall be liable for damages as provided in this section and may be enjoined from such acts in accordance with this section in an appropriate court.

B. A cause of action for injunctive relief against any person who has knowingly violated a provision of Section 2 of this act may be maintained by the woman upon whom an abortion was performed or attempted to be performed in violation of this act; any person who is the spouse, parent, sibling or guardian of, or a current or former licensed health care provider of, the female upon whom an abortion has been performed or attempted to be performed in violation of this act; by a district attorney with appropriate jurisdiction; or by the Attorney General. The injunction shall prevent the abortion provider from performing further abortions in violation of this act in the State of Oklahoma.

C. Any person who knowingly violates the terms of an injunction issued in accordance with this section shall be subject to civil contempt, and shall be fined Ten Thousand Dollars ($10,000.00) for the first violation, Fifty Thousand Dollars ($50,000.00) for the second violation, One Hundred Thousand Dollars ($100,000.00) for the third violation, and for each succeeding violation an amount in excess of One Hundred Thousand Dollars ($100,000.00) that is sufficient to deter future violations. The fines shall be the exclusive penalties for such contempt. Each performance or attempted performance of an abortion in violation of the terms of an injunction is a separate violation. These fines shall be cumulative. No fine shall be assessed against the woman on whom an abortion is performed or attempted.

D. A pregnant woman upon whom an abortion has been performed in violation of Section 2 of this act, or the parent or legal guardian of the woman if she is an unemancipated minor, as defined in Section 1-740.1 of Title 63 of the Oklahoma Statutes, may commence a civil action against the abortion provider for any knowing or reckless violation of this act for actual and punitive damages.

E. An abortion provider who performed an abortion in violation of Section 2 of this act shall be considered to have engaged in unprofessional conduct for which the provider's certificate or license to provide health care services in this state may be suspended or revoked by the State Board of Medical Licensure and Supervision or the State Board of Osteopathic Examiners.

Added by Laws 2010, HB 2780, c. 173, § 3.

63 § 1-738.4. Abortion Compelled by Medical Emergency

When a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death or that a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Added by Laws 2005, HB 1686, c. 200, § 9, emerg. eff. May 20, 2005.

63 § 1-738.5. Performing or Attempting an Abortion in Violation of Act - No Penalty Assessed Against the Woman - Felony

A. Any physician who knowingly or recklessly performs or attempts to perform an abortion in violation of the provisions of this act shall be subject to disciplinary action by the State Board of Medical Licensure and Supervision or the State Board of Osteopathic Examiners.

B. No penalty may be assessed against the woman upon whom the abortion is performed or attempted to be performed.

C. No penalty or civil liability may be assessed for failure to comply with Section 1-738.2 of this title unless the State Board of Medical Licensure

and Supervision has made the printed materials available at the time the physician or the agent of the physician is required to inform the woman of her right to review them.

D. Any person who knowingly or recklessly performs or attempts to perform an abortion in violation of this act shall be guilty of a felony.

Added by Laws 2005, HB 1686, c. 200, § 10, emerg. eff. May 20, 2005; Amended by Laws 2006, SB 1742, c. 185, § 5, eff. November 1, 2006.

63 § 1-738.5a. Severability

If some or all of the newly amended provisions of 63 O.S. 2011, Section 1-738.2, 63 O.S. 2011, Section 1-738.3; 63 O.S. 2011, Section 1-738.3a; 63 O.S. 2011, Section 1-738.8; 63 O.S. 2011, Section 1-738.13; 63 O.S. 2011, Section 1-738m, as amended by Section 2, Chapter 303, O.S.L. 2013 (63 O.S. Supp. 2014, Section 1-738m); Section 2, Chapter 175, O.S.L. 2014 (63 O.S. Supp. 2014, Section 1-746.2); or Section 6, Chapter 175, O.S.L. 2013 (63 O.S. Supp. 2014, Section 1-746.6), resulting from the actions taken by the 2015 session of the Oklahoma legislature are ever temporarily or permanently restrained or enjoined by judicial order, these sections shall be enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

Added by Laws 2015, HB 1409, c. 255, § 9, eff. November 1, 2015.

Unborn Child Pain Awareness/Prevention Act
63 § 1-738.6. Short Title --

This act shall be known and may be cited as the "Unborn Child Pain Awareness/Prevention Act".

Added by Laws 2006, SB 1742, c. 185, § 6, eff. November 1, 2006.

63 § 1-738.7. Definitions

As used in the Unborn Child Pain Awareness/Prevention Act:

1. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to remove an ectopic pregnancy, or to remove a dead fetus who dies as the result of a spontaneous miscarriage, accidental trauma or a criminal assault on the pregnant female or her unborn child;

2. "Attempt to perform an abortion" means an act, or an omission of a statutorily required act that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in Oklahoma in violation of the Unborn Child Pain Awareness/Prevention Act;

3. "Unborn child" means a member of the species homo sapiens from fertilization until birth;

4. "Medical emergency" means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the female to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy;

5. "Physician" means a person licensed to practice medicine in this state pursuant to Sections 495 and 633 of Title 59 of the Oklahoma Statutes; and

6. "Probable gestational age" means the gestational age of the unborn child at the time the abortion is planned to be performed, as determined by the physician using reasonable probability.

Added by Laws 2006, SB 1742, c. 185, § 7, eff. November 1, 2006; Amended by Laws 2007, SB 139, c. 161, § 4, eff. November 1, 2007.

63 § 1-738.8. Provision of Information Prior to Abortion - Written Certification of Receipt

A. Except in the case of a medical emergency, at least seventy-two (72) hours prior to an abortion being performed on an unborn child whose probable gestational age is twenty (20) weeks or more, the physician performing the abortion or the agent of the physician shall inform the pregnant female, by telephone or in person, of the right to review the printed materials described in Section 1-738.10 of this title, that these materials are available on a state-sponsored website, and the web address of that website. The physician or the agent of the physician shall orally inform the female that the materials have been provided by the State of Oklahoma and that the materials contain information on pain and the unborn child. If the female chooses to view the materials other than on the website, the materials shall either be given to the female at least seventy-two (72) hours before the abortion, or received by the female at least seventy-two (72) hours before the abortion by certified mail, restricted delivery to the addressee. The information required by this subsection may be provided by a tape recording if provision is made to record or otherwise register specifically whether the female does or does not choose to receive the printed materials given or mailed.

B. The female shall certify in writing, prior to the abortion, that the information described in subsection A of this section has been furnished to the female and that the female has been informed of the opportunity to review the printed materials described in Section 1-738.10 of this title. Prior to the performance of the abortion, the physician who is to perform the abortion or the agent of the physician shall obtain a copy of the written certification and retain the copy on file with the medical record of the female for at least three (3) years following the date of receipt.

Added by Laws 2006, SB 1742, c. 185, § 8, eff. November 1, 2006; Amended by Laws 2015, HB 1409, c. 255, § 4, eff. November 1, 2015.

63 § 1-738.9. Information About and Administration of Anesthetic or Analgesic

Except in the case of a medical emergency, before an abortion is performed on an unborn child who is twenty (20) weeks gestational age or more, the physician performing the abortion or the agent of the physician shall inform the female if an anesthetic or analgesic would eliminate or alleviate organic pain to the unborn child caused by the particular method of abortion to be employed and inform the female of the particular medical risks associated with the particular anesthetic or analgesic. With the consent of the female, the physician shall administer the anesthetic or analgesic.

Added by Laws 2006, SB 1742, c. 185, § 9, eff. November 1, 2006.

63 § 1-738.10. Materials Conveying Accurate, Scientific Information About Fetus at Various Gestational Stages

A. Within ninety (90) days after the Unborn Child Pain Awareness/Prevention Act becomes law, the State Board of Medical Licensure and Supervision shall cause to be published, in English and in each language which is the primary language of two percent (2%) or more of the population of the state, and shall cause to be available on the state web site provided for in Section 11 of this act, printed materials with the following statement concerning unborn children of twenty (20) weeks gestational age: "By twenty (20) weeks gestation, the unborn child has the physical structures necessary to experience pain. There is evidence that by twenty (20) weeks gestation unborn children seek to evade certain stimuli in a manner which in an infant or an adult would be interpreted to be a response to pain. Anesthesia is routinely administered to unborn children who are twenty (20) weeks gestational age or older who undergo prenatal surgery."

The materials shall be objective, nonjudgmental and designed to convey only accurate scientific information about the human fetus at the various gestational ages.

B. The materials referred to in subsection A of this section shall be printed in a typeface large enough to be clearly legible. The web site provided for in Section 11 of this act shall be maintained at a minimum resolution of 70 DPI (dots per inch). All pictures appearing on this web site shall be a minimum of 200x300 pixels. All letters on the web site shall be a minimum of 11 point font. All information and pictures shall be accessible with an industry standard browser requiring no additional plug-ins.

C. The materials required under this section shall be available at no cost from the State Board of Medical Licensure and Supervision upon request and in appropriate number to any person, facility, or hospital.

Added by Laws 2006, SB 1742, c. 185, § 10, eff. November 1, 2006.

63 § 1-738.11. Internet Website

The State Board of Medical Licensure and Supervision shall develop and maintain a stable Internet web site to provide the information described under Section 10 of this act. No information regarding who uses the web site shall be collected or maintained. The State Board of Medical Licensure and Supervision shall monitor the web site on a daily basis to prevent and correct tampering.

Added by Laws 2006, SB 1742, c. 185, § 11, eff. November 1, 2006.

63 § 1-738.12. Information to be Provided When Medical Emergency Compels Performance of Abortion

When a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting the judgment of the physician that an abortion is necessary to avert the death of the female or that a twenty-four-hour delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Added by Laws 2006, SB 1742, c. 185, § 12, eff. November 1, 2006.

63 § 1-738.13. Physicians' Reporting Form

A. Within ninety (90) days after the Unborn Child Pain Awareness/Prevention Act becomes law, the State Department of Health shall prepare a reporting form for physicians containing a reprint of the Unborn Child Pain Awareness/Prevention Act and listing:

1. The number of females to whom the physician or an agent of the physician provided the information described in subsection A of Section 1-738.8 of this title; of that number, the number provided by telephone and the number provided in person; and of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion or agent of such a physician;

2. The number of females who availed themselves of the opportunity to obtain a copy of the printed information described in Section 1-738.10 of this title other than on the website, and the number who did not; and of each of those numbers, the number who, to the best of the information and belief of the reporting physician, went on to obtain the abortion; and

3. The number of abortions performed by the physician in which information otherwise required to be provided at least seventy-two (72) hours before the abortion was not so provided because an immediate abortion was necessary to avert the death of the female, and the number of abortions in which such information was not so provided because a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

B. The Department shall ensure that copies of the reporting forms described in subsection A of this section are provided:

1. Within one hundred twenty (120) days after the Unborn Child Pain Awareness/Prevention Act becomes law, to all physicians licensed to practice in this state;

2. To each physician who subsequently becomes newly licensed to practice in this state, at the same time as official notification to that physician that the physician is so licensed; and

3. By December 1 of each year, other than the calendar year in which forms are distributed in accordance with paragraph 1 of this subsection, to all physicians licensed to practice in this state.

C. By February 28 of each year following a calendar year in any part of which the Unborn Child Pain Awareness/Prevention Act was in effect, each physician who provided, or whose agent provided, information to one or more females in accordance with Section 1-738.8 of this title during the previous calendar year shall submit to the Department a copy of the form described in subsection A of this section, with the requested data entered accurately and completely.

D. Reports that are not submitted by the end of a grace period of thirty (30) days following the due date shall be subject to a late fee of Five Hundred Dollars ($500.00) for each additional thirty-day period or portion of a thirty-day period the reports are overdue. Any physician required to report in accordance with this section who has not submitted a report, or has submitted only an incomplete report, more than one (1) year following the due date may, in an action brought by the State Board of Medical Licensure and Supervision, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to sanctions for civil contempt.

E. By June 30 of each year, the Department shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection A of this section. Each such report shall also provide the statistics for all previous calendar years, adjusted to reflect any additional information from late or corrected reports. The Department shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any individual providing or provided information in accordance with subsection A or B of Section 1-738.8 of this title.

F. The Department, by rule promulgated in accordance with the Administrative Procedures Act, may alter the dates established by paragraph 3 of subsection B, subsection C, or subsection E of this section or consolidate the forms or reports described in this section with other forms or reports to achieve administrative convenience or fiscal savings or to reduce the burden of reporting requirements, so long as reporting forms are sent to all licensed physicians in the state at least once every year and the report described in subsection E of this section is issued at least once every year.

Added by Laws 2006, SB 1742, c. 185, § 13, eff. November 1, 2006;
Amended by Laws 2015, HB 1409, c. 255, § 5, eff. November 1, 2015.

63 § 1-738.14. Violations - Penalties

Any person who knowingly or recklessly performs or attempts to perform an abortion in violation of the Unborn Child Pain Awareness/Prevention Act shall be guilty of a felony. Any physician who knowingly or recklessly submits a false report under subsection C of Section 13 of this act shall be guilty of a misdemeanor. No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed. No penalty or civil liability may be assessed for failure to comply with Section 8 of this act requiring a written certification that the female has been informed of the opportunity to review the information referred to in Section 8 of this act unless the State Department of Health has made the printed materials available at the time the physician or the agent of the physician is required to inform the female of the right to review the materials.

Added by Laws 2006, SB 1742, c. 185, § 14, eff. November 1, 2006.

63 § 1-738.15. Civil Actions

A. Any person upon whom an abortion has been performed without the Unborn Child Pain Awareness/Prevention Act having been complied with,

the father of the unborn child who was the subject of such an abortion, or the grandparent of such an unborn child may maintain an action against the person who performed the abortion in knowing or reckless violation of the Unborn Child Pain Awareness/Prevention Act for actual and punitive damages. Any person upon whom an abortion has been attempted without the Unborn Child Pain Awareness/Prevention Act having been complied with may maintain an action against the person who attempted to perform the abortion in knowing or reckless violation of the Unborn Child Pain Awareness/Prevention Act for actual and punitive damages.

B. If the Department fails to issue the public report required by the Statistical Reporting of Abortion Act of Oklahoma, an action pursuant to Title 12 of the Oklahoma Statutes may be initiated.

Added by Laws 2006, SB 1742, c. 185, § 15, eff. November 1, 2006.

63 § 1-738.16. Ruling Concerning Public Disclosure of Identity of Female - Order

In every civil or criminal proceeding or action brought under the Unborn Child Pain Awareness/Prevention Act, the court shall rule whether the anonymity of any female upon whom an abortion has been performed or attempted shall be preserved from public disclosure if the female does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that the anonymity of the female should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard the identity of the female from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the female should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the female upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under subsection A of Section 15 of this act shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

Added by Laws 2006, SB 1742, c. 185, § 16, eff. November 1, 2006.

63 § 1-738.17. Severability

If any one or more provision, section, subsection, sentence, clause, phrase or word of the Unborn Child Pain Awareness/Prevention Act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of the Unborn Child Pain Awareness/Prevention Act shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed the Unborn Child Pain Awareness/Prevention Act, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

Added by Laws 2006, SB 1742, c. 185, § 17, eff. November 1, 2006.

63 § 1-739. Records

All hospitals shall keep records, including admission and discharge notes, histories, results of tests and examinations, nurses worksheets, social service records and progress notes of patients. All abortion facilities and hospitals in which abortions are performed shall also keep certifications of medical necessity, certifications of nonviability, certifications of nonavailability, abortion reports and complication reports as required in this act. Such records shall be maintained in the permanent files of the hospital for a period of not less than seven (7) years.

Laws 1978, c. 207, § 11, eff. Oct. 1, 1978.

63 § 1-740. Abortion on Minor Without Parental Consent

Any person who performs an abortion on a minor without parental consent or knowledge shall be liable for the cost of any subsequent medical treatment such minor might require because of the abortion.

Added by Laws 2001, HB 1727, c. 379, § 2, emerg. eff. June 4, 2001.

Abortion Performed upon Emancipated Minors
63 § 1-740.1. Definitions

As used in Sections 1-740.1 through 1-740.5 of this title:

1. "Abortion" means the term as is defined in Section 1-730 of this title;

2. "Medical emergency" means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy of the minor in order to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy, and there is insufficient time to provide the required notice and obtain the written informed consent of one parent;

3. "Parent" means one parent of the pregnant unemancipated minor or guardian if the pregnant unemancipated minor has one; and

4. "Unemancipated minor" means any person less than eighteen (18) years of age who is not or has not been married or who is under the care, custody and control of the person's parent or parents, guardian or juvenile court of competent jurisdiction.

Added by Laws 2005, HB 1686, c. 200, § 11, emerg. eff. May 20, 2005;
Amended by Laws 2007, SB 139, c. 161, § 5, eff. November 1, 2007.

63 § 1-740.2. Parental Notification

A. Except in the case of a medical emergency, a physician may not perform an abortion on a pregnant female unless the physician has:

1. Obtained proof of age demonstrating that the female is not a minor;

2. Obtained proof that the female, although a minor, is emancipated; or

3. Complied with Section 1-740.3 of this title.

B. No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian has been appointed pursuant to Section 1-113 of Title 30 of the Oklahoma Statutes because of a finding of incompetency, except in a medical emergency or where a judicial waiver was obtained pursuant to Section 1-740.3 of this title, until at least forty-eight (48) hours after the request for written informed consent for the pending abortion has been delivered in the manner specified in this subsection and the attending physician has secured proof of identification and the written informed consent of one parent.

1. The request for written informed consent of one parent shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

2. In lieu of the delivery required by paragraph 1 of this subsection, the request for written informed consent of one parent shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return-receipt requested and restricted delivery to the addressee, which means a postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 noon on the third day on which regular mail delivery takes place, subsequent to mailing. The information concerning the address of the parent shall be that which a reasonable and prudent person, under similar circumstances, would have relied upon as sufficient evidence that the parent resides at that address.

3. a. The parent who provides consent shall provide to the physician a copy of a government-issued proof of identification and written documentation that establishes that he or she is the lawful parent of the pregnant female. The parent shall certify in a signed, dated, notarized statement, initialed on each page, that he or she consents to the abortion. The signed, dated, and notarized statement shall include: "I certify that I, (insert name of parent), am the parent of

(insert name of minor daughter) and give consent for (insert name of physician) to perform an abortion on my daughter. I understand that any person who knowingly makes a fraudulent statement in this regard commits a felony."

b. The physician shall keep a copy of the proof of identification of the parent and the certified statement in the medical file of the minor for five (5) years past the majority of the minor, but in no event less than seven (7) years.

c. A physician receiving parental consent under this section shall execute for inclusion in the medical record of the minor an affidavit stating: "I, (insert name of physician), certify that according to my best information and belief, a reasonable person under similar circumstances would rely on the information presented by both the minor and her parent as sufficient evidence of identity."

C. No request for written informed consent of one parent shall be required under this section if the attending physician certifies in the medical records of the pregnant unemancipated minor that a medical emergency exists; provided, however, that the attending physician or an agent shall, within twenty-four (24) hours after completion of the abortion, notify one of the parents of the minor in the manner provided in this section that an emergency abortion was performed on the minor and of the circumstances that warranted invocation of this subsection.

D. The attending physician, or the agent of the physician, shall verbally inform the parent of the minor within twenty-four (24) hours after the performance of a medical emergency abortion or an abortion that was performed to prevent her death that an abortion was performed on the unemancipated minor. The attending physician, or the agent of the attending physician, shall also inform the parent of the basis for the certification of the physician required under subsection C of this section. The attending physician, or the agent of the attending physician, shall also send a written notice of the performed abortion via the United States Post Office to the last-known address of the parent, restricted delivery, return receipt requested. The information concerning the address of the parent shall be that which a reasonable and prudent person, under similar circumstances, would have relied upon as sufficient evidence that the parent resides at that address.

E. The State Board of Health shall **adopt the forms** necessary for physicians to obtain the certifications required by this section.

Added by Laws 2005, HB 1686, c. 200, § 12, emerg. eff. May 20, 2005; Amended by Laws 2006, SB 1742, c. 185, § 18, eff. November 1, 2006 Amended by Laws 2007, SB 139, c. 161, § 6, eff. November 1, 2007; Amended by Laws 2009, HB 2029, c. 234, § 152, emerg. eff. May 21, 2009; Amended by Laws 2013, HB 1361, c. 268, § 1, eff. November 1, 2013; Amended by Laws 2013, HB 1588, c. 320, § 2, eff. November 1, 2013.

63 § 1-740.2A. Court-Ordered Evaluation and Counseling Session with a Mental Health Professional - Purpose - Report to Court

A. Prior to the court hearing for judicial waiver pursuant to Section 1-740.3 of Title 63 of the Oklahoma Statutes, the court may require the pregnant unemancipated minor to participate in an **evaluation and counseling session with a mental health professional from the State Department of Health**. Such evaluation shall be confidential and scheduled expeditiously.

B. Such evaluation and counseling session shall be for the purpose of developing trustworthy and reliable expert opinion concerning the pregnant unemancipated minor's sufficiency of knowledge, insight, judgment, and maturity with regard to her abortion decision in order to aid the court in its decision and to make the resources of the state available to the court for this purpose. Persons conducting such sessions may employ the information and printed materials referred to in Sections 1-738.2 and 1-738.3 of Title 63 of the Oklahoma Statutes in examining how well the pregnant unemancipated minor is informed about pregnancy, fetal development, abortion risks and consequences, and abortion alternatives, and should also endeavor to verify that the pregnant unemancipated minor is seeking an abortion of her own free will and is not acting under coercion, intimidation, threats, abuse, undue pressure, or extortion by any other persons.

C. The results of such evaluation and counseling shall be reported to the court by the most expeditious means, commensurate with security and confidentiality, to assure receipt by the court prior to a hearing on the petition of the pregnant unemancipated minor.

Added by Laws 2013, HB 1361, c. 268, § 2, eff. November 1, 2013.

63 § 1-740.3. Judicial Authorization of Abortion Without Parental Notification - Participation by Minor in Court Proceedings - Confidentiality – Appeal

A. If a pregnant unemancipated minor elects not to allow the request for written informed consent of her parent, any judge of a district court in the county in which the pregnant unemancipated minor resides shall, upon petition or motion, and after an appropriate hearing, authorize a physician to perform the abortion if the judge determines, by clear and convincing evidence, that the pregnant unemancipated minor is mature and capable of giving informed consent to the proposed abortion based upon her experience level, perspective, and judgment. If the judge determines that the pregnant unemancipated minor is not mature, or if the pregnant unemancipated minor does not claim to be mature, the judge shall determine, by clear and convincing evidence, whether the performance of an abortion upon her without written informed consent of her parent would be in her best interest and shall authorize a physician to perform the abortion without written informed consent if the judge concludes that the best interests of the pregnant unemancipated minor would be served thereby.

In assessing the experience level of the pregnant unemancipated minor, the court may consider, among other relevant factors, the age of the pregnant unemancipated minor and experiences working outside the home, living away from home, traveling on her own, handling personal finances, and making other significant decisions. In assessing the perspective of the pregnant unemancipated minor, the court may consider, among other relevant factors, what steps the pregnant unemancipated minor took to explore her options and the extent to which she considered and weighed the potential consequences of each option. In assessing the judgment of the pregnant unemancipated minor, the court may consider, among other relevant factors, the conduct of the pregnant unemancipated minor since learning of her pregnancy and her intellectual ability to understand her options and to make an informed decision. In assessing whether, by clear and convincing evidence, obtaining the written informed consent of the parent of the pregnant unemancipated minor is not in her best interest, a court may not consider the potential financial impact on the pregnant unemancipated minor or the family of the pregnant unemancipated minor if she does not have an abortion.

B. A pregnant unemancipated minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall advise the pregnant unemancipated minor that she has a right to court-appointed counsel and, upon her request, shall provide her with counsel.

C. Proceedings in the court under this section shall be confidential and shall be given precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant unemancipated minor. A judge of the court who conducts proceedings under this section shall make, in writing, specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained, including the findings and conclusions of the court.

D. An expedited confidential appeal shall be available to any pregnant unemancipated minor for whom the court denies an order authorizing an abortion without written informed consent of one parent. An order authorizing an abortion without written informed consent of one parent shall not be subject to appeal. No filing fees shall be required of any pregnant unemancipated minor at either the trial or the appellate level. Access to the trial court for the purpose of a petition or motion, and access to the appellate courts for the purpose of making an appeal from the denial of same, shall be afforded a pregnant unemancipated minor twenty-four (24) hours a day, seven (7) days a week.

Added by Laws 2005, HB 1686, c. 200, § 13, emerg. eff. May 20, 2005; Amended by Laws 2006, SB 1742, c. 185, § 19, eff. November 1, 2006; Amended by Laws 2007, SB 139, c. 161, § 7, eff. November 1, 2007; Amended by Laws 2013, HB 1361, c. 268, § 3, eff. November 1, 2013; Amended by Laws 2013, HB 1588, c. 320, § 3, eff. November 1, 2013.

63 § 1-740.4. Violations - Misdemeanor - Civil Actions

Performance of an abortion in knowing or reckless violation of Sections 1-740.1 through 1-740.5 of this title shall be a misdemeanor. Performance of an abortion in violation of Sections 1-740.1 through 1-740.5 of this title shall be grounds for actual and punitive damages in a civil action pursuant to Sections 1-738.3f through 1-738.3k of this title.

Added by Laws 2005, HB 1686, c. 200, § 14, emerg. eff. May 20, 2005; Amended by Laws 2006, SB 1742, c. 185, § 20, eff. November 1, 2006; Amended by Laws 2013, HB 1588, c. 320, § 4, eff. November 1, 2013

63 § 1-740.4a. Physicians Reporting Procedures for Abortions Performed on Unemancipated Minors - Department of Health Web Site - Notice - Public Statistical Report

A. Any physician performing an abortion upon an unemancipated minor shall complete and electronically transmit to the State Department of Health a report of the procedure within thirty (30) days after having performed the abortion. Within ninety (90) days after this act becomes law, the **State Department of Health shall prepare and make available on its stable Internet web site the reporting forms** for this purpose to all physicians required to be licensed in this state and health facilities licensed in accordance with Section 1-702 of Title 63 of the Oklahoma Statutes. The reporting form regarding the minor receiving the abortion shall include, but not be limited to:

1. Age;

2. Educational level;

3. Number of previous pregnancies;

4. Number of previous live births;

5. Number of previous abortions;

6. Complications, if any, of the abortion being reported;

7. The city and county in which the abortion was performed;

8. Whether a parent gave consent to the physician, or an agent of the physician, pursuant to Section 1-740.2 of Title 63 of the Oklahoma Statutes; or

9. Whether the physician performed the abortion without first obtaining the consent of the parent of the minor as described in Section 1-740.2 of Title 63 of the Oklahoma Statutes; if so:

a. whether the minor was emancipated,

b. whether the abortion was performed because of a medical emergency,

c. whether the abortion was performed to prevent the death of the minor,

d. whether the parent was notified after the performance of a medical emergency abortion, and

e. whether the parent was notified after the performance of an abortion to prevent the death of the minor;

10. Whether a judicial waiver was obtained after the performance of a medical emergency abortion; and

11. Whether a judicial waiver was obtained after the performance of an abortion to prevent the death of the minor.

B. The State Department of Health shall ensure that the reporting **forms** described in this section, together with a **reprint of this act**, are **posted** on its stable Internet web site, within one hundred twenty (120) days after the effective date of this act. The State Department of Health **shall notify:**

1. Each physician who subsequently becomes newly licensed to practice in this state, simultaneously with the receipt of official notification to that physician that the physician is so licensed, of the requirements of this act; and

2. By December 1 of every year, other than the calendar year in which forms are made available in accordance with subsection A of this section, all physicians licensed to practice in this state.

C. By February 28 of each year following a calendar year in any part of which this act was in effect, each physician, or agent of a physician, who obtained the consent described in Section 1-740.2 of Title 63 of the Oklahoma Statutes, and any physician who knowingly performed an abortion upon a pregnant minor or upon a female for whom a guardian or conservator had been appointed pursuant to applicable federal law or as provided by Section 1-113 of Title 30 of the Oklahoma Statutes because of incompetency during the previous calendar year shall complete and electronically submit to the State Department of Health the form described in subsection A of this section, with the requested data entered accurately and completely. Any such report shall not contain the name, address, or other information by which the minor receiving the abortion may be identified.

D. Reports that are not submitted by the end of a grace period of thirty (30) days following the due date shall be subject to a late fee of Five Hundred Dollars ($500.00) for each additional thirty-day period or portion of a thirty-day period the reports are overdue. Any physician required to report in accordance with this section who has not electronically submitted a report, or has electronically submitted only an incomplete report, more than one (1) year following the due date, may, in an action brought by the State Department of Health, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to sanctions for civil contempt.

E. By June 30 of each year, the State Department of Health shall post, on its stable Internet web site, a **public report** providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection A of this section. The report shall also include statistics giving the total number of petitions or motions filed under Section 1-740.3 of Title 63 of the Oklahoma Statutes and of that number:

1. The number in which the court appointed a guardian ad litem;

2. The number in which the court appointed counsel;

3. The number in which the judge issued an order authorizing an abortion without notification; and

4. The number in which the judge denied such an order, and of this:

a. the number of denials from which an appeal was filed,

b. the number of the appeals that resulted in the denial being affirmed, and

c. the number of appeals that resulted in reversals of the denials.

Each report shall also provide the statistics for all previous calendar years for which the public statistical report was required to be issued,

adjusted to reflect any additional information from late or corrected reports. The State Department of Health shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any individual female.

F. The State Department of Health may promulgate rules in accordance with the Administrative Procedures Act to alter the dates established by this section or consolidate the forms or reports to achieve administrative convenience, fiscal savings, or to reduce the burden of reporting requirements, as long as reporting forms are made available on its web site, to all licensed physicians in the state at least once every year and the report described in subsection E of this section is posted at least once every year.

G. If the State Department of Health fails to post the public report required by subsection E of this section, an action may be initiated pursuant to Title 12 of the Oklahoma Statutes.

H. If judgment is rendered in favor of the plaintiff in any action described in this section, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

Added by Laws 2007, SB 139, c. 161, § 8, eff. November 1, 2007.

63 § 1-740.4b. Criminal Violations - Penalties - Defenses - Civil Liability - Injunction

A. A person who knowingly or recklessly uses a false governmental record or makes a fraudulent representation or statement in order to obtain an abortion for a minor in violation of this title or intentionally causes, aids, abets or assists an unemancipated minor to obtain an abortion without the consent required by Section 1-740.2 of this title commits a felony.

B. A physician who intentionally or knowingly performs an abortion on a pregnant unemancipated minor in violation of this title commits a felony.

C. 1. It is a defense to prosecution under subsection B of this section if the person falsely representing himself or herself as the parent or guardian of the minor displayed an apparently valid governmental record of identification such that a reasonable person, under similar circumstances, would have relied on the representation.

2. The defense does not apply if the physician, or agent of the physician, failed to use due diligence in determining the age of the minor or the identity of the person represented as the parent or guardian of the minor.

D. A person who knowingly or recklessly uses a false governmental record or makes a fraudulent representation or statement in order to obtain an abortion for a minor in violation of this title or intentionally causes, aids, abets or assists an unemancipated minor to obtain an abortion without the consent required by Section 1-740.2 of this title or any physician who intentionally or knowingly performs an abortion on a pregnant unemancipated minor in violation of this title shall be civilly liable to the minor and to the person or persons required to give consent pursuant to the provisions of Section 1-740.2 of this title. A court may award damages to the person or persons adversely affected by a violation of this section including compensation for emotional injury without the need for personal presence at the act or event, and the court may further award attorney fees, litigation costs, and punitive damages. Any adult who engages in or consents to another person engaging in a sexual act with a minor, which results in the minor's pregnancy, shall not be awarded damages under this section.

E. A court of competent jurisdiction may enjoin conduct that would be in violation of this section upon petition by the Attorney General, a district attorney or any person adversely affected or who reasonably may be adversely affected by such conduct, upon a showing that such conduct:

1. Is reasonably anticipated to occur in the future; or

2. Has occurred in the past, whether with the same minor or others, and that it is reasonably expected to be repeated.

F. It is not a defense to a claim brought pursuant to this section that the minor gave informed and voluntary consent.

G. An unemancipated minor does not have the capacity to consent to any action that violates this title.

Added by Laws 2007, SB 139, c. 161, § 9, eff. November 1, 2007;
Amended by Laws 2015, SB 642, c. 387, § 1, eff. November 1, 2015.

63 § 1-740.5. Severability - Savings Clause

If any one or more provision, section, subsection, sentence, clause, phrase or word of this act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase or word be declared unconstitutional.

Added by Laws 2005, HB 1686, c. 200, § 15, emerg. eff. May 20, 2005.

63 § 1-740.6. Effect of Court Injunction, Suspension, or Delays of Implementation of Act

If any court of law enjoins, suspends, or delays the implementation of the provisions of this act, the provisions of Sections 1-730, 1-738.1, 1-738.7, 1-740.1, 1-740.2 and 1-740.3 of Title 63 of the Oklahoma Statutes, as of December 31, 2006, are effective during the injunction, suspension, or delayed implementation.

Added by Laws 2007, SB 139, c. 161, § 10, eff. November 1, 2007.

Alternatives-to-Abortion Services
63 § 1-740.11. Funding to Nongovernmental Entities That Provide Alternatives-to-Abortion Services

A. Before July 1, 2007, the State Department of Health shall establish and implement a program to facilitate funding to nongovernmental entities that provide alternatives-to-abortion services. The services must be outcome-based with positive outcome-based results.

B. During the 2006 interim, the State Department of Health shall make annual reports to the Speaker of the House of Representatives and the President Pro Tempore of the Senate regarding the status of the alternatives-to-abortion services funding, the first of which must be made by December 1, 2006.

C. The Department may contract with nongovernmental health care and special service organizations to provide services offered under the program. The services must be outcome-based with positive outcome-based results. The Department may not contract with a provider of adoption services not licensed by the state.

D. The State Department of Health shall promulgate rules necessary to implement the provisions of this act.

E. As used in this section, "alternatives-to-abortion services" means those services that promote childbirth instead of abortion by providing information, counseling, and support services that assist pregnant women or women who believe they may be pregnant to choose childbirth and to make informed decisions regarding the choice of adoption or parenting with respect to their children.

The information, counseling and services provided under this program may include, but are not limited to:

1. Medical care;

2. Nutritional services;

3. Housing assistance;

4. Adoption services;

5. Educational and employment assistance, including services that support the continuation and completion of high school;

6. Child care assistance; and

7. Parenting education and support services.

Added by Laws 2006, SB 1742, c. 185, § 21, eff. November 1, 2006.

63 § 1-740.12. Alternatives-to-Abortion Services Revolving Fund

There is hereby created in the State Treasury a revolving fund for the State Department of Health to be designated the **"Alternatives-to-Abortion Services Revolving Fund"**. The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies deposited to the credit of the fund by law. All monies accruing to the credit of the fund are hereby appropriated and may be budgeted and expended by the State Department of Health as provided in subsection A of Section 21 of this act. The fund shall not be available to any organization or affiliate of an organization which provides or promotes abortions or directly refers for abortion; provided, however, any nondirective counseling relating to the pregnancy shall not disqualify an organization from receiving these funds. Expenditures from the fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of State Finance for approval and payment.

Added by Laws 2006, SB 1742, c. 185, § 22, eff. November 1, 2006.

63 § 1-740.13. Form Used to Obtain Consent of a Minor – Validity – Parental Consent Statement

A. A **form** created by the State Department of Health shall be used by physicians to obtain the consent required prior to performing an abortion on a minor who is not emancipated.

B. A form is not valid, and therefore consent is not sufficient, unless:

1. A parent or legal guardian initials each page of the form, indicating that he or she has read and understands the information included on that page;

2. A parent or legal guardian signs the last page of the form in front of a person who is a notary public;

3. The minor initials each list of risks and hazards listed in subsection C of this section;

4. The minor signs a consent statement described in subsection C of this section; and

5. The physician signs the declaration described in subsection C of this section.

C. The form shall include, but not be limited to, the following:

1. A description of the minor's rights, including her right to informed consent;

2. A description of the parent or legal guardian's rights pursuant to Oklahoma law;

3. A detailed description of the surgical and medical procedures that are planned to be performed on the minor;

4. A detailed list of the risks and hazards related to the surgical and medical procedures planned for the minor, including but not limited to:

a. risks and hazards that may occur in connection with any surgical, medical, or diagnostic procedure, including but not limited to infection, blood clots in veins and lungs, hemorrhage, allergic reactions, and death,

b. risks and hazards that may occur with surgical abortion, including but not limited to hemorrhage, uterine perforation, sterility, injuries to the bowel and bladder, hysterectomy as a result of complication or injury during the procedure, and failure to remove all products of conception that may result in an additional procedure,

c. risks and hazards that may occur with a medical or nonsurgical abortion, including but not limited to hemorrhage, failure to remove all products of conception that may result in an additional procedure, sterility, and possible continuation of pregnancy, and

d. risks and hazards of the particular procedure planned for the minor, including but not limited to cramping of the uterus, pelvic pain, infection of the uterus, tubes, and ovaries, cervical laceration, incompetent cervix, and emergency treatment for any of the above named complications;

5. A description of additional information that must be provided by the physician to the minor pursuant to the provisions of Section 1-730 et seq. of this title;

6. A consent statement which must be signed by the minor. The consent statement must include, but not be limited to, the following requirements, which must each be individually initialed by the minor:

a. that the minor understands that the doctor is going to perform an abortion on her which will end her pregnancy and result in the death of her unborn child,

b. that the minor is not being forced to have an abortion and that she has the choice not to have the abortion and may withdraw consent prior to the abortion,

c. that the minor gives permission for the procedure,

d. that the minor understands that there are risks and hazards that could affect the minor if she has the surgical or medical procedures planned for her,

e. that the minor has been given the opportunity to ask questions about her condition, alternative forms of treatment, risks of not receiving treatment, the procedures to be used, and the risks and hazards involved,

f. that the minor has been given information required by Section 1-730 et seq. of this title, and

g. that the minor has sufficient information to give informed consent;

7. A physician declaration, which must be signed by the physician, stating that the physician or his or her assistant has explained the procedure and the contents of this form to the minor and her parent or legal guardian, as required, and has answered all questions. Further, to the best of the physician's knowledge, the patient and her parent or legal guardian have been adequately informed and have consented to the procedure;

8. A parental consent statement stating that the signing parent or legal guardian:

a. understands that the doctor signing the physician declaration is going to perform an abortion on the minor which will end her pregnancy and result in the death of her unborn child,

b. that the parent or legal guardian had the opportunity to read this form or have it read to him or her and has initialed each page,

c. that the parent or legal guardian had the opportunity to ask questions to the physician or the physician's assistant about the information in this form and the surgical and medical procedures to be performed on the minor,

d. that the parent or legal guardian believes he or she has sufficient information to give informed consent, and

e. that by the parent or legal guardian's signature, the parent or legal guardian affirms that he or she is the minor's parent or legal guardian;

9. A page for the parent or legal guardian's signature that must be notarized by a notary public; and

10. Any additional information that must be provided pursuant to applicable laws of this state.

Added by Laws 2013, HB 1361, c. 268, § 4, eff. November 1, 2013.

63 § 1-740.14. Effect of Temporary or Permanent Judicial Orders

If some or all of the provisions of Sections 1-740.2 and 1-740.3 of Title 63 of the Oklahoma Statutes, as amended by Sections 1 and 3 of this act, are ever temporarily or permanently restrained or enjoined by judicial order, these sections shall be enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

Added by Laws 2013, HB 1361, c. 268, § 5, eff. November 1, 2013.

63 § 1-740.15. Short Title

This act shall be known and may be cited as the "Choosing Childbirth Act".

Added by Laws 2017, HB 1703, c. 308, § 1, eff. November 1, 2017.

63 § 1-740.16. Definitions

As used in the Choosing Childbirth Act:

1. "Abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device to intentionally:

a. kill the unborn child of a woman known to be pregnant, or

b. terminate the pregnancy of a woman known to be pregnant, with an intention other than:

(1) after viability of the unborn child, to produce a live birth and preserve the life and health of the child born alive, or

(2) to remove a dead unborn child;

2. "Unborn child" means an individual organism of the species Homo sapiens from fertilization until birth; and

3. "Grant-supervising entity" means a private entity which approves all grants provided under the Choosing Childbirth Act and which:

a. is organized as a not-for-profit corporation in Oklahoma and as a 501(c)3 entity under the federal Internal Revenue Code, and

b. does not encourage or counsel any woman to have an abortion not necessary to prevent her death, to provide her such an abortion or to refer her for such an abortion, and does not accept funds or services knowingly from any entity which performs abortions or receives money for abortions.

Added by Laws 2017, HB 1703, c. 308, § 2, eff. November 1, 2017.

63 § 1-740.17. Grant Requirements for Reimbursement to Private Non-Profits Organizations Providing Women's Health Services

A. The State Department of Health shall make grants, from funds appropriated by the Legislature specifically for this purpose, to a grant-supervising entity for the purpose of reimbursing private organizations in Oklahoma for the reasonable expenses of programs providing the following services:

1. Providing information on, referral to, and assistance in securing the services of relevant existing programs or agencies that assist women in Oklahoma to carry their children to term, and/or providing services that assist women to carry their children to term, including, but not limited to, agencies and programs that will provide medical attention for the pregnant woman for the duration of her pregnancy, nutritional support services, housing assistance, adoption services, education and employment assistance and parenting education and support services; and

2. Providing women in Oklahoma, in person and through community outreach, information and/or services that encourage and assist them to carry their children to term.

B. To be eligible for a service grant, an organization shall:

1. Be registered with the Oklahoma Secretary of State as a not-for-profit corporation located in Oklahoma;

2. Have the grant amount approved by a grant-supervising entity;

3. Provide each pregnant woman counseled with accurate information on the developmental characteristics of unborn children, including offering the printed information described in Section 1-738.3 of Title 63 of the Oklahoma Statutes;

4. Assure that the grant's sole purposes are to assist and encourage women to carry their children to term and to maximize their potentials thereafter; and

5. Assure that none of the funds provided pursuant to the Choosing Childbirth Act, nor any other funds or services provided by the organization, are used to encourage or counsel a woman to have an abortion not necessary to prevent her death, to provide her such an abortion or to refer her for such an abortion.

Added by Laws 2017, HB 1703, c. 308, § 3, eff. November 1, 2017.

63 § 1-740.18. Grant Compliance and Monitoring

The State Department of Health shall make grants to a grant-supervising entity under the Choosing Childbirth Act from funds appropriated by the Legislature specifically for this purpose. The State Department of Health shall annually monitor and review the grant-supervising entity to assure that the grant-supervising entity carefully adheres to the purposes and requirements of the Choosing Childbirth Act, and it shall cease funding a grant-supervising entity that fails to do so if the Department proves specific findings of noncompliance, subject to judicial review.

Added by Laws 2017, HB 1703, c. 308, § 4, eff. November 1, 2017.

63 § 1-740.19. Invalidity of Act

If any provision, word, phrase or clause of the Choosing Childbirth Act or the application thereof to any person or circumstance is held invalid, such invalidity shall make the entire Act invalid and to this end, the provisions, works, phrases and clauses of the Choosing Childbirth Act are declared to be inseverable.

Added by Laws 2017, HB 1703, c. 308, § 5, eff. November 1, 2017.

63 § 1-741. Abortions - Refusal to Perform or Participate – Exemptions

A. No private hospital, hospital director or governing board of a private hospital in Oklahoma, is required to permit abortions to be performed or induced in such hospital. Refusal to permit an abortion, in accordance with a standard policy, is not grounds for civil liability nor a basis for disciplinary or other recriminatory action.

B. No person may be required to perform, induce or participate in medical procedures which result in an abortion which are in preparation for an abortion or which involve aftercare of an abortion patient, except when the aftercare involves emergency medical procedures which are necessary to protect the life of the patient, and refusal to perform or participate in such medical procedures is not grounds for civil liability nor a basis for disciplinary or other recriminatory action.

C. The rights and immunities granted by this section shall not include medical procedures in which a woman is in the process of the spontaneous, inevitable abortion of an unborn child, the death of the child is imminent, and the procedures are necessary to prevent the death of the mother.

Laws 1978, c. 158, § 1.

D. Violations

63 § 1-741.1. Prohibition Against Use of State Assistance or Resources to Encourage or Perform Abortion - Exceptions

A. It shall be unlawful for any person employed by this state or any agency or political subdivision thereof, within the scope of the person's employment, to perform or assist an abortion not necessary to save the life of the mother except when the pregnancy resulted from an act of forcible rape which was reported to the proper law enforcement authorities or when the pregnancy resulted from an act of incest committed against a minor and the perpetrator has been reported to the proper law enforcement authorities. It shall be unlawful for any public

institution, public facility, public equipment, or other physical asset owned, leased or controlled by this state or any agency or political subdivisions thereof to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother except when the pregnancy resulted from an act of forcible rape which was reported to the proper law enforcement authorities or when the pregnancy resulted from an act of incest committed against a minor and the perpetrator has been reported to the proper law enforcement authorities. This subsection shall not be construed to prohibit use by private entities of public utilities or the services of firefighters or police.

B. It shall be unlawful for any funds received or controlled by this state or any agency or political subdivision thereof, including, but not limited to, funds derived from federal, state or local taxes, gifts or grants, federal grants or payments, or intergovernmental transfers, to be used to encourage a woman to have an abortion not necessary to save her life, except to the extent required for continued participation in a federal program. Nothing in this subsection shall be construed to prohibit a physician from discussing options with a patient through nondirective counseling.

Added by Laws 2007, SB 139, c. 161, § 11, eff. November 1, 2007.

63 § 1-741.3. Health Plans – Coverage for Abortion – Elective Abortion Coverage - Employers

A. Pursuant to the Patient Protection and Affordable Care Act, P.L. 111-148, all qualified health plans offered through an Exchange established in the state are prohibited from including elective abortion coverage. Nothing in this section shall be construed as preventing anyone from purchasing optional supplemental coverage for elective abortions for which there must be paid a separate premium in accordance with subsection D of this section in the health insurance market outside of the Exchange.

B. No health plan, including health insurance contracts, plans or policies, offered outside of an Exchange, but within the state, shall provide coverage for elective abortions except by optional separate supplemental coverage for abortion for which there must be paid a separate premium in accordance with subsection D of this section.

C. For purposes of this section, "elective abortion" means an abortion for any reason other than to prevent the death of the mother upon whom the abortion is performed; provided, however, that an abortion may not be deemed one to prevent the death of the mother based on a claim or diagnosis that she will engage in conduct which will result in her death.

D. The issuer of any health plan providing elective abortion coverage shall:

1. Calculate the premium for such coverage so that it fully covers the estimated cost of covering elective abortions per enrollee as determined on an average actuarial basis. In calculating such premium, the issuer of the plan shall not take into account any cost reduction in any health plan covering an enrollee estimated to result from the provision of abortion coverage, including prenatal care, delivery or postnatal care;

2. If the enrollee is enrolling in a health plan providing any other coverage at the same time as the enrollee is enrolling in a plan providing elective abortion coverage, require a separate signature, distinct from that to enroll in the health plan providing other coverage, in order to enroll in the separate supplemental plan providing elective abortion coverage; and

3. Provide a notice to enrollees at the time of enrollment that:

a. specifically states the cost of the separate premium for coverage of elective abortions distinct and apart from the cost of the premium for any health plan providing any other coverage in any health plan covering an enrollee,

b. states that enrollment in elective abortion coverage is optional, and

c. if the enrollee is enrolling in a health plan providing any other coverage at the same time as the enrollee is enrolling in a plan providing elective abortion coverage, states that the enrollee may choose to enroll in the plan providing other coverage without enrolling in the plan providing elective abortion coverage.

E. The issuer of any health plan providing any coverage other than elective abortion shall not discount or reduce the premium for such coverage on the basis that an enrollee has elective abortion coverage.

F. Any employer who offers employees a health plan providing elective abortion coverage shall, at the time of beginning employment and at least once in each calendar year thereafter, provide each employee the option to choose or reject the separate supplemental elective abortion coverage.

G. Any entity offering a group health plan providing separate supplemental elective abortion coverage, other than employers offering such a plan to their employees, shall, at the time each group member begins coverage and at least once in each calendar year thereafter, provide each group member the option to choose or reject the separate supplemental elective abortion coverage.

H. Nothing in this section shall be construed to apply in circumstances in which federal law preempts state health insurance regulation.

Added by Laws 2011, SB 547, c. 92, § 1, eff. November 1, 2011.

63 § 1-741.12. Wrongful Life Action - Wrongful Birth Action - Limitation on Damages

A. It is the intent of the Legislature that the birth of a child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages because of the birth of a child or for the rearing of that child.

B. For the purposes of this section:

1. "Abortion" means the term as is defined in Section 1-730 of Title 63 of the Oklahoma Statutes;

2. "Wrongful life action" means a cause of action that is brought by or on behalf of a child, which seeks economic or noneconomic damages for the child because of a condition of the child that existed at the time of the child's birth, and which is based on a claim that a person's act or omission contributed to the mother's not having obtained an abortion; and

3. "Wrongful birth action" means a cause of action that is brought by a parent or other person who is legally required to provide for the support of a child, which seeks economic or noneconomic damages because of a condition of the child that existed at the time of the child's birth, and which is based on a claim that a person's act or omission contributed to the mother's not having obtained an abortion.

C. In a wrongful life action or a wrongful birth action, no damages may be recovered for any condition that existed at the time of a child's birth if the claim is that the defendant's act or omission contributed to the mother's not having obtained an abortion.

D. This section shall not preclude causes of action based on claims that, but for a wrongful act or omission, maternal death or injury would not have occurred, or handicap, disease, or disability of an individual prior to birth would have been prevented, cured, or ameliorated in a manner that preserved the health and life of the affected individual.

Added by Laws Laws 2010, HB 2656, c. 171, § 1.

Parental Notification for Abortion Act
63 § 1-744 Short Title

This act shall be known and may be cited as the "Parental Notification for Abortion Act".

Added by Laws 2013, HB 1588, c. 320, § 1, eff. November 1, 2013.

63 § 1-744.1. Definitions

As used in the Parental Notification for Abortion Act:

1. "Parent" means one parent of the pregnant minor, or the guardian or conservator if the pregnant female has one;

2. "Abortion" means the use of any means intentionally to terminate the pregnancy of a female known to be pregnant with knowledge that the termination with those means will, with reasonable likelihood, cause the death of the fetus;

3. "Fetus" means any individual human organism from fertilization to birth;

4. "Medical emergency" means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician would determine necessitates the immediate abortion of the female's pregnancy to avert her death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy;

5. "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved; and

6. "Physician" means any person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state.

Added by Laws 2013, HB 1588, c. 320, § 5, eff. November 1, 2013.

63 § 1-744.2. Written Notice Required for Unemancipated Minors Found to be Incompetent

No abortion shall be performed or induced upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed pursuant to the Oklahoma Guardianship and Conservatorship Act because of a finding of incompetency, until at least forty-eight (48) hours after written notice of the pending abortion has been delivered in the manner specified in Sections 7 through 9 of this act to one of the parents of the minor upon whom the abortion is contemplated or to the guardian or conservator of the female upon whom the abortion is contemplated.

1. The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

2. In lieu of the delivery required by paragraph 1 of this section, notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee, which means a postal employee can deliver the mail only to the authorized addressee. Time of delivery shall be deemed to occur at noon on the third day on which regular mail delivery takes place, subsequent to mailing. The information concerning the address of the parent shall be that which a reasonable and prudent person, under similar circumstances, would have relied upon as sufficient evidence that the parent resides at that address.

Added by Laws 2013, HB 1588, c. 320, § 6, eff. November 1, 2013.

63 § 1-744.3. Exception from Advance Notice Requirement in Cases of Medical Emergency

Immediate notice shall not be required if the attending physician certifies in the pregnant female's record that, in reasonable medical judgment, a medical emergency exists and there is insufficient time to provide the prior notification required by Section 6 of this act. The attending physician or the physician's agent shall verbally inform the parent within twenty-four (24) hours after the performance of a medical emergency abortion, that a medical emergency abortion was performed on the unemancipated minor or on the female for whom a guardian or conservator has been appointed and shall also send a written notice within twenty-four (24) hours after the performance of a medical emergency abortion to the last-known address of the parent, of the performed medical emergency abortion. The written notice shall follow the requirements in paragraph 2 of Section 6 of this act.

Added by Laws 2013, HB 1588, c. 320, § 7, eff. November 1, 2013.

63 § 1-744.4. Exceptions from Notice Requirement - Prior Notice - Victims of Sexual or Physical Abuse

No notice shall be required under this act if:

1. The person who is entitled to notice states in notarized writing that he or she has been notified and the statement is placed in the female's medical record; or

2. The pregnant female declares that she is a victim of sexual or physical abuse by her parent as defined in Section 1111 et seq. of Title 21 of the Oklahoma Statutes and the attending physician has notified child abuse authorities about the alleged parental sexual or physical abuse. In such circumstances, the physician shall notify child abuse authorities of the name and address of the abusing parent so that they can investigate. The child abuse authorities shall maintain the confidentiality of the fact that the minor has sought or obtained an abortion and shall take all necessary steps to ensure that this information is not revealed to the female's parents or guardians.

Added by Laws 2013, HB 1588, c. 320, § 8, eff. November 1, 2013.

63 § 1-744.5. Violations – Misdemeanor – Civil Actions

Performance of an abortion in knowing or reckless violation of this act shall be a misdemeanor. Performance of an abortion in violation of this act shall be grounds for a civil action pursuant to Sections 1-738.3f through 1-738.3k of Title 63 of the Oklahoma Statutes.

Added by Laws 2013, HB 1588, c. 320, § 9, eff. November 1, 2013.

63 § 1-744.6. Effect of Restraining Order or Injunction

If some or all of the provisions of Sections 1-740.2, 1-740.3 and 1-740.4 of Title 63 of the Oklahoma Statutes, as amended by Sections 2, 3 and 4 of this act, are ever temporarily or permanently restrained or enjoined by judicial order, these sections shall be enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

Added by Laws 2013, HB 1588, c. 320, § 10, eff. November 1, 2013.

PAIN-CAPABLE UNBORN CHILD PROTECTION ACT

63 § 1-745.1. Short Title

This act shall be known and may be cited as the "Pain-Capable Unborn Child Protection Act".

Added by Laws 2011, HB 1888, c. 89, § 1, eff. November 1, 2011.

63 § 1-745.2. Definitions

As used in the Pain-Capable Unborn Child Protection Act only:

1. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase

the probability of a live birth, to preserve the life or health of the child *after live birth, or to remove a dead unborn child who died as the result of* natural causes in utero, accidental trauma, or a criminal assault on the pregnant woman or her unborn child, and which causes the premature termination of the pregnancy;

2. "Attempt to perform or induce an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in this state in violation of the Pain-Capable Unborn Child Protection Act;

3. "Postfertilization age" means the age of the unborn child as calculated from the fertilization of the human ovum;

4. "Fertilization" means the fusion of a human spermatozoon with a human ovum;

5. "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that it necessitates the immediate abortion of her pregnancy without first determining postfertilization age to avert her death or for which the delay necessary to determine postfertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function;

6. "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved;

7. "Physician" means any person licensed to practice medicine and surgery or osteopathic medicine and surgery in this state;

8. "Probable postfertilization age of the unborn child" means what, in reasonable medical judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced;

9. "Unborn child" or "fetus" each means an individual organism of the species homo sapiens from fertilization until live birth; and

10. "Woman" means a female human being whether or not she has reached the age of majority.

Added by Laws 2011, HB 1888, c. 89, § 2, eff. November 1, 2011.

63 § 1-745.3. Legislative Findings

The Legislature of the State of Oklahoma finds that:

1. Pain receptors (nociceptors) are present throughout the unborn child's entire body by no later than sixteen (16) weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than twenty (20) weeks;

2. By eight (8) weeks after fertilization, the unborn child reacts to touch. After twenty (20) weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example by recoiling;

3. In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response;

4. Subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life;

5. For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia;

6. The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty (20) weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain;

7. Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain;

8. In adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does;

9. Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing;

10. The position, asserted by some, that the unborn child remains in a coma-like sleep state that precludes the unborn child from experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who have found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery;

11. Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty (20) weeks after fertilization;

12. It is the purpose of the State of Oklahoma to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain; and

13. Oklahoma's compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of Oklahoma's compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other.

Added by Laws 2011, HB 1888, c. 89, § 3, eff. November 1, 2011.

63 § 1-745.4. Probable Postfertilization Age of Unborn Child - Unprofessional Conduct

A. Except in the case of a medical emergency, no abortion shall be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician. In making such a determination, the physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to postfertilization age.

B. Knowing or reckless failure by any physician to conform to any requirement of this section constitutes "unprofessional conduct".

Added by Laws 2011, HB 1888, c. 89, § 4, eff. November 1, 2011.

63 § 1-745.5. Prohibited Abortions - Physician Judgment

A. No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies,

that the probable postfertilization age of the woman's unborn child is twenty (20) or more weeks, unless, in reasonable medical judgment, she has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such condition shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

B. When an abortion upon a woman whose unborn child has been determined to have a probable postfertilization age of twenty (20) or more weeks is not prohibited by this section, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods. No such greater risk shall be deemed to exist if it is based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

Added by Laws 2011, HB 1888, c. 89, § 5, eff. November 1, 2011.

63 § 1-745.6. Physician Reporting Requirements - Department of Health Report - Fines

A. Any physician who performs or induces or attempts to perform or induce an abortion shall report to the State Department of Health, on a schedule and in accordance with **forms and rules and regulations adopted and promulgated by the State Board of Health that include**:

1. If a determination of probable postfertilization age was made, the probable postfertilization age determined and the method and basis of the determination;

2. If a determination of probable postfertilization age was not made, the basis of the determination that a medical emergency existed;

3. If the probable postfertilization age was determined to be twenty (20) or more weeks, the basis of the determination that the pregnant woman had a condition which so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions; and

4. The method used for the abortion and, in the case of an abortion performed when the probable postfertilization age was determined to be twenty (20) or more weeks:

a. whether the method used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive, or

b. if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods.

B. By June 30 of each year, the State Department of Health shall issue a **public report** providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection A of this section. Each such report shall also provide the statistics for all previous calendar years during which this section was in effect, adjusted to reflect any additional information from late or corrected reports. The State Department of Health shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an abortion was performed or attempted.

C. Any physician who fails to submit a report by the end of thirty (30) days following the due date shall be subject to a late fee of Five Hundred Dollars ($500.00) for each additional thirty-day period or portion of a thirty-day period the report is overdue. Any physician required to report in accordance with this act who has not submitted a report, or had submitted only an incomplete report, more than one (1) year following the due date, may, in an action brought by the State Department of Health or by the State Board of Medical Licensure and Supervision, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to civil contempt. Knowing or reckless failure by any physician to conform to any requirement of this section, other than late filing of a report, constitutes "unprofessional conduct" pursuant to Section 509 of Title 59 of the Oklahoma Statutes. Knowing or reckless failure by any physician to submit a complete report in accordance with a court order constitutes "unprofessional conduct" pursuant to Section 509 of Title 59 of the Oklahoma Statutes. Knowing or reckless falsification of any report required under this section is a misdemeanor.

D. By February 1, 2012, the **State Board of Health shall adopt and promulgate rules and regulations** to assist in compliance with this section. Subsection A of this section shall take effect so as to require reports regarding all abortions performed or induced on and after the first day of the first calendar month following the effective date of such rules.

Added by Laws 2011, HB 1888, c. 89, § 6, eff. November 1, 2011.

63 § 1-745.7. Violation of Act

Any person who knowingly or recklessly performs or induces or attempts to perform or induce an abortion in violation of the Pain-Capable Unborn Child Protection Act shall be guilty of a felony. No penalty may be assessed against the woman upon whom the abortion is performed or induced or attempted to be performed or induced.

Added by Laws 2011, HB 1888, c. 89, § 7, eff. November 1, 2011.

63 § 1-745.8. Liability - Cause of Action - Judgment and Attorney Fees - Damages

A. Any woman upon whom an abortion has been performed in violation of the Pain-Capable Unborn Child Protection Act, or the father of the unborn child who was the subject of such an abortion, may maintain an action against the person who performed or induced the abortion in knowing or reckless violation of the Pain-Capable Unborn Child Protection Act for actual and punitive damages. Any woman upon whom an abortion has been attempted in violation of the Pain-Capable Unborn Child Protection Act may maintain an action against the person who attempted to perform or induce the abortion in knowing or reckless violation of the Pain-Capable Unborn Child Protection Act for actual and punitive damages.

B. A cause of action for injunctive relief against any person who has knowingly or recklessly violated the Pain-Capable Unborn Child Protection Act may be maintained by the woman upon whom an abortion was performed or induced or attempted to be performed or induced in violation of the Pain-Capable Unborn Child Protection Act; by any person who is the spouse, parent, sibling or guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or induced or attempted to be performed or induced in violation of the Pain-Capable Unborn Child Protection Act; by a district attorney with appropriate jurisdiction; or by the Attorney General. The injunction shall prevent the abortion provider from performing or inducing or attempting to perform or induce further abortions in violation of the Pain-Capable Unborn Child Protection Act in the State of Oklahoma.

C. If judgment is rendered in favor of the plaintiff in an action described in this section, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant.

D. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

E. No damages or attorney fee may be assessed against the woman upon whom an abortion was performed or attempted to be performed except in accordance with subsection D of this section.

Added by Laws 2011, HB 1888, c. 89, § 7, eff. November 1, 2011.

63 § 1-745.9. Civil and Criminal Proceedings Brought Under Act

In every civil or criminal proceeding or action brought under the Pain-Capable Unborn Child Protection Act, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or induced or attempted to be performed or induced shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or induced or attempted to be performed or induced, anyone, other than a public official, who brings an action under subsections A or B of Section 8 of this act shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

Added by Laws 2011, HB 1888, c. 89, § 8, eff. November 1, 2011.

63 § 1-745.10. Constitutionality and Severability

A. If any one or more provisions, sections, subsections, sentences, clauses, phrases or words of the Pain-Capable Unborn Child Protection Act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of the Pain-Capable Unborn Child Protection Act shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed the Pain-Capable Unborn Child Protection Act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of the Pain-Capable Unborn Child Protection Act, or the application of the Pain-Capable Unborn Child Protection Act, would be declared unconstitutional.

B. The Pain-Capable Unborn Child Protection Act shall not be construed to repeal, by implication or otherwise, Section 1-732 of Title 63 of the Oklahoma Statutes, or any otherwise applicable provision of Oklahoma's laws regulating or restricting abortion. An abortion that complies with this act but violates the provisions of Section 1-732 of Title 63 of the Oklahoma Statutes, or any otherwise applicable provision of Oklahoma's laws shall be deemed unlawful as provided in such provision. An abortion that complies with the provisions of Section 1-732 of Title 63 of the Oklahoma Statutes, or any otherwise applicable provision of Oklahoma's laws regulating or restricting abortion but violates this act shall be deemed unlawful as provided in this act.

Added by Laws 2011, HB 1888, c. 89, § 10, eff. November 1, 2011

63 § 1-745.11. No Right to Abortion by Act

Nothing in the Pain-Capable Unborn Child Protection Act shall be construed as creating or recognizing a right to abortion.

Added by Laws 2011, HB 1888, c. 89, § 11, eff. November 1, 2011.

Heartbeat Informed Consent Act

63 § 1-745.12. Short Title

This act shall be known and may be cited as the "Heartbeat Informed Consent Act".

Added by Laws 2012, SB 1274, c. 159, § 1, eff. November 1, 2012

63 § 1-745.13. Definitions

As used in the Heartbeat Informed Consent Act:

1. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device to cause the premature termination of the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead unborn child who died as the result of natural causes in utero, accidental trauma, or a criminal assault on the pregnant woman or her unborn child;

2. "Abortion provider" means any person legally qualified to perform an abortion under state law;

3. "Embryonic or fetal heartbeat" means embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the embryonic or fetal heart;

4. "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that it necessitates the immediate abortion of her pregnancy to avert her death or for which the delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function;

5. "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician;

6. "Unborn child" means a member of the species Homo sapiens from fertilization until live birth; and

7. "Woman" means a female human being, whether or not she has reached the age of majority.

Added by Laws 2012, SB 1274, c. 159, § 3, eff. November 1, 2012.

63 § 1-745.14. Duties of Abortion Providers

A. Any abortion provider who knowingly performs or induces any abortion shall comply with the requirements of the Heartbeat Informed Consent Act.

B. Prior to a woman giving informed consent to having any part of an abortion performed or induced, if the pregnancy is at least eight (8) weeks after fertilization, the abortion provider who is to perform or induce the abortion or an agent of the abortion provider shall tell the woman that it may be possible to make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear and ask the woman if she would like to hear the heartbeat. If the woman would like to hear the heartbeat, the abortion provider shall, using a Doppler fetal heart rate monitor, make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear. An abortion provider or an agent of the abortion provider shall not be in violation of the requirements of this subsection if:

1. The provider or agent has attempted, consistent with standard medical practice, to make the embryonic or fetal heartbeat of the unborn child audible for the pregnant woman to hear using a Doppler fetal heart rate monitor;

2. That attempt does not result in the heartbeat being made audible; and

3. The provider has offered to attempt to make the heartbeat audible at a subsequent date.

C. Nothing in this section shall be construed to prevent the pregnant woman from not listening to the sounds detected by the Doppler fetal

heart rate monitor pursuant to the requirements of subsection B of this section.

Added by Laws 2012, SB 1274, c. 159, § 4, eff. November 1, 2012.

63 § 1-745.15. Exceptions - Averting Mother's Death - Medical Emergencies

A. The provisions of Section 4 of this act shall not apply to an abortion provider in the case that the abortion is necessary to avert the mother's death or in the case of a medical emergency.

B. Upon a determination by an abortion provider under subsection A of this section that an abortion is necessary to avert the death of the mother or that there is a medical emergency, such provider shall certify the specific medical conditions that support such determination and include such certification in the medical file of the pregnant woman.

C. An abortion provider who knowingly or recklessly falsifies a certification made pursuant to subsection B of this section shall be deemed to have knowingly or recklessly failed to comply with this act for purposes of Section 6 of this act.

Added by Laws 2012, SB 1274, c. 159, § 5, eff. November 1, 2012.

63 § 1-745.16. Intentional or Reckless Violations of Act – Misdemeanor – Civil Action – Remedies

A. Any person who intentionally or recklessly performs or induces an abortion in violation of the Heartbeat Informed Consent Act shall be guilty of a misdemeanor. No penalty shall be assessed against the woman upon whom the abortion is performed or induced or attempted to be performed or induced.

B. Any woman upon whom an abortion has been performed or induced in violation of this act, or the father of the unborn child who was the subject of such an abortion, may maintain an action against the person who performed or induced the abortion in intentional or reckless violation of this act for actual and punitive damages. Any woman upon whom an abortion has been attempted in violation of this act may maintain an action against the person who attempted to perform or induce the abortion in an intentional or reckless violation of this act for actual and punitive damages.

C. A cause of action for injunctive relief against any person who has intentionally or recklessly violated this act may be maintained by the woman upon whom an abortion was performed or induced in violation of this act; by any person who is the spouse, parent, sibling, or guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or induced in violation of this act; by a district attorney with appropriate jurisdiction; or by the Attorney General. The injunction shall prevent the abortion provider from performing or inducing further abortions in violation of this act in the state.

D. If judgment is rendered in favor of the plaintiff in an action described in this section, the court shall also render judgment for a reasonable attorney fee in favor of the plaintiff against the defendant.

E. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous and brought in bad faith, the court shall also render judgment for a reasonable attorney fee in favor of the defendant against the plaintiff.

F. No damages or attorney fee may be assessed against the woman upon whom an abortion was performed or attempted to be performed or induced except in accordance with subsection E of this section.

Added by Laws 2012, SB 1274, c. 159, § 6, eff. November 1, 2012.

63 § 1-745.17. Anonymity of Woman

In every civil or criminal proceeding or action brought under the Heartbeat Informed Consent Act, the court shall rule whether the identity of any woman upon whom an abortion has been performed or induced or attempted to be performed or induced shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her identity should be preserved from public disclosure, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Such an order shall be accompanied by specific written findings explaining why the identity of the woman should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable, less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or induced or attempted to be performed or induced, anyone, other than a public official, who brings an action under Section 6 of this act shall do so under a pseudonym. This section shall not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

Added by Laws 2012, SB 1274, c. 159, § 7, eff. November 1, 2012.

63 § 1-745.18. Act Does Not Create or Recognize Right to Abortion

Nothing in the Heartbeat Informed Consent Act shall be construed as creating or recognizing a right to abortion.

Added by Laws 2012, SB 1274, c. 159, § 8, eff. November 1, 2012.

63 § 1-745.19. Severability

If any one or more provision, section, subsection, sentence, clause, phrase, or word of this act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective notwithstanding such unconstitutionality. The Oklahoma Legislature hereby declares that it would have passed this act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

Added by Laws 2012, SB 1274, c. 159, § 9, eff. November 1, 2012.

Abortions (cont.)
63 § 1-746.1. Definitions

As used in this act, the term:

1. "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device intentionally to terminate the pregnancy of a female known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to remove an ectopic pregnancy or to remove a dead unborn child who died as a result of a spontaneous abortion, accidental trauma or a criminal assault on the pregnant female or her unborn child;

2. "Attempt to perform or induce an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in Oklahoma in violation of this act;

3. "Fetal anomaly incompatible with life" means a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth. Fetal anomaly incompatible with life does not include conditions which can be treated;

4. "Medical emergency" means any condition which, on the basis of the physician's good-faith clinical judgment, so complicates the medical condition of a pregnant female 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;

5. "Perinatal hospice" means comprehensive support that includes support from the time of diagnosis through the time of birth and death of the infant and through the postpartum period. Supportive care may include maternal-fetal medical specialists, obstetricians, neonatologists, anesthesia specialists, psychiatrists, psychologists, or other mental health professionals, clergy, social workers, and specialty nurses; and

6. "Physician" means a person licensed to practice medicine in this state pursuant to Sections 495 and 633 of Title 59 of the Oklahoma Statutes.

Added by Laws 2014, HB 2685, c. 175, § 1, eff. November 1, 2014.

63 § 1-746.2. Informed and Voluntary Consent - Duty to Provide Information to Female Seeking Abortion - Certification of Receipt

No abortion shall be performed or induced or attempted to be performed or induced without the voluntary and informed consent of the female upon whom the abortion is to be performed or induced or attempted to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if, at least seventy-two (72) hours before the abortion:

1. In the case of a female seeking an abortion of her unborn child diagnosed with a fetal anomaly incompatible with life, the female is informed, by telephone or in person, by the physician who is to perform the abortion or the physician's agent:

a. that perinatal hospice services are available,

b. this service is an alternative to abortion,

c. that she has the right to review the printed materials described in this section,

d. that these materials are available on a state-sponsored website, and

e. what the website address is where she can access this information.

The information required by this paragraph may be provided by a tape recording if provision is made to record or otherwise register specifically whether the female does or does not choose to have the printed materials given or mailed to her;

2. The physician or the physician's agent shall orally inform the female that the materials have been provided by the State of Oklahoma and that they list the places which offer perinatal hospice services both in her state and nationally. If the female chooses to view the materials other than on the website, they shall either be given to her at least seventy-two (72) hours before the abortion, or received by her at least seventy-two (72) hours before the abortion by certified mail, restricted delivery to addressee, which means the postal employee can only deliver the mail to the addressee;

3. The female certifies in writing, prior to the abortion, that the information described in paragraphs 1 and 2 of this section has been furnished her, and that she has been informed of her opportunity to review the information referred to in paragraph 2 of this section; and

4. Prior to the performance of the abortion, the physician who is to perform the abortion or the physician's agent receives a copy of the written certification prescribed by paragraph 3 of this section. This certification shall be maintained in the female patient's file for not less than five (5) years.

Added by Laws 2014, HB 2685, c. 175, § 2, eff. November 1, 2014;
Amended by Laws 2015, HB 1409, c. 255, § 7, eff. November 1, 2015

63 § 1-746.3. Online Publication of Information and Materials

A. Within ninety (90) days after this act is enacted, the State Board of Medical Licensure and Supervision shall cause to be published, in English and in each language which is the primary language of two percent (2%) or more of the state's population, and shall cause to be available on the state website provided for in Section 4 of this act, the following printed materials in such a way as to ensure that the information is easily comprehensible: geographically indexed materials designed to inform the female who has been told her unborn child has a fetal anomaly incompatible with life of public and private agencies and services available to her which offer perinatal hospice and palliative care if she chooses to continue her pregnancy. The material shall include a comprehensive list of the agencies available, a description of the services they offer, and a description of the manner, including telephone numbers, in which they might be contacted or, at the option of the Board, printed materials including a toll-free, twenty-four-hour-a-day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer.

B. The materials referred to in subsection A of this section shall be printed in a typeface large enough to be clearly legible. The website provided for in Section 4 of this act shall be maintained at a minimum resolution of 70 DPI (dots per inch). All letters on the website shall be a minimum of 11-point font. All information shall be accessible with an industry standard browser, requiring no additional plug-ins.

C. The materials required under this section shall be available at no cost from the Board upon request and in appropriate number to any person, facility or hospital.

Added by Laws 2014, HB 2685, c. 175, § 3, eff. November 1, 2014.

63 § 1-746.4. Public Website

A. The State Board of Medical Licensure and Supervision shall develop and maintain a stable Internet website to provide the information described under Section 2 of this act. No information regarding who uses the website shall be collected or maintained. The State Board of Medical Licensure and Supervision shall monitor the website on a daily basis to prevent and correct tampering and shall immediately notify abortion providers of any change in the location of the material on its website.

B. The website:

1. Must use enhanced, user-friendly search capabilities to ensure that the information described in Section 2 of this act is easily accessible and must be searchable by keywords and phrases, specifically to ensure that entering the terms "abortion" and "fetal anomaly" yield the materials described in Section 2 of this act, regardless of how the materials are labeled;

2. Must ensure that the materials described in Section 2 of this act are printable;

3. Must give clear prominent instructions on how to receive the information in printed form; and

4. Must be accessible to the public without requiring registration or use of a user name, a password or another user identification.

Added by Laws 2014, HB 2685, c. 175, § 4, eff. November 1, 2014.

63 § 1-746.5. Notification by Physician of Medical Emergency that Compels Performance of Abortion

When a medical emergency compels the performance of an abortion, the physician shall inform the female, prior to the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death or that a twenty-four-hour delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Added by Laws 2014, HB 2685, c. 175, § 5, eff. November 1, 2014.

63 § 1-746.6. Reporting by Physicians - Forms

A. Within ninety (90) days after this act is enacted, the State Board of Medical Licensure and Supervision shall prepare a reporting form for physicians containing a reprint of this act and listing:

1. The number of females to whom the physician or an agent of the physician provided the information described in paragraph 1 of Section 2 of this act; of that number, the number provided by telephone and the number provided in person; of each of those numbers, the number provided in the capacity of a referring physician and the number provided in the capacity of a physician who is to perform the abortion; and of each of those numbers, the number provided by the physician and the number provided by an agent of the physician;

2. The number of females who availed themselves of the opportunity to obtain a copy of the printed information described in Section 3 of this act other than on the website, and the number who did not; and of each of those numbers, the number who, to the best of the reporting physician's information and belief, went on to obtain the abortion; and

3. The number of abortions performed by the physician in which information otherwise required to be provided at least seventy-two (72) hours before the abortion was not so provided because an immediate abortion was necessary to avert the female's death, and the number of abortions in which such information was not so provided because a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

B. The Board shall ensure that copies of the reporting forms described in subsection A of this section are provided:

1. Within one hundred twenty (120) days after this act is enacted, to all physicians licensed to practice in this state;

2. To each physician who subsequently becomes newly licensed to practice in this state, at the same time as official notification to that physician that the physician is so licensed; and

3. By December 1 of each year, other than the calendar year in which forms are distributed in accordance with paragraph 1 of this subsection, to all physicians licensed to practice in this state.

C. By February 28 of each year following a calendar year in any part of which this act was in effect, each physician who provided, or whose agent provided, information to one or more females in accordance with Section 2 of this act during the previous calendar year shall submit to the Board a copy of the form described in subsection A of this section, with the requested data entered accurately and completely.

D. Reports that are not submitted by the end of a grace period of thirty (30) days following the due date shall be subject to a late fee of Five Hundred Dollars ($500.00) for each additional thirty-day period or portion of a thirty-day period they are overdue. Any physician required to report in accordance with this section who has not submitted a report, or has submitted only an incomplete report, more than one (1) year following the due date, may, in an action brought by the Board, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to sanctions for civil contempt.

E. By June 30 of each year the State Board of Medical Licensure and Supervision shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection A of this section. Each such report shall also provide the statistics for all previous calendar years, adjusted to reflect any additional information from late or corrected reports. The Board shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any individual provided information in accordance with paragraph 1 of Section 2 of this act.

F. The Board may by rule alter the dates established by paragraph 3 of subsection B or subsection C or E of this section or consolidate the forms or reports described in this section with other forms or reports to achieve administrative convenience or fiscal savings or to reduce the burden of reporting requirements, so long as reporting forms are sent to all licensed physicians in the state at least once every year and the report described in subsection E of this section is issued at least once every year.

Added by Laws 2014, HB 2685, c. 175, § 6, eff. November 1, 2014;
Amended by Laws 2015, HB 1409, c. 255, § 8, eff. November 1, 2015.

63 § 1-746.7. Penalties for Violations of Act

Any person who knowingly or recklessly performs or attempts to perform an abortion in violation of this act shall be guilty of a felony. No penalty may be assessed against the female upon whom the abortion is performed or attempted to be performed.

No penalty or civil liability may be assessed for failure to comply with paragraph 1 or 2 of Section 2 of this act or that portion of paragraph 3 of Section 2 of this act requiring a written certification that the female has been informed of her opportunity to review the information referred to in paragraph 1 of Section 2 of this act unless the Board has made the printed materials available at the time the physician or the physician's agent is required to inform the female of her right to review them.

Added by Laws 2014, HB 2685, c. 175, § 7, eff. November 1, 2014.

63 § 1-746.8. Civil Action by Female, Father, or Grandparent Following Unlawful Abortion

Any person upon whom an abortion has been performed or induced without this act being complied with, the father of the unborn child who was the subject of such an abortion, or the grandparent of such an unborn child may maintain an action pursuant to Sections 1-738.3f through 1-738.3k of Title 63 of the Oklahoma Statutes against any person or entity which performed or induced or attempted to perform or induce the abortion in violation of this act, or against any person or entity which made a referral as defined in Sections 1-738.3f through 1-738.3k of Title 63 of the Oklahoma Statutes regarding this particular abortion. The procedure and remedy in a civil action brought pursuant to this section shall be the same as the procedure and remedy in other suits brought pursuant to Sections 1-738.3f through 1-738.3k of Title 63 of the Oklahoma Statutes.

Added by Laws 2014, HB 2685, c. 175, § 8, eff. November 1, 2014.

63 § 1-746.9. Criminal and Civil Actions - Court to Rule on Anonymity of Female Upon Whom Abortion Performed

In every civil or criminal proceeding or action brought under this act, the court shall rule whether the anonymity of any female upon whom an abortion has been performed or attempted shall be preserved from public disclosure if she does not give her consent to such disclosure. The court, upon motion or sua sponte, shall make such a ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to

the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the female should be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less-restrictive alternative exists. In the absence of written consent of the female upon whom an abortion has been performed or attempted, anyone, other than a public official, who brings an action under Section 8 of this act shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

Added by Laws 2014, HB 2685, c. 175, § 9, eff. November 1, 2014.

63 § 1-746.10. Severability

If any one or more provision, section, subsection, sentence, clause, phrase or word of this act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this act shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed this act, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase or word be declared unconstitutional.

Added by Laws 2014, HB 2685, c. 175, § 10, eff. November 1, 2014.

Prioritization of Public Funding in the Purchasing of Family Planning and Counseling Services Act

63 § 1-747.1. Short Title

This act shall be known as the "Prioritization of Public Funding in the Purchasing of Family Planning and Counseling Services Act".

Added by Laws 2013, SB 900, c. 385, § 1, eff. November 1, 2013.

63 § 1-747.2. Definitions

As used in the Prioritization of Public Funding in the Purchasing of Family Planning and Counseling Services Act:

1. "Public funds" means state funds from whatever source, including without limitation state general revenue funds, state special account and limited purpose grants and/or loans, and federal funds provided under Title V (42 U.S.C., Section 701 et seq.), Title X (42 U.S.C., Section 300 et seq.), Title XIX (42 U.S.C., Section 1396 et seq.), Title XX (42 U.S.C., Section 1397 et seq.) and Title X (42 U.S.C., Section 1786 et seq.);

2. "Federally qualified health center" means a health care provider that is eligible for federal funding under 42 U.S.C., Section 1396d(1)(2)(B);

3. "Rural health clinic" means a health care provider that is eligible for federal funding under 42 U.S.C., Section 1395x(aa)(2);

4. "Hospital" means a primary or tertiary care facility licensed as a hospital under the laws of this state; and

5. "Department" means the Oklahoma Health Care Authority or the State Department of Health.

Added by Laws 2013, SB 900, c. 385, § 2, eff. November 1, 2013.

63 § 1-747.3. Priority of Funding

Subject to any applicable requirements of federal statutes, rules, regulations or guidelines, any expenditures or grants of public funds for family planning or counseling services by the State of Oklahoma, by and through the Department shall be made in the following order of priority:

1. To public entities;

2. To nonpublic hospitals, federally qualified health centers, and rural health clinics; and

3. To nonpublic health providers that have as their primary purpose the provision of the primary health care services enumerated in 42 U.S.C., Section 254b(a)(1).

Added by Laws 2013, SB 900, c. 385, § 3, eff. November 1, 2013.

63 § 1-747.4. Cause of Action for Intentional Violations

A cause of action in law or equity for recoupment, declaratory or injunctive relief against any person who has intentionally violated the Prioritization of Public Funding in the Purchasing of Family Planning and Counseling Services Act may be maintained by a district attorney with appropriate jurisdiction, or by the Attorney General.

Added by Laws 2013, SB 900, c. 385, § 4, eff. November 1, 2013.

63 § 1-747.5. Severability

If any one or more provisions, sections, subsections, sentences, clauses, phrases or words of this act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of the Prioritization of Public Funding in the Purchasing of Family Planning and Counseling Services Act shall remain effective notwithstanding such unconstitutionality. The Legislature hereby declares that it would have passed this act, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases or words of the act, or the application of the act, would be declared unconstitutional.

Added by Laws 2013, SB 900, c. 385, § 5, eff. November 1, 2013.

Abortion Procedure Standards

63 § 1-748. Establishment of Standards for Abortion Facility Supplies and Equipment - Presence of Physician with Admitting Privileges - Training of Assistants - Patient Screening and Evaluation - Abortion Procedure and Post Procedure Follow-up Care - Records and Reports - Penalties for Violations

A. The State Board of Health shall establish abortion facility supplies and equipment standards, including equipment required to be immediately available for use in an emergency. Such standards shall, at a minimum:

1. Specify required equipment and supplies, including medications, required for the performance of abortion procedures and for monitoring the progress of each patient throughout the abortion procedure and post-procedure recovery period;

2. Require that the number or amount of equipment and supplies at the facility is adequate at all times to assure sufficient quantities of clean and sterilized durable equipment and supplies to meet the needs of each patient;

3. Specify the mandated equipment and supplies for required laboratory tests and the requirements for protocols to calibrate and maintain laboratory equipment at the abortion facility or operated by facility staff;

4. Require ultrasound equipment in all abortion facilities; and

5. Require that all equipment is safe for the patient and facility staff, meets applicable federal standards, and is checked annually to ensure safety and appropriate calibration.

B. On any day when any abortion is performed in a facility providing abortions, a physician with admitting privileges at a general medical surgical hospital which offers obstetrical or gynecological care in this state within thirty (30) miles of where the abortion is being performed must remain on the premises of the facility to facilitate the transfer of emergency cases if hospitalization of an abortion patient or a child born alive is necessary and until all abortion patients are stable and ready to leave the recovery room.

C. The State Board of Health shall adopt standards relating to the training physician assistants licensed pursuant to the provisions of Section 519.1 of Title 59 of the Oklahoma Statutes and employed by or providing services in a facility providing abortions shall receive in counseling, patient advocacy, and the specific medical and other services.

D. The State Board of Health shall adopt standards related to the training that volunteers at facilities providing abortions shall receive in the specific services that the volunteers provide, including counseling and patient advocacy.

E. The State Board of Health shall adopt standards related to the medical screening and evaluation of each abortion patient. At minimum these standards shall require:

1. A medical history, including the following:

a. reported allergies to medications, antiseptic solutions, and latex,

b. obstetric and gynecological history,

c. past surgeries, and

d. medication the patient is currently taking;

2. A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa; and

3. The appropriate preprocedure testing, including:

a. urine or blood tests for pregnancy, if ordered by a physician,

b. a test for anemia,

c. Rh typing, unless reliable written documentation of blood type is available, and

d. an ultrasound evaluation for all patients who elect to have an abortion. The physician performing the abortion is responsible for estimating the gestational age of the unborn child based on the ultrasound examination and established standards of obstetrical care and shall write the estimate in the patient's medical record. An original print of each ultrasound examination of the patient shall be kept in the patient's medical record.

F. The State Board of Health shall adopt standards related to the performance of the abortion procedure and post-procedure follow-up care. At minimum these standards shall require:

1. That medical personnel are available to all abortion patients throughout the procedure;

2. The appropriate use of local anesthesia, analgesia, and sedation if ordered by the physician performing the procedure;

3. The use of appropriate precautions, such as the establishment of intravenous access;

4. That the physician performing the abortion procedure monitors the patient's vital signs and other defined signs and markers of the patient's status throughout the procedure and during the recovery period until the patient's condition is deemed to be stable in the recovery room;

5. Immediate post-procedure care and observation in a supervised recovery room for as long as the patient's condition warrants;

6. That the facility in which the abortion procedure is performed arranges for a patient's hospitalization if any complication beyond the management capability of the abortion facility's medical staff occurs or is suspected;

7. That a licensed health-care professional trained in the management of the recovery room and capable of providing cardiopulmonary resuscitation actively monitors patients in the recovery room;

8. That there is a specified minimum time that a patient remains in the recovery room by type of abortion procedure and duration of gestation;

9. That a physician discusses RhO(D) immune globulin with each patient for whom it is indicated and assures it is offered to the patient in the immediate post-operative period or that it will be available to her within seventy-two (72) hours after completion of the abortion procedure. If the patient refuses, a refusal form approved by the State Board of Health shall be signed by the patient and a witness and included in the medical record;

10. Written instructions with regard to post-abortion coitus, signs of possible complications, and general aftercare are given to each patient. Each patient shall have specific instructions regarding access to medical care for complications, including a telephone number to call for medical emergencies;

11. That the physician ensures that a licensed health-care professional from the abortion facility makes a good faith effort to contact the patient by phone, with the patient's consent, within twenty-four (24) hours after procedure to assess the patient's recovery;

12. Equipment and services are located in the recovery room to provide appropriate emergency and resuscitative life-support procedures pending the transfer of the patient or a child born alive in the facility;

13. That a post-abortion medical visit shall be offered to each abortion patient and, if requested, scheduled for two (2) to three (3) weeks after the abortion procedure and shall include a medical examination and a review of the results of all laboratory tests; and

14. That a urine or blood test shall be obtained at the time of the follow-up visit to rule out continued pregnancy. If a continuing pregnancy is suspected, the patient shall be appropriately evaluated; and a physician who performs abortions shall be consulted.

G. Facilities performing abortions shall record each incident resulting in a patient's or a born-alive child's injury occurring at the facility and shall report incidents in writing to the State Board of Health within ten (10) days of the incident. For the purposes of this subsection, "injury" shall mean an injury that occurs at the facility and creates a serious risk of substantial impairment of a major body organ or function.

H. If a patient's death occurs, other than the death of an unborn child properly reported pursuant to law, the facility performing abortions shall

report the death to the State Board of Health no later than the next business day.

I. Incident reports shall be filed with the State Board of Health and all appropriate professional licensing and regulatory boards, including, but not limited to, the State Board of Medical Licensure and Supervision and the Oklahoma Board of Nursing.

J. Whoever operates a facility performing abortions without a valid license shall be guilty of a felony. Any person who intentionally, knowingly, or recklessly violates the provisions of this act or any standards adopted by the State Board of Health in accordance with this act shall be guilty of a felony.

K. Any violation of this act or any standards adopted under this act may be subject to a civil penalty or fine up to Twenty-five Thousand Dollars ($25,000.00) imposed by the State Board of Health. Each day of violation constitutes a separate violation for purposes of assessing civil penalties or fines. In deciding whether and to what extent to impose civil penalties or fines, the State Board of Health shall consider the following factors:

1. Gravity of the violation, including the probability that death or serious physical harm to a patient or individual will result or has resulted;

2. Size of the population at risk as a consequence of the violation;

3. Severity and scope of the actual or potential harm;

4. Extent to which the provisions of the applicable statutes or regulations were violated;

5. Any indications of good faith exercised by facility;

6. The duration, frequency, and relevance of any previous violations committed by the facility; and

7. Financial benefit to the facility of committing or continuing the violation.

L. In addition to any other penalty provided by law, whenever in the judgment of the State Commissioner of Health any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, a violation of this act, or any standard adopted in accordance with this act, the Commissioner shall make application to any court of competent jurisdiction for an order enjoining such acts and practices. Upon a showing by the Commissioner that such person has engaged, or is about to engage, in any such acts or practices, an injunction, restraining order, or such other order as may be appropriate shall be granted by such court without bond.

Added by Laws 2014, SB 1848, c. 370, § 1, eff. November 1, 2014.

63 § 1-749. Abortion on Minor Less Than Fourteen Years of Age

A. Any physician who performs an abortion on a minor who is less than fourteen (14) years of age at the time of the abortion shall preserve, in accordance with rules promulgated by the Oklahoma State Bureau of Investigation, fetal tissue extracted during such abortion. The physician shall submit the tissue to the Oklahoma State Bureau of Investigation.

B. The Oklahoma State Bureau of Investigation shall adopt rules to implement the provisions of this section. Such rules shall contain, at a minimum:

1. The amount and type of fetal tissue to be preserved and submitted by a physician pursuant to the provisions of this section;

2. Procedures for the proper preservation of such tissue for the purposes of DNA testing and examination;

3. Procedures for documenting the chain of custody of such tissue for use as evidence;

4. Procedures for the proper disposal of fetal tissue preserved pursuant to this section;

5. A uniform reporting form mandated to be utilized by physicians when submitting fetal tissue under this section, which shall include the name and address of the physician submitting the fetal tissue and the name and complete address of residence of the parent or legal guardian of the minor upon whom the abortion was performed; and

6. Procedures for communication with law enforcement regarding evidence and information obtained pursuant to this section.

C. Failure of a physician to comply with any requirement of this section or any rule adopted thereunder:

1. Shall constitute unprofessional conduct pursuant to the provisions of Section 509 of Title 59 of the Oklahoma Statutes; and

2. Is a felony.

Added by Laws 2015, SB 642, c. 387, § 2, eff. November 1, 2015.

63 § 1-749.1. Inspections and Investigations of Facilities - Complaints - Denial, Suspension, or Revocation of License

A. The State Board of Health shall establish policies and procedures for conducting pre-licensure and re-licensure inspections of abortion facilities. Prior to issuing or reissuing a license, the Department shall conduct an on-site inspection to ensure compliance with the rules promulgated by the Board.

B. The Board shall promulgate rules for conducting inspections and investigations pursuant to complaints received by the State Department of Health and made against any abortion facility. The Department shall receive, record, and dispose of complaints in accordance with established policies and procedures.

C. If the State Commissioner of Health determines that there is reasonable cause to believe a licensee, licensed abortion facility or abortion facility that is required to be licensed in this state is not adhering to the requirements of Section 1-729a et seq. of Title 63 of the Oklahoma Statutes, local fire ordinances or rules or any other law, administrative rule or regulation relating to abortion, the Commissioner and any duly designated employee or agent of the Commissioner including employees of county or city-county health departments and county or municipal fire inspectors, consistent with standard medical practices, may enter on and into the premises of the licensee, licensed abortion facility or abortion facility that is required to be licensed in this state during regular business hours of the licensee or abortion facility to determine compliance with the provisions of Section 1-729a et seq. of Title 63 of the Oklahoma Statutes, local fire ordinances or rules, and any other law, administrative rule or regulation relating to abortion.

D. An application for a license to operate a private office, freestanding outpatient clinic or other facility or clinic in which abortions are performed constitutes permission for, and complete acquiescence in, an entry or inspection of the premises during the pendency of the application and, if licensed, during the term of the license.

E. If an inspection or investigation conducted pursuant to this section reveals that an applicant, licensee or licensed abortion facility is not adhering to the requirements of this section, the provisions of Title 1-729a et seq. of Title 63 of the Oklahoma Statutes, local fire ordinances or rules and any other law, administrative rule or regulation relating to abortion, the Commissioner may take action to deny, suspend, revoke or refuse to renew a license to operate an abortion facility.

Added by Laws 2015, SB 642, c. 387, § 3, eff. November 1, 2015.

63 § 1-750. Criminal and Civil Penalties for Violations

A. A person who intentionally, knowingly or recklessly violates any provision or requirement of this act, Section 1-729a et seq. of Title 63 of the Oklahoma Statutes or any rule or regulation adopted under Section 1-729a et seq. of Title 63 of the Oklahoma Statutes is guilty of a felony.

B. No criminal penalty may be assessed against the pregnant woman upon whom the abortion is performed for a violation of any provision or requirement of this act, Section 1-729a et seq. of Title 63 of the Oklahoma Statutes or any rule or regulation adopted under Section 1-729a et seq. of Title 63 of the Oklahoma Statutes.

C. Any violation of this act, Section 1-729a et seq. of Title 63 of the Oklahoma Statutes or any rule or regulation adopted under Section 1-729a et seq. of Title 63 of the Oklahoma Statutes may be subject to a civil penalty or a fine up to One Hundred Thousand Dollars ($100,000.00).

D. Each day of violation shall constitute a separate violation for purposes of assessing civil penalties or fines.

E. In deciding whether and to what extent to impose fines, a court shall consider the:

1. Gravity of the violation or violations including the probability that death or serious physical harm to a patient or individual will result or has resulted;

2. Size of the population at risk as a consequence of the violation or violations;

3. Severity and scope of the actual or potential harm;

4. Extent to which the provisions of the applicable statutes or regulations were violated;

5. Indications of good faith exercised by the licensee, abortion facility or the person performing the abortion;

6. Duration, frequency, and relevance of any previous violations committed by the licensee, abortion facility or person performing the abortion; and

7. Financial benefit to the abortion facility or person performing the abortion from committing or continuing the violation or violations.

F. The Office of the Attorney General and a district attorney for the county in which the violation or violations occurred may institute a legal action to enforce collection of civil penalties or fines.

G. Any person who violates this act, Section 1-729a et seq. of Title 63 of the Oklahoma Statutes or any rule or regulation adopted under Section 1-729a et seq. of Title 63 of the Oklahoma Statutes shall be civilly liable to the person or persons adversely affected by the violation or violations. A court may award damages to the person or persons adversely affected by any violation of this act, Section 1-729a et seq. of Title 63 of the Oklahoma Statutes or any rule or regulation adopted under Section 1-729a et seq. of Title 63 of the Oklahoma Statutes including compensation for emotional, physical, and psychological harm; attorney fees, litigation costs, and punitive damages.

H. The provisions of this act are severable, and if any part or provision shall be held void, the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

I. If some or all of the newly amended provisions of this act resulting from the actions taken by the 2015 Session of the Oklahoma Legislature are ever temporarily or permanently restrained or enjoined by judicial order, this act shall be enforced as though such restrained or enjoined provisions had not been adopted; provided, however, that whenever such temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

J. The Oklahoma State Bureau of Investigation and the State Board of Health shall promulgate rules to implement the provisions of this act.

Added by Laws 2015, SB 642, c. 387, § 4, eff. November 1, 2015.

63 § 1-751. Short Title

This act shall be known and may be cited as the "Humanity of the Unborn Child Act".

Added by Laws 2016, HB 2797, c. 353, § 1, eff. November 1, 2016.

63 § 1-752. State Department of Health to Maintain Website and Signage - Information About Assistance for Pregnant Women

A. Utilizing funds appropriated to the Health Department specifically for the provisions of this act, the State Department of Health shall develop, update annually and maintain an electronic form containing information concerning public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, which shall include a comprehensive list of the agencies available, including adoption agencies, a description of the services they offer and a description of the manner, including telephone numbers and email addresses, by which they might be contacted. The Department shall index this form geographically and shall make it readily accessible on the Department's website. The website shall include the following statement:

"There are many public and private agencies willing and able to help you carry your child to term, have a healthy pregnancy and a healthy baby and assist you and your child after your child is born, whether you choose to keep your child or to place him or her for adoption. The State of Oklahoma strongly urges you to contact them if you are pregnant."

B. The statement required by subsection A of this section and a unique URL linked to the section of the Department's Internet website containing the information required by subsection A of this section shall be made available in a downloadable format appropriate for display.

C. The Department shall use its official, online social media platforms to promote the unique URL specified in subsection B of this section.

D. The State Board of Health shall promulgate rules to implement the provisions of this section.

Added by Laws 2016, HB 2797, c. 353, § 2, eff. November 1, 2016;
Amended by Laws 2017, SB 30, c. 123, § 2, emerg. eff. July 1, 2017

63 § 1-753. Distribution of Information and Materials Concerning Nature of and Alternatives to Abortion

Contingent on the availability of funds being appropriated by the Legislature specifically for this purpose, the State Department of Health shall:

1. Develop and make available materials designed to provide accurate, scientifically verifiable information concerning the probable anatomical and physiological characteristics of the unborn child at two-week gestational intervals. The Department may utilize as a resource the material dealing with characteristics of the unborn child created pursuant to Section 1-738.3 of Title 63 of the Oklahoma Statutes and as located on the website www.awomansright.org under the link "Characteristics of the Unborn Child";

2. Develop and distribute educational and informational materials to provide public information through public service announcements, media and otherwise for the purpose of achieving an abortion-free society. Such materials shall be developed from the most readily available, accurate

and up-to-date information and shall clearly and consistently teach that abortion kills a living human being. All efforts by the Department in this regard shall be reported annually to the Chair and Vice Chair of the Senate Health and Human Services Committee and the House Public Health Committee;

3. Provide technical assistance to help community-based organizations in the planning and implementation of abortion prevention, alternatives to abortion referral and education programs regarding the humanity of the unborn child;

4. Provide outreach, consultation, training and alternatives to abortion referral services to schools, organizations and members of the community;

5. Distribute educational and informational material concerning maternal behavior during pregnancy which is helpful to a human child in utero, including avoidance of tobacco, alcohol and other drugs; proper nutrition and prenatal vitamins; and utilization of and resources available for prenatal medical and wellness care; and

6. Recommend to the State Department of Education scientifically verifiable information concerning the unborn child in the educational standards of science, family and consumer sciences and health classes.

Added by Laws 2016, HB 2797, c. 353, § 3, eff. November 1, 2016.

63 § 1-754. Instructional Program for Students Consistent with the Provisions of the Humanity of the Unborn Child Act

Contingent on the availability of funds being appropriated by the Legislature specifically for this purpose and pursuant to Section 5 of this act, the State Department of Education, in collaboration with the State Department of Health, shall establish an instructional program for students consistent with the provisions of the Humanity of the Unborn Child Act. Local school boards may choose to implement the instructional program established by the State Department of Health and the State Department of Education consistent with the provisions of the Humanity of the Unborn Child Act. For school districts choosing to implement the instructional program, the content of instruction used by local schools to teach the humanity of the unborn child shall be at the discretion of the local school board; provided, the instructional program shall:

1. Provide accurate, scientifically verifiable information concerning the probable anatomical and physiological characteristics of the unborn child at two-week gestational intervals. The State Department of Education may utilize as a resource the material dealing with characteristics of the unborn child created pursuant to Section 1-738.3 of Title 63 of the Oklahoma Statutes and as located on the website www.awomansright.org under the link "Characteristics of the Unborn Child";

2. Include information on accessing prenatal health care; provided, no program or state employee may refer any student to a medical facility or any provider for the performance of an abortion;

3. Include no component of human sexuality education other than those included in science education standards; and

4. Comply with the provisions of the Parents' Bill of Rights, Section 2001 et seq. of Title 25 of the Oklahoma Statutes.

Added by Laws 2016, HB 2797, c. 353, § 4, eff. November 1, 2016.

63 § 1-755. Public Education on the Humanity of the Unborn Child Fund

There is hereby created in the State Treasury a revolving fund for the State Board of Education to be designated as the "Public Education on the Humanity of the Unborn Child Fund". The fund shall be a continuing fund, not subject to fiscal year limitations, and shall consist of all monies deposited to the credit of the fund by law. All monies accruing to the credit of said fund shall be budgeted and expended by the Board for the establishment of the instruction programs established in Section 4 of this act. Expenditures from said fund shall be made upon warrants issued by the State Treasurer against claims filed as prescribed by law with the Director of the Office of Management and Enterprise Services for approval and payment.

Added by Laws 2016, HB 2797, c. 353, § 5, eff. November 1, 2016.

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KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by Women's Medical Center of N.W. Houston v. Archer, S.D.Tex., December 29, 1999

93 S.Ct. 705
Supreme Court of the United States

Jane ROE, et al., Appellants,
v.
Henry WADE.

No. 70-18.
|
Argued Dec. 13, 1971.
|
Reargued Oct. 11, 1972.
|
Decided Jan. 22, 1973.
|
Rehearing Denied Feb. 26, 1973.

See 410 U.S. 959, 93 S.Ct. 1409.

Synopsis

Action was brought for a declaratory and injunctive relief respecting Texas criminal abortion laws which were claimed to be unconstitutional. A three-judge United States District Court for the Northern District of Texas, 314 F.Supp. 1217, entered judgment declaring laws unconstitutional and an appeal was taken. The Supreme Court, Mr. Justice Blackmun, held that the Texas criminal abortion statutes prohibiting abortions at any stage of pregnancy except to save the life of the mother are unconstitutional; that prior to approximately the end of the first trimester the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician, subsequent to approximately the end of the first trimester the state may regulate abortion procedure in ways reasonably related to maternal health, and at the stage subsequent to viability the state may regulate and even proscribe abortion except where necessary in appropriate medical judgment for preservation of life or health of mother.

Affirmed in part and reversed in part.

Mr. Chief Justice Burger, Mr. Justice Douglas and Mr. Justice Stewart filed concurring opinions. See 93 S.Ct. 755 & 756.

Mr. Justice White filed a dissenting opinion in which Mr. Justice Rehnquist joined. See 93 S.Ct. 762.

Mr. Justice Rehnquist filed a dissenting opinion.

West Headnotes (18)

[1] Federal Courts
Constitutional questions

Supreme Court was not foreclosed from review of both the injunctive and declaratory aspects of case attacking constitutionality of Texas criminal abortion statutes where case was properly before Supreme Court on direct appeal from decision of three-judge district court specifically denying injunctive relief and the arguments as to both aspects were necessarily identical. 28 U.S.C.A. § 1253.

64 Cases that cite this headnote

[2] Constitutional Law
Abortion and birth control

Constitutional Law
Mootness

Constitutional Law
Justiciability

With respect to single, pregnant female who alleged that she was unable to obtain a legal abortion in Texas, when viewed as of the time of filing of case and for several months thereafter, she had standing to challenge constitutionality of Texas criminal abortion laws, even though record did not disclose that she was pregnant at time of district court hearing or when the opinion and judgment were filed, and she presented a justiciable controversy; the termination of her pregnancy did not render case moot. Vernon's Ann.Tex. P.C. arts. 1191–1194, 1196.

215 Cases that cite this headnote

[3] Federal Courts

Case or controversy requirement; justiciability;mootness and ripeness

Federal Courts

Review of federal district courts

Usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review and not simply at date action is initiated.

121 Cases that cite this headnote

[4] Constitutional Law

Mootness

Where pregnancy of plaintiff was a significant fact in litigation and the normal human gestation period was so short that pregnancy would come to term before usual appellate process was complete and pregnancy often came more than once to the same woman, fact of that pregnancy provided a classic justification for conclusion of nonmootness because of termination.

101 Cases that cite this headnote

[5] Declaratory Judgment

New parties

Federal Civil Procedure

Particular Intervenors

Texas physician, against whom there were pending indictments charging him with violations of Texas abortion laws who made no allegation of any substantial and immediate threat to any federally protected right that could not be asserted in his defense against state prosecutions and who had not alleged any harassment or bad faith prosecution, did not have standing to intervene in suit seeking declaratory and injunctive relief with respect to Texas abortion statutes which were claimed to be unconstitutional. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

77 Cases that cite this headnote

[6] Courts

Criminal proceedings

Absent harassment and bad faith, defendant in pending state criminal case cannot affirmatively challenge in federal court the statutes under which state is prosecuting him.

5 Cases that cite this headnote

[7] Federal Civil Procedure

Proceedings for intervention

Application for leave to intervene making certain assertions relating to a class of people was insufficient to establish party's desire to intervene on behalf of class, where the complaint failed to set forth the essentials of class suit.

5 Cases that cite this headnote

[8] Constitutional Law

Abortion and birth control

Childless married couple alleging that they had no desire to have children at the particular time because of medical advice that the wife should avoid pregnancy and for other highly personal reasons and asserting an inability to obtain a legal abortion in Texas were not, because of the highly speculative character of their position, appropriate plaintiffs in federal district court suit challenging validity of Texas criminal abortion statutes. Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

161 Cases that cite this headnote

[9] Constitutional Law

Right to Privacy

Right of personal privacy or a guarantee of certain areas or zones of privacy does exist under Constitution, and only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy; the right has some extension to activities relating to marriage. U.S.C.A.Const. Amends. 1, 4, 5, 9, 14, 14, § 1.

535 Cases that cite this headnote

[10] Constitutional Law
Abortion

Constitutional right of privacy is broad enough to encompass woman's decision whether or not to terminate her pregnancy, but the woman's right to terminate pregnancy is not absolute since state may properly assert important interests in safeguarding health, in maintaining medical standards and in protecting potential life, and at some point in pregnancy these respective interests become sufficiently compelling to sustain regulation of factors that govern the abortion decision. U.S.C.A.Const. Amends. 9, 14.

1125 Cases that cite this headnote

[11] Constitutional Law
Strict or heightened scrutiny;compelling interest

Where certain fundamental rights are involved, regulation limiting these rights may be justified only by a compelling state interest and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake.

244 Cases that cite this headnote

[12] Constitutional Law
Children and the unborn
Constitutional Law
Unborn children;fetuses

Word "person" as used in the Fourteenth Amendment does not include the unborn. U.S.C.A.Const. Amend. 14.

144 Cases that cite this headnote

[13] Abortion and Birth Control
Fetal age and viability;trimester

Prior to approximately the end of the first trimester of pregnancy, the attending physician in consultation with his patient is free to determine, without regulation by state, that in his medical judgment the patient's pregnancy should be terminated, and if that decision is reached such judgment may be effectuated by an abortion without interference by the state.

292 Cases that cite this headnote

[14] Abortion and Birth Control
Fetal age and viability;trimester
Abortion and Birth Control
Health and safety of patient

From and after approximately the end of the first trimester of pregnancy, a state may regulate abortion procedure to extent that the regulation reasonably relates to preservation and protection of maternal health.

167 Cases that cite this headnote

[15] Abortion and Birth Control
Fetal age and viability;trimester
Abortion and Birth Control
Health and safety of patient

If state is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when necessary to preserve the life or the health of the mother.

273 Cases that cite this headnote

[16] Abortion and Birth Control
Production, procurement or inducement in general
Abortion and Birth Control
Attempts
Abortion and Birth Control
Health of patient;necessity
Constitutional Law
Abortion and birth control

State criminal abortion laws like Texas statutes making it a crime to procure or attempt an abortion except an abortion on medical advice for purpose of saving life of the mother regardless of stage of

pregnancy violate due process clause of Fourteenth Amendment protecting right to privacy against state action. U.S.C.A.Const. Amend. 14; Vernon's Ann.Tex.P.C. arts. 1191–1194, 1196.

196 Cases that cite this headnote

[17] Abortion and Birth Control

Clinics, facilities, and practitioners

State in regulating abortion procedures may define "physician" as a physician currently licensed by State and may proscribe any abortion by a person who is not a physician as so defined.

17 Cases that cite this headnote

[18] Statutes

Criminal justice

Conclusion that Texas criminal abortion statute proscribing all abortions except to save life of mother is unconstitutional meant that the abortion statutes as a unit must fall, and the exception could not be struck down separately for then the state would be left with statute proscribing all abortion procedures no matter how medically urgent the case. Vernon's Ann.Tex. P.C. arts. 1191–1194, 1196.

42 Cases that cite this headnote

****707** ***113** Syllabus [*]

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

1. While 28 U.S.C. s 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. Pp. 711-712.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 712-715.

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is 'capable of repetition, yet evading review,' is an exception to the usual federal rule that an actual controversy ***114** must exist at review stages and not simply when the action is initiated. Pp. 712-713.

(b) The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertable as a defense against the good-faith state prosecutions pending against him. Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688. Pp. 713-714.

****708** (c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 714-715.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment,

which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a 'compelling' point at various stages of the woman's approach to term. Pp. 726-732.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 731-732.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 731-732.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 732-733.

4. The State may define the term 'physician' to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. Pp. 732-733.

5. It is unnecessary to decide the injunctive relief issue since the Texas authorities will doubtless fully recognize the Court's ruling ***115** that the Texas criminal abortion statutes are unconstitutional. P. 733.

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

Attorneys and Law Firms

Sarah R. Weddington, Austin, Tex., for appellants.

Robert C. Flowers, Asst. Atty. Gen. of Texas, Austin, Tex., for appellee on reargument.

Jay Floyd, Asst. Atty. Gen., Austin, Tex., for appellee on original argument.

Opinion

***116** Mr. Justice BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

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

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we ***117** have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in Lochner v. New York, 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937 (1905):

> '(The Constitution) is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying

them conflict with the Constitution of the United States.'

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code, [1] Vernon's Ann.P.C. These make it a crime to 'procure an abortion,' as therein ***118** defined, or to attempt one, except with respect to 'an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.' Similar statutes are in existence in a majority of the States. [2]

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

***120** II

Jane Roe, [4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

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

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

John and Mary Doe, [5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a 'neural-chemical' disorder; that her physician had 'advised her to avoid pregnancy until such time as her condition has materially improved' (although a pregnancy at the present time would not present 'a serious risk' to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue 'on behalf of themselves and all couples similarly situated.'

The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant, ***122** and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the

Does had failed to allege facts sufficient to state a present controversy and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the 'fundamental right of single women and married persons to choose where to have children is protected by the Ninth Amendment, through the Fourteenth Amendment,' and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (N.D.Tex.1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U.S.C. s 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941, 91 S.Ct. 1610, 29 L.Ed. 108 (1971).

***123** III

[1] It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in Mitchell v. Donovan, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970), and ****712** Gunn v. University Committee, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970), are to the effect that s 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under s 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See Carter v. Jury Comm'n, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970); Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73; 80-81, 80 S.Ct. 568, 573-574, 4 L.Ed.2d 568 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201.

IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that 'personal stake in the outcome of the controversy,' Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962), that insures that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution,' Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968), and Sierra Club v. Morton, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

***124** **[2]** A. Jane Roe. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late as May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. Abele v. Markle, 452 F.2d 1121, 1125 (CA2 1971); Crossen v. Breckenridge, 446 F.2d 833, 8380-839 (CA6 1971); Poe v. Menghini, 339 F.Supp. 986, 990-991 (D.C.Kan. 1972). See Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1951). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The 'logical nexus between the status asserted and the claim sought to be adjudicated,' Flast v. Cohen, 392 U.S., at 102, 88 S.Ct., at 1953, and the necessary degree of contentiousness, Golden v. Zwickler,

394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, [6] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

***125** **[3]** The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. ****713** United States v. Munsingwear, Inc., 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950); Golden v. Zwickler, supra; SEC v. Medical Committee for Human Rights, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972).

[4] But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911). See Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 178-179, 89 S.Ct. 347, 350, 351, 21 L.Ed.2d 325 (1968); United States v. W. T. Grant Co., 345 U.S. 629, 632-633, 73 S.Ct. 894, 897-898, 97 L.Ed. 1303 (1953).

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

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

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

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

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

We see no merit in that distinction. Our decision in Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in Samuels v. Mackell, supra, and in ***127** Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27

L.Ed.2d 669 (1971); Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); **714 Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971); and Byrne v. Karalexis, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (1971). See also Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We note, in passing, that Younger and its companion cases were decided after the three-judge District Court decision in this case.

[7] Dr. Hallford's complaint in intervention, therefore, is to be dismissed.[7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

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

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

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

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. Younger v. Harris, 401 U.S., at 41-42, 91 S.Ct., at 749; Golden v. Zwickler, 394 U.S., at 109-110, 89 S.Ct., at 960; Abele v. Markle, 452 F.2d, at 1124-1125; Crossen v. Breckenridge, 446 F.2d, at 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, investment Co. Institute v. Camp, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971); **715 Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *129 and Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). See also Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915).

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

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); id., at 460, 92 S.Ct. 1029, at 1042, 31 L.Ed.2d 349 (White, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, 381 U.S., at 486, 85 S.Ct., at 1682 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

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

***130** 1. Ancient attitudes. These are not capable of precise determination. We are told that at the time of the Persian Empire abortifacients were known and that criminal abortions were severely punished.[8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era,[9] and that 'it was resorted to without scruple.'[10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable.[11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion.[12]

2. The Hippocratic Oath. What then of the famous Oath that has stood so ****716** long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B.C.), who has been described ***131** as the Father of Medicine, the 'wisest and the greatest practitioner of his art,' and the 'most important and most complete medical personality of antiquity,' who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past?[13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear: 'I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion,'[14] or 'I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy.'[15]

Although the Oath is not mentioned in any of the principal briefs in this case or in Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory:[16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, 'echoes Pythagorean doctrines,' ***132** and '(i)n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity.'[17]

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) 'give evidence of the violation of almost every one of its injunctions.'[18] But with the end of antiquity a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Phthagorean ethic. The Oath 'became the nucleus of all medical ethics' and 'was applauded as the embodiment of truth.' Thus, suggests Dr. Edelstein, it is 'a Pythagorean manifesto and not the expression of an absolute standard of medical conduct.'[19]

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

3. The common law. It is undisputed that at common law, abortion performed before 'quickening'-the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy[20]-was not an indictable offense.[21] The absence ***133** of a ****717** common-law crime for pre-quickening

abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became 'formed' or recognizably human, or in terms of when a 'person' came into being, that is, infused with a 'soul' or 'animated.' A loose concensus evolved in early English law that these events occurred at some point between conception and live birth. [22] This was 'mediate animation.' Although ***134** Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that prior to this point the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance of quickening was echoed by later common-law scholars and found its way into the received common law in this country.

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide. [23] But the later and predominant ****718** view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited ***135** passage, Coke took the position that abortion of a woman 'quick with childe' is 'a great misprision, and no murder.' [24] Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), 'modern law' took a less severe view. [25] A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime. [26] This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, [27] others followed Coke in stating that abortion ***136** of a quick fetus was a 'misprision,' a term they translated to mean 'misdemeanor.' [28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.

4. The English statutory law. England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, s 1, a capital crime, but in s 2 it provided lesser penalties for the felony of abortion before quickening, and thus preserved the 'quickening' distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, s 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85, s 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, s 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of 'the life of ****719** a child capable of being born alive.' It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be ***137** found guilty of the offense 'unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.'

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

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

5. The American law. In this country, the law in effect in all but a few States until mid-19th century was the pre-existing English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman 'quick with child.'[29] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860.[30] In 1828, New York enacted legislation[31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickend fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it 'shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose.' By 1840, when Texas had received the common law,[32] only eight American States ***139** had ****720** statutes dealing with abortion.[33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared and the typical law required that the procedure actually be necessary for that purpose.

Gradually, in the middle and late 19th century the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother.[34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health.[35] Three States permitted abortions that were not 'unlawfully' performed or that were not 'without lawful justification,' leaving interpretation of those standards to the courts.[36] In ***140** the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, s 230.3,[37] set forth as Appendix B to the opinion in Doe v. Bolton, 410 U.S. 205, 93 S.Ct. 754.

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

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

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

its frequency and it listed three causes of 'this general demoralization':
'The first of these causes is a wide-spread popular ignorance of the true character of the crime-a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.

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

'The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, ***142** and to its life as yet denies all protection.' Id., at 75-76.

The Committee then offered, and the Association adopted, resolutions protesting 'against such unwarrantable destruction of human life,' calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies 'in pressing the subject.' Id., at 28, 78.

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

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

In 1970, after the introduction of a variety of proposed resolutions, and of a report from its Board of Trustees, a reference committee noted 'polarization of the medical profession on this controversial issue'; division among those who had testified; a difference of opinion among AMA councils and committees; 'the remarkable shift in testimony' in six months, felt to be influenced 'by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available;' and a feeling 'that this trend will continue.' On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized 'the best interests of the patient,' 'sound clinical judgment,' and 'informed patient consent,' in contrast to 'mere acquiescence to the patient's demand.' The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles. [38] Proceedings ***144** of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion. [39]

7. The position of the American Public Health Association. In October 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:
'a. Rapid and simple abortion referral must be readily available through state and local public ***145** health departments, medical societies, or other non-profit organizations.

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

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

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

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

Among factors pertinent to life and health risks associated with abortion were three that 'are recognized as important':
'a. the skill of the physician,

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

'c. The duration of pregnancy, as determined by uterine size and confirmed by menstrual history.' Id., at 397.

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

8. The position of the American Bar Association. At its meeting in February 1972 the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). We set forth the Act in full in the margin. [40] The ***147** Conference ****724** has appended an enlightening Prefatory Note. [41]

VII

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

***148** It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. [42] The appellants and amici contend, moreover, that this is not a proper state purpose at all and suggest that, if it were, the Texas statutes are overbroad in protecting it since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. [43] This was particularly true prior to the ***149** development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the

pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

****725** Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.[44] Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain. ***150** The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy,

The third reason is the State's interest-some phrase it in terms of duty-in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception.[45] The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to life birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

***151** Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life.[46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[47] The few state courts ****726** called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus.[48] Proponents of this view point out that in many States, including Texas,[49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.[50] They claim that adoption of the 'quickening' distinction through received common ***152** law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

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

VIII

[9] The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9, 88 S.Ct. 1868, 1872-1873, 20 L.Ed.2d 889 (1968), Katz v. United States, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), see Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485, 85 S.Ct., at 1681-1682; in the Ninth Amendment, id., at 486, 85 S.Ct. at 1682 (Goldberg, J.,

concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 1113-1114, 86 L.Ed. 1655 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-454, 92 S.Ct., at 1038-1039; ***153** id., at 460, 463-465, 92 S.Ct. at 1042, 1043-1044 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); and child rearing and education, ****727** Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925), Meyer v. Nebraska, supra.

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

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The ***154** Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905) (vaccination); Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) (sterilization).

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

We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights. Abele v. Markle, 342 F.Supp. 800 (D.C.Conn.1972), appeal docketed, No. 72-56; Abele v. Markle, 351 F.Supp. 224 (D.C.Conn.1972), appeal docketed, No. 72-730; Doe v. Bolton, 319 F.Supp. 1048 (N.D.Ga.1970), appeal decided today, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201; Doe v. Scott, 321 F.Supp. 1385 (N.D.Ill.1971), appeal docketed, No. 70-105; Poe v. Menghini, 339 F.Supp. 986 (D.C.Kan.1972); YWCA v. Kugler, 342 F.Supp. 1048 (D.C.N.J.1972); ***155** Babbitz v. McCann, 310 F.Supp. 293 (E.D.Wis.1970), appeal dismissed, 400 U.S. 1, 91 S.Ct. 12, 27 L.Ed.2d 1 (1970); People v. Belous, 71 Cal.2d 954, 80 Cal.Rptr. 354, 458 P.2d 194 (1969), cert. denied, 397 U.S. 915, 90 S.Ct. 920, 25 L.Ed.2d 96 (1970); State v. Barquet, 262 So.2d 431 (Fla.1972).

Others have sustained state statutes. ****728** Crossen v. Attorney General, 344 F.Supp. 587 (E.D.Ky.1972), appeal docketed, No. 72-256; Rosen v. Louisiana State Board of Medical Examiners, 318 F.Supp. 1217 (E.D.La.1970), appeal docketed, No. 70-42; Corkey v. Edwards, 322 F.Supp. 1248 (W.D.N.C.1971), appeal docketed, No. 71-92; Steinberg v. Brown, 321 F.Supp. 741 (N.D.Ohio 1970); Doe v. Rampton, 366 F.Supp. 189 (Utah 1971), appeal docketed, No. 71-5666; Cheaney v. State, Ind., 285 N.E.2d 265 (1972); Spears v. State, 257 So.2d 876 (Miss.1972); State v. Munson, S.D., 201 N.W.2d 123 (1972), appeal docketed, No. 72-631.

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

[11] Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' Kramer v. Union Free School District, 395 U.S. 621, 627, 89 S.Ct. 1886, 1890, 23 L.Ed.2d 583 (1969); Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed.2d 965 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Griswold v. Connecticut, 381 U.S., at 485, 85 S.Ct., at 1682; Aptheker v. Secretary of State, 378 U.S. 500, 508, 84 S.Ct. 1659, 1664, 12 L.Ed.2d 992 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307-308, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 (1940); see ***156** Eisenstadt v. Baird, 405 U.S., at 460, 463-464, 92 S.Ct., at 1042, 1043-1044 (White, J., concurring in result).

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

IX

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

A. The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, ***157** for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. [51] On the other hand, the appellee conceded on reargument [52] that no case could be cited ****729** that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define 'person' in so many words. Section 1 of the Fourteenth Amendment contains three references to 'person.' The first, in defining 'citizens,' speaks of 'persons born or naturalized in the United States.' The word also appears both in the Due Process Clause and in the Equal Protection Clause. 'Person' is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art, I, s 2, cl. 2, and s 3, cl. 3; in the Apportionment Clause, Art. I, s 2, cl. 3; [53] in the Migration and Importation provision, Art. I, s 9, cl. 1; in the Emoulument Clause, Art, I, s 9, cl. 8; in the Electros provisions, Art. II, s 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, s 1, cl. 5; in the Extradition provisions, Art. IV, s 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth,

Twelfth, and Twenty-second Amendments, as well as in ss 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application. [54]

***158** **[12]** All this, together with our observation, supra, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn. [55] This is in accord with the results reached in those few cases where the issue has been squarely presented. McGarvey v. Magee-Womens Hospital, 340 F.Supp. 751 (W.D.Pa.1972); Byrn v. New York City Health & Hospitals Corp., 31 N.Y.2d 194, 335 N.Y.S.2d 390, 286 N.E.2d 887 (1972), appeal docketed, No. 72-434; Abele v. Markle, 351 F.Supp. 224 (D.C.Conn.1972), appeal docketed, No. 72-730. Cf. Cheaney v. State, Ind., 285 N.E.2d, at 270; Montana v. Rogers, 278 F.2d 68, 72 (CA7 1960), aff'd sub nom. Montana v. Kennedy, 366 U.S. 308, 81 S.Ct. 1336, 6 L.Ed.2d 313 (1961); Keeler v. Superior Court, 2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617 (1970); ***159** State v. Dickinson, 28 Ohio St.2d 65, 275 N.E.2d 599 (1971). Indeed, our decision in United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the ****730** termination of life entitled to Fourteenth Amendment protection.

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

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

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

***160** It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. [56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. [57] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. [58] As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid. [59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. [60] The Aristotelian theory of 'mediate animation,' that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this 'ensoulment' theory from those in the Church who would recognize the existence of life from ***161** the moment of conception. [61] The latter is now, of course, the official belief of the Catholic Church. As one brief amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial ****731** problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a 'process' over

time, rather than an event, and by new medical techniques such as menstrual extraction, the 'morning-after' pill, implantation of embryos, artificial insemination, and even artificial wombs. [62]

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before life birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon life birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. [63] That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few ***162** courts have squarely so held. [64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. [65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem. [66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

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

[13] **[14]** With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical ****732** fact, referred to above at 725, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

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

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

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

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See United States v. Vuitch, 402 U.S., at 67-72, 91 S.Ct., at 1296-1299.

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

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

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

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

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

In Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together. [67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important ***166** state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

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

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. Zwickler v. Koota, 389 U.S 241, 252-255, 88 S.Ct. 391, 397-399, 19 L.Ed.2d 444 (1967); Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under Dombrowski and refined in Younger v. Harris, 401 U.S., at 50, 91 S.Ct., at 753.

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

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

It is so ordered.

Affirmed in part and reversed in part.

Mr. Justice STEWART, concurring.

In 1963, this Court, in ****734** Ferguson v. Skrupa, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in Skrupa put it: 'We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' Id., at 730, 83 S.Ct., at 1031. [1]

Barely two years later, in Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in Skrupa, the Court's opinion in Griswold understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. [2] So it was clear ***168** to me then, and it is equally clear to me now, that the Griswold decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment. [3] As so understood, Griswold stands as one in a long line of pre-Skrupa cases decided under the doctrine of substantive due process, and I now accept it as such.

'In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.' Board of Regents v. Roth, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239, 77 S.Ct. 752, 755-756, 1 L.Ed.2d 796; Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 573-574, 69 L.Ed. 1070; Meyer v. Nebraska, 262 U.S. 390, 399-400, 43 S.Ct. 625, 626-627, 67 L.Ed. 1042. Cf. Shapiro v. Thompson, 394 U.S. 618, 629-630, 89 S.Ct. 1322, 1328-1329, 22 L.Ed.2d 600; United States v. Guest, 383 U.S. 745, 757-758, 86 S.Ct. 1170, 1177-1178, 16 L.Ed.2d 239; Carrington v. Rash, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675; Aptheker v. Secretary of State, 378 U.S. 500, 505, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992; Kent v. Dulles, 357 U.S. 116, 127, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204; Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694-695, 98 L.Ed. 884; Truax v. Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 10, 60 L.Ed. 131.

***169** As Mr. Justice Harlan once wrote: '(T)he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise ****735** terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points priced out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.' Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 989 (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Mr. Justice Frankfurter, 'Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.' National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010; Griswold v. Connecticut, supra; Pierce v. Society of Sisters, supra; Meyer v. Nebraska, supra. See also Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645; Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655. As recently as last Term, in Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349, we recognized 'the right of the

individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person ***170** as the decision whether to bear or beget a child.' That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy. 'Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interests that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), or the right to teach a foreign language protected in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).' Abele v. Markle, 351 F.Supp. 224, 227 (D.C.Conn.1972).

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

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

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

Mr. Justice REHNQUIST, dissenting.

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

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her last trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may ***172** impose virtually no restrictions on medical abortions performed during the first trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). See also Ashwander v. TVA, 297 U.S. 288, 345, 56 S.Ct. 466, 482, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of 'privacy' is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not 'private' in the ordinary usage of that word. Nor is the 'privacy' that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

If the Court means by the term 'privacy' no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of 'liberty' protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of Mr. Justice STEWART in his concurring opinion that the 'liberty,' against deprivation of which without due process the Fourteenth ***173** Amendment protects, embraces more than the rights found in the Bill of Rights. But that ****737** liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. Williamson v. Lee Optical Inc., 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in Williamson, supra. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the 'compelling state interest' test. See Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 179, 92 S.Ct. 1400, 1408, 31 L.Ed.2d 768 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the 'compelling state interest test,' the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

***174** While the Court's opinion quotes from the dissent of Mr. Justice Holmes in Lochner v. New York, 198 U.S. 45, 74, 25 S.Ct. 539, 551, 49 L.Ed. 937 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in Lochner and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be 'compelling.' The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the 'right' to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the Scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. As early as 1821, the first state law dealing directly with abortion was enacted by the Connecticut Legislature. Conn.Stat., Tit. 22, ss 14, 16. By the time of the adoption of the Fourteenth ***175**

Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting **738 abortion.[1] While many States have amended or updated *176 their laws, 21 of the laws on the books in 1868 remain in effect today.[2] Indeed, the Texas statute **739 struck down today was, as the majority notes, first enacted in 1857 *177 and 'has remained substantially unchanged to the present time.' Ante, at 710.

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

III

Even if one were to agree that the case that the Court decides were here, and that the enunciation of the substantive constitutional law in the Court's opinion were proper, the actual disposition of the case by the Court is still difficult to justify. The Texas statute is struck down in toto, even though the Court apparently concedes that at later periods of pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found *178 to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply 'struck down' but is, instead, declared unconstitutional as applied to the fact situation before the Court. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 572 (1969).

For all of the foregoing reasons, I respectfully dissent.

All Citations

410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 'Article 1191. Abortion
'If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.
'Art. 1192. Furnishing the means
'Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.
'Art. 1193. Attempt at abortion
'If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.
'Art. 1194. Murder in producing abortion
'If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.'
'Art. 1196. By medical advice
'Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.'
The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:
'Art. 1195. Destroying unborn child
'Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.'

2 Ariz.Rev.Stat.Ann. s 13-211 (1956); Conn.Pub.Act No. 1 (May 1972 special session) (in 4 Conn.Leg.Serv. 677 (1972)), and Conn.Gen.Stat.Rev. ss 53-29, 53-30 (1968) (or unborn child); Idaho Code s 18-601 (1948); Ill.Rev.Stat., c. 38, s 21-1 (1971); Ind.Code s 35-1-58-1 (1971); Iowa Code s 701.1 (1971); Ky.Rev.Stat. s 436.020 (1962); LaRev.Stat. s 37:1285(6) (1964) (loss of medical license) (but see s 14-87 (Supp.1972) containing no exception for the life of the mother under the criminal statute); Me.Rev.Stat.Ann., Tit. 17, s 51 (1964); Mass.Gen.Laws Ann., c. 272, s 19 (1970) (using the term 'unlawfully,' construed to exclude an abortion to save the mother's life, Kudish v. Bd. of Registration, 356 Mass. 98, 248 N.E.2d 264 (1969)); Mich.Comp.Laws s 750.14 (1948); Minn.Stat. s 617.18 (1971); Mo.Rev.Stat. s 559.100 (1969); Mont.Rev.Codes Ann. s 94-401 (1969); Neb.Rev.Stat. s 28-405 (1964); Nev.Rev.Stat. s 200.220 (1967); N.H.Rev.Stat.Ann. s 585:13 (1955); N.J.Stat.Ann. s 2A:87-1 (1969) ('without lawful justification'); N.D.Cent.Code ss 12-25-01, 12-25-02 (1960); Ohio Rev.Code Ann. s 2901.16 (1953); Okla.Stat.Ann., Tit. 21, s 861 (1972-1973 Supp.); Pa.Stat.Ann., Tit. 18, ss 4718, 4719 (1963) ('unlawful'); R.I.Gen.Laws Ann. s 11-3-1 (1969); S.D.Comp.Laws Ann. s 22-17-1 (1967); Tenn.Code Ann. ss 39-301, 39-302 (1956); Utah Code Ann. ss 76-2-1, 76-2-2 (1953); Vt.Stat.Ann., Tit. 13, s 101 (1958); W.Va.Code Ann. s 61-2-8 (1966); Wis.Stat. s 940.04 (1969); Wyo.Stat.Ann. ss 6-77, 6-78 (1957).

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

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

The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. Thompson v. State, 493 S.W.2d 913 (1971), appeal docketed, No. 71-1200. The court held that 'the State of Texas has a compelling interest to protect fetal life'; that Art. 1191 'is designed to protect fetal life'; that the Texas homicide statutes, particularly Act. 1205 of the Penal Code, are intended to protect a person 'in existence by actual birth' and thereby implicitly recognize other human life that is not 'in existence by actual birth'; that the definition of human life is for the legislature and not the courts; that Art. 11196 'is more definite that the District of Columbia statute upheld in (United States v.) Vuitch' (402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601); and that the Texas statute 'is not vague and indefinite or overbroad.' A physician's abortion conviction was affirmed.

In 493 S.W.2d, at 920 n. 2, the court observed that any issue as to the burden of proof under the exemption of Art. 1196 'is not before us.' But see Veevers v. State, 172 Tex.Cr.R. 162, 168-169, 354 S.W.2d 161, 166-167 (1962). Cf. United States v. Vuitch, 402 U.S. 62, 69-71, 91 S.Ct. 1294, 1298-1299, 28 L.Ed.2d 601 (1971).

4 The name is a pseudonym.

5 These names are pseudonyms.

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

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

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

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

10 L. Edelstein, The Hippocratic Oath 10 (1943) (hereinafter Edelstein). But see Castiglioni 227.

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

12 Edelstein 13-14.

13 Castiglioni 148.

14 Id., at 154.

15 Edelstein 3.

16 Id., at 12, 15-18.

17 Id., at 18; Lader 76.

18 Edelstein 63.

19 Id., at 64.

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

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

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

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

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, in 1 Corpus Juris Canonici 1122, 1123 (A. Friedberg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.

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

23 Bracton took the position that abortion by blow or poison was homicide 'if the foetus be already formed and animated, and particularly if it be animated.' 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879), or, as a later translation puts it, 'if the foetus is already formed or quickened, especially if it is quickened,' 2 H. Bracton, On the Laws and Customs of England 341 (S. Thorne ed. 1968). See Quay 431; see also 2 Fleta 60-61 (Book 1, c. 23) (Selden Society ed. 1955).

24 E. Coke, Institutes III *50.

25 1 W. Blackstone, Commentaries *129-130.

26 Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?, 17 N.Y.L.F. 335 (1971) (hereinafter Means II). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common-law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon-law crime. See also Lader 78-79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, s 1, referred to in the text, infra, at 718, states that 'no adequate means have been hitherto provided for the prevention and punishment of such offenses.'

27 Commonwealth v. Bangs, 9 Mass. 387, 388 (1812); Commonwealth v. Parker, 50 Mass. (9 Metc.) 263, 265-266 (1845); State v. Cooper, 22 N.J.L. 52, 58 (1849); Abrams v. Foshee, 3 Iowa 274, 278-280 (1856); Smith v. Gaffard, 31 Ala. 45, 51 (1857); Mitchell v. Commonwealth, 78 Ky. 204, 210 (1879); Eggart v. State, 40 Fla. 527, 532, 25 So. 144, 145 (1898); State v. Alcorn, 7 Idaho 599, 606, 64 P. 1014, 1016 (1901); Edwards v. State, 79 Neb. 251, 252, 112 N.W. 611, 612

(1907); Gray v. State, 77 Tex.Cr.R. 221, 224, 178 S.W. 337, 338 (1915); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949). Contra, Mills v. Commonwealth, 13 Pa. 631, 633 (1850); State v. Slagle, 83 N.C. 630, 632 (1880).

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

29 Conn.Stat., Tit. 20, s 14 (1821).

30 Conn.Pub.Acts, c. 71, s 1 (1860).

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

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

33 The early statutes are discussed in Quay 435-438. See also Lader 85-88; Stern 85-86; and Means II 375-376.

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

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

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

37 Fourteen States have adopted some form of the ALI statute. See Ark.Stat.Ann. ss 41-303 to 41-310 (Supp.1971); Calif. Health & Safety Code ss 25950-25955.5 (Supp.1972); Colo.Rev.Stat.Ann. ss 40-2-50 to 40-2-53 (Cum.Supp.1967); Del.Code Ann., Tit. 24, ss 1790-1793 (Supp.1972); Florida Law of Apr. 13, 1972, c. 72-196, 1972 Fla.Sess.Law Serv., pp. 380-382; Ga.Code ss 26-1201 to 26-1203 (1972); Kan.Stat.Ann. s 21-3407 (Supp.1971); Md.Ann.Code, Art. 43, ss 137-139 (1971); Miss.Code Ann. s 2223 (Supp.1972); N.M.Stat.Ann. ss 40A-5-1 to 40A-5-3 (1972); N.C.Gen.Stat. s 14-45.1 (Supp.1971); Ore.Rev.Stat. ss 435.405 to 435.495 (1971); S.C.Code Ann. ss 16-82 to 16-89 (1962 and Supp.1971); Va.Code Ann. ss 18.1-62 to 18.1-62.3 (Supp.1972). Mr. Justice Clark described some of these States as having 'led the way.' Religion, Morality, and Abortion: A Constitutional Appraisal, 2 Loyola U. (L.A.) L.Rev. 1, 11 (1969). By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. s 11.15.060 (1970); Haw.Rev.Stat. s 453-16 (Supp.1971); N.Y.Penal Code s 125.05, subd. 3 (Supp.1972-1973); Wash.Rev.Code ss 9.02.060 to 9.02.080 (Supp.1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

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

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

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

'RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles. In these circumstances good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice.' Proceedings of the AMA House of Delegates 220 (June 1970).

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

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

40 'UNIFORM ABORTION ACT

'Section 1. (Abortion Defined; When Authorized.)

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

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

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

'(2) within (20) weeks after the commencement of the pregnancy (or after (20) weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years).

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

'Section 3. (Uniformity of Interpretation.) This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

'Section 4. (Short Title.) This Act may be cited as the Uniform Abortion Act.

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

'Section 6. (Repeal.) The following acts and parts of acts are repealed:

'(1)

'(2)

'(3)

'Section 7. (Time of Taking Effect.) This Act shall take effect ___.'

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

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

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

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

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

44 Potts, Postconceptive Control of Fertility, 8 Int'l J. of G. & O. 957, 967 (1970) (England and Wales); Abortion Mortality, 20 Morbidity and Mortality 208, 209 (June 12, 1971) (U.S. Dept. of HEW, Public Health Service) (New York City); Tietze, United States: Therapeutic Abortions, 1963-1968, 59 Studies in Family Planning 5, 7 (1970); Tietze, Mortality with Contraception and Induced Abortion, 45 Studies in Family Planning 6 (1969) (Japan, Czechoslovakia, Hungary); Tietze & Lehfeldt, Legal Abortion in Eastern Europe, 175 J.A.M.A. 1149, 1152 (April 1961). Other sources are discussed in Lader 17-23.

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

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

47 See discussions in Means I and Means II.

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

49 Watson v. State, 9 Tex.App. 237, 244-245 (1880); Moore v. State, 37 Tex.Cr.R. 552, 561, 40 S.W. 287, 290 (1897); Shaw v. State, 73 Tex.Cr.R. 337, 339, 165 S.W. 930, 931 (1914); Fondren v. State, 74 Tex.Cr.R. 552, 557, 169 S.W. 411, 414 (1914); Gray v. State, 77 Tex.Cr.R. 221, 229, 178 S.W. 337, 341 (1915). There is no immunity in Texas for the father who is not married to the mother. Hammett v. State, 84 Tex.Cr.R. 635, 209 S.W. 661 (1919); Thompson v. State, Tex.Cr.App., 493 S.W.2d 913 (1971), appeal pending.

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

51 Tr. of Oral Rearg. 20-21.

52 Tr. of Oral Rearg. 24.

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

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

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

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

56 Edelstein 16.

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

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

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

60 Hellman & Pritchard, supra, n. 59, at 493.

61 For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice, and Morality 409-447 (1970); Noonan 1.

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

63 W. Prosser, The Law of Torts 33k-338 (4th ed. 1971); 2 F. Harper & F. James, The Law of Torts 1028-1031 (1956) ; Note, 63 Harv.L.Rev. 173 (1949).

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

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

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

67 Neither in this opinion nor in Doe v. Bolton, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that

some statutes recognize the father under certain circumstances. North Carolina, for example, N.C.Gen.Stat. s 14-45.1 (Supp.1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N.C.A.G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

1 Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S., at 733, 83 S.Ct., at 1032.

2 There is no constitutional right of privacy, as such. '(The Fourth) Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy-his right to be let alone by other people-is like the protection of his property and of his very life, left largely to the law of the individual States.' Katz v. United States, 389 U.S. 347, 350-351, 88 S.Ct. 507, 510-511, 19 L.Ed.2d 576 (footnotes omitted).

3 This was also clear to Mr. Justice Black, 381 U.S., at 507, (dissenting opinion); to Mr. Justice Harlan, 381 U.S., at 499, 85 S.Ct., at 1689 (opinion concurring in the judgment); and to Mr. Justice White, 381 U.S., at 502, 85 S.Ct., at 1691 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in Poe v. Ullman, 367 U.S. 497, 522, 81 S.Ct. 1752, 1765, 6 L.Ed.2d 989.

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

1. Alabama-Ala.Acts, c. 6, s 2 (1840).
2. Arizona-Howell Code, c. 10, s 45 (1865).
3. Arkansas-Ark.Rev.Stat., c. 44, div. III, Art. II, s 6 (1838).
4. California-Cal.Sess.Laws, c. 99, s 45, p. 233 (1849-1850).
5. Colorado (Terr.)-Colo.Gen.Laws of Terr. of Colo., 1st Sess., s 42, pp. 296-297 (1861).
6. Connecticut-Conn.Stat. Tit. 20, ss 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn.Pub.Acts, c. 71, ss 1, 2, p. 65 (1860).
7. Florida-Fla.Acts 1st Sess., c. 1637, subs. 3, ss 10, 11, subc. 8, ss 9, 10, 11 (1868), as amended, now Fla.Stat.Ann. ss 782.09, 782.10, 797.01, 797.02, 782.16 (1965).
8. Georgia-Ga.Pen.Code, 4th Div., s 20 (1833).
9. Kingdom of Hawaii-Hawaii Pen.Code, c. 12, ss 1, 2, 3 (1850).
10. Idaho (Terr.)-Idaho (Terr.) Laws, Crimes and Punishments ss 33, 34, 42, pp. 441, 443 (1863).
11. Illinois-Ill.Rev. Criminal Code ss 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill.Pub.Laws ss 1, 2, 3, p. 89 (1867).
12. Indiana-Ind.Rev.Stat. ss 1, 3, p. 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind.Laws, c. LXXXI, s 2 (1859).
13. Iowa (Terr.)-Iowa (Terr.) Stat. 1st Legis., 1st Sess., s 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev.Stat., c. 49, ss 10, 13 (1843).
14. Kansas (Terr.)-Kan. (Terr.) Stat., c. 48, ss 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 28, ss 9, 10, 37 (1859).
15. Louisiana-La.Rev.Stat., Crimes and Offenses s 24, p. 138 (1856).
16. Maine-Me.Rev.Stat., c. 160, ss 11, 12, 13, 14 (1840).
17. Maryland-Md.Laws, c. 179, s 2, p. 315 (1868).
18. Massachusetts-Mass.Acts & Resolves, c. 27 (1845).
19. Michigan-Mich.Rev.Stat., c. 153, ss 32, 33, 34, p. 662 (1846).
20. Minnesota (Terr.)-Minn. (Terr.) Rev.Stat., c. 100, ss 10, 11, p. 493 (1851).
21. Mississippi-Miss.Code, c. 64, ss 8, 9, p. 958 (1848).
22. Missouri-Mo.Rev.Stat., Art. II, ss 9, 10, 36, pp. 168, 172 (1835).
23. Montana (Terr.)-Mont. (Terr.) Laws, Criminal Practice Acts s 41, p. 184 (1864).
24. Nevada (Terr.)-Nev. (Terr.) Laws, c. 28, s 42, p. 63 (1861).
25. New Hampshire-N.H.Laws, c. 743, s 1, p. 708 (1848).
26. New Jersey-N.J.Laws, p. 266 (1849).
27. New York-N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, ss 8, 9, pp. 12-13 (1828). By 1868, this statute had been superseded. N.Y.Laws, c. 260, ss 1, 2, 3, 4, 5, 6, pp. 285-286 (1845); N.Y.Laws, c. 22, s 1, p. 19 (1846).
28. Ohio-Ohio Gen.Stat. ss 111(1), 112(2), p. 252 (1841).
29. Oregon-Ore.Gen.Laws, Crim.Code, c. 43, s 509, p. 528 (1845-1964).
30. Pennsylvania-Pa.Laws No. 374 ss 87, 88, 89 (1860).

31. Texas-Tex.Gen.Stat.Dig., c. VII, Arts. 531-536, p. 524 (Oldham & White 1859).
32. Vermont-Vt.Acts No. 33, s 1 (1846). By 1868, this statute had been amended. Vt.Acts No. 57, ss 1, 3 (1867).
33. Virginia-Va.Acts, Tit. II, c. 3, s 9, p. 96 (1848).
34. Washington (Terr.)-Wash. (Terr.) Stats., c. II, ss 37, 38, p. 81 (1854).
35. West Virginia-Va.Acts, Tit. II, c. 3, s 9, p. 96 (1848).
36. Wisconsin-Wis.Rev.Stat., c. 133, ss 10, 11 (1849). By 1868, this statute had been superseded. Wis.Rev.Stat., c. 164, ss 10, 11; c. 169, ss 58, 59 (1858).

2 Abortion laws in effect in 1868 and still applicable as of August 1970:

1. Arizona (1865).
2. Connecticut (1860).
3. Florida (1868).
4. Idaho (1863).
5. Indiana (1838).
6. Iowa (1843).
7. Maine (1840).
8. Massachusetts (1845).
9. Michigan (1846).
10. Minnesota (1851).
11. Missouri (1835).
12. Montana (1864).
13. Nevada (1861).
14. New Hampshire (1848).
15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
19. Vermont (1867).
20. West Virginia (1848).
21. Wisconsin (1858).

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.

Synopsis

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.

94 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.

27 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.

56 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.

144 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.

95 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.

70 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.

80 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.

116 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.

6 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.

8 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.

8 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.

5 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.

41 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.

35 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.

13 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.

145 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.

40 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.

234 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.

75 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.

84 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.

126 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.

13 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.

3 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.

18 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.

24 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.

50 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.

9 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.

30 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.

11 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.

19 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.

19 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.*

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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....
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> . . . . .
>
> "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....
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> . . . . .
>
> "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.

****2832 *899** D

[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.

It is so ordered.

***902** APPENDIX TO OPINION of O'CONNOR, KENNEDY, and SOUTER, JJ.

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

18 PA.CONS.STAT. (1990).

"§ 3203. Definitions.

. . . . .

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

"§ 3205. Informed consent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"§ 3206. Parental consent.

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

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

"(c) Petition to the court for consent.—If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

"(d) Court order.—If the court determines that the pregnant woman is not mature and capable of giving

informed consent or if the pregnant woman does not claim to be mature and capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician to perform the abortion.

"(e) Representation in proceedings.—The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem to assist her. The court shall, however, advise her that she has ***906** a right to court appointed counsel, and shall provide her with such counsel unless she wishes to appear with private counsel or has knowingly and intelligently waived representation by counsel."

"§ 3207. Abortion facilities.

. . . . .

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

"(1) Name and address of the facility.

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

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

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

"§ 3208. Printed information.

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

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

"(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term, including pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival; provided that any such pictures or drawings must contain the dimensions of the fetus and must be realistic and appropriate for the woman's stage of pregnancy. The materials shall be objective, non-judgmental and designed ***908** to convey only

accurate scientific information about the unborn child at the various gestational ages. The material shall also contain objective information describing the methods of abortion procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with each such procedure and the medical risks commonly associated with carrying a child to term.

"(b) Format.—The materials shall be printed in a typeface large enough to be clearly legible.

"(c) Free distribution.—The materials required under this section shall be available at no cost from the department upon request and in appropriate number to any person, facility or hospital."

"§ 3209. Spousal notice.

"(a) Spousal notice required.—In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

"(b) Exceptions.—The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:

"(1) Her spouse is not the father of the child.

****2837** "(2) Her spouse, after diligent effort, could not be located.

***909** "(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.

"(4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

"(c) Medical emergency.—The requirements of subsection (a) shall not apply in case of a medical emergency.

"(d) Forms.—The department shall cause to be published, forms which may be utilized for purposes of providing the signed statements required by subsections (a) and (b). The department shall distribute an adequate supply of such forms to all abortion facilities in this Commonwealth.

"(e) Penalty; civil action.—Any physician who violates the provisions of this section is guilty of 'unprofessional conduct,' and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. In addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of $5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs."

"§ 3214. Reporting.

"(a) General rule.—For the purpose of promotion of maternal health and life by adding to the sum of medical and ***910** public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child, a report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

"(1) Identification of the physician who performed the abortion, the concurring physician as required by section 3211(c)(2) (relating to abortion on unborn

child of 24 or more weeks gestational age), the second physician as required by section 3211(c)(5) and the facility where the abortion was performed and of the referring physician, agency or service, if any.

"(2) The county and state in which the woman resides.

"(3) The woman's age.

"(4) The number of prior pregnancies and prior abortions of the woman.

"(5) The gestational age of the unborn child at the time of the abortion.

"(6) The type of procedure performed or prescribed and the date of the abortion.

"(7) Pre-existing medical conditions of the woman which would complicate pregnancy, if any, and if known, any medical complication which resulted from the abortion itself.

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

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

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

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

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

. . . . .

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

Justice STEVENS, concurring in part and dissenting in part.

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

***912** I

The Court is unquestionably correct in concluding that the doctrine of *stare decisis* has controlling significance in a case of this kind, notwithstanding an individual Justice's concerns about the merits. [1] The central holding of *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), has been a "part of our law" for almost two decades. *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 101, 96 S.Ct. 2831, 2855, 49 L.Ed.2d 788 (1976) (STEVENS, J., concurring in part and dissenting in part). It was a natural sequel to the protection of individual liberty established in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). See also *Carey v. Population Services International,* 431 U.S. 678, 687, 702, 97 S.Ct. 2010, 2017, 2025, 52 L.Ed.2d 675 (1977) (WHITE, J., concurring in part and concurring in result). The societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.

Stare decisis also provides a sufficient basis for my agreement with the joint opinion's reaffirmation of *Roe*'s postviability analysis. Specifically, I accept the proposition that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except ****2839** when it is necessary to preserve the life or health of the mother." 410 U.S., at 163–164, 93 S.Ct., at 732; see *ante,* at 2821.

I also accept what is implicit in the Court's analysis, namely, a reaffirmation of *Roe*'s explanation of *why* the State's obligation to protect the life or health of the mother ***913** must take precedence over any duty to the unborn. The Court in *Roe* carefully considered, and rejected, the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment." 410 U.S., at 156, 93 S.Ct., at 728. After analyzing the usage of "person" in the Constitution, the Court concluded that that word "has application only postnatally." *Id.,* at 157, 93 S.Ct., at 729. Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense." *Id.,* at 162, 93 S.Ct., at 731. Accordingly, an abortion is not "the termination of life entitled to Fourteenth Amendment protection." *Id.,* at 159, 93 S.Ct., at 730. From this holding, there was no dissent, see *id.,* at 173, 93 S.Ct., at 737; indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life."[2] This has been and, by the Court's holding today, ***914** remains a fundamental premise of our constitutional law governing reproductive autonomy.

II

My disagreement with the joint opinion begins with its understanding of the trimester framework established in *Roe.* Contrary to the suggestion of the joint opinion, *ante,* at 2823, it is not a "contradiction" to recognize that the State may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability (although other interests, such as maternal health, may). The fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty. It is appropriate, therefore, to consider more carefully the nature of the interests at stake.

First, it is clear that, in order to be legitimate, the State's interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest. See *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 778, 106 S.Ct. 2169, 2188, 90 L.Ed.2d 779 (1986) (STEVENS, J., concurring); see generally *Webster v. Reproductive Health Services,* 492 U.S. 490, 563–572, 109 S.Ct. 3040, 3081–3085, 106 L.Ed.2d 410 (1989) (STEVENS, J., concurring in part and dissenting in part). ****2840** Moreover, as discussed above, the state interest in potential human life is not an interest *in loco parentis,* for the fetus is not a person.

Identifying the State's interests—which the States rarely articulate with any precision—makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more ***915** than a million abortions each year is intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in minimizing such offense. The State may also have a broader interest in expanding the population,[3] believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life.

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

U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969). The same holds true for the power to control women's bodies.

The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. Cf. ***916** *Whalen v. Roe,* 429 U.S. 589, 598–600, 97 S.Ct. 869, 875–877, 51 L.Ed.2d 64 (1977). A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future—perhaps to the salvation of her own immortal soul." *Thornburgh,* 476 U.S., at 781, 106 S.Ct., at 2189. The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.

Weighing the State's interest in potential life and the woman's liberty interest, I agree with the joint opinion that the State may " ' "expres[s] a preference for normal childbirth," ' " that the State may take steps to ensure that a woman's choice "is thoughtful and informed," and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Ante,* at 2818. Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." *Ante,* at 2821. Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to ****2841** abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments.

This theme runs throughout our decisions concerning reproductive freedom. In general, *Roe*'s requirement that restrictions on abortions before viability be justified by the State's interest in *maternal* health has prevented States from interjecting regulations designed to influence a woman's decision. Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. We have, for example, upheld regulations requiring ***917** written informed consent, see *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); limited recordkeeping and reporting, see *ibid.;* and pathology reports, see *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983); as well as various licensing and qualification provisions, see, *e.g., Roe,* 410 U.S., at 150, 93 S.Ct., at 725; *Simopoulos v. Virginia,* 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983). Conversely, we have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, see *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), or by "requir[ing] the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' " *Thornburgh,* 476 U.S., at 760, 106 S.Ct., 2178; see also *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 442–449, 103 S.Ct. 2481, 2499–2502, 76 L.Ed.2d 687 (1983).

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

Under this same analysis, §§ 3205(a)(1)(i) and (iii) of the Pennsylvania statute are constitutional. Those sections, which require the physician to inform a woman of the nature and risks of the abortion procedure and the medical risks of carrying to term, are neutral requirements comparable to those imposed in other medical procedures. Those sections indicate no effort by the Commonwealth to influence the ***918** woman's choice in any way. If anything, such requirements *enhance,* rather than skew, the woman's decisionmaking.

III

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

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

Second, it can more reasonably be argued that the 24–hour delay furthers the Commonwealth's interest in ensuring that the woman's decision is informed and thoughtful. But there is no evidence that the mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the patient. The mandatory delay thus appears to rest on outmoded **2842 and unacceptable assumptions about the decisionmaking capacity of women. While there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions, see *Hodgson v. Minnesota,* 497 U.S. 417, 449, 110 S.Ct. 2926, 2944, 111 L.Ed.2d 344 (1990),[4] none of those reasons applies to an *919 adult woman's decisionmaking ability. Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, see *ante,* at 2830–2831, so we must reject the notion that a woman is less capable of deciding matters of gravity. Cf. *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

In the alternative, the delay requirement may be premised on the belief that the decision to terminate a pregnancy is presumptively wrong. This premise is illegitimate. Those who disagree vehemently about the legality and morality of abortion agree about one thing: The decision to terminate a pregnancy is profound and difficult. No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.[5]

*920 Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

IV

In my opinion, a correct application of the "undue burden" standard leads to the same conclusion concerning the constitutionality of these requirements. A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: **2843 A burden may be "undue" either because the burden is too severe or because it lacks a legitimate, rational justification.[6]

The 24–hour delay requirement fails both parts of this test. The findings of the District Court establish the severity of *921 the burden that the 24–hour delay imposes on many pregnant women. Yet even in those cases in which the delay is not especially onerous, it is, in my opinion, "undue" because there is no evidence that such a delay serves a useful and legitimate purpose. As indicated above, there is no legitimate reason to require a woman who has agonized over her decision to leave the clinic or hospital and return again another day. While a general requirement that a physician notify her patients about the risks of a proposed medical procedure is appropriate, a rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, "undue" burden.

The counseling provisions are similarly infirm. Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate. In these cases, the Pennsylvania statute directs that counselors provide women seeking abortions with information concerning alternatives to abortion, the availability of medical assistance benefits, and the possibility of child-support payments. §§ 3205(a)(2)(i)–(iii). The statute requires that this information be given to *all* women seeking abortions,

including those for whom such information is clearly useless, such as those who are married, those who have undergone the procedure in the past and are fully aware of the options, and those who are fully convinced that abortion is their only reasonable option. Moreover, the statute requires physicians to inform all of their patients of "[t]he probable gestational age of the unborn child." § 3205(a)(1)(ii). This information is of little decisional value in most cases, because 90% of all abortions are performed during the first trimester [7] when fetal age has less relevance than when the fetus nears viability. Nor can the information ***922** required by the statute be justified as relevant to any "philosophic" or "social" argument, *ante,* at 2818, either favoring or disfavoring the abortion decision in a particular case. In light of all of these facts, I conclude that the information requirements in § 3205(a)(1)(ii) and §§ 3205(a)(2)(i)–(iii) do not serve a useful purpose and thus constitute an unnecessary—and therefore undue—burden on the woman's constitutional liberty to decide to terminate her pregnancy.

Accordingly, while I disagree with Parts IV, V–B, and V–D of the joint opinion, [8] I join the remainder of the Court's opinion.

Justice BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.
I join Parts I, II, III, V–A, V–C, and VI of the joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER, *ante.*

****2844** Three years ago, in *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), four Members of this Court appeared poised to "cas[t] into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. *Id.,* at 557, 109 S.Ct., at 3077 (BLACKMUN, J., dissenting). See *id.,* at 499, 109 S.Ct., at 3046 (plurality opinion of REHNQUIST, C.J., joined by WHITE and KENNEDY, JJ.); *id.,* at 532, 109 S.Ct., at 3064 (SCALIA, J., concurring in part and concurring in judgment). All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. See, *e.g., Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 524, 110 S.Ct. 2972, 2984, 111 L.Ed.2d 405 (1990) (BLACKMUN, J., dissenting). But now, just when so many expected the darkness to fall, the flame has grown bright.

***923** I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster.* And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

I

Make no mistake, the joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER is an act of personal courage and constitutional principle. In contrast to previous decisions in which Justices O'CONNOR and KENNEDY postponed reconsideration of *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the authors of the joint opinion today join Justice STEVENS and me in concluding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Ante,* at 2804. In brief, five Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages." *Ante,* at 2803.

A fervent view of individual liberty and the force of *stare decisis* have led the Court to this conclusion. *Ante,* at 2808. Today a majority reaffirms that the Due Process Clause of the Fourteenth Amendment establishes "a realm of personal liberty which the government may not enter," *ante,* at 2805—a realm whose outer limits cannot be determined by interpretations of the Constitution that focus only on the specific practices of States at the time the Fourteenth Amendment was adopted. See *ante,* at 2805. Included within this realm of liberty is " 'the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.' " *Ante,* at 2807, quoting *Eisenstadt v. Baird,* 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349 (1972) (emphasis in original). "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are *central* to the ***924** liberty protected by the Fourteenth Amendment." *Ante,* at 2807 (emphasis added). Finally, the Court today recognizes that in the case of abortion, "the liberty of the woman is at stake in a

sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Ante,* at 2807.

The Court's reaffirmation of *Roe*'s central holding is also based on the force of *stare decisis*. "[N]o erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *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." *Ante,* at 2812. Indeed, the Court acknowledges that *Roe*'s limitation on state power could not be removed "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by the ****2845** rule in question." *Ante,* at 2809. In the 19 years since *Roe* was decided, that case has shaped more than reproductive planning—"[a]n entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Ante,* at 2812. The Court understands that, having "call[ed] the contending sides ... to end their national division by accepting a common mandate rooted in the Constitution," *ante,* at 2815, a decision to overrule *Roe* "would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." *Ante,* at 2814. What has happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch.

In striking down the Pennsylvania statute's spousal notification requirement, the Court has established a framework ***925** for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice. [1] In determining the burden imposed by the challenged regulation, the Court inquires whether the regulation's "*purpose or effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Ante,* at 2821 (emphasis added). The Court reaffirms: "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Ante,* at 2829. Looking at this group, the Court inquires, based on expert testimony, empirical studies, and common sense, whether "in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante,* at 2830. "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Ante,* at 2820. And in applying its test, the Court remains sensitive to the unique role of women in the decisionmaking process. Whatever may have been the practice when the Fourteenth Amendment was adopted, the Court observes, "[w]omen 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." *Ante,* at 2831. [2]

***926** Lastly, while I believe that the joint opinion errs in failing to invalidate the other regulations, I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it. See, *e.g., ante,* at 2825. I am confident that in the future evidence will be produced to show that "in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante,* at 2830.

II

Today, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected ****2846** to the strictest of judicial scrutiny. Our precedents and the joint opinion's principles require us to subject all non-*de-minimis* abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24–hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

A

The Court today reaffirms the long recognized rights of privacy and bodily integrity. As early as 1891, the Court held, "[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every

individual to the possession and control of his own person, free from all restraint or interference of others....” *Union Pacific R. Co. v. Botsford,* 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891). Throughout this century, this Court also has held that the fundamental right of privacy protects citizens against governmental intrusion ***927** in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice. See *ante,* at 2804–2805. These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. *Eisenstadt,* 405 U.S., at 453, 92 S.Ct., at 1038. In *Roe v. Wade,* this Court correctly applied these principles to a woman's right to choose abortion.

State restrictions on abortion violate a woman's right of privacy in two ways. First, compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. See, *e.g., Winston v. Lee,* 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) (invalidating surgical removal of bullet from murder suspect); *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (invalidating stomach pumping). [3]

Further, when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning—critical life choices that this Court long has deemed central to the right to privacy. The decision to terminate or continue a pregnancy has no less an impact on a woman's life than decisions about contraception or marriage. ***928** 410 U.S., at 153, 93 S.Ct., at 727. Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life. For these reasons, “the decision whether or not to beget or bear a child” lies at “the very heart of this cluster of constitutionally protected choices.” *Carey v. Population Services International,* 431 U.S. 678, 685, 97 S.Ct. 2010, 2016, 52 L.Ed.2d 675 (1977).

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains ****2847** of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood —appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. See, *e.g., Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724–726, 102 S.Ct. 3331, 3336–3337, 73 L.Ed.2d 1090 (1982); *Craig v. Boren,* 429 U.S. 190, 198–199, 97 S.Ct. 451, 457–458, 50 L.Ed.2d 397 (1976). [4] The joint opinion recognizes that these assumptions about women's place in society “are no longer consistent with our ***929** understanding of the family, the individual, or the Constitution.” *Ante,* at 2831.

B

The Court has held that limitations on the right of privacy are permissible only if they survive “strict” constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. *Griswold v. Connecticut,* 381 U.S. 479, 485, 85 S.Ct. 1678, 1682, 14 L.Ed.2d 510 (1965). We have applied this principle specifically in the context of abortion regulations. *Roe v. Wade,* 410 U.S., at 155, 93 S.Ct., at 728. [5]

Roe implemented these principles through a framework that was designed “to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact,” *ante,* at 2818. *Roe* identified two relevant state interests: “an interest in preserving and protecting the health of the pregnant woman” and an interest in “protecting the potentiality of human life.” 410 U.S., at 162, 93 S.Ct., at 731. With respect to the State's interest in the health of the mother, “the ‘compelling’ point ... is at approximately the end of the first trimester,” because

it is at that point that the mortality rate in abortion approaches that in childbirth. *Id.,* at 163, 93 S.Ct., at 731. With respect to the State's interest in potential life, "the 'compelling' point is at viability," because it is at that point that the ***930** fetus "presumably has the capability of meaningful life outside the mother's womb." *Ibid.* In order to fulfill the requirement of narrow tailoring, "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester during which its health interest will be furthered." *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 434, 103 S.Ct. 2481, 2495, 76 L.Ed.2d 687 (1983).

In my view, application of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe.* Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right ****2848** to make her own reproductive decisions, free from state coercion. No majority of this Court has ever agreed upon an alternative approach. The factual premises of the trimester framework have not been undermined, see *Webster,* 492 U.S., at 553, 109 S.Ct., at 3075 (BLACKMUN, J., dissenting), and the *Roe* framework is far more administrable, and far less manipulable, than the "undue burden" standard adopted by the joint opinion.

Nonetheless, three criticisms of the trimester framework continue to be uttered. First, the trimester framework is attacked because its key elements do not appear in the text of the Constitution. My response to this attack remains the same as it was in *Webster:*

> "Were this a true concern, we would have to abandon most of our constitutional jurisprudence. [T]he 'critical elements' of countless constitutional doctrines nowhere appear in the Constitution's text.... The Constitution makes no mention, for example, of the First Amendment's 'actual malice' standard for proving certain libels, see *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).... Similarly, the Constitution makes no mention of the rational-basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims under the Equal Protection Clause. The reason is simple. Like the *Roe* framework, these ***931** tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government." *Id.*, at 548, 109 S.Ct., at 3072–3073.

The second criticism is that the framework more closely resembles a regulatory code than a body of constitutional doctrine. Again, my answer remains the same as in *Webster:*

> "[I]f this were a true and genuine concern, we would have to abandon vast areas of our constitutional jurisprudence.... Are [the distinctions entailed in the trimester framework] any finer, or more 'regulatory,' than the distinctions we have often drawn in our First Amendment jurisprudence, where, for example, we have held that a 'release time' program permitting public-school students to leave school grounds during school hours to receive religious instruction does not violate the Establishment Clause, even though a release-time program permitting religious instruction on school grounds does violate the Clause? Compare *Zorach v. Clauson,* 343 U.S. 306 [72 S.Ct. 679, 96 L.Ed. 954] (1952), with *Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County,* 333 U.S. 203 [68 S.Ct. 461, 92 L.Ed. 649] (1948).... Similarly, in a Sixth Amendment case, the Court held that although an overnight ban on attorney-client communication violated the constitutionally guaranteed right to counsel, *Geders v. United States,* 425 U.S. 80 [96 S.Ct. 1330, 47 L.Ed.2d 592] (1976), that right was not violated when a trial judge separated a defendant from his lawyer during a 15–minute recess after the defendant's direct testimony. *Perry v. Leeke,* 488 U.S. 272 [109 S.Ct. 594, 102 L.Ed.2d 624] (1989).
>
> "That numerous constitutional doctrines result in narrow differentiations between similar circumstances does ***932** not mean that this Court has abandoned adjudication in favor of regulation." *Id.,* at 549–550, 109 S.Ct., at 3073–3074.

The final, and more genuine, criticism of the trimester framework is that it fails to find the State's interest in potential human life compelling throughout pregnancy. No Member of this Court—nor for that matter, the Solicitor General, Tr. of Oral Arg. 42—has ever questioned our holding in *Roe* that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 410 U.S., at 159, 93 S.Ct., at 729–730. ****2849** Accordingly, a State's interest in protecting fetal

life is not grounded in the Constitution. Nor, consistent with our Establishment Clause, can it be a theological or sectarian interest. See *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 778, 106 S.Ct. 2169, 2188, 90 L.Ed.2d 779 (1986) (STEVENS, J., concurring). It is, instead, a legitimate interest grounded in humanitarian or pragmatic concerns. See *ante,* at 2839–2840 (STEVENS, J., concurring in part and dissenting in part).

But while a State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child," *ante,* at 2804, legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling. The question then is how best to accommodate the State's interest in potential human life with the constitutional liberties of pregnant women. Again, I stand by the views I expressed in *Webster:*

> "I remain convinced, as six other Members of this Court 16 years ago were convinced, that the *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life. The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the ***933** woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling. As a practical matter, because viability follows 'quickening'—the point at which a woman feels movement in her womb—and because viability occurs no earlier than 23 weeks gestational age, it establishes an easily applicable standard for regulating abortion while providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy." 492 U.S., at 553–554, 109 S.Ct., at 3075–3076. [6]

Roe's trimester framework does not ignore the State's interest in prenatal life. Like Justice STEVENS, *ante*, at 2840, I agree that the State may take steps to ensure that a woman's choice "is thoughtful and informed," *ante,* at 2818, and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Ante,* at 2818. But

> "[s]erious questions arise ... when a State attempts to persuade the woman to choose childbirth over abortion. *Ante,* at 2821. Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect ***934** the individual's freedom to make such judgments." *Ante,* at 2840 (STEVENS, J., concurring in part and dissenting in part) (internal quotation marks omitted).

As the joint opinion recognizes, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Ante,* at 2820.

In sum, *Roe*'s requirement of strict scrutiny as implemented through a trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman's fundamental right. Lastly, no other approach properly accommodates the woman's ****2850** constitutional right with the State's legitimate interests.

C

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

This Court has upheld informed- and written-consent requirements only where the State has demonstrated that they genuinely further important health-related state concerns. See *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 65–67, 96 S.Ct. 2831, 2839–2840, 49 L.Ed.2d 788 (1976). A State may not, under the guise

of securing informed consent, "require the delivery of information 'designed to influence the woman's informed choice between abortion or childbirth.' " *Thornburgh,* 476 U.S., at 760, 106 S.Ct., at 2178, quoting *Akron,* 462 U.S., at 443–444, 103 S.Ct., at 2499–2500. Rigid requirements that a specific body of information be imparted to a woman in all cases, regardless of the needs of the patient, improperly intrude upon the discretion of the pregnant woman's physician and thereby impose an " 'undesired and uncomfortable straitjacket.' " *Thornburgh,* 476 U.S., at 762, 106 S.Ct., at 2179, quoting *Danforth,* 428 U.S., at 67, n. 8, 96 S.Ct., at 2840, n. 8.

Measured against these principles, some aspects of the Pennsylvania informed-consent scheme are unconstitutional. ***935** While it is unobjectionable for the Commonwealth to require that the patient be informed of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child, compare Pa.Cons.Stat. §§ 3205(a)(1)(i)–(iii) (1990) with *Akron,* 462 U.S., at 446, n. 37, 103 S.Ct., at 2501, n. 37, I remain unconvinced that there is a vital state need for insisting that the information be provided by a physician rather than a counselor. *Id.,* at 448, 103 S.Ct., at 2502. The District Court found that the physician-only requirement necessarily would increase costs to the plaintiff clinics, costs that undoubtedly would be passed on to patients. And because trained women counselors are often more understanding than physicians, and generally have more time to spend with patients, see App. 366–387, the physician-only disclosure requirement is not narrowly tailored to serve the Commonwealth's interest in protecting maternal health.

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

> "[T]he listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or ***936** comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.
>
> "The requirements ... that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly ****2851** disguised elements of discouragement for the abortion decision. Much of this ..., for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the 'information' in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment.... Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest." 476 U.S., at 762–763, 106 S.Ct., at 2180 (citation omitted).

"This type of compelled information is the antithesis of informed consent," *id.,* at 764, 106 S.Ct., at 2180, and goes far beyond merely describing the general subject matter relevant to the woman's decision. "That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion character of the statute and its real purpose." *Ibid.* [7]

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

difficulty explaining their whereabouts. 744 F.Supp. 1323, 1378–1379 (ED Pa.1990). In *Akron* this Court invalidated a similarly arbitrary or inflexible waiting period because, as here, it furthered no legitimate state interest. [8]

As Justice STEVENS insightfully concludes, the mandatory delay rests either on outmoded or unacceptable assumptions about the decisionmaking capacity of women or the belief that the decision to terminate the pregnancy is ***938** presumptively wrong. *Ante,* at 2841–2842. The requirement that women consider this obvious and slanted information for an additional 24 hours contained in these provisions will only influence the woman's decision in improper ways. The vast majority of women will know this information—of ****2852** the few that do not, it is less likely that their minds will be changed by this information than it will be either by the realization that the State opposes their choice or the need once again to endure abuse and harassment on return to the clinic. [9]

Except in the case of a medical emergency, § 3206 requires a physician to obtain the informed consent of a parent or guardian before performing an abortion on an unemancipated minor or an incompetent woman. Based on evidence in the record, the District Court concluded that, in order to fulfill the informed-consent requirement, generally accepted medical principles would require an in-person visit by the parent to the facility. 744 F.Supp., at 1382. Although the Court "has recognized that the State has somewhat broader authority to regulate the activities of children than of adults," the State nevertheless must demonstrate that there is a "*Significant state interest* in conditioning an abortion ... that is not present in the case of an adult." *Danforth,* 428 U.S., at 74–75, 96 S.Ct., at 2843–2844 (emphasis added). The requirement of an in-person visit would carry with it the risk of a delay of several days or possibly weeks, even where the parent is willing to consent. While the State has an interest in encouraging parental involvement in the minor's abortion decision, § 3206 is not narrowly drawn to serve that interest. [10]

***939** Finally, the Pennsylvania statute requires every facility performing abortions to report its activities to the Commonwealth. Pennsylvania contends that this requirement is valid under *Danforth,* in which this Court held that recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality are permissible. *Id.,* at 79–81, 96 S.Ct., at 2845–2847. The Commonwealth attempts to justify its required reports on the ground that the public has a right to know how its tax dollars are spent. A regulation designed to inform the public about public expenditures does not further the Commonwealth's interest in protecting maternal health. Accordingly, such a regulation cannot justify a legally significant burden on a woman's right to obtain an abortion.

The confidential reports concerning the identities and medical judgment of physicians involved in abortions at first glance may seem valid, given the Commonwealth's interest in maternal health and enforcement of the Act. The District Court found, however, that, notwithstanding the confidentiality protections, many physicians, particularly those who have previously discontinued performing abortions because of harassment, would refuse to refer patients to abortion clinics if their names were to appear on these reports. 744 F.Supp., at 1392. The Commonwealth has failed to show that the name of the referring physician either adds to the pool of scientific knowledge concerning abortion or is reasonably related to the Commonwealth's interest in maternal health. I therefore agree with the District Court's conclusion that the confidential reporting requirements are unconstitutional ***940** insofar as they require the name of the referring physician and the basis for his or her medical judgment.

****2853** In sum, I would affirm the judgment in No. 91–902 and reverse the judgment in No. 91–744 and remand the cases for further proceedings.

III

At long last, THE CHIEF JUSTICE and those who have joined him admit it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases." *Post,* at 2855. If there is much reason to applaud the advances made by the joint opinion today, there is far more to fear from THE CHIEF JUSTICE's opinion.

THE CHIEF JUSTICE's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy. *Post,* at 2859. This constricted view is reinforced by THE CHIEF JUSTICE's exclusive reliance on tradition as a source of fundamental rights. He argues that the record in favor of a right to abortion is no stronger than the record in *Michael H. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), where the plurality found no fundamental right to visitation privileges by an adulterous father, or in *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), where the Court found no fundamental right to engage in homosexual sodomy, or in a case involving the " 'firing [of] a gun ... into another person's body.' " *Post,* at 2859. In THE CHIEF JUSTICE's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called "sexual ***941** deviates." [11] Given THE CHIEF JUSTICE's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

Even more shocking than THE CHIEF JUSTICE's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental—for THE CHIEF JUSTICE, only women's *psychological* health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of their decision. *Post,* at 2867–2868. In short, THE CHIEF JUSTICE's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

Nor does THE CHIEF JUSTICE give any serious consideration to the doctrine of *stare decisis.* For THE CHIEF JUSTICE, the facts that gave rise to *Roe* are surprisingly simple: "women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children." *Post,* at 2861. This characterization of the issue thus allows THE CHIEF JUSTICE quickly to discard the joint opinion's reliance argument by asserting that "reproductive planning could take virtually immediate account of" a decision overruling *Roe. Post,* at 2861–2862 (internal quotation marks omitted).

THE CHIEF JUSTICE's narrow conception of individual liberty and *stare decisis* leads him to propose the same standard of review proposed by the plurality in *Webster.* "States may regulate abortion procedures in ways rationally related to a legitimate state ****2854** interest. *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955); cf. *Stanley v. Illinois,* 405 U.S. 645, 651–653, 92 S.Ct. 1208, 1212–1213, 31 L.Ed.2d 551 (1972)." *Post,* at 2867. THE ***942** CHIEF JUSTICE then further weakens the test by providing an insurmountable requirement for facial challenges: Petitioners must " 'show that no set of circumstances exists under which the [provision] would be valid.' " *Post,* at 2870, quoting *Ohio v. Akron Center for Reproductive Health,* 497 U.S., at 514, 110 S.Ct., at 2980. In short, in his view, petitioners must prove that the statute cannot constitutionally be applied to *anyone.* Finally, in applying his standard to the spousal-notification provision, THE CHIEF JUSTICE contends that the record lacks any "hard evidence" to support the joint opinion's contention that a "large fraction" of women who prefer not to notify their husbands involve situations of battered women and unreported spousal assault. *Post,* at 2870, n. 2. Yet throughout the explication of his standard, THE CHIEF JUSTICE never explains what hard evidence is, how large a fraction is required, or how a battered women is supposed to pursue an as-applied challenge.

Under his standard, States can ban abortion if that ban is rationally related to a legitimate state interest—a standard which the United States calls "deferential, but not toothless." Yet when pressed at oral argument to describe the teeth, the best protection that the Solicitor General could offer to women was that a prohibition, enforced by criminal penalties, *with no exception for the life of the mother,* "could raise very serious questions." Tr. of Oral Arg. 48. Perhaps, the Solicitor General offered, the failure to include an exemption for the life of the mother would be "arbitrary and capricious." *Id.,* at 49. If, as THE CHIEF JUSTICE contends, the undue burden test is made out of whole cloth, the so-called "arbitrary and capricious" limit is the Solicitor General's "new clothes."

Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or incest? Is there anything arbitrary or capricious about a ***943** State's prohibiting the sins of the father from being visited upon his offspring? [12]

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

IV

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and Justice SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the ****2855** confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

***944** Chief Justice REHNQUIST, with whom Justice WHITE, Justice SCALIA, and Justice THOMAS join, concurring in the judgment in part and dissenting in part. The joint opinion, following its newly minted variation on *stare decisis,* retains the outer shell of *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the plurality in *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), and uphold the challenged provisions of the Pennsylvania statute in their entirety.

I

In ruling on this litigation below, the Court of Appeals for the Third Circuit first observed that "this appeal does not directly implicate *Roe;* this case involves the regulation of abortions rather than their outright prohibition." 947 F.2d 682, 687 (1991). Accordingly, the court directed its attention to the question of the standard of review for abortion regulations. In attempting to settle on the correct standard, however, the court confronted the confused state of this Court's abortion jurisprudence. After considering the several opinions in *Webster v. Reproductive Health Services, supra,* and *Hodgson v. Minnesota,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), the Court of Appeals concluded that Justice O'CONNOR's "undue burden" test was controlling, as that was the narrowest ground on which we had upheld recent abortion regulations. 947 F.2d, at 693–697 ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (quoting *Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (internal quotation marks omitted))). Applying this standard, the Court of Appeals upheld all of the challenged regulations except the one ***945** requiring a woman to notify her spouse of an intended abortion.

In arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in *Roe v. Wade, supra,* in which we held unconstitutional a Texas statute making it a crime to procure an abortion except to save the life of the mother. [1] We agree with the Court of Appeals that our decision in *Roe* is not directly implicated by the Pennsylvania statute, which does not prohibit, but simply regulates, abortion. But, as the Court of Appeals found, the state of our post-*Roe* decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that line of cases is in order. Unfortunately for those who must apply this Court's decisions, the reexamination undertaken today leaves the Court no less divided than beforehand. Although they reject the trimester framework that formed the underpinning of *Roe,* Justices O'CONNOR, KENNEDY, and SOUTER adopt a revised undue burden standard to analyze the challenged regulations. We conclude, however, that such an outcome is an unjustified constitutional compromise, one which leaves the ****2856** Court in a position to closely scrutinize all

types of abortion regulations despite the fact that it lacks the power to do so under the Constitution.

In *Roe,* the Court opined that the State "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, ... and that it has still another important and legitimate interest in protecting ***946** the potentiality of human life." 410 U.S., at 162, 93 S.Ct., at 731 (emphasis omitted). In the companion case of *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), the Court referred to its conclusion in *Roe* "that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." 410 U.S., at 189, 93 S.Ct., at 746. But while the language and holdings of these cases appeared to leave States free to regulate abortion procedures in a variety of ways, later decisions based on them have found considerably less latitude for such regulations than might have been expected.

For example, after *Roe,* many States have sought to protect their young citizens by requiring that a minor seeking an abortion involve her parents in the decision. Some States have simply required notification of the parents, while others have required a minor to obtain the consent of her parents. In a number of decisions, however, the Court has substantially limited the States in their ability to impose such requirements. With regard to parental *notice* requirements, we initially held that a State could require a minor to notify her parents before proceeding with an abortion. *H. L. v. Matheson,* 450 U.S. 398, 407–410, 101 S.Ct. 1164, 1170–1172, 67 L.Ed.2d 388 (1981). Recently, however, we indicated that a State's ability to impose a notice requirement actually depends on whether it requires notice of one or both parents. We concluded that although the Constitution might allow a State to demand that notice be given to one parent prior to an abortion, it may not require that similar notice be given to *two* parents, unless the State incorporates a judicial bypass procedure in that two-parent requirement. *Hodgson v. Minnesota, supra.*

We have treated parental *consent* provisions even more harshly. Three years after *Roe,* we invalidated a Missouri regulation requiring that an unmarried woman under the age of 18 obtain the consent of one of her parents before proceeding with an abortion. We held that our abortion jurisprudence prohibited the State from imposing such a "blanket provision ... requiring the consent of a parent." *Planned Parenthood* ***947** *of Central Mo. v. Danforth,* 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976). In *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), the Court struck down a similar Massachusetts parental consent statute. A majority of the Court indicated, however, that a State could constitutionally require parental consent, if it alternatively allowed a pregnant minor to obtain an abortion without parental consent by showing either that she was mature enough to make her own decision, or that the abortion would be in her best interests. See *id.,* at 643–644, 99 S.Ct., at 3048–3049 (plurality opinion); *id.,* at 656–657, 99 S.Ct., at 3054–3055 (WHITE, J., dissenting). In light of *Bellotti,* we have upheld one parental consent regulation which incorporated a judicial bypass option we viewed as sufficient, see *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983), but have invalidated another because of our belief that the judicial procedure did not satisfy the dictates of *Bellotti,* see *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 439–442, 103 S.Ct. 2481, 2497–2499, 76 L.Ed.2d 687 (1983). We have never had occasion, as we have in the parental notice context, to further parse our parental consent jurisprudence into one-parent and two-parent components.

In *Roe,* the Court observed that certain States recognized the right of the father to participate in the abortion decision in certain circumstances. Because neither *Roe* nor *Doe* ****2857** involved the assertion of any paternal right, the Court expressly stated that the case did not disturb the validity of regulations that protected such a right. *Roe v. Wade, supra,* 410 U.S., at 165, n. 67, 93 S.Ct., at 732, n. 67. But three years later, in *Danforth,* the Court extended its abortion jurisprudence and held that a State could not require that a woman obtain the consent of her spouse before proceeding with an abortion. *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S., at 69–71, 96 S.Ct., at 2841–2842.

States have also regularly tried to ensure that a woman's decision to have an abortion is an informed and well-considered one. In *Danforth,* we upheld a requirement that a woman sign a consent form prior to her abortion, and observed that "it is desirable and imperative that [the decision] ***948** be made with full knowledge of its nature and consequences." *Id.,* at 67, 96 S.Ct., at 2840. Since that case, however, we have twice invalidated state

statutes designed to impart such knowledge to a woman seeking an abortion. In *Akron,* we held unconstitutional a regulation requiring a physician to inform a woman seeking an abortion of the status of her pregnancy, the development of her fetus, the date of possible viability, the complications that could result from an abortion, and the availability of agencies providing assistance and information with respect to adoption and childbirth. *Akron v. Akron Center for Reproductive Health, supra,* 462 U.S., at 442–445, 103 S.Ct., at 2499–2500. More recently, in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), we struck down a more limited Pennsylvania regulation requiring that a woman be informed of the risks associated with the abortion procedure and the assistance available to her if she decided to proceed with her pregnancy, because we saw the compelled information as "the antithesis of informed consent." *Id.,* at 764, 106 S.Ct., at 2180. Even when a State has sought only to provide information that, in our view, was consistent with the *Roe* framework, we concluded that the State could not require that a physician furnish the information, but instead had to alternatively allow nonphysician counselors to provide it. *Akron v. Akron Center for Reproductive Health,* 462 U.S., at 448–449, 103 S.Ct., at 2502. In *Akron* as well, we went further and held that a State may not require a physician to wait 24 hours to perform an abortion after receiving the consent of a woman. Although the State sought to ensure that the woman's decision was carefully considered, the Court concluded that the Constitution forbade the State to impose any sort of delay. *Id.,* at 449–451, 103 S.Ct., at 2502–2503.

We have not allowed States much leeway to regulate even the actual abortion procedure. Although a State can require that second-trimester abortions be performed in outpatient clinics, see *Simopoulos v. Virginia,* 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983), we concluded in *Akron* and *Ashcroft* that a State could not ***949** require that such abortions be performed only in hospitals. See *Akron v. Akron Center for Reproductive Health, supra,* 462 U.S., at 437–439, 103 S.Ct., at 2496–2497; *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, supra,* 462 U.S., at 481–482, 103 S.Ct., at 2520. Despite the fact that *Roe* expressly allowed regulation after the first trimester in furtherance of maternal health, " 'present medical knowledge,' " in our view, could not justify such a hospitalization requirement under the trimester framework. *Akron v. Akron Center for Reproductive Health, supra,* 462 U.S., at 437, 103 S.Ct., at 2496 (quoting *Roe v. Wade, supra,* 410 U.S., at 163, 93 S.Ct., at 732). And in *Danforth,* the Court held that Missouri could not outlaw the saline amniocentesis method of abortion, concluding that the Missouri Legislature had "failed to appreciate and to consider several significant facts" in making its decision. 428 U.S., at 77, 96 S.Ct., at 2845.

Although *Roe* allowed state regulation after the point of viability to protect the potential ****2858** life of the fetus, the Court subsequently rejected attempts to regulate in this manner. In *Colautti v. Franklin,* 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), the Court struck down a statute that governed the determination of viability. *Id.,* at 390–397, 99 S.Ct., at 683–687. In the process, we made clear that the trimester framework incorporated only one definition of viability—ours—as we forbade States to decide that a certain objective indicator—"be it weeks of gestation or fetal weight or any other single factor"—should govern the definition of viability. *Id.,* at 389, 99 S.Ct., at 682. In that same case, we also invalidated a regulation requiring a physician to use the abortion technique offering the best chance for fetal survival when performing postviability abortions. See *id.,* at 397–401, 99 S.Ct., at 686–689; see also *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 768–769, 106 S.Ct., at 2183 (invalidating a similar regulation). In *Thornburgh,* the Court struck down Pennsylvania's requirement that a second physician be present at postviability abortions to help preserve the health of the unborn child, on the ground that it did not incorporate a sufficient medical emergency exception. *Id.,* at 769–771, 106 S.Ct., at 2183–2184. Regulations governing the treatment of aborted fetuses have ***950** met a similar fate. In *Akron,* we invalidated a provision requiring physicians performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." 462 U.S., at 451, 103 S.Ct., at 2503 (internal quotation marks omitted).

Dissents in these cases expressed the view that the Court was expanding upon *Roe* in imposing ever greater restrictions on the States. See *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 783, 106 S.Ct., at 2190 (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent"); *id.,* at 814, 106 S.Ct., at 2206 (WHITE, J., dissenting) ("[T]he majority indiscriminately strikes down statutory

provisions that in no way contravene the right recognized in *Roe*"). And, when confronted with state regulations of this type in past years, the Court has become increasingly more divided: The three most recent abortion cases have not commanded a Court opinion. See *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990); *Hodgson v. Minnesota,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990); *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989).

The task of the Court of Appeals in the present cases was obviously complicated by this confusion and uncertainty. Following *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), it concluded that in light of *Webster* and *Hodgson,* the strict scrutiny standard enunciated in *Roe* was no longer applicable, and that the "undue burden" standard adopted by Justice O'CONNOR was the governing principle. This state of confusion and disagreement warrants reexamination of the "fundamental right" accorded to a woman's decision to abort a fetus in *Roe,* with its concomitant requirement that any state regulation of abortion survive "strict scrutiny." See *Payne v. Tennessee,* 501 U.S. 808, 827–828, 111 S.Ct. 2597, 2609–2610, 115 L.Ed.2d 720 (1991) (observing that reexamination of constitutional decisions is appropriate when those decisions have generated uncertainty and failed to provide clear guidance, because "correction through legislative ***951** action is practically impossible" (internal quotation marks omitted)); *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 546–547, 557, 105 S.Ct. 1005, 1015, 1021, 83 L.Ed.2d 1016 (1985).

We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." ****2859** *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Three years earlier, in *Snyder v. Massachusetts,* 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934), we referred to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.,* at 105, 54 S.Ct., at 332; see also *Michael H. v. Gerald D.,* 491 U.S. 110, 122, 109 S.Ct. 2333, 2342, 105 L.Ed.2d 91 (1989) (plurality opinion) (citing the language from *Snyder*). These expressions are admittedly not precise, but our decisions implementing this notion of "fundamental" rights do not afford any more elaborate basis on which to base such a classification.

In construing the phrase "liberty" incorporated in the Due Process Clause of the Fourteenth Amendment, we have recognized that its meaning extends beyond freedom from physical restraint. In *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we held that it included a parent's right to send a child to private school; in *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that it included a right to teach a foreign language in a parochial school. Building on these cases, we have held that the term "liberty" includes a right to marry, *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); a right to procreate, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); and a right to use contraceptives, *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); *Eisenstadt v. Baird,* 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972). But a reading of these opinions makes clear that they do not endorse any all-encompassing "right of privacy."

In *Roe v. Wade,* the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S., at 152–153, 93 S.Ct., at 727. We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier ***952** opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." *Harris v. McRae,* 448 U.S. 297, 325, 100 S.Ct. 2671, 2692, 65 L.Ed.2d 784 (1980). The abortion decision must therefore "be recognized as *sui generis,* different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." *Thornburgh v. American College of Obstetricians and Gynecologists, supra,* 476 U.S., at 792, 106 S.Ct., at 2195 (WHITE, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See *Michael H. v. Gerald D., supra,* 491 U.S., at 124, n. 4, 109 S.Ct., at 2342, n. 4 (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body").

Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then–37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, Abortion in America 200 (1978). By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. *Roe v. Wade,* 410 U.S., at 139–140, 93 S.Ct., at 720; *id.,* at 176–177 , n. 2, 93 S.Ct., at 738–739, n. 2 (REHNQUIST, J., dissenting). On this record, ****2860** it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history ***953** supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.

We think, therefore, both in view of this history and of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny." In so concluding, we repeat the observation made in *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986):

> "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.,* at 194, 106 S.Ct., at 2846.

We believe that the sort of constitutionally imposed abortion code of the type illustrated by our decisions following *Roe* is inconsistent "with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does." *Webster v. Reproductive Health Services,* 492 U.S., at 518, 109 S.Ct., at 3056–3057 (plurality opinion). The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce, Meyer, Loving,* and *Griswold,* and thereby deemed the right to abortion fundamental.

II

The joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding." *Ante,* at 2817. Instead of claiming that *Roe* ***954** was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe. Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. *Ante,* at 2817–2818; see *Roe v. Wade, supra,* 410 U.S., at 162–164, 93 S.Ct., at 731–732. *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. *Ante,* at 2818.

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

standard expounded in the joint opinion. *Ante,* at 2822–2824.

In our view, authentic principles of *stare decisis* do not require that any portion of the ****2861** reasoning in *Roe* be kept intact. "*Stare decisis* is not ... a universal, inexorable command," especially in cases involving the interpretation of the Federal Constitution. *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 405, 52 S.Ct. 443, 446, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for ***955** constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depar[t] from a proper understanding" of the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S., at 557, 105 S.Ct., at 1020; see *United States v. Scott,* 437 U.S. 82, 101, 98 S.Ct. 2187, 2199, 57 L.Ed.2d 65 (1978) (" '[I]n cases involving the Federal Constitution, ... [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function' " (quoting *Burnet v. Coronado Oil & Gas Co., supra,* 285 U.S., at 406–408, 52 S.Ct., at 447–448 (Brandeis, J., dissenting))); *Smith v. Allwright,* 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944). Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question. See, *e.g., West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943); *Erie R. Co. v. Tompkins,* 304 U.S. 64, 74–78, 58 S.Ct. 817, 820–822, 82 L.Ed. 1188 (1938).

The joint opinion discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe.* Two of these factors are that the main "factual underpinning" of *Roe* has remained the same, and that its doctrinal foundation is no weaker now than it was in 1973. *Ante,* at 2810–2811. Of course, what might be called the basic facts which gave rise to *Roe* have remained the same —women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive ***956** forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

Nor does the joint opinion faithfully follow this alleged requirement. The opinion frankly concludes that *Roe* and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. *Ante,* at 2817–2818. But there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception.

The joint opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "[c]onsiderations in favor of *stare decisis* are at their acme." *Payne v. Tennessee,* 501 U.S., at 828, 111 S.Ct., at 2610. But, as the joint opinion apparently agrees, *ante,* at 2809, any traditional notion of reliance is not applicable here. The Court today cuts back on the protection afforded by *Roe,* and no one claims that this action defeats any reliance interest in the disavowed trimester framework. Similarly, reliance interests would not be diminished were the Court to go further and acknowledge the full error of *Roe,* as "reproductive planning could take virtually ****2862** immediate account of" this action. *Ante,* at 2809.

The joint opinion thus turns to what can only be described as an unconventional—and unconvincing—notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. *Ante,* at 2809. The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is dubious to suggest that women have reached their "places in society" in ***957** reliance upon *Roe,* rather than as a result of their determination to obtain higher education and compete with men in the job market, and

of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men. *Ante,* at 2809.

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have "ordered their thinking and living around" it. *Ante,* at 2809. As an initial matter, one might inquire how the joint opinion can view the "central holding" of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots and disposes of that same decision's trimester framework. Furthermore, at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed "separate but equal" treatment of minorities, see *Plessy v. Ferguson,* 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), or that "liberty" under the Due Process Clause protected "freedom of contract," see *Adkins v. Children's Hospital of District of Columbia,* 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923); *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). The "separate but equal" doctrine lasted 58 years after *Plessy,* and *Lochner*'s protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here. See *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (rejecting the "separate but equal" doctrine); *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (overruling *Adkins v. Children's Hospital, supra,* in upholding Washington's minimum wage law).

Apparently realizing that conventional *stare decisis* principles do not support its position, the joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect ***958** the "legitimacy" of this Court. *Ante,* at 2812–2816. Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, *ante,* at 2814, the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests.

But the joint opinion goes on to state that when the Court "resolve[s] the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," its decision is exempt from reconsideration under established principles of *stare decisis* in constitutional cases. *Ante,* at 2815. This is so, the joint opinion contends, because in those "intensely divisive" cases the Court has "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and must therefore take special care not to be perceived as "surrender[ing] to political pressure" and continued opposition. *Ante,* at 2815. This is a truly ****2863** novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away.*

The first difficulty with this principle lies in its assumption that cases that are "intensely divisive" can be readily distinguished from those that are not. The question of whether a particular issue is "intensely divisive" enough to qualify for special protection is entirely subjective and dependent on the individual assumptions of the Members of this Court. In addition, because the Court's duty is to ignore public opinion and criticism on issues that come before it, its Members are ***959** in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of *stare decisis* when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions. See *Payne v. Tennessee, supra,* at 828–830, and n. 1, 111 S.Ct., at 2610–2611, and n. 1 (listing cases).

The joint opinion picks out and discusses two prior Court rulings that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to *Roe. Ante,* at 2812–2814 (discussing *Lochner v. New York, supra,* and *Plessy v. Ferguson, supra*). It appears to us very odd indeed that the joint opinion

chooses as benchmarks two cases in which the Court chose *not* to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's "legitimacy" principle. See *West Coast Hotel Co. v. Parrish, supra; Brown v. Board of Education, supra.* One might also wonder how it is that the joint opinion puts these, and not others, in the "intensely divisive" category, and how it assumes that these are the only two lines of cases of comparable dimension to *Roe.* There is no reason to think that either *Plessy* or *Lochner* produced the sort of public protest when they were decided that *Roe* did. There were undoubtedly large segments of the bench and bar who agreed with the dissenting views in those cases, but surely that cannot be what the Court means when it uses the term "intensely divisive," or many other cases would have to be added to the list. In terms of public protest, however, *Roe,* so far as we know, was unique. But just as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the ***960** decision at all costs lest it *seem* to be retreating under fire. Public protests should not alter the normal application of *stare decisis,* lest perfectly lawful protest activity be penalized by the Court itself.

Taking the joint opinion on its own terms, we doubt that its distinction between *Roe,* on the one hand, and *Plessy* and *Lochner,* on the other, withstands analysis. The joint opinion acknowledges that the Court improved its stature by overruling *Plessy* in *Brown* on a deeply divisive issue. And our decision in *West Coast Hotel,* which overruled *Adkins v. Children's Hospital, supra,* and *Lochner,* was rendered at a time when Congress was considering President Franklin Roosevelt's proposal to "reorganize" this Court and enable him to name six additional Justices in the event that any Member of the Court over the age of 70 did not elect to retire. It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time, and, under the general principle proclaimed in the joint opinion, the Court seemingly should have responded to this opposition ****2864** by stubbornly refusing to reexamine the *Lochner* rationale, lest it lose legitimacy by appearing to "overrule under fire." *Ante,* at 2815.

The joint opinion agrees that the Court's stature would have been seriously damaged if in *Brown* and *West Coast Hotel* it had dug in its heels and refused to apply normal principles of *stare decisis* to the earlier decisions. But the opinion contends that the Court was entitled to overrule *Plessy* and *Lochner* in those cases, despite the existence of opposition to the original decisions, only because both the Nation and the Court had learned new lessons in the interim. This is at best a feebly supported, *post hoc* rationalization for those decisions.

For example, the opinion asserts that the Court could justifiably overrule its decision in *Lochner* only because the Depression had convinced "most people" that constitutional protection of contractual freedom contributed to an economy ***961** that failed to protect the welfare of all. *Ante,* at 2812. Surely the joint opinion does not mean to suggest that people saw this Court's failure to uphold minimum wage statutes as the cause of the Great Depression! In any event, the *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simply believed, erroneously, that "liberty" under the Due Process Clause protected the "right to make a contract." *Lochner v. New York,* 198 U.S., at 53, 25 S.Ct., at 541. Nor is it the case that the people of this Nation only discovered the dangers of extreme laissez-faire economics because of the Depression. State laws regulating maximum hours and minimum wages were in existence well before that time. A Utah statute of that sort enacted in 1896 was involved in our decision in *Holden v. Hardy,* 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780 (1898), and other states followed suit shortly afterwards, see, *e.g., Muller v. Oregon,* 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908); *Bunting v. Oregon,* 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830 (1917). These statutes were indeed enacted because of a belief on the part of their sponsors that "freedom of contract" did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before the Great Depression. Whether "most people" had come to share it in the hard times of the 1930's is, insofar as anything the joint opinion advances, entirely speculative. The crucial failing at that time was not that workers were not paid a fair wage, but that there was no work available at *any* wage.

When the Court finally recognized its error in *West Coast Hotel,* it did not engage in the *post hoc* rationalization that the joint opinion attributes to it today; it did not state that *Lochner* had been based on an economic view that had fallen into disfavor, and that it therefore should

be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that "[t]he Constitution does not speak of freedom of contract." *West Coast Hotel Co. v. Parrish,* 300 U.S., at 391, 57 S.Ct., at 581; *Lochner v. New York, supra,* 198 U.S., at 75, 25 S.Ct., at 546 (Holmes, ***962** J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*"). Although the Court did acknowledge in the last paragraph of its opinion the state of affairs during the then-current Depression, the theme of the opinion is that the Court had been mistaken as a matter of constitutional law when it embraced "freedom of contract" 32 years previously.

The joint opinion also agrees that the Court acted properly in rejecting the doctrine of "separate but equal" in *Brown.* In fact, the opinion lauds *Brown* in comparing it to *Roe. Ante,* at 2815. This is strange, in that under the opinion's "legitimacy" principle the Court would seemingly have been forced to adhere to its erroneous decision in *Plessy* because of its "intensely divisive" ****2865** character. To us, adherence to *Roe* today under the guise of "legitimacy" would seem to resemble more closely adherence to *Plessy* on the same ground. Fortunately, the Court did not choose that option in *Brown,* and instead frankly repudiated *Plessy.* The joint opinion concludes that such repudiation was justified only because of newly discovered evidence that segregation had the effect of treating one race as inferior to another. But it can hardly be argued that this was not urged upon those who decided *Plessy,* as Justice Harlan observed in his dissent that the law at issue "puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." *Plessy v. Ferguson,* 163 U.S., at 562, 16 S.Ct., at 1147. It is clear that the same arguments made before the Court in *Brown* were made in *Plessy* as well. The Court in *Brown* simply recognized, as Justice Harlan had recognized beforehand, that the Fourteenth Amendment does not permit racial segregation. The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground ***963** alone the Court was justified in properly concluding that the *Plessy* Court had erred.

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

There are other reasons why the joint opinion's discussion of legitimacy is unconvincing as well. In assuming that the Court is perceived as "surrender[ing] to political pressure" when it overrules a controversial decision, *ante,* at 2815, the joint opinion forgets that there are two sides to any controversy. The joint opinion asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to *adhere* to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those who have demonstrated in favor of the original decision. The decision in *Roe* has engendered large demonstrations, including repeated marches on this Court and on Congress, both in opposition to and in support of that opinion. A decision either way on *Roe* can therefore be perceived as favoring one group or the other. But this perceived dilemma arises only if one assumes, as the joint opinion does, that the Court ***964** should make its decisions with a view toward speculative public perceptions. If one assumes instead, as the Court surely did in both *Brown* and *West Coast Hotel,* that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side.

Roe is not this Court's only decision to generate conflict. Our decisions in some recent capital cases, and in *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), have also engendered demonstrations in opposition. The joint opinion's message to such protesters

appears to be that they must cease their activities in order to serve their cause, because their ****2866** protests will only cement in place a decision which by normal standards of *stare decisis* should be reconsidered. Nearly a century ago, Justice David J. Brewer of this Court, in an article discussing criticism of its decisions, observed that "many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all." Justice Brewer on "The Nation's Anchor," 57 Albany L.J. 166, 169 (1898). This was good advice to the Court then, as it is today. Strong and often misguided criticism of a decision should not render the decision immune from reconsideration, lest a fetish for legitimacy penalize freedom of expression.

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion —the "undue burden" standard. As indicated above, *Roe v. Wade* adopted a "fundamental right" standard under which state regulations could survive only if they met the requirement of "strict scrutiny." While we disagree with that standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result ***965** in the sort of "simple limitation," easily applied, which the joint opinion anticipates. *Ante,* at 2809. In sum, it is a standard which is not built to last.

In evaluating abortion regulations under that standard, judges will have to decide whether they place a "substantial obstacle" in the path of a woman seeking an abortion. *Ante,* at 2820. In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent "judges from roaming at large in the constitutional field" guided only by their personal views. *Griswold v. Connecticut,* 381 U.S., at 502, 85 S.Ct., at 1691 (Harlan, J., concurring in judgment). Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views. For example, in the very matter before us now, the authors of the joint opinion would uphold Pennsylvania's 24–hour waiting period, concluding that a "particular burden" on some women is not a substantial obstacle. *Ante,* at 2825. But the authors would at the same time strike down Pennsylvania's spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. *Ante,* at 2830. And, while the authors conclude that the informed consent provisions do not constitute an "undue burden," Justice STEVENS would hold that they do. *Ante,* at 2842–2843.

Furthermore, while striking down the spousal *notice* regulation, the joint opinion would uphold a parental *consent* restriction that certainly places very substantial obstacles in the path of a minor's abortion choice. The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. *Ante,* at 2829. This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between parental consent and ***966** spousal consent which the joint opinion adopts. Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.

The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out ****2867** to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in *Webster.* A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955); cf. *Stanley v. Illinois,* 405 U.S. 645,

651–653, 92 S.Ct. 1208, 1212–1214, 31 L.Ed.2d 551 (1972). With this rule in mind, we examine each of the challenged provisions.

III

A

Section 3205 of the Act imposes certain requirements related to the informed consent of a woman seeking an abortion. 18 Pa.Cons.Stat. § 3205 (1990). Section 3205(a)(1) requires that the referring or performing physician must inform a woman contemplating an abortion of (i) the nature of the procedure and the risks and alternatives that a reasonable patient would find material; (ii) the fetus' probable gestational ***967** age; and (iii) the medical risks involved in carrying her pregnancy to term. Section 3205(a)(2) requires a physician or a nonphysician counselor to inform the woman that (i) the state health department publishes free materials describing the fetus at different stages and listing abortion alternatives; (ii) medical assistance benefits may be available for prenatal, childbirth, and neonatal care; and (iii) the child's father is liable for child support. The Act also imposes a 24–hour waiting period between the time that the woman receives the required information and the time that the physician is allowed to perform the abortion. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante,* at 2833–2834.

This Court has held that it is certainly within the province of the States to require a woman's voluntary and informed consent to an abortion. See *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 760, 106 S.Ct., at 2178. Here, Pennsylvania seeks to further its legitimate interest in obtaining informed consent by ensuring that each woman "is aware not only of the reasons for having an abortion, but also of the risks associated with an abortion and the availability of assistance that might make the alternative of normal childbirth more attractive than it might otherwise appear." *Id.,* at 798–799, 106 S.Ct., at 2198–2199 (WHITE, J., dissenting).

We conclude that this provision of the statute is rationally related to the State's interest in assuring that a woman's consent to an abortion be a fully informed decision. Section 3205(a)(1) requires a physician to disclose certain information about the abortion procedure and its risks and alternatives. This requirement is certainly no large burden, as the Court of Appeals found that "the record shows that the clinics, without exception, insist on providing this information to women before an abortion is performed." 947 F.2d, at 703. We are of the view that this information "clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent." *Akron v.* ***968** *Akron Center for Reproductive Health, Inc.,* 462 U.S., at 446, 103 S.Ct., at 2501. An accurate description of the gestational age of the fetus and of the risks involved in carrying a child to term helps to further both those interests and the State's legitimate interest in unborn human life. See *id.,* at 445–446, n. 37, 103 S.Ct., at 2500–2501, n. 37 (required disclosure of gestational age of the fetus "certainly is not objectionable"). Although petitioners contend that it is unreasonable for the State to require that a physician, as ****2868** opposed to a nonphysician counselor, disclose this information, we agree with the Court of Appeals that a State "may rationally decide that physicians are better qualified than counselors to impart this information and answer questions about the medical aspects of the available alternatives." 947 F.2d, at 704.

Section 3205(a)(2) compels the disclosure, by a physician or a counselor, of information concerning the availability of paternal child support and state-funded alternatives if the woman decides to proceed with her pregnancy. Here again, the Court of Appeals observed that "the record indicates that most clinics already require that a counselor consult in person with the woman about alternatives to abortion before the abortion is performed." *Id.,* at 704–705. And petitioners do not claim that the information required to be disclosed by statute is in any way false or inaccurate; indeed, the Court of Appeals found it to be "relevant, accurate, and non-inflammatory." *Id.,* at 705. We conclude that this required presentation of "balanced information" is rationally related to the State's legitimate interest in ensuring that the woman's consent is truly informed, *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 830, 106 S.Ct., at 2215 (O'CONNOR, J., dissenting), and in addition furthers the State's interest in preserving unborn life. That the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids the provision of such information. Indeed, it

only demonstrates that this information might ***969** very well make a difference, and that it is therefore relevant to a woman's informed choice. Cf. *id.,* at 801, 106 S.Ct., at 2200 (WHITE, J., dissenting) ("[T]he ostensible objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice"). We acknowledge that in *Thornburgh* this Court struck down informed consent requirements similar to the ones at issue here. See *id.,* at 760–764, 106 S.Ct., at 2178–2181. It is clear, however, that while the detailed framework of *Roe* led to the Court's invalidation of those informational requirements, they "would have been sustained under any traditional standard of judicial review, ... or for any other surgical procedure except abortion." *Webster v. Reproductive Health Services,* 492 U.S., at 517, 109 S.Ct., at 3056 (plurality opinion) (citing *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 802, 106 S.Ct., at 2200 (WHITE, J., dissenting); *id.,* at 783, 106 S.Ct., at 2190 (Burger, C.J., dissenting)). In light of our rejection of *Roe*'s "fundamental right" approach to this subject, we do not regard *Thornburgh* as controlling.

For the same reason, we do not feel bound to follow this Court's previous holding that a State's 24–hour mandatory waiting period is unconstitutional. See *Akron v. Akron Center for Reproductive Health, Inc., supra,* 462 U.S., at 449–451, 103 S.Ct., at 2502–2503. Petitioners are correct that such a provision will result in delays for some women that might not otherwise exist, therefore placing a burden on their liberty. But the provision in no way prohibits abortions, and the informed consent and waiting period requirements do not apply in the case of a medical emergency. See 18 Pa.Cons.Stat. §§ 3205(a), (b) (1990). We are of the view that, in providing time for reflection and reconsideration, the waiting period helps ensure that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus. It "is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences ***970** on fetal life, and the possible effects on her own." 462 U.S., at 474, 103 S.Ct., at 2516 (O'CONNOR, J., dissenting).

B

In addition to providing her own informed consent, before an unemancipated woman under the age of 18 may obtain an abortion she ****2869** must either furnish the consent of one of her parents, or must opt for the judicial procedure that allows her to bypass the consent requirement. Under the judicial bypass option, a minor can obtain an abortion if a state court finds that she is capable of giving her informed consent and has indeed given such consent, *or* determines that an abortion is in her best interests. Records of these court proceedings are kept confidential. The Act directs the state trial court to render a decision within three days of the woman's application, and the entire procedure, including appeal to Pennsylvania Superior Court, is to last no longer than eight business days. The parental consent requirement does not apply in the case of a medical emergency. 18 Pa.Cons.Stat. § 3206 (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ. *ante,* at 2834–2835.

This provision is entirely consistent with this Court's previous decisions involving parental consent requirements. See *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983) (upholding parental consent requirement with a similar judicial bypass option); *Akron v. Akron Center for Reproductive Health, Inc., supra,* 462 U.S., at 439–440, 103 S.Ct., at 2497 (approving of parental consent statutes that include a judicial bypass option allowing a pregnant minor to "demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests"); *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979).

We think it beyond dispute that a State "has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes ***971** impair their ability to exercise their rights wisely." *Hodgson v. Minnesota,* 497 U.S., at 444, 110 S.Ct., at 2942 (opinion of STEVENS, J.). A requirement of parental consent to abortion, like myriad other restrictions placed upon minors in other contexts, is reasonably designed to further this important and legitimate state interest. In our view, it is entirely "rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." *Ohio v. Akron Center for Reproductive Health,* 497 U.S., at 520, 110 S.Ct., at 2984 (opinion of KENNEDY, J.); see also *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S.,

at 91, 96 S.Ct., at 2851 (Stewart, J., concurring) ("There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child"). We thus conclude that Pennsylvania's parental consent requirement should be upheld.

C

Section 3209 of the Act contains the spousal notification provision. It requires that, before a physician may perform an abortion on a married woman, the woman must sign a statement indicating that she has notified her husband of her planned abortion. A woman is not required to notify her husband if (1) her husband is not the father, (2) her husband, after diligent effort, cannot be located, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) the woman has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her by him or by another individual. In addition, a woman is exempted from the notification requirement in the case of a medical emergency. 18 Pa.Cons.Stat. § 3209 (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ. *ante,* at 2836–2837.

***972** We first emphasize that Pennsylvania has not imposed a spousal *consent* requirement of the type the Court struck down in *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S., at 67–72, 96 S.Ct., at 2840–2842. Missouri's spousal consent provision was invalidated in that case because of the Court's view that it unconstitutionally ****2870** granted to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." *Id.,* at 71, 96 S.Ct., at 2842. But the provision here involves a much less intrusive requirement of spousal *notification,* not consent. Such a law requiring only notice to the husband "does not give any third party the legal right to make the [woman's] decision for her, or to prevent her from obtaining an abortion should she choose to have one performed." *Hodgson v. Minnesota, supra,* 497 U.S., at 496, 110 S.Ct., at 2969 (KENNEDY, J., concurring in judgment in part and dissenting in part); see *H.L. v. Matheson,* 450 U.S., at 411, n. 17, 101 S.Ct., at 1172, n. 17. *Danforth* thus does not control our analysis. Petitioners contend that it should, however; they argue that the real effect of such a notice requirement is to give the power to husbands to veto a woman's abortion choice. The District Court indeed found that the notification provision created a risk that some woman who would otherwise have an abortion will be prevented from having one. 947 F.2d, at 712. For example, petitioners argue, many notified husbands will prevent abortions through physical force, psychological coercion, and other types of threats. But Pennsylvania has incorporated exceptions in the notice provision in an attempt to deal with these problems. For instance, a woman need not notify her husband if the pregnancy is the result of a reported sexual assault, or if she has reason to believe that she would suffer bodily injury as a result of the notification. 18 Pa.Cons.Stat. § 3209(b) (1990). Furthermore, because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision "might operate unconstitutionally under some conceivable set of circumstances." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987). Thus, it is not enough for petitioners ***973** to show that, in some "worst case" circumstances, the notice provision will operate as a grant of veto power to husbands. *Ohio v. Akron Center for Reproductive Health,* 497 U.S., at 514, 110 S.Ct., at 2981. Because they are making a facial challenge to the provision, they must "show that no set of circumstances exists under which the [provision] would be valid." *Ibid.* (internal quotation marks omitted). This they have failed to do.[2]

****2871** ***974** The question before us is therefore whether the spousal notification requirement rationally furthers any legitimate state interests. We conclude that it does. First, a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. See *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S., at 69, 96 S.Ct., at 2841 ("We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying"); *id.,* at 93, 96 S.Ct., at 2852 (WHITE, J., concurring in part and dissenting in part); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S., at 541, 62 S.Ct., at 1113. The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely

that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him. This participation might in some cases result in a decision to proceed with the pregnancy. As Judge Alito observed in his dissent below, "[t]he Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed ***975** opposition—that may be obviated by discussion prior to the abortion." 947 F.2d, at 726 (opinion concurring in part and dissenting in part).

The State also has a legitimate interest in promoting "the integrity of the marital relationship." 18 Pa.Cons.Stat. § 3209(a) (1990). This Court has previously recognized "the importance of the marital relationship in our society." *Planned Parenthood of Central Mo. v. Danforth, supra,* 428 U.S., at 69, 96 S.Ct., at 2841. In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby fosters marital integrity. See *Labine v. Vincent,* 401 U.S. 532, 538, 91 S.Ct. 1017, 1020, 28 L.Ed.2d 288 (1971) ("[T]he power to make rules to establish, protect, and strengthen family life" is committed to the state legislatures). Petitioners argue that the notification requirement does not further any such interest; they assert that the majority of wives already notify their husbands of their abortion decisions, and the remainder have excellent reasons for keeping their decisions a secret. In the first case, they argue, the law is unnecessary, and in the second case it will only serve to foster marital discord and threats of harm. Thus, petitioners see the law as a totally irrational means of furthering whatever legitimate interest the State might have. But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife. See *Planned Parenthood of Central Mo. v. Danforth, supra,* 428 U.S., at 103–104, 96 S.Ct., at 2857 (STEVENS, J., concurring in part and dissenting in part) (making a similar point in the context of a parental consent statute). The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but "the existence of particular cases in which a feature of a statute performs no function (or is even counter ****2872** productive) ***976** ordinarily does not render the statute unconstitutional or even constitutionally suspect." *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S., at 800, 106 S.Ct., at 2199 (WHITE, J., dissenting). The Pennsylvania Legislature was in a position to weigh the likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial. Whether this was a wise decision or not, we cannot say that it was irrational. We therefore conclude that the spousal notice provision comports with the Constitution. See *Harris v. McRae,* 448 U.S., at 325–326, 100 S.Ct., at 2692–2693 ("It is not the mission of this Court or any other to decide whether the balance of competing interests ... is wise social policy").

D

The Act also imposes various reporting requirements. Section 3214(a) requires that abortion facilities file a report on each abortion performed. The reports do not include the identity of the women on whom abortions are performed, but they do contain a variety of information about the abortions. For example, each report must include the identities of the performing and referring physicians, the gestational age of the fetus at the time of abortion, and the basis for any medical judgment that a medical emergency existed. See 18 Pa.Cons.Stat. §§ 3214(a)(1), (5), (10) (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ. *ante,* at 2837–2838. The District Court found that these reports are kept completely confidential. 947 F.2d, at 716. We further conclude that these reporting requirements rationally further the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act.

Section 3207 of the Act requires each abortion facility to file a report with its name and address, as well as the names ***977** and addresses of any parent, subsidiary, or affiliated organizations. 18 Pa.Cons.Stat. § 3207(b) (1990). Section 3214(f) further requires each facility to file quarterly reports stating the total number of abortions performed, broken down by trimester. Both of these reports are available to the public only if the facility

received state funds within the preceding 12 months. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ. *ante,* at 2835, 2838. Petitioners do not challenge the requirement that facilities provide this information. They contend, however, that the forced public disclosure of the information given by facilities receiving public funds serves no legitimate state interest. We disagree. Records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. See Pa.Stat.Ann., Tit. 65, §§ 66.1, 66.2 (Purdon 1959 and Supp.1991–1992). As the Court of Appeals observed, "[w]hen a state provides money to a private commercial enterprise, there is a legitimate public interest in informing taxpayers who the funds are benefiting and what services the funds are supporting." 947 F.2d, at 718. These reporting requirements rationally further this legitimate state interest.

E

Finally, petitioners challenge the medical emergency exception provided for by the Act. The existence of a medical emergency exempts compliance with the Act's informed consent, parental consent, and spousal notice requirements. See 18 Pa.Cons.Stat. §§ 3205(a), 3206(a), 3209(c) (1990). The Act defines a "medical emergency" as

> "[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 ***978** and irreversible ****2873** impairment of major bodily function." § 3203.

Petitioners argued before the District Court that the statutory definition was inadequate because it did not cover three serious conditions that pregnant women can suffer—preeclampsia, inevitable abortion, and prematurely ruptured membrane. The District Court agreed with petitioners that the medical emergency exception was inadequate, but the Court of Appeals reversed this holding. In construing the medical emergency provision, the Court of Appeals first observed that all three conditions do indeed present the risk of serious injury or death when an abortion is not performed, and noted that the medical profession's uniformly prescribed treatment for each of the three conditions is an immediate abortion. See 947 F.2d, at 700–701. Finding that "[t]he Pennsylvania legislature did not choose the wording of its medical emergency exception in a vacuum," the court read the exception as intended "to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Id.,* at 701. It thus concluded that the exception encompassed each of the three dangerous conditions pointed to by petitioners.

We observe that Pennsylvania's present definition of medical emergency is almost an exact copy of that State's definition at the time of this Court's ruling in *Thornburgh,* one which the Court made reference to with apparent approval. 476 U.S., at 771, 106 S.Ct., at 2184 ("It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so"). [3] We find that the interpretation ***979** of the Court of Appeals in these cases is eminently reasonable, and that the provision thus should be upheld. When a woman is faced with any condition that poses a "significant threat to [her] life or health," she is exempted from the Act's consent and notice requirements and may proceed immediately with her abortion.

IV

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

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

My views on this matter are unchanged from those I set forth in my separate opinions in *Webster v. Reproductive Health Services,* 492 U.S. 490, 532, 109 S.Ct. 3040, 3064, 106 L.Ed.2d 410 (1989) (opinion concurring in part and concurring in judgment), and *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 520, 110 S.Ct. 2972, 2984, 111 L.Ed.2d 405 (1990) (*Akron II*) (concurring

opinion). The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree the government can adopt one position or the other." *Ante,* at 2806. The Court is correct in adding the qualification that this "assumes a state of ****2874** affairs in which the choice does not intrude upon a protected liberty," *ante,* at 2807—but the crucial part of that qualification ***980** is the penultimate word. A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example—with which entire societies of reasonable people disagree—intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid.* Rather, I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected —because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. [1] *Akron II, supra,* at 520, 110 S.Ct., at 2984 (SCALIA, J., concurring).

***981** The Court destroys the proposition, evidently meant to represent my position, that "liberty" includes "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified," *ante,* at 2805 (citing *Michael H. v. Gerald D.,* 491 U.S. 110, 127, n. 6, 109 S.Ct. 2333, 2344, n. 6, 105 L.Ed.2d 91 (1989) (opinion of SCALIA, J.)). That is not, however, what *Michael H.* says; it merely observes that, in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," *ibid.* But the Court does not wish to be fettered by any such limitations on its preferences. The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "cur[b] the discretion of federal judges," *ante,* at 2804, is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs.

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

"The inescapable fact is that adjudication of substantive due process claims may call upon the Court *982 in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment." *Ante,* at 2806.

Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying "reasoned judgment," I do not see how that could possibly have produced the answer the Court arrived at in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). Today's opinion describes the methodology of *Roe,* quite accurately, as weighing against the woman's interest the State's " 'important and legitimate interest in protecting the potentiality of human life.' " *Ante,* at 2817 (quoting *Roe, supra,* at 162, 93 S.Ct., at 731). But "reasoned judgment" does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." See, *e.g., Roe, supra,* at 162, 93 S.Ct., at 731; *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 61, 96 S.Ct. 2831, 2837, 49 L.Ed.2d 788 (1976); *Colautti v. Franklin,* 439 U.S. 379, 386, 99 S.Ct. 675, 681, 58 L.Ed.2d 596 (1979); *Akron v. Akron Center for Reproductive*

Health, Inc., 462 U.S. 416, 428, 103 S.Ct. 2481, 2491, 76 L.Ed.2d 687 (1983) (*Akron I*); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 482, 103 S.Ct. 2517, 2520, 76 L.Ed.2d 733 (1983). The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life.* Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.

The authors of the joint opinion, of course, do not squarely contend that *Roe v. Wade* was a *correct* application of "reasoned judgment"; merely that it must be followed, because of *stare decisis. Ante,* at 2808, 2812, 2817. But in their exhaustive discussion of all the factors that go into the determination ***983** of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "[t]he Court's power lies ... in its legitimacy, a product of substance and perception," *ante,* at 2814, the "substance" part of the equation demands that plain error be acknowledged and eliminated. *Roe* was plainly wrong—even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in "liberty" because it is among "a person's most basic decisions," *ante,* at 2806; it involves a "most intimate and personal choic[e]," *ante,* at 2807; it is "central to personal dignity and ****2876** autonomy," *ibid.;* it "originate[s] within the zone of conscience and belief," *ibid.;* it is "too intimate and personal" for state interference, *ante,* at 2807; it reflects "intimate views" of a "deep, personal character," *ante,* at 2808; it involves "intimate relationships" and notions of "personal autonomy and bodily integrity," *ante,* at 2810; and it concerns a particularly " 'important decisio[n],' " *ante,* at 2811 (citation omitted). [2] But it is ***984** obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority, see *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)) has held are *not* entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deep[ly] personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection. Justice Curtis's warning is as timely today as it was 135 years ago:

> "[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Dred Scott v. Sandford,* 19 How. 393, 621, 15 L.Ed. 691 (1857) (dissenting opinion).
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> **"Liberty finds no refuge in a jurisprudence of doubt."** *Ante,* at 2803.

One might have feared to encounter this august and sonorous phrase in an opinion defending the real *Roe v. Wade,* rather than the revised version fabricated today by the authors ***985** of the joint opinion. The shortcomings of *Roe* did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion —which calls upon federal district judges to apply an "undue burden" standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear.

The joint opinion frankly concedes that the amorphous concept of "undue burden" has been inconsistently applied by the Members of this Court in the few brief years since that "test" was first explicitly propounded by Justice O'CONNOR in her dissent in *Akron I,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). See *ante,* at 2820.[3] Because the three Justices now wish to "set forth a standard ****2877** of general application," the joint opinion announces that "it is important to clarify what is meant by an undue burden." *Ibid.* I certainly agree with that, but I do not agree that the joint opinion succeeds in the announced endeavor. To the contrary, its efforts at clarification ***986** make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.

The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ibid.;* see also *ante,* at 2820–2821. An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." *Ante,* at 2820.[4] This latter statement cannot ***987** possibly mean what it says. *Any* regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not *unduly* hinder the woman's decision. That, of course, brings us right back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the ****2878** test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

The ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis. As THE CHIEF JUSTICE points out, *Roe*'s strict-scrutiny standard "at least had a recognized basis in constitutional law at the time *Roe* was decided," *ante,* at 2866, while "[t]he same cannot be said for the 'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion," *ibid.* The joint opinion is flatly wrong in asserting that "our jurisprudence relating to all liberties save perhaps abortion has recognized" the permissibility of laws that do not impose an "undue burden." *Ante,* at 2818. It argues that the abortion right is similar to other rights in that a law "not designed to strike at the right itself, [but which] has the incidental effect of making it more difficult or more expensive to [exercise the right,]" is not invalid. *Ante,* at 2819. I agree, indeed I have ***988** forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, see *R.A.V. v. St. Paul,* 505 U.S. 377, 389–390, 112 S.Ct. 2538, 2546–2547, 120 L.Ed.2d 305 (1992); *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 878–882, 110 S.Ct. 1595, 1599–1602, 108 L.Ed.2d 876 (1990), but that principle does not establish the quite different (and quite dangerous) proposition that a law which *directly* regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden." It is that, of course, which is at issue here: Pennsylvania has *consciously and directly* regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24–hour waiting period, or to pay a nominal additional tax of 1¢. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a "substantial obstacle" to the exercise of First Amendment rights. The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for these cases, to preserve some judicial foothold in this ill-gotten territory. In claiming otherwise, the three Justices show their willingness to place all constitutional rights at risk in an effort to preserve what they deem the "central holding in *Roe.*" *Ante,* at 2818.

The rootless nature of the "undue burden" standard, a phrase plucked out of context from our earlier abortion decisions, see n. 3, *supra,* is further reflected in the fact that the joint opinion finds it necessary expressly to repudiate the more narrow formulations used in Justice O'CONNOR's earlier opinions. *Ante,* at 2820. Those opinions stated that a statute imposes an "undue burden" if it imposes "*absolute* obstacles or *severe* limitations on the abortion decision," *Akron I,* 462 U.S., at 464, 103 S.Ct., at 2510 (dissenting opinion) (emphasis added); see also *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 828, 106 S.Ct. 2169, 2214, 90 L.Ed.2d 779 (1986) (dissenting ***989** opinion). Those strong adjectives are conspicuously missing from the joint opinion, whose authors have for some unexplained reason

now determined that a burden is "undue" if it merely imposes a "substantial" obstacle to abortion decisions. See, *e.g., ante,* at 2830, 2833. Justice O'CONNOR has also abandoned (again without explanation) the view she expressed in *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983) (dissenting opinion), that a medical regulation which imposes an "undue burden" could nevertheless be upheld if it "reasonably relate[s] to the preservation and protection of maternal health," *id.,* at 505, 103 S.Ct., at 2532 (citation and internal quotation marks omitted). In today's version, ****2879** even health measures will be upheld only "*if they do not constitute an undue burden,*" *ante,* at 2821 (emphasis added). Gone too is Justice O'CONNOR's statement that "the State possesses *compelling* interests in the protection of potential human life ... throughout pregnancy," *Akron I, supra,* 462 U.S., at 461, 103 S.Ct., at 2509 (dissenting opinion) (emphasis added); see also *Ashcroft, supra,* 462 U.S., at 505, 103 S.Ct., at 2532 (O'CONNOR, J., concurring in judgment in part and dissenting in part); *Thornburgh, supra,* 476 U.S., at 828, 106 S.Ct., at 2214 (O'CONNOR, J., dissenting); instead, the State's interest in unborn human life is stealthily downgraded to a merely "substantial" or "profound" interest, *ante,* at 2820, 2821. (That had to be done, of course, since designating the interest as "compelling" throughout pregnancy would have been, shall we say, a "substantial obstacle" to the joint opinion's determined effort to reaffirm what it views as the "central holding" of *Roe.* See *Akron I,* 462 U.S., at 420, n. 1, 103 S.Ct., at 2487, n. 1.) And "viability" is no longer the "arbitrary" dividing line previously decried by Justice O'CONNOR in *Akron I, id.,* at 461, 103 S.Ct., at 2509; the Court now announces that "the attainment of viability may continue to serve as the critical fact," *ante,* at 2811. [5] It is difficult to ***990** maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

Because the portion of the joint opinion adopting and describing the undue burden test provides no more useful guidance than the empty phrases discussed above, one must turn to the 23 pages applying that standard to the present facts for further guidance. In evaluating Pennsylvania's abortion law, the joint opinion relies extensively on the factual findings of the District Court, and repeatedly qualifies its conclusions by noting that they are contingent upon the record developed in these cases. Thus, the joint opinion would uphold the 24–hour waiting period contained in the Pennsylvania statute's informed consent provision, 18 Pa.Cons.Stat. § 3205 (1990), because "the record evidence shows that in the vast majority of cases, a 24–hour delay does not create any appreciable health risk," *ante,* at 2825. The three Justices therefore conclude that "on the record before us, ... we are not convinced that the 24–hour waiting period constitutes an undue burden." *Ante,* at 2826. The requirement that a doctor provide the information pertinent to informed consent would also be upheld because "there is no evidence on this record that [this requirement] would amount in practical terms to a substantial obstacle to a woman seeking an abortion." *Ante,* at 2824. Similarly, the joint opinion would uphold the reporting requirements of the Act, §§ 3207, 3214, because "there is no ... showing on the record before us" that these requirements constitute a "substantial obstacle" ***991** to abortion decisions. *Ante,* at 2833. But at the same time the opinion pointedly observes that these reporting requirements may increase the costs of abortions and that "at some point [that fact] could become a substantial obstacle." *Ibid.* Most significantly, the joint opinion's conclusion that the spousal notice requirement of the Act, see § 3209, imposes an "undue burden" is based in large measure on the District Court's "detailed findings of fact," which the joint opinion sets out at great length, *ante,* at 2826–2828.

****2880** I do not, of course, have any objection to the notion that, in applying legal principles, one should rely only upon the facts that are contained in the record or that are properly subject to judicial notice. [6] But what is remarkable about the joint opinion's fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that the provision either does or does not impose a "substantial obstacle" or an "undue burden." See, *e.g., ante,* at 2822, 2824, 2825–2826, 2828–2829, 2830, 2833. We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been ***992** appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and

relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue"—subject, of course, to the possibility of being reversed by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

To the extent I can discern *any* meaningful content in the "undue burden" standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the "undue burden" analysis is whether the regulation "prevent[s] a significant number of women from obtaining an abortion," *ante,* at 2829; whether a "significant number of women ... are likely to be deterred from procuring an abortion," *ibid.;* and whether the regulation often "deters" women from seeking abortions, *ante,* at 2830–2831. We are not told, however, what forms of "deterrence" are impermissible or what degree of success in deterrence is too much to be tolerated. If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to "deter" a "significant number of women" from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State's "substantial" and "profound" interest in "potential human life," and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful. As Justice BLACKMUN recognizes (with evident hope), *ante,* at 2845, the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "express[ing] a preference ***993** for childbirth over abortion," *ante,* at 2824. Reason finds no refuge in this jurisprudence of confusion.

"While we appreciate the weight of the arguments ... that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* **2881 are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*." *Ante,* at 2808.

The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe,* but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis,* and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. I wonder whether, as applied to *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803), for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts.

I am certainly not in a good position to dispute that the Court *has saved* the "central holding" of *Roe,* since to do that effectively I would have to know what the Court has saved, which in turn would require me to understand (as I do not) what the "undue burden" test means. I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains. It seems particularly ungrateful to carve the trimester framework out of the core of *Roe,* since its very rigidity (in sharp contrast to the utter indeterminability of the "undue burden" test) is probably the only reason the Court is able to say, in urging *stare decisis,* that *Roe* "has in no sense proven 'unworkable,' " *ante,* at 2809. I suppose the ***994** Court is entitled to call a "central holding" whatever it wants to call a "central holding"—which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis.* I thought I might note, however, that the following portions of *Roe* have not been saved:

• Under *Roe,* requiring that a woman seeking an abortion be provided truthful information about abortion before giving informed written consent is unconstitutional, if the information is designed to influence her choice. *Thornburgh,* 476 U.S., at 759–765, 106 S.Ct., at 2178–2181; *Akron I,* 462 U.S., at 442–445, 103 S.Ct., at 2499–2500. Under the joint opinion's "undue burden" regime (as applied today, at least) such a requirement is constitutional. *Ante,* at 2822–2825.

• Under *Roe,* requiring that information be provided by a doctor, rather than by nonphysician counselors, is unconstitutional, *Akron I, supra,* at 446–449, 103 S.Ct., at 2501–2502. Under the "undue burden" regime (as applied today, at least) it is not. *Ante,* at 2824.

• Under *Roe,* requiring a 24–hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional. *Akron I, supra,* at 449–451, 103 S.Ct., at 2502–2503. Under the "undue burden" regime (as applied today, at least) it is not. *Ante,* at 2825–2826.

• Under *Roe,* requiring detailed reports that include demographic data about each woman who seeks an abortion and various information about each abortion is unconstitutional. *Thornburgh, supra,* 476 U.S., at 765–768, 106 S.Ct., at 2181–2183. Under the "undue burden" regime (as applied today, at least) it generally is not. *Ante,* at 2832–2833.

"Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* ..., its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a *995 national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante,* at 2815.

****2882** The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue—as it does over other issues, such as the death penalty—but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre–*Roe,* moreover, political compromise was possible.

Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution *guarantees* abortion, how can it be bad?"—not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. But to portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court ***996** in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana,* that the Court's new majority decrees.

"[T]o overrule under fire ... would subvert the Court's legitimacy....

"... To all those who will be ... tested by following, the Court implicitly undertakes to remain steadfast.... The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and ... the commitment [is not] obsolete....

"[The American people's] belief in themselves as ... a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals." *Ante,* at 2815–2816.

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges —leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speak[s] before all others for their constitutional ideals"—with the somewhat more modest role envisioned for these lawyers by the Founders.

> "The judiciary ... has ... no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment...." The Federalist No. 78, pp. 393–394 (G. Wills ed. 1982).

Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no

***997** shadow of change or hint of alteration ("There is a limit to the amount of error that can plausibly be imputed to prior Courts," *ante,* at 2815), with ****2883** the more democratic views of a more humble man:

> "[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, p. 139 (1989).

It is particularly difficult, in the circumstances of the present decision, to sit still for the Court's lengthy lecture upon the virtues of "constancy," *ante,* at 2815, of "remain[ing] steadfast," *ibid.,* of adhering to "principle," *ante, passim.* Among the five Justices who purportedly adhere to *Roe,* at most three agree upon the *principle* that constitutes adherence (the joint opinion's "undue burden" standard)—and that principle is inconsistent with *Roe.* See 410 U.S., at 154–156, 93 S.Ct., at 727–728.[7] To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions. See n. 4, *supra;* see *supra,* at 2878–2879. It is beyond me how the Court expects these accommodations to be accepted "as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." *Ante,* at 2814. The only principle the Court "adheres" ***998** to, it seems to me, is the principle that the Court must be seen as standing by *Roe.* That is not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik*—and a wrong one at that.

I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe.* In my history-book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford,* 19 How. 393, 15 L.Ed. 691 (1857), an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937), which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal. (Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of "substantive due process" that the Court praises and employs today. Indeed, *Dred Scott* was "very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade.*" D. Currie, The Constitution in the Supreme Court 271 (1985) (footnotes omitted).)

But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Constitution ***999** has an evolving meaning, see ****2884** *ante,* at 2805; that the Ninth Amendment's reference to "othe [r]" rights is not a disclaimer, but a charter for action, *ibid.;* and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition—then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. We are offended by these marchers who descend upon us, every year on the anniversary of *Roe,* to protest our saying that the Constitution requires what our society has never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change—to show how little they intimidate us.

Of course, as THE CHIEF JUSTICE points out, we have been subjected to what the Court calls " 'political pressure' " by *both* sides of this issue. *Ante,* at 2865. Maybe today's decision *not* to overrule *Roe* will be seen as buckling to pressure from *that* direction. Instead of engaging in the hopeless task of predicting public perception—a job

not for lawyers but for political campaign managers—the Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.

In truth, I am as distressed as the Court is—and expressed my distress several years ago, see *Webster,* 492 U.S., at 535, 109 S.Ct., at 3065—about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account ***1000** their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," *ante,* at 2806, which turns out to be nothing but philosophical predilection and moral intuition. All manner of "liberties," the Court tells us, inhere in the Constitution and are enforceable by this Court—not just those mentioned in the text or established in the traditions of our society. *Ante,* at 2804–2806. Why even the Ninth Amendment—which says only that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"—is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted—at "rights," definable and enforceable by us, through "reasoned judgment." *Ante,* at 2805–2806.

What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public high school graduation ****2885** ceremonies, *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); if, as I say, our pronouncement of constitutional law rests primarily on value ***1001** judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours.* Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidently committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. Justice BLACKMUN not only regards this prospect with equanimity, he solicits it. *Ante,* at 2854–2855.

* * *

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "cal[l] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante,* at 2815.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott.* He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There ***1002** seems to be on his face, and in

his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this litigation, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S.Doc. No. 101–10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

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

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

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

2 Professor Dworkin has made this comment on the issue:
"The suggestion that states are free to declare a fetus a person.... assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others.
"... If a state could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment's guarantee of free speech, which could not be understood as a license to kill.... Once we understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women." Unenumerated Rights: Whether and How *Roe* Should be Overruled, 59 U.Chi.L.Rev. 381, 400–401 (1992).

3 The state interest in protecting potential life may be compared to the state interest in protecting those who seek to immigrate to this country. A contemporary example is provided by the Haitians who have risked the perils of the sea in a desperate attempt to become "persons" protected by our laws. Humanitarian and practical concerns would support a state policy allowing those persons unrestricted entry; countervailing interests in population control support a policy of limiting the entry of these potential citizens. While the state interest in population control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman's liberty interest. Thus, a state interest in population control could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions.

4 As we noted in that opinion, the State's "legitimate interest in protecting minor women from their own immaturity" distinguished that case from *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), which involved "a provision that required that mature women, capable of consenting to an abortion, wait 24 hours after giving consent before undergoing an abortion." *Hodgson,* 497 U.S., at 449, n. 35, 110 S.Ct., at 2944, n. 35.

5 The joint opinion's reliance on the indirect effects of the regulation of constitutionally protected activity, see *ante,* at 2818–2819, is misplaced; what matters is not only the effect of a regulation but also the reason for the regulation. As I explained in *Hodgson:*

"In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the constitutionally protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders, *Shapiro v. Thompson,* 394 U.S. 618, 631, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600 (1969), or deny prisoners the right to marry, *Turner v. Safley,* 482 U.S. 78, 94–99, 107 S.Ct. 2254, 2265–2267, 96 L.Ed.2d 64 (1987). But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. Cf. *Turner v. Safley, supra; Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. See, *e.g., Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977); cf. *Webster v. Reproductive Health Services,* 492 U.S. 490, 508–511, 109 S.Ct. 3040, 3051–3053, 106 L.Ed.2d 410 (1989); *id.,* at 523–524, 109 S.Ct., at 3059 (O'CONNOR, J., concurring in part and concurring in judgment). A State's value judgment favoring childbirth over abortion may provide adequate support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing 'obstacles—absolute or otherwise—in the pregnant woman's path to an abortion.' " 497 U.S., at 435, 110 S.Ct., at 2937.

6 The meaning of any legal standard can only be understood by reviewing the actual cases in which it is applied. For that reason, I discount both Justice SCALIA's comments on past descriptions of the standard, see *post,* at 2878–2879 (opinion concurring in judgment in part and dissenting in part), and the attempt to give it crystal clarity in the joint opinion. The several opinions supporting the judgment in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), are less illuminating than the central holding of the case, which appears to have passed the test of time. The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.

7 U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 71 (111th ed. 1991).

8 Although I agree that a parental-consent requirement (with the appropriate bypass) is constitutional, I do not join Part V–D of the joint opinion because its approval of Pennsylvania's informed parental-consent requirement is based on the reasons given in Part V–B, with which I disagree.

1 As I shall explain, the joint opinion and I disagree on the appropriate standard of review for abortion regulations. I do agree, however, that the reasons advanced by the joint opinion suffice to invalidate the spousal notification requirement under a strict scrutiny standard.

2 I also join the Court's decision to uphold the medical emergency provision. As the Court notes, its interpretation is consistent with the essential holding of *Roe* that "forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Ante,* at 2822. As is apparent in my analysis below, however, this exception does not render constitutional the provisions which I conclude do not survive strict scrutiny.

3 As the joint opinion acknowledges, *ante,* at 2810, this Court has recognized the vital liberty interest of persons in refusing unwanted medical treatment. *Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). Just as the Due Process Clause protects the deeply personal decision of the individual to *refuse* medical treatment, it also must protect the deeply personal decision to *obtain* medical treatment, including a woman's decision to terminate a pregnancy.

4 A growing number of commentators are recognizing this point. See, *e.g.,* L. Tribe, American Constitutional Law § 15–10, pp. 1353–1359 (2d ed. 1988); Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan.L.Rev. 261, 350–380 (1992); Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum.L.Rev. 1, 31–44 (1992); MacKinnon, Reflections

on Sex Equality Under Law, 100 Yale L.J. 1281, 1308–1324 (1991); cf. Rubenfeld, The Right of Privacy, 102 Harv.L.Rev. 737, 788–791 (1989) (similar analysis under the rubric of privacy); MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1308–1324 (1991).

5 To say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute. Regulations can be upheld if they have no significant impact on the woman's exercise of her right and are justified by important state health objectives. See, *e.g., Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 65–67, 79–81, 96 S.Ct. 2831, 2839–2840, 2845–2847, 49 L.Ed.2d 788 (1976) (upholding requirements of a woman's written consent and record-keeping). But the Court today reaffirms the essential principle of *Roe* that a woman has the right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Ante,* at 2804. Under *Roe,* any more than *de minimis* interference is undue.

6 The joint opinion agrees with *Roe*'s conclusion that viability occurs at 23 or 24 weeks at the earliest. Compare *ante,* at 2811, with *Roe v. Wade,* 410 U.S. 113, 160, 93 S.Ct. 705, 730, 35 L.Ed.2d 147 (1973).

7 While I do not agree with the joint opinion's conclusion that these provisions should be upheld, the joint opinion has remained faithful to principles this Court previously has announced in examining counseling provisions. For example, the joint opinion concludes that the "information the State requires to be made available to the woman" must be "truthful and not misleading." *Ante,* at 2823. Because the State's information must be "calculated to inform the woman's free choice, not hinder it," *ante,* at 2820, the measures must be designed to ensure that a woman's choice is "mature and informed," *ante,* at 2824, not intimidated, imposed, or impelled. To this end, when the State requires the provision of certain information, the State may not alter the *manner* of presentation in order to inflict "psychological abuse," *ante,* at 2828, designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation. Just as a visual preview of an operation to remove an appendix plays no part in a physician's securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State's interest in the preservation of the woman's health or demonstrate the State's "profound respect for the life of the unborn." *Ante,* at 2821.

8 The Court's decision in *Hodgson v. Minnesota,* 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), validating a 48–hour waiting period for minors seeking an abortion to permit parental involvement does not alter this conclusion. Here the 24–hour delay is imposed on an *adult* woman. See *Hodgson, id.,* at 449–450, n. 35, 110 S.Ct., at 2944, n. 35; *Ohio v. Akron Center for Reproductive Health, Inc.,* 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990). Moreover, the statute in *Hodgson* did not require any delay once the minor obtained the affirmative consent of either a parent or the court.

9 Because this information is so widely known, I am confident that a developed record can be made to show that the 24–hour delay, "in a large fraction of the cases in which [the restriction] is relevant, ... will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante,* at 2830.

10 The judicial-bypass provision does not cure this violation. *Hodgson* is distinguishable, since these cases involve more than parental involvement or approval—rather, the Pennsylvania law requires that the parent receive information designed to discourage abortion in a face-to-face meeting with the physician. The bypass procedure cannot ensure that the parent would obtain the information, since in many instances, the parent would not even attend the hearing. A State may not place any restriction on a young woman's right to an abortion, however irrational, simply because it has provided a judicial bypass.

11 Obviously, I do not share THE CHIEF JUSTICE's views of homosexuality as sexual deviance. See *Bowers,* 478 U.S., at 202–203 n. 2, 106 S.Ct., at 2849–2850 n. 2 (BLACKMUN, J., dissenting).

12 Justice SCALIA urges the Court to "get out of this area," *post,* at 2885, and leave questions regarding abortion entirely to the States, *post,* at 2883–2884. Putting aside the fact that what he advocates is nothing short of an abdication by the Court of its constitutional responsibilities, Justice SCALIA is uncharacteristically naive if he thinks that overruling *Roe* and holding that restrictions on a woman's right to an abortion are subject only to rational-basis review will enable the Court henceforth to avoid reviewing abortion-related issues. State efforts to regulate and prohibit abortion in a post-*Roe* world undoubtedly would raise a host of distinct and important constitutional questions meriting review by this Court. For example, does the Eighth Amendment impose any limits on the degree or kind of punishment a State can inflict upon physicians who perform, or women who undergo, abortions? What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel? Does the First Amendment permit States that choose not to criminalize abortion to ban all advertising providing information about where and how to obtain abortions?

1 Two years after *Roe,* the West German constitutional court, by contrast, struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected. *Judgment of February 25, 1975,* 39 BVerfGE 1 (translated in Jonas & Gorby, West German Abortion Decision: A Contrast to *Roe v. Wade,* 9 John Marshall J.Prac. & Proc. 605 (1976)). In 1988, the Canadian Supreme Court followed reasoning similar to that of *Roe* in striking down a law that restricted abortion. *Morgentaler v. Queen,* 1 S.C.R. 30, 44 D.L.R. 4th 385 (1988).

2 The joint opinion of Justices O'CONNOR, KENNEDY, and SOUTER appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision. *Ante,* at 2826–2831. In most instances the notification requirement operates without difficulty. As the District Court found, the vast majority of wives seeking abortions notify and consult with their husbands, and thus suffer no burden as a result of the provision. 744 F.Supp. 1323, 1360 (ED Pa.1990). In other instances where a woman does not want to notify her husband, the Act provides exceptions. For example, notification is not required if the husband is not the father, if the pregnancy is the result of a reported spousal sexual assault, or if the woman fears bodily injury as a result of notifying her husband. Thus, in these instances as well, the notification provision imposes no obstacle to the abortion decision.

The joint opinion puts to one side these situations where the regulation imposes no obstacle at all, and instead focuses on the group of married women who would not otherwise notify their husbands and who do not qualify for one of the exceptions. Having narrowed the focus, the joint opinion concludes that in a "large fraction" of those cases, the notification provision operates as a substantial obstacle, *ante,* at 2830, and that the provision is therefore invalid. There are certainly instances where a woman would prefer not to notify her husband, and yet does not qualify for an exception. For example, there are the situations of battered women who fear psychological abuse or injury to their children as a result of notification; because in these situations the women do not fear bodily injury, they do not qualify for an exception. And there are situations where a woman has become pregnant as a result of an unreported spousal sexual assault; when such an assault is unreported, no exception is available. But, as the District Court found, there are also instances where the woman prefers not to notify her husband for a variety of other reasons. See 744 F.Supp., at 1360. For example, a woman might desire to obtain an abortion without her husband's knowledge because of perceived economic constraints or her husband's previously expressed opposition to abortion. The joint opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a "large fraction" of those cases in which women prefer not to notify their husbands (and do not qualify for an exception). *Ante,* at 2830. This assumption is not based on any hard evidence, however. And were it helpful to an attempt to reach a desired result, one could just as easily assume that the battered women situations form 100 percent of the cases where women desire not to notify, or that they constitute only 20 percent of those cases. But reliance on such speculation is the necessary result of adopting the undue burden standard.

3 The definition in use at that time provided as follows:

" 'Medical emergency.' That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24–hour delay will create grave peril of immediate and irreversible loss of major bodily function." Pa.Stat.Ann., Tit. 18, § 3203 (Purdon 1983).

1 The Court's suggestion, *ante,* at 2805, that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted *by a text* —an Equal Protection Clause that explicitly establishes racial equality as a constitutional value. See *Loving v. Virginia,* 388 U.S. 1, 9, 87 S.Ct. 1817, 1822, 18 L.Ed.2d 1010 (1967) ("In the case at bar, ... we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race"); see also *id.,* at 13, 87 S.Ct., at 1824 (Stewart, J., concurring in judgment). The enterprise launched in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), by contrast, sought to *establish* —in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text. There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention, *ante,* at 2811, that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

2 Justice BLACKMUN's parade of adjectives is similarly empty: Abortion is among " 'the most intimate and personal choices,' " *ante,* at 2844; it is a matter "central to personal dignity and autonomy," *ibid.;* and it involves "personal decisions that profoundly affect bodily integrity, identity, and destiny," *ante,* at 2846. Justice STEVENS is not much less conclusory: The decision to choose abortion is a matter of "the highest privacy and the most personal nature," *ante,* at 2840; it involves

a " 'difficult choice having serious and personal consequences of major importance to [a woman's] future,' " *ibid.;* the authority to make this "traumatic and yet empowering decisio[n]" is "an element of basic human dignity," *ibid.;* and it is "nothing less than a matter of conscience," *ibid.*

3 The joint opinion is clearly wrong in asserting, *ante,* at 2819, that "the Court's early abortion cases adhered to" the "undue burden" standard. The passing use of that phrase in Justice BLACKMUN's opinion for the Court in *Bellotti v. Baird,* 428 U.S. 132, 147, 96 S.Ct. 2857, 2866, 49 L.Ed.2d 844 (1976) (*Bellotti I*), was not by way of setting forth the *standard* of unconstitutionality, as Justice O'CONNOR's later opinions did, but by way of expressing the *conclusion* of unconstitutionality. Justice Powell for a time appeared to employ a variant of "undue burden" analysis in several nonmajority opinions, see, *e.g., Bellotti v. Baird,* 443 U.S. 622, 647, 99 S.Ct. 3035, 3050, 61 L.Ed.2d 797 (1979) (*Bellotti II*); *Carey v. Population Services International,* 431 U.S. 678, 705, 97 S.Ct. 2010, 2026, 52 L.Ed.2d 675 (1977) (Powell, J., concurring in part and concurring in judgment), but he too ultimately rejected that standard in his opinion for the Court in *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 420, n. 1, 103 S.Ct. 2481, 2487, n. 1, 76 L.Ed.2d 687 (1983) (*Akron I*). The joint opinion's reliance on *Maher v. Roe,* 432 U.S. 464, 473, 97 S.Ct. 2376, 2382, 53 L.Ed.2d 484 (1977), and *Harris v. McRae,* 448 U.S. 297, 314, 100 S.Ct. 2671, 2686, 65 L.Ed.2d 784 (1980), is entirely misplaced, since those cases did not involve regulation of abortion, but mere refusal to fund it. In any event, Justice O'CONNOR's earlier formulations have apparently now proved unsatisfactory to the three Justices, who—in the name of *stare decisis* no less—today find it necessary to devise an entirely new version of "undue burden" analysis. See *ante,* at 2820–2821.

4 The joint opinion further asserts that a law imposing an undue burden on abortion decisions is not a "permissible" means of serving "legitimate" state interests. *Ante,* at 2820. This description of the undue burden standard in terms more commonly associated with the rational-basis test will come as a surprise even to those who have followed closely our wanderings in this forsaken wilderness. See, *e.g., Akron I, supra,* 462 U.S., at 463, 103 S.Ct., at 2510 (O'CONNOR, J., dissenting) ("The 'undue burden' ... represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard"); see also *Hodgson v. Minnesota,* 497 U.S. 417, 458–460, 110 S.Ct. 2926, 2949–2950, 111 L.Ed.2d 344 (1990) (O'CONNOR, J., concurring in part and concurring in judgment in part); *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 828, 106 S.Ct. 2169, 2214, 90 L.Ed.2d 779 (1986) (O'CONNOR, J., dissenting). This confusing equation of the two standards is apparently designed to explain how one of the Justices who joined the plurality opinion in *Webster v. Reproductive Health Services,* 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), which adopted the rational-basis test, could join an opinion expressly adopting the undue burden test. See *id.,* at 520, 109 S.Ct., at 3058 (rejecting the view that abortion is a "fundamental right," instead inquiring whether a law regulating the woman's "liberty interest" in abortion is "reasonably designed" to further "legitimate" state ends). The same motive also apparently underlies the joint opinion's erroneous citation of the plurality opinion in *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 506, 110 S.Ct. 2972, 2977, 111 L.Ed.2d 405 (1990) (*Akron II*) (opinion of KENNEDY, J.), as applying the undue burden test. See *ante,* at 2820 (using this citation to support the proposition that "two of us"—*i.e.,* two of the authors of the joint opinion—have previously applied this test). In fact, *Akron II* does not mention the undue burden standard until the conclusion of the opinion, when it states that the statute at issue "does not impose an undue, *or otherwise unconstitutional,* burden." 497 U.S., at 519, 110 S.Ct., at 2983 (emphasis added). I fail to see how anyone can think that saying a statute does not impose an unconstitutional burden under *any* standard, including the undue burden test, amounts to adopting the undue burden test as the *exclusive* standard. The Court's citation of *Hodgson* as reflecting Justice KENNEDY's and Justice O'CONNOR's "shared premises," *ante,* at 2821, is similarly inexplicable, since the word "undue" was never even used in the former's opinion in that case. I joined Justice KENNEDY's opinions in both *Hodgson* and *Akron II;* I should be grateful, I suppose, that the joint opinion does not claim that I, too, have adopted the undue burden test.

5 Of course Justice O'CONNOR was correct in her former view. The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother. *Ante,* at 2817. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

6 The joint opinion is not entirely faithful to this principle, however. In approving the District Court's factual findings with respect to the spousal notice provision, it relies extensively on nonrecord materials, and in reliance upon them adds a number of factual conclusions of its own. *Ante,* at 2827–2829. Because this additional factfinding pertains to matters that surely are "subject to reasonable dispute," Fed.Rule Evid. 201(b), the joint opinion must be operating on the premise that

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

7 Justice BLACKMUN's effort to preserve as much of *Roe* as possible leads him to read the joint opinion as more “constan[t]” and “steadfast” than can be believed. He contends that the joint opinion's “undue burden” standard requires the application of strict scrutiny to “all non-*de minimis*” abortion regulations, *ante,* at 2846, but that could only be true if a “substantial obstacle,” *ante,* at 2820 (joint opinion), were the same thing as a non-*de minimis* obstacle—which it plainly is not.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Stuart v. Camnitz, 4th Cir.(N.C.), December 22, 2014

127 S.Ct. 1610
Supreme Court of the United States

Alberto R. GONZALES,
Attorney General, Petitioner,
v.
Leroy CARHART et al.
Alberto R. Gonzales, Attorney General, Petitioner,
v.
Planned Parenthood Federation
of America, Inc., et al.

Nos. 05–380, 05–1382.
|
Argued Nov. 8, 2006.
|
Decided April 18, 2007.

Synopsis
Background: Four physicians brought action against Attorney General challenging constitutionality of the Partial-Birth Abortion Ban Act of 2003 on its face. The United States District Court for the District of Nebraska, Richard G. Kopf, J., 331 F.Supp.2d 805, held Act unconstitutional and enjoined enforcement of Act. The Court of Appeals for the Eighth Circuit, Bye, Circuit Judge, 413 F.3d 791,affirmed. In separate suit, abortion advocacy groups challenged Act's constitutionality on its face. The United States District Court for the Northern District of California, Phyllis J. Hamilton, J., 320 F.Supp.2d 957, invalidated statute and granted permanent injunction against its enforcement. The Court of Appeals for the Ninth Circuit, Reinhardt, Circuit Judge, 435 F.3d 1163, affirmed. Petitions for writs of certiorari were granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

[1] Act's prohibition on "intact" dilation and evacuation (D & E) procedure is not void for vagueness on its face;

[2] most reasonable reading of terms of Act is that it does not sweep too broadly to include prototypical D & Es;

[3] Act does not on its face impose unconstitutional substantial obstacle on women seeking late-term, but previability, abortions;

[4] Act furthered legitimate congressional purposes; and

[5] absence of health exception did not render Act facially unconstitutional.

Reversed.

Justice Thomas filed a concurring opinion in which Justice Scalia joined.

Justice Ginsburg filed a dissenting opinion in which Justices Stevens, Souter, and Breyer joined.

West Headnotes (24)

[1] Abortion and Birth Control
Public policy and governmental interest

Government has legitimate interest in protecting the life of the fetus that may become a child.

18 Cases that cite this headnote

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

Before viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy. U.S.C.A. Const.Amend. 5.

19 Cases that cite this headnote

[3] Abortion and Birth Control
Scope and standard of review

Abortion and Birth Control
Fetal age and viability;trimester

State may not impose an undue burden on right of woman to terminate pregnancy prior to viability. U.S.C.A. Const.Amend. 5.

31 Cases that cite this headnote

[4] **Abortion and Birth Control**
Scope and standard of review

An "undue burden" exists on woman's right to terminate her pregnancy if a regulation's purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. U.S.C.A. Const.Amend. 5.

49 Cases that cite this headnote

[5] **Abortion and Birth Control**
Regulation in general

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 to terminate unwanted pregnancy. U.S.C.A. Const.Amend. 5.

13 Cases that cite this headnote

[6] **Abortion and Birth Control**
Methods, modes and procedures

Partial-Birth Abortion Ban Act of 2003 prohibits knowing performance of "intact" dilation and evacuation (D & E) procedure. 18 U.S.C.A. § 1531.

8 Cases that cite this headnote

[7] **Abortion and Birth Control**
Methods, modes and procedures

Prohibition on "intact" dilation and evacuation (D & E) procedure in Partial-Birth Abortion Ban Act of 2003 applies to both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. 18 U.S.C.A. § 1531.

5 Cases that cite this headnote

[8] **Constitutional Law**
Statutes

Void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. U.S.C.A. Const.Amend. 5.

51 Cases that cite this headnote

[9] **Abortion and Birth Control**
Methods, modes and procedures in general

Constitutional Law
Health care professionals

Constitutional Law
Families and children

Partial-Birth Abortion Ban Act of 2003 provides physicians of ordinary intelligence with opportunity to know what procedure is criminalized so as to avoid being void for vagueness on its face; statute requires that living fetus be delivered vaginally to one of two anatomical landmarks depending on fetus' presentation, thereby providing physicians with objective standard, requires performance thereafter of overt act other than completion of delivery "that kills the partially delivered living fetus," and contains scienter requirements concerning actions involved in prohibited abortion, such that physicians will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability. 18 U.S.C.A. § 1531(b)(1)(A).

13 Cases that cite this headnote

[10] **Abortion and Birth Control**
Methods, modes and procedures in general

Constitutional Law
Health care professionals

Constitutional Law
Families and children

Partial-Birth Abortion Ban Act of 2003, which criminalizes performance of partial-birth abortions, does not encourage arbitrary or discriminatory enforcement of ban on performance of "intact" dilation and evacuation (D & E) procedure, so as to be void for vagueness; statute's requirement that living fetus be delivered to one of two anatomical landmarks establishes minimal guidelines to govern law enforcement, and scienter requirements narrow prohibition and limit prosecutorial discretion. 18 U.S.C.A. § 1531(b)(1)(A).

41 Cases that cite this headnote

[11] Abortion and Birth Control
Methods, modes and procedures

Constitutional Law
Abortion, contraception, and birth control

Most reasonable reading and understanding of terms of Partial-Birth Abortion Ban Act of 2003 is that it proscribes intentionally performing "intact" dilation and evacuation (D & E) procedure, in which living fetus is vaginally delivered to one of two anatomical landmarks and fetal skull is then pierced or crushed, but does not prohibit prototypical second trimester D & Es in which the fetus is removed from uterus in pieces, and thus does not impose undue burden on second-trimester abortions based on overbreadth. 18 U.S.C.A. § 1531(b)(1)(A, B).

9 Cases that cite this headnote

[12] Statutes
Plain Language;Plain, Ordinary, or Common Meaning

Statutes
Context

In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result.

21 Cases that cite this headnote

[13] Constitutional Law
Avoidance of constitutional questions

Under canon of constitutional avoidance, every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.

22 Cases that cite this headnote

[14] Constitutional Law
Avoidance of constitutional questions

Canon of constitutional avoidance does not apply if a statute is not genuinely susceptible to two constructions.

14 Cases that cite this headnote

[15] Abortion and Birth Control
Methods, modes and procedures

Intent requirement of Partial-Birth Abortion Ban Act of 2003, which excludes liability for an accidental performance of "intact" dilation and evacuation (D & E) procedure, prevents Act from imposing undue burden on its face on physicians who, because they cannot predict amount of cervical dilation, may wind up performing partial intact delivery beyond Act's anatomical landmarks. 18 U.S.C.A. § 1531(b)(1)(A).

2 Cases that cite this headnote

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

Abortion and Birth Control
Methods, modes and procedures

Partial-Birth Abortion Ban Act of 2003, which prohibits "intact" dilation and evacuation (D & E) procedures both before and after viability, does not on its face impose unconstitutional substantial obstacle on women seeking late-term, but previability, abortions. 18 U.S.C.A. § 1531.

14 Cases that cite this headnote

[17] Abortion and Birth Control
Methods, modes and procedures

Stated legitimate congressional purposes of protecting innocent human life from inhumane procedure and protecting medical community's ethics and reputation were furthered by enactment of Partial-Birth Abortion Ban Act of 2003, prohibiting "intact" dilation and evacuation (D & E) procedures, such that Act was not facially unconstitutional on basis that it was purportedly designed to place a substantial obstacle in the path of a woman seeking an abortion. 18 U.S.C.A. § 1531.

12 Cases that cite this headnote

[18] Health
Power to regulate professionals in general

Government has an interest in protecting the integrity and ethics of the medical profession.

12 Cases that cite this headnote

[19] Abortion and Birth Control
Health and safety of patient

Absence of health exception to ban on "intact" dilation and evacuation (D & E) procedure in Partial-Birth Abortion Ban Act of 2003 did not render Act facially unconstitutional as imposing undue burden on abortion right; disagreement in medical community over whether the barred procedure is ever necessary to preserve a woman's health did not render ban facially invalid, where regulation was rational and in pursuit of legitimate ends. 18 U.S.C.A. § 1531.

28 Cases that cite this headnote

[20] Statutes
Powers and duties of legislature in general

State and federal legislatures have wide discretion to pass legislation in areas where there is medical and scientific uncertainty.

9 Cases that cite this headnote

[21] Constitutional Law
Determination of Facts

Congressional factfinding is reviewed under a deferential standard.

Cases that cite this headnote

[22] Constitutional Law
Determination of Facts

Court retains an independent constitutional duty to review Congressional factual findings where constitutional rights are at stake.

13 Cases that cite this headnote

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

Absence of health exception to Partial-Birth Abortion Act's ban on "intact" dilation and evacuation (D & E) procedure could not be upheld based on congressional findings alone, where some of Act's recitations were factually incorrect and some of its important findings had been superseded. 18 U.S.C.A. § 1531.

4 Cases that cite this headnote

[24] Abortion and Birth Control
Health and safety of patient

As-applied challenge to constitutionality of Partial-Birth Abortion Ban Act of 2003, rather than facial challenge, was proper means by which to challenge absence of health exception if it could be shown, under discrete circumstances, that condition had or was likely to occur in which procedure prohibited by Act was necessary to protect woman's health. 18 U.S.C.A. § 1531.

47 Cases that cite this headnote

West Codenotes

Negative Treatment Reconsidered
18 U.S.C.A. § 1531

****1613 *124** *Syllabus* [*]

Following this Court's ****1614** *Stenberg v. Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743, decision that Nebraska's "partial birth abortion" statute violated the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, Congress passed the Partial–Birth Abortion Ban Act of 2003(Act) to proscribe a particular method of ending fetal life in the later stages of pregnancy. The Act does not regulate the most common abortion procedures used in the first trimester of pregnancy, when the vast majority of abortions take place. In the usual second-trimester procedure, "dilation and evacuation" (D & E), the doctor dilates the cervix and then inserts surgical instruments into the uterus and maneuvers them to grab the fetus and pull it back through the cervix and vagina. The fetus is usually ripped apart as it is removed, and the doctor may take 10 to 15 passes to remove it in its entirety. The procedure that prompted the federal Act and various state statutes, including Nebraska's, is a variation of the standard D & E, and is herein referred to as "intact D & E." The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes, pulling out its entire body instead of ripping it apart. In order to allow the head to pass through the cervix, the doctor typically pierces or crushes the skull.

The Act responded to *Stenberg* in two ways. First, Congress found that unlike this Court in *Stenberg,* it was not required to accept the District Court's factual findings, and that that there was a moral, medical, and ethical consensus that partial-birth abortion is a gruesome and inhumane procedure that is never medically necessary and should be prohibited. Second, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. Among other things, the Act prohibits "knowingly perform[ing] a partial-birth abortion ... that is [not] necessary to save the life of a mother," 18 U.S.C. § 1531(a). It defines ***125** "partial-birth abortion," § 1531(b)(1), as a procedure in which the doctor: "(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the [mother's] body ..., or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the [mother's] body ..., for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus"; and "(B) performs the overt act, other than completion of delivery, that kills the fetus."

In No. 05–380, respondent abortion doctors challenged the Act's constitutionality on its face, and the Federal District Court granted a permanent injunction prohibiting petitioner Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. The court found the Act unconstitutional because it (1) lacked an exception allowing the prohibited procedure where necessary for the mother's health and (2) covered not merely intact D & E but also other D & Es. Affirming, the Eighth Circuit found that a lack of consensus existed in the medical community as to the banned procedure's necessity, and thus *Stenberg* required legislatures to err on the side of protecting women's health by including a health exception. In No. 05–1382, respondent abortion advocacy groups brought suit challenging the Act. The District Court enjoined the Attorney General from enforcing the Act, concluding it was unconstitutional on its face because it (1) unduly burdened a woman's ability to choose a second-trimester abortion, (2) was too vague, and (3) lacked a health exception as required by *Stenberg*. The Ninth Circuit agreed and affirmed.

****1615** *Held:* Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. Pp. 1625 – 1639.

1. The *Casey* Court reaffirmed what it termed *Roe's* three-part "essential holding": First, a woman has the right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State. Second, the State has the power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering the woman's life or health. And third, the State has legitimate interests from the pregnancy's outset in protecting the health of the woman and the life of the

fetus that may become a child. 505 U.S., at 846, 112 S.Ct. 2791. Though all three are implicated here, it is the third that requires the most extended discussion. In deciding whether the Act furthers the Government's legitimate interest in protecting fetal life, the Court assumes, *inter alia,* that an undue burden on the previability abortion ***126** right exists if a regulation's "purpose or effect is to place a substantial obstacle in the [woman's] path," *id.,* at 878, 112 S.Ct. 2791, but that "[r]egulations which do no more than create a structural mechanism by which the State ... 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," *id.,* at 877, 112 S.Ct. 2791. *Casey* struck a balance that was central to its holding, and the Court applies *Casey's* standard here. A central premise of *Casey's* joint opinion—that the government has a legitimate, substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments below. Pp. 1625 – 1627.

2. The Act, on its face, is not void for vagueness and does not impose an undue burden from any overbreadth. Pp. 1626 – 1633.

(a) The Act's text demonstrates that it regulates and proscribes performing the intact D & E procedure. First, since the doctor must "vaginally delive[r] a living fetus," § 1531(b)(1)(A), the Act does not restrict abortions involving delivery of an expired fetus or those not involving vaginal delivery, *e.g.,* hysterotomy or hysterectomy. And it applies both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism within the womb, whether or not it is viable outside the womb. Second, because the Act requires the living fetus to be delivered to a specific anatomical landmark depending on the fetus' presentation, *ibid.,* an abortion not involving such partial delivery is permitted. Third, because the doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered fetus," § 1531(b)(1)(B), the "overt act" must be separate from delivery. It must also occur after delivery to an anatomical landmark, since killing "the partially delivered" fetus, when read in context, refers to a fetus that has been so delivered, *ibid.* Fourth, given the Act's scienter requirements, delivery of a living fetus past an anatomical landmark by accident or inadvertence is not a crime because it is not "deliberat[e] and intentiona[l]," § 1531(b)(1)(A). Nor is such a delivery prohibited if the fetus has not been delivered for the purpose of performing an overt act that the [doctor] knows will kill [it]." *Ibid.* Pp. 1626 – 1628.

(b) The Act is not unconstitutionally vague on its face. It satisfies both requirements of the void-for-vagueness doctrine. First, it provides doctors "of ordinary intelligence a reasonable opportunity ****1616** to know what is prohibited," *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222, setting forth "relatively clear guidelines as to prohibited conduct" and providing "objective criteria" to evaluate whether a doctor has performed a prohibited procedure, ***127** *Posters 'N' Things, Ltd. v. United States,* 511 U.S. 513, 525–526, 114 S.Ct. 1747, 128 L.Ed.2d 539. Second, it does not encourage arbitrary or discriminatory enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903. Its anatomical landmarks "establish minimal guidelines to govern law enforcement," *Smith v. Goguen,* 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605, and its scienter requirements narrow the scope of its prohibition and limit prosecutorial discretion, see *Kolender, supra,* at 358, 103 S.Ct. 1855. Respondents' arbitrary enforcement arguments, furthermore, are somewhat speculative, since this is a preenforcement challenge. Pp. 1628 – 1629.

(c) The Court rejects respondents' argument that the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. Pp. 1629 – 1633.

(i) The Act's text discloses that it prohibits a doctor from intentionally performing an intact D & E. Its dual prohibitions correspond with the steps generally undertaken in this procedure: The doctor (1) delivers the fetus until its head lodges in the cervix, usually past the anatomical landmark for a breech presentation, see § 1531(b)(1)(A), and (2) proceeds to the overt act of piercing or crushing the fetal skull after the partial delivery, see § 1531(b)(1)(B). The Act's scienter requirements limit its reach to those physicians who carry out the intact D & E, with the intent to undertake both steps at the outset. The Act excludes most D & Es in which the doctor intends to remove the fetus in pieces from the outset. This interpretation is confirmed by comparing the Act with the Nebraska statute in *Stenberg.* There, the Court concluded that the statute encompassed D & E, which "often involve[s] a physician pulling a 'substantial portion'

of a still living fetus ..., say, an arm or leg, into the vagina prior to the death of the fetus," 530 U.S., at 939, 120 S.Ct. 2597, and rejected the Nebraska Attorney General's limiting interpretation that the statute's reference to a "procedure" that " 'kill[s] the unborn child' " was to a distinct procedure, not to the abortion procedure as a whole, *id.,* at 943, 120 S.Ct. 2597. It is apparent Congress responded to these concerns because the Act adopts the phrase "delivers a living fetus," 18 U.S.C. § 1531(b)(1)(A), instead of " 'delivering ... a living unborn child, or a substantial portion thereof,' " 530 U.S., at 938, 120 S.Ct. 2597, thereby targeting extraction of an entire fetus rather than removal of fetal pieces; identifies specific anatomical landmarks to which the fetus must be partially delivered, § 1531(b)(1)(A), thereby clarifying that the removal of a small portion of the fetus is not prohibited; requires the fetus to be delivered so that it is partially "outside the [mother's] body," *ibid.,* thereby establishing that delivering a substantial portion of the fetus into the vagina would not subject a doctor to criminal sanctions; and adds the overt-act requirement, § 1531(b)(1), thereby making the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General ***128** advanced). Finally, the canon of constitutional avoidance, see, *e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645, extinguishes any lingering doubt. Interpreting the Act not to prohibit standard D & E is the most reasonable reading and understanding of its terms. Pp. 1629 – 1631.

****1617** (ii) Respondents' contrary arguments are unavailing. The contention that any D & E may result in the delivery of a living fetus beyond the Act's anatomical landmarks because doctors cannot predict the amount the cervix will dilate before the procedure does not take account of the Act's intent requirements, which preclude liability for an accidental intact D & E. The evidence supports the legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance, belying any claim that a standard D & E cannot be performed without intending or foreseeing an intact D & E. That many doctors begin every D & E with the objective of removing the fetus as intact as possible based on their belief that this is safer does not prove, as respondents suggest, that every D & E might violate the Act, thereby imposing an undue burden. It demonstrates only that those doctors must adjust their conduct to the law by not attempting to deliver the fetus to an anatomical landmark. Respondents have not shown that requiring doctors to intend dismemberment before such a delivery will prohibit the vast majority of D & E abortions. Pp. 1631 – 1633.

3. The Act, measured by its text in this facial attack, does not impose a "substantial obstacle" to late-term, but previability, abortions, as prohibited by the *Casey* plurality, 505 U.S., at 878, 112 S.Ct. 2791. Pp. 1632 – 1638.

(a) The contention that the Act's congressional purpose was to create such an obstacle is rejected. The Act's stated purposes are protecting innocent human life from a brutal and inhumane procedure and protecting the medical community's ethics and reputation. The government undoubtedly "has an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg,* 521 U.S. 702, 731, 117 S.Ct. 2258, 138 L.Ed.2d 772. Moreover, *Casey* reaffirmed that the government may use its voice and its regulatory authority to show its profound respect for the life within the woman. See, *e.g.,* 505 U.S., at 873, 112 S.Ct. 2791. The Act's ban on abortions involving partial delivery of a living fetus furthers the Government's objectives. Congress determined that such abortions are similar to the killing of a newborn infant. This Court has confirmed the validity of drawing boundaries to prevent practices that extinguish life and are close to actions that are condemned. *Glucksberg, supra,* at 732–735, and n. 23, 117 S.Ct. 2258. The Act also recognizes that respect for human life finds an ultimate expression in a mother's love for her child. Whether to have an abortion requires a difficult and painful moral decision, ***129** *Casey,* 505 U.S., at 852–853, 112 S.Ct. 2791, which some women come to regret. In a decision so fraught with emotional consequence, some doctors may prefer not to disclose precise details of the abortion procedure to be used. It is, however, precisely this lack of information that is of legitimate concern to the State. *Id.,* at 873, 112 S.Ct. 2791. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion. The objection that the Act accomplishes little because the standard D & E is in some respects as brutal, if not more, than intact D & E is unpersuasive. It was reasonable for Congress to think that partial-birth abortion, more than standard D & E, undermines the public's perception of the doctor's

appropriate role during delivery, and perverts the birth process. Pp. 1632 – 1635.

(b) The Act's failure to allow the banned procedure's use where " 'necessary, in appropriate medical judgment, **1618 for the preservation of the [mother's] health,' " *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 327–328, 126 S.Ct. 961, 163 L.Ed.2d 812, does not have the effect of imposing an unconstitutional burden on the abortion right. The Court assumes the Act's prohibition would be unconstitutional, under controlling precedents, if it "subject[ed] [women] to significant health risks." *Id.,* at 328, 126 S.Ct. 961. Whether the Act creates such risks was, however, a contested factual question below: The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their positions. The Court's precedents instruct that the Act can survive facial attack when this medical uncertainty persists. See, *e.g., Kansas v. Hendricks,* 521 U.S. 346, 360, n. 3, 117 S.Ct. 2072, 138 L.Ed.2d 501. This traditional rule is consistent with *Casey,* which confirms both that the State has an interest in promoting respect for human life at all stages in the pregnancy, and that abortion doctors should be treated the same as other doctors. Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. Other considerations also support the Court's conclusion, including the fact that safe alternatives to the prohibited procedure, such as D & E, are available. In addition, if intact D & E is truly necessary in some circumstances, a prior injection to kill the fetus allows a doctor to perform the procedure, given that the Act's prohibition only applies to the delivery of "a living fetus," 18 U.S.C. § 1531(b)(1)(A). *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 77–79, 96 S.Ct. 2831, 49 L.Ed.2d 788, distinguished. The Court rejects certain of the parties' arguments. On the one hand, the Attorney General's contention that the Act should be upheld based on the congressional findings alone fails because some of the Act's recitations are factually *130 incorrect, and some of the important findings have been superseded. Also unavailing, however, is respondents' contention that an abortion regulation must contain a health exception if "substantial medical authority supports the proposition that banning a particular procedure could endanger women's health," *Stenberg,* 530 U.S., at 938, 120 S.Ct. 2597. Interpreting *Stenberg* as leaving no margin for legislative error in the face of medical uncertainty is too exacting a standard. Marginal safety considerations, including the balance of risks, are within the legislative competence where, as here, the regulation is rational and pursues legitimate ends, and standard, safe medical options are available. Pp. 1635 – 1639.

4. These facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. Cf. *Wisconsin Right to Life, Inc. v. Federal Election Comm'n,* 546 U.S. 410, 412, 126 S.Ct. 1016, 163 L.Ed.2d 990. This is the proper manner to protect the woman's health if it can be shown that in discrete and well-defined instances a condition has or is likely to occur in which the procedure prohibited by the Act must be used. No as-applied challenge need be brought if the Act's prohibition threatens a woman's life, because the Act already contains a life exception. 18 U.S.C. § 1531(a). Pp. 1638 – 1640.

413 F.3d 791, No. 05–1382, 435 F.3d 1163, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined, *post,* p. 1639. GINSBURG, J., filed a dissenting opinion, in which STEVENS, **1619 SOUTER, and BREYER, JJ., joined, *post,* p. 1640.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

***132** These cases require us to consider the validity of the Partial–Birth Abortion Ban Act of 2003(Act), 18 U.S.C. § 1531 (2000 ed., Supp. IV), a federal statute regulating abortion procedures. In recitations preceding its operative provisions the Act refers to the Court's opinion in *Stenberg v.* ***133** *Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), which also addressed the subject of abortion procedures used in the later stages of pregnancy. Compared to the state statute at issue in *Stenberg,* the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage. We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.

In No. 05–380 *(Carhart)* respondents are LeRoy Carhart, William G. Fitzhugh, William H. Knorr, and Jill L. Vibhakar, doctors who perform second-trimester abortions. These doctors filed their complaint against the Attorney General of the United States in the United States District Court for the District of Nebraska. They challenged the constitutionality of the Act and sought a permanent injunction against its enforcement. *Carhart v. Ashcroft,* 331 F.Supp.2d 805 (2004). In 2004, after a 2–week trial, the District Court granted a permanent injunction that prohibited the Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable. *Id.,* at 1048. The Court of Appeals for the Eighth Circuit affirmed. 413 F.3d 791 (2005). We granted certiorari. 546 U.S. 1169, 126 S.Ct. 2901, 165 L.Ed.2d 916 (2006).

In No. 05–1382 *(Planned Parenthood)* respondents are Planned Parenthood Federation of America, Inc., Planned Parenthood Golden Gate, and the City and County of San Francisco. The Planned Parenthood entities sought to enjoin enforcement of the Act in a suit filed in the United States District Court for the Northern District of California. *Planned* ****1620** *Parenthood Federation of Am. v. Ashcroft,* 320 F.Supp.2d 957 (2004). The City and County of San Francisco intervened as a plaintiff. In 2004, the District Court held a trial spanning a period just short of three weeks, and it, too, enjoined the Attorney General from enforcing the Act. *Id.,* at 1035. The Court of Appeals for the Ninth Circuit affirmed. 435 F.3d 1163 (2006). We granted certiorari. 547 U.S. 1205, 126 S.Ct. 2901, 165 L.Ed.2d 916 (2006).

***134** I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg,* to discuss abortion procedures in some detail. Three United States District Courts heard extensive evidence describing the procedures. In addition to the two courts involved in the instant cases the District Court for the Southern District of New York also considered the constitutionality of the Act. *National Abortion Federation v. Ashcroft,* 330 F.Supp.2d 436 (2004). It found the Act unconstitutional, *id.,* at 493, and the Court of Appeals for the Second Circuit affirmed, *National Abortion Federation v. Gonzales,* 437 F.3d 278 (2006). The three District Courts relied on similar medical evidence; indeed, much of the evidence submitted to the *Carhart* court previously had been submitted to the other two courts. 331 F.Supp.2d, at 809–810. We refer to the District Courts' exhaustive opinions in our own discussion of abortion procedures.

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. *Planned Parenthood, supra,* at 960, and n. 4; App. in No. 05–1382, pp. 45–48. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative

is to use medication, such as mifepristone (commonly known as RU–486), to terminate the pregnancy. *National Abortion Federation, supra,* at 464, n. 20. The Act does not regulate these procedures.

***135** Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D & E" is the usual abortion method in this trimester. *Planned Parenthood, supra,* at 960–961. Although individual techniques for performing D & E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. *National Abortion Federation, supra,* at 465; App. in No. 05–1382, at 61. The steps taken to cause dilation differ by physician and gestational age of the fetus. See, *e.g., Carhart, supra,* at 852, 856, 859, 862–865, 868, 870, 873–874, 876–877, 880, 883, 886. A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix ****1621** for two days, while others use dilators for a day or less. *National Abortion Federation, supra,* at 464–465; *Planned Parenthood, supra,* at 961.

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of ***136** evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed. See, *e.g., National Abortion Federation, supra,* at 465; *Planned Parenthood,* 320 F.Supp.2d, at 962.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit. *Carhart, supra,* at 907–912; *National Abortion Federation, supra,* at 474–475.

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D & E. See M. Haskell, Dilation and Extraction for Late Second Trimester Abortion (1992), 1 Appellant's App. in No. 04–3379(CA8), p. 109 (hereinafter Dilation and Extraction). The medical community has not reached unanimity on the appropriate name for this D & E variation. It has been referred to as "intact D & E," "dilation and extraction" (D & X), and "intact D & X." *National Abortion Federation, supra,* at 440, n. 2; see also F. Cunningham et al., Williams Obstetrics 243 (22d ed.2005) (identifying the procedure as D & X); Danforth's Obstetrics and Gynecology 567 (J. Scott, R. Gibbs, B. Karlan, & A. Haney eds. 9th ed.2003) (identifying the procedure as intact D & X); M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield, A Clinician's Guide to Medical and Surgical ***137** Abortion 136 (1999) (identifying the procedure as intact D & E). For discussion purposes this D & E variation will be referred to as intact D & E. The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D & Es are performed in this manner.

Intact D & E, like regular D & E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called "serial" dilation. *Carhart,* 331 F.Supp.2d, at 856, 870, 873; *Planned Parenthood, supra,* at

965. Doctors who attempt at the outset to perform intact D & E may dilate for two full days or use up to 25 osmotic dilators. See, *e.g.,* Dilation and ****1622** Extraction 110; *Carhart, supra,* at 865, 868, 876, 886.

In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. One doctor, for example, testified:

> "If I know I have good dilation and I reach in and the fetus starts to come out and I think I can accomplish it, the abortion with an intact delivery, then I use my forceps a little bit differently. I don't close them quite so much, and I just gently draw the tissue out attempting to have an intact delivery, if possible." App. in No. 05–1382, at 74.

Rotating the fetus as it is being pulled decreases the odds of dismemberment. *Carhart, supra,* at 868–869; App. in No. 05–380, pp. 40–41; 5 Appellant's App. in No. 04–3379(CA8), at 1469. A doctor also "may use forceps to grasp a fetal part, pull it down, and re-grasp the fetus at a higher level—sometimes using both his hand and a forceps—to exert traction to retrieve the fetus intact until the head is lodged in the [cervix]." *Carhart, supra,* at 886–887.

***138** Intact D & E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. Dilation and Extraction 110–111. In the usual intact D & E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. See, *e.g., ibid.;* App. in No. 05–380, at 577; App. in No. 05–1382, at 74, 282. Haskell explained the next step as follows:

> " 'At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).
>
> " 'While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.
>
> " '[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
>
> " 'The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.' " H.R.Rep. No. 108–58, p. 3 (2003).

This is an abortion doctor's clinical description. Here is another description from a nurse who witnessed the same method performed on a $26^{1/2}$-week fetus and who testified before the Senate Judiciary Committee:

> " 'Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms—everything ***139** but the head. The doctor kept the head right inside the uterus ....
>
> " 'The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.
>
> " 'The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp ....
>
> " 'He cut the umbilical cord and delivered the placenta. He threw the baby ****1623** in a pan, along with the placenta and the instruments he had just used.' " *Ibid.*

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. *Planned Parenthood,* 320 F.Supp.2d, at 965. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." App. in No. 05–380, at 41; see also *Carhart,* 331 F.Supp.2d, at 866–867, 874. Still other physicians reach into the cervix with their forceps and crush the fetus' skull. *Id.,* at 858, 881. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it. *Id.,* at 864, 878; see also *Planned Parenthood, supra,* at 965.

Some doctors performing an intact D & E attempt to remove the fetus without collapsing the skull. See *Carhart, supra,* at 866, 869. Yet one doctor would not allow delivery of a live fetus younger than 24 weeks because "the objective of [his] procedure is to perform an abortion," not a birth. App. in No. 05–1382, at 408–409. The doctor thus answered in the affirmative when asked whether he would "hold the fetus' head on the internal side of the [cervix] in order to ***140** collapse the skull" and kill the fetus before it is born. *Id.,* at 409; see also *Carhart, supra,* at 862, 878. Another doctor testified he crushes a fetus' skull not only to reduce its size but also to ensure the fetus is dead before it is removed. For the staff to have to deal with a fetus that has "some viability to it, some movement of limbs," according to this doctor, "[is] always a difficult situation." App. in No. 05–380, at 94; see *Carhart, supra,* at 858.

D & E and intact D & E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D & E should occur in a hospital, can last as little as 6 hours but can take longer than 48. It accounts for about 5 percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about 0.07 percent of second-trimester abortions. *National Abortion Federation,* 330 F.Supp.2d, at 467; *Planned Parenthood, supra,* at 962–963.

B

After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on " 'partial birth abortion' " proliferated. By the time of the *Stenberg* decision, about 30 States had enacted bans designed to prohibit the procedure. 530 U.S., at 995–996, and nn. 12–13, 120 S.Ct. 2597 (THOMAS, J., dissenting); see also H.R.Rep. No. 108–58, at 4–5. In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation, ***141** and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. In 2003, after this Court's decision in *Stenberg,* Congress passed the Act at issue here. H.R.Rep. No. 108–58, at 12–14. On November 5, ****1624** 2003, President Bush signed the Act into law. It was to take effect the following day. 18 U.S.C. § 1531(a) (2000 ed., Supp. IV).

The Act responded to *Stenberg* in two ways. First, Congress made factual findings. Congress determined that this Court in *Stenberg* "was required to accept the very questionable findings issued by the district court judge," § 2(7), 117 Stat. 1202, notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 768, ¶ (7) (hereinafter Congressional Findings), but that Congress was "not bound to accept the same factual findings," *id.,* ¶ (8). Congress found, among other things, that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion ... is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." *Id.,* ¶ (1).

Second, and more relevant here, the Act's language differs from that of the Nebraska statute struck down in *Stenberg*. See 530 U.S., at 921–922, 120 S.Ct. 2597 (quoting Neb.Rev.Stat. Ann. §§ 28–328(1), 28–326(9) (Supp.1999)). The operative provisions of the Act provide in relevant part:

> "(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.
>
> ***142** "(b) As used in this section—
>
> "(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—
>
> "(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother,

or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

"(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

"(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however,* That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

.....

"(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

"(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning ****1625** of the ***143** trial for not more than 30 days to permit such a hearing to take place.

"(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section." 18 U.S.C. § 1531 (2000 ed., Supp. IV).

The Act also includes a provision authorizing civil actions that is not of relevance here. § 1531(c).

C

The District Court in *Carhart* concluded the Act was unconstitutional for two reasons. First, it determined the Act was unconstitutional because it lacked an exception allowing the procedure where necessary for the health of the mother. 331 F.Supp.2d, at 1004–1030. Second, the District Court found the Act deficient because it covered not merely intact D & E but also certain other D & Es. *Id.,* at 1030–1037.

The Court of Appeals for the Eighth Circuit addressed only the lack of a health exception. 413 F.3d, at 803–804. The court began its analysis with what it saw as the appropriate question—"whether 'substantial medical authority' supports the medical necessity of the banned procedure." *Id.,* at 796 (quoting *Stenberg, supra,* at 938, 120 S.Ct. 2597). This was the proper framework, according to the Court of Appeals, because "when a lack of consensus exists in the medical community, the Constitution requires legislatures to err on the side of protecting women's health by including a health exception." 413 F.3d, at 796. The court rejected the Attorney General's attempt to demonstrate changed evidentiary circumstances since *Stenberg* and considered itself bound by *Stenberg's* conclusion that a health exception was required. 413 F.3d, at 803 (explaining "[t]he record in [the] case and the record in *Stenberg* [were] similar in all significant respects"). It invalidated the Act. *Ibid.*

***144** D

The District Court in *Planned Parenthood* concluded the Act was unconstitutional "because it (1) pose[d] an undue burden on a woman's ability to choose a second trimester abortion; (2)[was] unconstitutionally vague; and (3) require[d] a health exception as set forth by ... *Stenberg*." 320 F.Supp.2d, at 1034–1035.

The Court of Appeals for the Ninth Circuit agreed. Like the Court of Appeals for the Eighth Circuit, it concluded the absence of a health exception rendered the Act unconstitutional. The court interpreted *Stenberg* to require a health exception unless "there is *consensus in the medical community* that the banned procedure is never medically necessary to preserve the health of women." 435 F.3d, at 1173. Even after applying a deferential standard of review to Congress' factual findings, the Court of Appeals determined "substantial disagreement exists in the medical community regarding whether" the

procedures prohibited by the Act are ever necessary to preserve a woman's health. *Id.,* at 1175–1176.

The Court of Appeals concluded further that the Act placed an undue burden on a woman's ability to obtain a second-trimester abortion. The court found the textual differences between the Act and the Nebraska statute struck down in *Stenberg* insufficient to distinguish D & E and intact D & E. 435 F.3d, at 1178–1180. As a result, according to the Court of Appeals, the Act imposed an undue burden because it prohibited D & E. *Id.,* at 1180–1181.

Finally, the Court of Appeals found the Act void for vagueness. *Id.,* at 1181. Abortion doctors testified they were uncertain ****1626** which procedures the Act made criminal. The court thus concluded the Act did not offer physicians clear warning of its regulatory reach. *Id.,* at 1181–1184. Resting on its understanding of the remedial framework established by this Court in *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 328–330, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006), the Court of Appeals held ***145** the Act was unconstitutional on its face and should be permanently enjoined. 435 F.3d, at 1184–1191.

II

The principles set forth in the joint opinion in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), did not find support from all those who join the instant opinion. See *id.,* at 979–1002, 112 S.Ct. 2791 (SCALIA, J., joined by THOMAS, J., *inter alios,* concurring in judgment in part and dissenting in part). Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

[1] *Casey* involved a challenge to *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). The opinion contains this summary:

> "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." 505 U.S., at 846, 112 S.Ct. 2791 (opinion of the Court).

***146** Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.

To implement its holding, *Casey* rejected both *Roe's* rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted. 505 U.S., at 875–876, 878, 112 S.Ct. 2791 (plurality opinion). On this point *Casey* overruled the holdings in two cases because they undervalued the State's interest in potential life. See *id.,* at 881–883, 112 S.Ct. 2791 (joint opinion) (overruling *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), and *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983)).

[2] **[3]** **[4]** **[5]** We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." 505 U.S., at 879, 112 S.Ct. 2791 (plurality opinion). It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman ****1627** seeking an abortion before the fetus attains viability." *Id.,* at 878, 112 S.Ct. 2791. On the other hand, "[r]egulations 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." *Id.,* at 877, 112 S.Ct. 2791. *Casey*,

in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

III

[6] We begin with a determination of the Act's operation and effect. A straightforward reading of the Act's text demonstrates its purpose and the scope of its provisions: It regulates ***147** and proscribes, with exceptions or qualifications to be discussed, performing the intact D & E procedure.

Respondents agree the Act encompasses intact D & E, but they contend its additional reach is both unclear and excessive. Respondents assert that, at the least, the Act is void for vagueness because its scope is indefinite. In the alternative, respondents argue the Act's text proscribes all D & Es. Because D & E is the most common second-trimester abortion method, respondents suggest the Act imposes an undue burden. In this litigation the Attorney General does not dispute that the Act would impose an undue burden if it covered standard D & E.

We conclude that the Act is not void for vagueness, does not impose an undue burden from any overbreadth, and is not invalid on its face.

A

The Act punishes "knowingly perform[ing]" a "partial-birth abortion." § 1531(a) (2000 ed., Supp. IV). It defines the unlawful abortion in explicit terms. § 1531(b)(1).

[7] First, the person performing the abortion must "vaginally delive[r] a living fetus." § 1531(b)(1)(A). The Act does not restrict an abortion procedure involving the delivery of an expired fetus. The Act, furthermore, is inapplicable to abortions that do not involve vaginal delivery (for instance, hysterotomy or hysterectomy). The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb. See, *e.g., Planned Parenthood,* 320 F.Supp.2d, at 971–972. We do not understand this point to be contested by the parties.

Second, the Act's definition of partial-birth abortion requires the fetus to be delivered "until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part ***148** of the fetal trunk past the navel is outside the body of the mother." § 1531(b)(1)(A) (2000 ed., Supp. IV). The Attorney General concedes, and we agree, that if an abortion procedure does not involve the delivery of a living fetus to one of these "anatomical 'landmarks' "—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply. Brief for Petitioner in No. 05–380, p. 46.

Third, to fall within the Act, a doctor must perform an "overt act, other than completion of delivery, that kills the partially delivered living fetus." § 1531(b)(1)(B) (2000 ed., Supp. IV). For purposes of criminal liability, the overt act causing the fetus' death must be separate from delivery. And the overt act must ****1628** occur after the delivery to an anatomical landmark. This is because the Act proscribes killing "the partially delivered" fetus, which, when read in context, refers to a fetus that has been delivered to an anatomical landmark. *Ibid.*

Fourth, the Act contains scienter requirements concerning all the actions involved in the prohibited abortion. To begin with, the physician must have "deliberately and intentionally" delivered the fetus to one of the Act's anatomical landmarks. § 1531(b)(1)(A). If a living fetus is delivered past the critical point by accident or inadvertence, the Act is inapplicable. In addition, the fetus must have been delivered "for the purpose of performing an overt act that the [doctor] knows will kill [it]." *Ibid.* If either intent is absent, no crime has occurred. This follows from the general principle that where scienter is required no crime is committed absent the requisite state of mind. See generally 1 W. LaFave, Substantive Criminal Law § 5.1 (2d ed.2003) (hereinafter LaFave); 1 C. Torcia, Wharton's Criminal Law § 27 (15th ed.1993).

B

[8] Respondents contend the language described above is indeterminate, and they thus argue the Act is unconstitutionally vague on its face. "As generally stated, the void-for-vagueness ***149** doctrine requires that a penal statute define the criminal offense with sufficient

definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Posters 'N' Things, Ltd. v. United States,* 511 U.S. 513, 525, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994). The Act satisfies both requirements.

[9] The Act provides doctors "of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Indeed, it sets forth "relatively clear guidelines as to prohibited conduct" and provides "objective criteria" to evaluate whether a doctor has performed a prohibited procedure. *Posters 'N' Things, supra,* at 525–526, 114 S.Ct. 1747. Unlike the statutory language in *Stenberg* that prohibited the delivery of a " 'substantial portion' " of the fetus—where a doctor might question how much of the fetus is a substantial portion —the Act defines the line between potentially criminal conduct on the one hand and lawful abortion on the other. *Stenberg,* 530 U.S., at 922, 120 S.Ct. 2597 (quoting Neb.Rev.Stat. Ann. § 28–326(9) (Supp.1999)). Doctors performing D & E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability.

This conclusion is buttressed by the intent that must be proved to impose liability. The Court has made clear that scienter requirements alleviate vagueness concerns. *Posters 'N' Things, supra,* at 526, 114 S.Ct. 1747; see also *Colautti v. Franklin,* 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea* "). The Act requires the doctor deliberately to have delivered the fetus to an anatomical landmark. 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). Because a doctor performing a D & E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake, the Act cannot be described as "a trap for ***150** those who act in good faith." *Colautti,* ****1629** *supra,* at 395, 99 S.Ct. 675 (internal quotation marks omitted).

[10] Respondents likewise have failed to show that the Act should be invalidated on its face because it encourages arbitrary or discriminatory enforcement. *Kolender, supra,* at 357, 103 S.Ct. 1855. Just as the Act's anatomical landmarks provide doctors with objective standards, they also "establish minimal guidelines to govern law enforcement." *Smith v. Goguen,* 415 U.S. 566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). The scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion. It cannot be said that the Act "vests virtually complete discretion in the hands of [law enforcement] to determine whether the [doctor] has satisfied [its provisions]." *Kolender, supra,* at 358, 103 S.Ct. 1855 (invalidating a statute regulating loitering). Respondents' arguments concerning arbitrary enforcement, furthermore, are somewhat speculative. This is a preenforcement challenge, where "no evidence has been, or could be, introduced to indicate whether the [Act] has been enforced in a discriminatory manner or with the aim of inhibiting [constitutionally protected conduct]." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 503, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Act is not vague.

C

[11] We next determine whether the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. A review of the statutory text discloses the limits of its reach. The Act prohibits intact D & E; and, notwithstanding respondents' arguments, it does not prohibit the D & E procedure in which the fetus is removed in parts.

1

The Act prohibits a doctor from intentionally performing an intact D & E. The dual prohibitions of the Act, both of which are necessary for criminal liability, correspond with the steps generally undertaken during this type of procedure. ***151** First, a doctor delivers the fetus until its head lodges in the cervix, which is usually past the anatomical landmark for a breech presentation. See 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). Second, the doctor proceeds to pierce the fetal skull with scissors or crush it with forceps. This step satisfies the overt-act requirement because it kills the fetus and is distinct from delivery. See § 1531(b)(1)(B). The Act's intent requirements, however, limit its reach to those physicians who carry out the intact D & E after intending to undertake both steps at the outset.

The Act excludes most D & Es in which the fetus is removed in pieces, not intact. If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability. A doctor performing a standard D & E procedure can often "tak[e] about 10–15 'passes' through the uterus to remove the entire fetus." *Planned Parenthood,* 320 F.Supp.2d, at 962. Removing the fetus in this manner does not violate the Act because the doctor will not have delivered the living fetus to one of the anatomical landmarks or committed an additional overt act that kills the fetus after partial delivery. § 1531(b)(1) (2000 ed., Supp. IV).

A comparison of the Act with the Nebraska statute struck down in *Stenberg* confirms this point. The statute in *Stenberg* prohibited " 'deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such ****1630** procedure knows will kill the unborn child and does kill the unborn child.' " 530 U.S., at 922, 120 S.Ct. 2597 (quoting Neb.Rev.Stat. Ann. § 28–326(9) (Supp.1999)). The Court concluded that this statute encompassed D & E because "D & E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." 530 U.S., at 939, 120 S.Ct. 2597. The Court also rejected the limiting interpretation urged by Nebraska's Attorney General that the statute's reference to ***152** a "procedure" that " 'kill[s] the unborn child' " was to a distinct procedure, not to the abortion procedure as a whole. *Id.,* at 943, 120 S.Ct. 2597.

[12] Congress, it is apparent, responded to these concerns because the Act departs in material ways from the statute in *Stenberg*. It adopts the phrase "delivers a living fetus," § 1531(b)(1)(A) (2000 ed., Supp. IV), instead of " 'delivering ... a living unborn child, or a substantial portion thereof,' " 530 U.S., at 938, 120 S.Ct. 2597 (quoting Neb.Rev.Stat. Ann. § 28–326(9) (Supp.1999)). The Act's language, unlike the statute in *Stenberg,* expresses the usual meaning of "deliver" when used in connection with "fetus," namely, extraction of an entire fetus rather than removal of fetal pieces. See Stedman's Medical Dictionary 470 (27th ed.2000) (defining deliver as "[t]o assist a woman in childbirth" and "[t]o extract from an enclosed place, as the fetus from the womb, an object or foreign body"); see also I. Dox, B. Melloni, G. Eisner, & J. Melloni, The HarperCollins Illustrated Medical Dictionary 160 (4th ed.2001); Merriam-Webster's Collegiate Dictionary 306 (10th ed.1997). The Act thus displaces the interpretation of "delivering" dictated by the Nebraska statute's reference to a "substantial portion" of the fetus. *Stenberg, supra,* at 944, 120 S.Ct. 2597 (indicating that the Nebraska "statute itself specifies that it applies *both* to delivering 'an intact unborn child' *or* 'a substantial portion thereof' "). In interpreting statutory texts courts use the ordinary meaning of terms unless context requires a different result. See, *e.g.,* 2A N. Singer, Sutherland on Statutes and Statutory Construction § 47:28 (rev. 6th ed.2000). Here, unlike in *Stenberg,* the language does not require a departure from the ordinary meaning. D & E does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.

The identification of specific anatomical landmarks to which the fetus must be partially delivered also differentiates the Act from the statute at issue in *Stenberg*. ***153** § 1531(b)(1)(A) (2000 ed., Supp. IV). The Court in *Stenberg* interpreted " 'substantial portion' " of the fetus to include an arm or a leg. 530 U.S., at 939, 120 S.Ct. 2597. The Act's anatomical landmarks, by contrast, clarify that the removal of a small portion of the fetus is not prohibited. The landmarks also require the fetus to be delivered so that it is partially "outside the body of the mother." § 1531(b)(1)(A). To come within the ambit of the Nebraska statute, on the other hand, a substantial portion of the fetus only had to be delivered into the vagina; no part of the fetus had to be outside the body of the mother before a doctor could face criminal sanctions. *Id.,* at 938–939, 120 S.Ct. 2597.

By adding an overt-act requirement Congress sought further to meet the Court's objections to the state statute considered in *Stenberg*. Compare 18 U.S.C. § 1531(b)(1) (2000 ed., Supp. IV) with Neb.Rev.Stat. Ann. § 28–326(9) (Supp.1999). The Act makes the distinction the Nebraska statute failed to draw (but the Nebraska Attorney General advanced) by differentiating between the overall partial-birth ****1631** abortion and the distinct overt act that kills the fetus. See *Stenberg, supra,* at 943–944, 120 S.Ct. 2597. The fatal overt act must occur after delivery to an anatomical landmark, and it must be something "other than [the] completion of delivery." § 1531(b)(1)(B). This distinction matters because, unlike intact D & E, standard D & E does not involve a delivery followed by a fatal act.

[13] **[14]** The canon of constitutional avoidance, finally, extinguishes any lingering doubt as to whether the Act covers the prototypical D & E procedure. " '[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (quoting *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895)). It is true this longstanding maxim of statutory interpretation has, in the past, fallen by the wayside when the Court confronted a statute regulating abortion. The Court at times employed an antagonistic ***154** " 'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.' " *Stenberg, supra,* at 977, 120 S.Ct. 2597 (KENNEDY, J., dissenting) (quoting *Thornburgh,* 476 U.S., at 829, 106 S.Ct. 2169 (O'Connor, J., dissenting); some internal quotation marks omitted). *Casey* put this novel statutory approach to rest. *Stenberg, supra,* at 977, 120 S.Ct. 2597 (KENNEDY, J., dissenting). *Stenberg* need not be interpreted to have revived it. We read that decision instead to stand for the uncontroversial proposition that the canon of constitutional avoidance does not apply if a statute is not "genuinely susceptible to two constructions." *Almendarez–Torres v. United States,* 523 U.S. 224, 238, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); see also *Clark v. Martinez,* 543 U.S. 371, 385, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005). In *Stenberg* the Court found the statute covered D & E. 530 U.S., at 938–945, 120 S.Ct. 2597. Here, by contrast, interpreting the Act so that it does not prohibit standard D & E is the most reasonable reading and understanding of its terms.

2

[15] Contrary arguments by respondents are unavailing. Respondents look to situations that might arise during D & E, situations not examined in *Stenberg*. They contend —relying on the testimony of numerous abortion doctors —that D & E may result in the delivery of a living fetus beyond the Act's anatomical landmarks in a significant fraction of cases. This is so, respondents say, because doctors cannot predict the amount the cervix will dilate before the abortion procedure. It might dilate to a degree that the fetus will be removed largely intact. To complete the abortion, doctors will commit an overt act that kills the partially delivered fetus. Respondents thus posit that any D & E has the potential to violate the Act, and that a physician will not know beforehand whether the abortion will proceed in a prohibited manner. Brief for Respondent Planned Parenthood et al. in No. 05–1382, p. 38.

***155** This reasoning, however, does not take account of the Act's intent requirements, which preclude liability from attaching to an accidental intact D & E. If a doctor's intent at the outset is to perform a D & E in which the fetus would not be delivered to either of the Act's anatomical landmarks, but the fetus nonetheless is delivered past one of those points, the requisite and prohibited scienter is not present. 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). When a doctor in that situation completes an abortion by performing ****1632** an intact D & E, the doctor does not violate the Act. It is true that intent to cause a result may sometimes be inferred if a person "knows that that result is practically certain to follow from his conduct." 1 LaFave § 5.2(a), at 341. Yet abortion doctors intending at the outset to perform a standard D & E procedure will not know that a prohibited abortion "is practically certain to follow from" their conduct. *Ibid.* A fetus is only delivered largely intact in a small fraction of the overall number of D & E abortions. *Planned Parenthood,* 320 F.Supp.2d, at 965.

The evidence also supports a legislative determination that an intact delivery is almost always a conscious choice rather than a happenstance. Doctors, for example, may remove the fetus in a manner that will increase the chances of an intact delivery. See, *e.g.,* App. in No. 05–1382, pp. 74, 452. And intact D & E is usually described as involving some manner of serial dilation. See, *e.g.,* Dilation and Extraction 110. Doctors who do not seek to obtain this serial dilation perform an intact D & E on far fewer occasions. See, *e.g., Carhart,* 331 F.Supp.2d, at 857–858 ("In order for intact removal to occur on a regular basis, Dr. Fitzhugh would have to dilate his patients with a second round of laminaria"). This evidence belies any claim that a standard D & E cannot be performed without intending or foreseeing an intact D & E.

Many doctors who testified on behalf of respondents, and who objected to the Act, do not perform an intact D & E by accident. On the contrary, they begin every D & E abortion ***156** with the objective of removing the fetus as intact as possible. See, *e.g., id.,* at 869 ("Since Dr. Chasen believes that the intact D & E is safer than the

dismemberment D & E, Dr. Chasen's goal is to perform an intact D & E every time"); see also *id.,* at 873, 886. This does not prove, as respondents suggest, that every D & E might violate the Act and that the Act therefore imposes an undue burden. It demonstrates only that those doctors who intend to perform a D & E that would involve delivery of a living fetus to one of the Act's anatomical landmarks must adjust their conduct to the law by not attempting to deliver the fetus to either of those points. Respondents have not shown that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the vast majority of D & E abortions. The Act, then, cannot be held invalid on its face on these grounds.

IV

[16] Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "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." *Casey,* 505 U.S., at 878, 112 S.Ct. 2791 (plurality opinion). The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

A

[17] The Act's purposes are set forth in recitals preceding its operative provisions. A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion ***157** in which a fetus is killed just inches before ****1633** completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." Congressional Findings ¶ (14)(N). The Act expresses respect for the dignity of human life.

[18] Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain:

> "Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." *Id.,* ¶ (14)(J).

There can be no doubt the government "has an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg,* 521 U.S. 702, 731, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); see also *Barsky v. Board of Regents of Univ. of N. Y.,* 347 U.S. 442, 451, 74 S.Ct. 650, 98 L.Ed. 829 (1954) (indicating the State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine). Under our precedents it is clear the State has a significant role to play in regulating the medical profession.

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after *Roe* had "undervalue[d] the State's interest in potential life." 505 U.S., at 873, 112 S.Ct. 2791 (plurality opinion); see also *id.,* at 871, 112 S.Ct. 2791. The plurality opinion indicated "[t]he fact that a law which serves a valid purpose, one not designed to strike ***158** 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." *Id.,* at 874, 112 S.Ct. 2791. This was not an idle assertion. The three premises of *Casey* must coexist. See *id.,* at 846, 112 S.Ct. 2791 (opinion of the Court). The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the

medical profession in order to promote respect for life, including life of the unborn.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," Congressional Findings ¶ (14)(L), and thus it was concerned ****1634** with "draw[ing] a bright line that clearly distinguishes abortion and infanticide," *id.,* ¶ (14)(G). The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. *Glucksberg* found reasonable the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." 521 U.S., at 732–735, and n. 23, 117 S.Ct. 2258.

***159** Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *Casey, supra,* at 852–853, 112 S.Ct. 2791 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05–380, pp. 22–24. Severe depression and loss of esteem can follow. See *ibid.*

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. See, *e.g., National Abortion Federation,* 330 F.Supp.2d, at 466, n. 22 ("Most of [the plaintiffs'] experts acknowledged that they do not describe to their patients what [the D & E and intact D & E] procedures entail in clear and precise terms"); see also *id.,* at 479.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. *Casey, supra,* at 873, 112 S.Ct. 2791 (plurality opinion) ("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"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what ***160** she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D & E is in some respects as brutal, if not more, than the intact D & E, so that the legislation accomplishes little. What we have already said, however, shows ample justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D & E because the former ****1635** occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D & E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." Congressional Findings ¶(14)(K). There would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude a ban on both D & E and intact D & E was overbroad and then to say it is irrational to ban only intact D & E because that does not proscribe both procedures. In sum, we reject the

contention that the congressional purpose of the Act was "to place a substantial obstacle in the path of a woman seeking an abortion." 505 U.S., at 878, 112 S.Ct. 2791 (plurality opinion).

***161** B

[19] The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where " 'necessary, in appropriate medical judgment, for the preservation of the ... health of the mother.' " *Ayotte,* 546 U.S., at 327–328, 126 S.Ct. 961 (quoting *Casey, supra,* at 879, 112 S.Ct. 2791 (plurality opinion)). The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it "subject[ed] [women] to significant health risks." *Ayotte, supra,* at 328, 126 S.Ct. 961; see also *Casey, supra,* at 880, 112 S.Ct. 2791 (opinion of the Court). In *Ayotte* the parties agreed a health exception to the challenged parental-involvement statute was necessary "to avert serious and often irreversible damage to [a pregnant minor's] health." 546 U.S., at 328, 126 S.Ct. 961. Here, by contrast, whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

Respondents presented evidence that intact D & E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*. See 530 U.S., at 932, 120 S.Ct. 2597. Abortion doctors testified, for example, that intact D & E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp. Respondents also presented evidence that intact D & E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete. Respondents, in addition, proffered evidence that intact D & E was safer for women with certain medical conditions or women with fetuses that had certain anomalies. See, *e.g., Carhart,* 331 F.Supp.2d, at 923–929; *National* ***162** *Abortion Federation,* 330 F.Supp.2d, at 470–474; *Planned Parenthood,* 320 F.Supp.2d, at 982–983.

These contentions were contradicted by other doctors who testified in the District Courts and before Congress. They concluded that the alleged health advantages were based on speculation without scientific studies to support them. They considered D & E always to be a safe alternative. See, *e.g., Carhart, supra,* at 930–940; *National Abortion Federation, supra,* at 470–474; *Planned Parenthood,* 320 F.Supp.2d, at 983.

****1636** There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. See, *e.g., id.,* at 1033 ("[T]here continues to be a division of opinion among highly qualified experts regarding the necessity or safety of intact D & E"); see also *National Abortion Federation, supra,* at 482. The three District Courts that considered the Act's constitutionality appeared to be in some disagreement on this central factual question. The District Court for the District of Nebraska concluded "the banned procedure is, sometimes, the safest abortion procedure to preserve the health of women." *Carhart, supra,* at 1017, 120 S.Ct. 2597. The District Court for the Northern District of California reached a similar conclusion. *Planned Parenthood, supra,* at 1002, 112 S.Ct. 2791 (finding intact D & E was "under certain circumstances ... significantly safer than D & E by disarticulation"). The District Court for the Southern District of New York was more skeptical of the purported health benefits of intact D & E. It found the Attorney General's "expert witnesses reasonably and effectively refuted [the plaintiffs'] proffered bases for the opinion that [intact D & E] has safety advantages over other second-trimester abortion procedures." *National Abortion Federation,* 330 F.Supp.2d, at 479. In addition it did "not believe that many of [the plaintiffs'] purported reasons for why [intact D & E] is medically necessary [were] credible; rather [it found them to be] theoretical or false." *Id.,* at 480. The court nonetheless invalidated ***163** the Act because it determined "a significant body of medical opinion ... holds that D & E has safety advantages over induction and that [intact D & E] has some safety advantages (however hypothetical and unsubstantiated by scientific evidence) over D & E for some women in some circumstances." *Ibid.*

[20] The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial

attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. See *Kansas v. Hendricks,* 521 U.S. 346, 360, n. 3, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); *Jones v. United States,* 463 U.S. 354, 364–365, n. 13, 370, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983); *Lambert v. Yellowley,* 272 U.S. 581, 597, 47 S.Ct. 210, 71 L.Ed. 422 (1926); *Collins v. Texas,* 223 U.S. 288, 297–298, 32 S.Ct. 286, 56 L.Ed. 439 (1912); *Jacobson v. Massachusetts,* 197 U.S. 11, 30–31, 25 S.Ct. 358, 49 L.Ed. 643 (1905); see also *Stenberg, supra,* at 969–972, 120 S.Ct. 2597 (KENNEDY, J., dissenting); *Marshall v. United States,* 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad").

This traditional rule is consistent with *Casey,* which confirms the State's interest in promoting respect for human life at all stages in the pregnancy. Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community. In *Casey* the controlling opinion held an informed-consent requirement in the abortion context was "no different from a requirement that a doctor give certain specific information about any medical procedure." 505 U.S., at 884, 112 S.Ct. 2791 (joint opinion). The opinion stated "the doctor-patient relation here is entitled to the same solicitude it receives in other contexts." *Ibid.;* see also *Webster v. Reproductive Health* ****1637** *Services,* 492 U.S. 490, 518–519, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) ***164** plurality opinion) (criticizing *Roe's* trimester framework because, *inter alia,* it "left this Court to serve as the country's *ex officio* medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States" (internal quotation marks omitted)); *Mazurek v. Armstrong,* 520 U.S. 968, 973, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) *(per curiam)* (upholding a restriction on the performance of abortions to licensed physicians despite the respondents' contention "all health evidence contradicts the claim that there is any health basis for the law" (internal quotation marks omitted)).

Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. See *Hendricks, supra,* at 360, n. 3, 117 S.Ct. 2072. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D & E. One District Court found D & E to have extremely low rates of medical complications. *Planned Parenthood, supra,* at 1000, 112 S.Ct. 2791. Another indicated D & E was "generally the safest method of abortion during the second trimester." *Carhart,* 331 F.Supp.2d, at 1031; see also *National Abortion Federation, supra,* at 467–468 (explaining that "[e]xperts testifying for both sides" agreed D & E was safe). In addition the Act's prohibition only applies to the delivery of "a living fetus." 18 U.S.C. § 1531(b)(1)(A) (2000 ed., Supp. IV). If the intact D & E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure.

The instant cases, then, are different from ***165** *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 77–79, 96 S.Ct. 2831, 49 L.Ed.2d 788 1976), in which the Court invalidated a ban on saline amniocentesis, the then-dominant second-trimester abortion method. The Court found the ban in *Danforth* to be "an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks." *Id.,* at 79, 96 S.Ct. 2831. Here the Act allows, among other means, a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right.

[21] **[22]** **[23]** In reaching the conclusion the Act does not require a health exception we reject certain arguments made by the parties on both sides of these cases. On the one hand, the Attorney General urges us to uphold the Act on the basis of the congressional findings alone. Brief for Petitioner in No. 05–380, at 23. Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake. See *Crowell v. Benson,* 285 U.S. 22, 60, 52 S.Ct. 285, 76 L.Ed. 598 (1932)

("In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function").

As respondents have noted, and the District Courts recognized, some recitations **1638 in the Act are factually incorrect. See *National Abortion Federation,* 330 F.Supp.2d, at 482, 488–491. Whether or not accurate at the time, some of the important findings have been superseded. Two examples suffice. Congress determined no medical schools provide instruction on the prohibited procedure. Congressional Findings ¶ (14)(B). The testimony in the District Courts, however, demonstrated intact D & E is taught at medical schools. *National Abortion Federation, supra,* at 490; *Planned Parenthood,* 320 F.Supp.2d, at 1029. Congress also found there existed a medical consensus that the prohibited procedure *166 is never medically necessary. Congressional Findings ¶ (1). The evidence presented in the District Courts contradicts that conclusion. See, *e.g., Carhart, supra,* at 1012–1015, 120 S.Ct. 2597; *National Abortion Federation, supra,* at 488–489; *Planned Parenthood, supra,* at 1025–1026. Uncritical deference to Congress' factual findings in these cases is inappropriate.

On the other hand, relying on the Court's opinion in *Stenberg,* respondents contend that an abortion regulation must contain a health exception "if 'substantial medical authority supports the proposition that banning a particular procedure could endanger women's health.' " Brief for Respondents in No. 05–380, p. 19 (quoting 530 U.S., at 938, 120 S.Ct. 2597); see also Brief for Respondent Planned Parenthood et al. in No. 05–1382, at 12 (same). As illustrated by respondents' arguments and the decisions of the Courts of Appeals, *Stenberg* has been interpreted to leave no margin of error for legislatures to act in the face of medical uncertainty. *Carhart,* 413 F.3d, at 796; *Planned Parenthood,* 435 F.3d, at 1173; see also *National Abortion Federation,* 437 F.3d, at 296 (Walker, C. J., concurring) (explaining the standard under *Stenberg* "is a virtually insurmountable evidentiary hurdle").

A zero tolerance policy would strike down legitimate abortion regulations, like the present one, if some part of the medical community were disinclined to follow the proscription. This is too exacting a standard to impose on the legislative power, exercised in this instance under the Commerce Clause, to regulate the medical profession. Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends. When standard medical options are available, mere convenience does not suffice to displace them; and if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations. The Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve *167 a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives.

V

[24] The considerations we have discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained. Tr. of Oral Arg. in No. 05–380, pp. 21–23. This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied **1639 challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

The latitude given facial challenges in the First Amendment context is inapplicable here. Broad challenges of this type impose "a heavy burden" upon the parties maintaining the suit. *Rust v. Sullivan,* 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). What that burden consists of in the specific context of abortion statutes has been a subject of some question. Compare *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid" (internal quotation marks omitted)), with *Casey,* 505 U.S., at 895, 112 S.Ct. 2791 (opinion of the Court) (indicating a spousal-notification statute would impose an undue burden "in a large fraction of the cases in which [it] is relevant" and holding the statutory provision facially invalid). See also

Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996). We need not resolve that debate.

As the previous sections of this opinion explain, respondents have not demonstrated that the Act would be unconstitutional ***168** in a large fraction of relevant cases. *Casey, supra,* at 895, 112 S.Ct. 2791 (opinion of the Court). We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications. It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *United States v. Raines,* 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (internal quotation marks omitted). For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." Fallon, As–Applied and Facial Challenges and Third–Party Standing, 113 Harv. L.Rev. 1321, 1328 (2000).

The Act is open to a proper as-applied challenge in a discrete case. Cf. *Wisconsin Right to Life, Inc. v. Federal Election Comm'n,* 546 U.S. 410, 412, 126 S.Ct. 1016, 163 L.Ed.2d 990 (2006) *(per curiam)*. No as-applied challenge need be brought if the prohibition in the Act threatens a woman's life because the Act already contains a life exception. 18 U.S.C. § 1531(a) (2000 ed., Supp. IV).

* * *

Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. For these reasons the judgments of the Courts of Appeals for the Eighth and Ninth Circuits are reversed.

It is so ordered.

Justice THOMAS, with whom Justice SCALIA joins, concurring.

I join the Court's opinion because it accurately applies current jurisprudence, including *Planned Parenthood of* ***169** *Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), has no basis in the Constitution. See *Casey, supra,* at 979, 112 S.Ct. 2791 (SCALIA, J., ****1640** concurring in judgment in part and dissenting in part); *Stenberg v. Carhart,* 530 U.S. 914, 980–983, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (THOMAS, J., dissenting). I also note that whether the Partial–Birth Abortion Ban Act of 2013 constitutes a permissible exercise of Congress' power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it. See *Cutter v. Wilkinson,* 544 U.S. 709, 727, n. 2, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (THOMAS, J., concurring).

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.
In *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 844, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court declared that "[l]iberty finds no refuge in a jurisprudence of doubt." There was, the Court said, an "imperative" need to dispel doubt as to "the meaning and reach" of the Court's 7–to–2 judgment, rendered nearly two decades earlier in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). 505 U.S., at 845, 112 S.Ct. 2791. Responsive to that need, the Court endeavored to provide secure guidance to "[s]tate and federal courts as well as legislatures throughout the Union," by defining "the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures." *Ibid.*

Taking care to speak plainly, the *Casey* Court restated and reaffirmed *Roe's* essential holding. 505 U.S., at 845–846, 112 S.Ct. 2791. First, the Court addressed the type of abortion regulation permissible prior to fetal viability. It recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.*, at 846, 112 S.Ct. 2791. Second, the Court acknowledged "the State's power to restrict abortions *after fetal viability,* if the law ***170** contains exceptions for pregnancies which endanger the woman's life *or health*." *Ibid.* (emphasis added). Third, the

Court confirmed 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." *Ibid.* (emphasis added).

In reaffirming *Roe,* the *Casey* Court described the centrality of "the decision whether to bear ... a child," *Eisenstadt v. Baird,* 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972), to a woman's "dignity and autonomy," her "personhood" and "destiny," her "conception of ... her place in society." 505 U.S., at 851–852, 112 S.Ct. 2791. Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman." *Id.,* at 846, 112 S.Ct. 2791.

Seven years ago, in *Stenberg v. Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000), the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion." [1] With fidelity to the *Roe*-*Casey* line of precedent, the Court held the Nebraska statute unconstitutional in part because ****1641** it lacked the requisite protection for the preservation of a woman's health. *Stenberg,* 530 U.S., at 930, 120 S.Ct. 2597; cf. *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 327, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006).

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians ***171** and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey,* between previability and postviability abortions. And, for the first time since *Roe,* the Court blesses a prohibition with no exception safeguarding a woman's health.

I dissent from the Court's disposition. Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices.

I

A

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." 505 U.S., at 869, 112 S.Ct. 2791 (plurality opinion). See also *id.*, at 852, 112 S.Ct. 2791 (majority opinion). [2] "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." *Id.*, at 896–897, 112 S.Ct. 2791 (quoting *Hoyt v. Florida,* 368 U.S. 57, 62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961)). Those views, this Court made clear in *Casey,* "are no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U.S., at 897, 112 S.Ct. 2791. Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." *Id.*, at 856, 112 S.Ct. 2791. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." ***172** *Ibid.* Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. See, *e.g.,* Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L.Rev. 261 (1992); Law, Rethinking Sex and the Constitution, 132 U. Pa. L.Rev. 955, 1002–1028 (1984).

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. See, *e.g., Ayotte,* 546 U.S., at 327–328, 126 S.Ct. 961 ("[O]ur precedents hold ... that a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for the preservation of the life or health of the [woman]." (quoting *Casey,* 505 U.S., at 879, 112 S.Ct. 2791 (plurality opinion))); ****1642** *Stenberg,* 530 U.S., at 930, 120 S.Ct. 2597 ("Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation."). See also *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 768–769, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (invalidating a *post*-viability abortion regulation

for "fail[ure] to require that [a pregnant woman's] health be the physician's paramount consideration").

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. See *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 79, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (holding unconstitutional a ban on a method of abortion that "force[d] a woman ... to terminate her pregnancy by methods more dangerous to her health"). See also *Stenberg,* 530 U.S., at 931, 120 S.Ct. 2597 ("[Our cases] make clear that a risk to ... women's health is the same whether it happens ***173** to arise from regulating a particular method of abortion, or from barring abortion entirely."). Indeed, we have applied the rule that abortion regulation must safeguard a woman's health to the particular procedure at issue here—intact dilation and evacuation (intact D & E). [3]

In *Stenberg,* we expressly held that a statute banning intact D & E was unconstitutional in part because it lacked a health exception. 530 U.S., at 930, 937, 120 S.Ct. 2597. We noted that there existed a "division of medical opinion" about the relative ***174** safety of intact D & E, *id.*, at 937, 120 S.Ct. 2597, but we made clear that as long as "substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health," a health exception is required, *id.*, at 938, 120 S.Ct. 2597. We explained:

> "The word 'necessary' in *Casey's* phrase 'necessary, in appropriate medical ****1643** judgment, for the preservation of the life or health of the [pregnant woman],' cannot refer to an absolute necessity or to absolute proof. Medical treatments and procedures are often considered appropriate (or inappropriate) in light of estimated comparative health risks (and health benefits) in particular cases. Neither can that phrase require unanimity of medical opinion. Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey's* words 'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion ... ." *Id.*, at 937, 120 S.Ct. 2597 (citation omitted).

Thus, we reasoned, division in medical opinion "at most means uncertainty, a factor that signals the presence of risk, not its absence." *Ibid.* "[A] statute that altogether forbids [intact D & E] .... consequently must contain a health exception." *Id.*, at 938, 120 S.Ct. 2597. See also *id.*, at 948, 120 S.Ct. 2597 (O'Connor, J., concurring) ("Th[e] lack of a health exception necessarily renders the statute unconstitutional.").

B

In 2003, a few years after our ruling in *Stenberg,* Congress passed the Partial–Birth Abortion Ban Act—without an exception for women's health. See 18 U.S.C. § 1531(a) (2000 ed., Supp. IV). [4] The congressional findings on which the ***175** Partial–Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. *Ante,* at 1637 – 1638. See *National Abortion Federation v. Ashcroft,* 330 F.Supp.2d 436, 482 (S.D.N.Y.2004) ("Congress did not ... carefully consider the evidence before arriving at its findings."), aff'd *sub nom. National Abortion Federation v. Gonzales,* 437 F.3d 278 (C.A.2 2006). See also *Planned Parenthood Federation of Am. v. Ashcroft,* 320 F.Supp.2d 957, 1019 (N.D.Cal.2004) ("[N]one of the six physicians who testified before Congress had ever performed an intact D & E. Several did not provide abortion services at all; and one was not even an obgyn ... .[T]he oral testimony before Congress was not only unbalanced, but intentionally polemic."), aff'd, 435 F.3d 1163 (C.A.9 2006); *Carhart v. Ashcroft,* 331 F.Supp.2d 805, 1011 (Neb.2004) ("Congress arbitrarily relied upon the opinions of doctors who claimed to have no (or very little) recent and relevant experience with surgical abortions, and disregarded the views of doctors who had significant and relevant experience with those procedures."), aff'd, 413 F.3d 791 (C.A.8 2005).

Many of the Act's recitations are incorrect. See *ante,* at 1637 – 1638. For example, Congress determined that no medical schools provide instruction on intact D & E. § 2(14)(B), 117 Stat. 1204, notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 769, ¶ (14)(B) (Congressional Findings). But in fact, numerous leading medical schools teach the procedure. See *Planned Parenthood,* 320 F.Supp.2d, at 1029; *National Abortion Federation,* 330 F.Supp.2d, at 479. See also Brief for ACOG as *Amicus Curiae* 18 ("Among the schools that now teach the intact variant are Columbia, Cornell, Yale, New York University, Northwestern, University of

**1644 Pittsburgh, *176 University of Pennsylvania, University of Rochester, and University of Chicago.").

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. Congressional Findings ¶ (1). But the evidence "very clearly demonstrate[d] the opposite." *Planned Parenthood,* 320 F.Supp.2d, at 1025. See also *Carhart,* 331 F.Supp.2d, at 1008–1009 ("[T]here was no evident consensus in the record that Congress compiled. There was, however, a substantial body of medical opinion presented to Congress in opposition. If anything ... the congressional record establishes that there was a 'consensus' in favor of the banned procedure."); *National Abortion Federation,* 330 F.Supp.2d, at 488 ("The congressional record itself undermines [Congress'] finding" that there is a medical consensus that intact D & E "is never medically necessary and should be prohibited." (internal quotation marks omitted)).

Similarly, Congress found that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." Congressional Findings (14)(B), in notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 769. But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D & E carries meaningful safety advantages over other methods. See *National Abortion Federation,* 330 F.Supp.2d, at 490. See also *Planned Parenthood,* 320 F.Supp.2d, at 1021 ("Congress in its findings ... chose to disregard the statements by ACOG and other medical organizations."). No comparable medical groups supported the ban. In fact, "all of the government's own witnesses disagreed with many of the specific congressional findings." *Id.,* at 1024.

*177 C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of "much more extensive medical and scientific evidence ... concerning the safety and necessity of intact D & Es." *Planned Parenthood,* 320 F.Supp.2d, at 1014; cf. *National Abortion Federation,* 330 F.Supp.2d, at 482 (District Court "heard more evidence during its trial than Congress heard over the span of eight years.").

During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D & E is safer than alternative procedures and necessary to protect women's health. *Carhart,* 331 F.Supp.2d, at 1024–1027; see *Planned Parenthood,* 320 F.Supp.2d, at 1001 ("[A]ll of the doctors who actually perform intact D & Es concluded that in their opinion and clinical judgment, intact D & Es remain the safest option for certain individual women under certain individual health circumstances, and are significantly safer for these women than other abortion techniques, and are thus medically necessary."); cf. *ante,* at 1635 ("Respondents presented evidence that intact D & E may be the safest method of abortion, for reasons similar to those adduced in *Stenberg*.").

According to the expert testimony plaintiffs introduced, the safety advantages of intact D & E are marked for women with certain medical conditions, for example, **1645 uterine scarring, bleeding disorders, heart disease, or compromised immune systems. See *Carhart,* 331 F.Supp.2d, at 924–929, 1026–1027; *National Abortion Federation,* 330 F.Supp.2d, at 472–473; *Planned Parenthood,* 320 F.Supp.2d, at 992–994, 1001. Further, plaintiffs' experts testified that intact D & E is significantly safer for women with certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such *178 as severe hydrocephalus. See *Carhart,* 331 F.Supp.2d, at 924, 1026–1027; *National Abortion Federation,* 330 F.Supp.2d, at 473–474; *Planned Parenthood,* 320 F.Supp.2d, at 992–994, 1001. See also *Stenberg,* 530 U.S., at 929, 120 S.Ct. 2597; Brief for ACOG as *Amicus Curiae* 2, 13–16.

Intact D & E, plaintiffs' experts explained, provides safety benefits over D & E by dismemberment for several reasons: *First,* intact D & E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus—the most serious complication associated with nonintact D & E. See *Carhart,* 331 F.Supp.2d, at 923–928, 1025; *National Abortion Federation,* 330 F.Supp.2d, at 471;

Planned Parenthood, 320 F.Supp.2d, at 982, 1001. *Second,* removing the fetus intact, instead of dismembering it *in utero,* decreases the likelihood that fetal tissue will be retained in the uterus, a condition that can cause infection, hemorrhage, and infertility. See *Carhart,* 331 F.Supp.2d, at 923–928, 1025–1026; *National Abortion Federation,* 330 F.Supp.2d, at 472; *Planned Parenthood,* 320 F.Supp.2d, at 1001. *Third,* intact D & E diminishes the chances of exposing the patient's tissues to sharp bony fragments sometimes resulting from dismemberment of the fetus. See *Carhart,* 331 F.Supp.2d, at 923–928, 1026; *National Abortion Federation,* 330 F.Supp.2d, at 471; *Planned Parenthood,* 320 F.Supp.2d, at 1001. *Fourth,* intact D & E takes less operating time than D & E by dismemberment, and thus may reduce bleeding, the risk of infection, and complications relating to anesthesia. See *Carhart,* 331 F.Supp.2d, at 923–928, 1026; *National Abortion Federation,* 330 F.Supp.2d, at 472; *Planned Parenthood,* 320 F.Supp.2d, at 1001. See also *Stenberg,* 530 U.S., at 928–929, 932, 120 S.Ct. 2597; Brief for ACOG as *Amicus Curiae* 2, 11–13.

Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress' findings as unreasonable ***179** and not supported by the evidence. See *Carhart,* 331 F.Supp.2d, at 1008–1027; *National Abortion Federation,* 330 F.Supp.2d, at 482, 488–491; *Planned Parenthood,* 320 F.Supp.2d, at 1032. The trial courts concluded, in contrast to Congress' findings, that "significant medical authority supports the proposition that in some circumstances, [intact D & E] is the safest procedure." *Id.,* at 1033 (quoting *Stenberg,* 530 U.S., at 932, 120 S.Ct. 2597); accord *Carhart,* 331 F.Supp.2d, at 1008–1009, 1017–1018; *National Abortion Federation,* 330 F.Supp.2d, at 480–482; [5] cf. *Stenberg,* 530 U.S., at 932, 120 S.Ct. 2597 ("[T]he record shows that significant medical authority supports the proposition that ****1646** in some circumstances, [intact D & E] would be the safest procedure.").

The District Courts' findings merit this Court's respect. See, *e.g.,* Fed. Rule Civ. Proc. 52(a); *Salve Regina College v. Russell,* 499 U.S. 225, 233, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991). Today's opinion supplies no reason to reject those findings. Nevertheless, despite the District Courts' appraisal of the weight of the evidence, and in undisguised conflict with *Stenberg,* the Court asserts that the Partial–Birth Abortion Ban Act can survive "when ... medical uncertainty persists." *Ante,* at 1636. This assertion is bewildering. Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for circumstances of medical uncertainty, see *supra,* at 1641 – 1642; it gives short shrift to the records before us, carefully canvassed by the District Courts. ***180** Those records indicate that "the majority of highly-qualified experts on the subject believe intact D & E to be the safest, most appropriate procedure under certain circumstances." *Planned Parenthood,* 320 F.Supp.2d, at 1034. See *supra,* at 1644 – 1645.

The Court acknowledges some of this evidence, *ante,* at 1635, but insists that, because some witnesses disagreed with ACOG and other experts' assessment of risk, the Act can stand. *Ante,* at 1635 – 1636, 1638 – 1639. In this insistence, the Court brushes under the rug the District Courts' well-supported findings that the physicians who testified that intact D & E is never necessary to preserve the health of a woman had slim authority for their opinions. They had no training for, or personal experience with, the intact D & E procedure, and many performed abortions only on rare occasions. See *Planned Parenthood,* 320 F.Supp.2d, at 980; *Carhart,* 331 F.Supp.2d, at 1025; cf. *National Abortion Federation,* 330 F.Supp.2d, at 462–464. Even indulging the assumption that the Government witnesses were equally qualified to evaluate the relative risks of abortion procedures, their testimony could not erase the "significant medical authority support[ing] the proposition that in some circumstances, [intact D & E] would be the safest procedure." *Stenberg,* 530 U.S., at 932, 120 S.Ct. 2597. [6]

***181** II

A

The Court offers flimsy and transparent justifications for upholding a nationwide ****1647** ban on intact D & E *sans* any exception to safeguard a woman's health. Today's ruling, the Court declares, advances "a premise central to [*Casey's*] conclusion"—*i.e.,* the Government's "legitimate and substantial interest in preserving and promoting fetal life." *Ante,* at 1626. See also *ibid.* ("[W]e must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child."). But the Act scarcely

furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. See *Stenberg,* 530 U.S., at 930, 120 S.Ct. 2597. And surely the statute was not designed to protect the lives or health of pregnant women. *Id.,* at 951, 120 S.Ct. 2597 (GINSBURG, J., concurring); cf. *Casey,* 505 U.S., at 846, 112 S.Ct. 2791 (recognizing along with the State's legitimate interest in the life of the fetus, its "legitimate interes[t] ... in protecting the *health of the woman*" (emphasis added)). In short, the Court upholds a law that, while doing nothing to "preserv[e] ... fetal life," *ante,* at 1626, bars a woman from choosing intact D & E although her doctor "reasonably believes [that procedure] will best protect [her]," *Stenberg,* 530 U.S., at 946, 120 S.Ct. 2597 (STEVENS, J., concurring).

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D & E procedure. See *ante,* at 1637. But why not, one might ask. ***182** Nonintact D & E could equally be characterized as "brutal," *ante,* at 1633, involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs, *ante,* at 1620 – 1621, 1621 – 1622. "[T]he notion that either of these two equally gruesome procedures ... is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." *Stenberg,* 530 U.S., at 946–947, 120 S.Ct. 2597 (STEVENS, J., concurring).

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. *Ante,* at 1633 – 1634. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, *ante,* at 1621, 1637 – 1638, or a fetus delivered through medical induction or cesarean, *ante,* at 1644. Yet, the availability of those procedures—along with D & E by dismemberment—the Court says, saves the ban on intact D & E from a declaration of unconstitutionality. *Ante,* at 1637 – 1638. Never mind that the procedures deemed acceptable might put a woman's health at greater risk. See *supra,* at 1646, and n. 6; cf. *ante,* at 1621, 1635 – 1636.

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. See *ante,* at 1633 – 1634 ("Congress could ... conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition."). Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. See, *e.g., Casey,* 505 U.S., at 850, 112 S.Ct. 2791 ("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."); *Lawrence v. Texas,* 539 U.S. 558, 571, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (Though "[f]or many persons [objections to homosexual conduct] are not trivial ****1648** ***183** concerns but profound and deep convictions accepted as ethical and moral principles," the power of the State may not be used "to enforce these views on the whole society through operation of the criminal law." (citing *Casey,* 505 U.S., at 850, 112 S.Ct. 2791)).

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." *Ante,* at 1634. [7] Because of women's ***184** fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure. *Ante,* at 1633 – 1634. [8] The solution the Court approves, then, is *not* to require doctors to ****1649** inform women, accurately and adequately, of the different procedures and their attendant risks. Cf. *Casey,* 505 U.S., at 873, 112 S.Ct. 2791 (plurality opinion) ("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."). Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. [9]

***185** This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Compare, *e.g., Muller v. Oregon,* 208 U.S. 412, 422–423, 28 S.Ct. 324, 52 L.Ed. 551 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal functio[n]"); *Bradwell v. State,* 16 Wall. 130, 141, 21 L.Ed. 442 (1873) (Bradley, J.,

concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. ... The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."), with *United States v. Virginia,* 518 U.S. 515, 533, 542, n. 12, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have ... impeded ... women's progress toward full citizenship stature throughout our Nation's history"); *Califano v. Goldfarb,* 430 U.S. 199, 207, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Though today's majority may regard women's feelings on the matter as "self-evident," *ante,* at 1634, this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped ... on her own conception of her spiritual imperatives and her place in society," *Casey,* 505 U.S., at 852, 112 S.Ct. 2791. See also ***186** *id.*, at 877, 112 S.Ct. 2791 (plurality opinion) ("[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."); *supra,* at 1641 – 1642.

B

In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration. See *Casey,* 505 U.S., at 869–870, 112 S.Ct. 2791 (plurality opinion). "[T]here is no line [more workable] ****1650** than viability," the Court explained in *Casey,* for viability 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. ... 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." *Id.*, at 870, 112 S.Ct. 2791.

Today, the Court blurs that line, maintaining that "[t]he Act [legitimately] appl[ies] both previability and postviability because ... a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Ante,* at 1627. Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed. See *ante,* at 1633 – 1634 (quoting Congressional Findings ¶ (14)(G)).

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." See *supra,* at 1647; cf. *ante,* at 1627 (noting that "[i]n this litigation" the Attorney General "does not dispute that the Act would impose an undue burden if it covered standard D & E"). The Court's hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions ***187** not by the titles of their medical specialties, but by the pejorative label "abortion doctor." *Ante,* at 1625, 1631, 1632, 1635, 1636. A fetus is described as an "unborn child," and as a "baby," *ante,* at 1620, 1622 – 1623; second-trimester, previability abortions are referred to as "late-term," *ante,* at 1632; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience," *ante,* at 1620, 1638. Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act, *ante,* at 1633 – 1634, 1638. And, most troubling, *Casey's* principles, confirming the continuing vitality of "the essential holding of *Roe,*" are merely "assume[d]" for the moment, *ante,* at 1626, 1635, rather than "retained" or "reaffirmed," *Casey,* 505 U.S., at 846, 112 S.Ct. 2791.

III

A

The Court further confuses our jurisprudence when it declares that "facial attacks" are not permissible in "these circumstances," *i.e.,* where medical uncertainty exists. *Ante,* at 1638; see *ibid.* ("In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack."). This

holding is perplexing given that, in materially identical circumstances we held that a statute lacking a health exception was unconstitutional on its face. *Stenberg,* 530 U.S., at 930, 120 S.Ct. 2597; see *id.*, at 937, 120 S.Ct. 2597 (in facial challenge, law held unconstitutional because "significant body of medical opinion believes [the] procedure may bring with it greater safety for *some patients* " (emphasis added)). See also *Sabri v. United States,* 541 U.S. 600, 609–610, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (identifying abortion as one setting in which we have recognized the validity of facial challenges); Fallon, Making Sense of Overbreadth, 100 Yale L.J. 853, 859, n. 29 (1991) **1651 ("[V]irtually all of the abortion cases reaching the Supreme Court since *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), have involved facial attacks on state statutes, and the Court, whether accepting *188 or rejecting the challenges on the merits, has typically accepted this framing of the question presented."). Accord Fallon, As–Applied and Facial Challenges and Third–Party Standing, 113 Harv. L.Rev. 1321, 1356 (2000); Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L.Rev. 235, 271–276 (1994).

Without attempting to distinguish *Stenberg* and earlier decisions, the majority asserts that the Act survives review because respondents have not shown that the ban on intact D & E would be unconstitutional "in a large fraction of [relevant] cases." *Ante,* at 1639 (citing *Casey,* 505 U.S., at 895, 112 S.Ct. 2791). But *Casey* makes clear that, in determining whether any restriction poses an undue burden on a "large fraction" of women, the relevant class is *not* "all women," nor "all pregnant women," nor even all women "seeking abortions." *Ibid.* Rather, a provision restricting access to abortion "must be judged by reference to those [women] for whom it is an actual rather than an irrelevant restriction." *Ibid.* Thus the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require an intact D & E because other procedures would place their health at risk. [10] Cf. *Stenberg,* 530 U.S., at 934, 120 S.Ct. 2597 (accepting the "relative rarity" of medically indicated intact D & Es as true but not "highly relevant"—for "the health exception question is whether protecting women's health requires an exception for those infrequent occasions"); *Ayotte,* 546 U.S., at 328, 126 S.Ct. 961 (facial challenge entertained where "[i]n some very small percentage of cases ... women ... need immediate abortions to avert serious, and often irreversible damage to their health"). It makes no sense to conclude that this facial challenge fails because respondents have not shown that a health exception is necessaryfor *189 a large fraction of second-trimester abortions, including those for which a health exception is unnecessary: The very purpose of a health *exception* is to protect women in *exceptional* cases.

B

If there is anything at all redemptive to be said of today's opinion, it is that the Court is not willing to foreclose entirely a constitutional challenge to the Act. "The Act is open," the Court states, "to a proper as-applied challenge in a discrete case." *Ante,* at 1639; see *ante,* at 1639 ("The Government has acknowledged that preenforcement, as-applied challenges to the Act can be maintained."). But the Court offers no clue on what a "proper" lawsuit might look like. See *ante,* at 1638 – 1639. Nor does the Court explain why the injunctions ordered by the District Courts should not remain in place, trimmed only to exclude instances in which another procedure would safeguard a woman's health at least equally well. Surely the Court cannot mean that no suit may be brought until a woman's health is immediately jeopardized by the ban on intact D & E. A woman "suffer[ing] from medical complications," *ante,* at 1639, needs access to the **1652 medical procedure at once and cannot wait for the judicial process to unfold. See *Ayotte,* 546 U.S., at 328, 126 S.Ct. 961.

The Court appears, then, to contemplate another lawsuit by the initiators of the instant actions. In such a second round, the Court suggests, the challengers could succeed upon demonstrating that "in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Ante,* at 1638. One may anticipate that such a preenforcement challenge will be mounted swiftly, to ward off serious, sometimes irremediable harm, to women whose health would be endangered by the intact D & E prohibition.

The Court envisions that in an as-applied challenge, "the nature of the medical risk can be better quantified and balanced." *Ibid.* But it should not escape notice that the record *190 already includes hundreds and hundreds of pages of testimony identifying "discrete and well-defined instances" in which recourse to an intact D & E would better protect the health of women with particular

conditions. See *supra,* at 1644 – 1645. Record evidence also documents that medical exigencies, unpredictable in advance, may indicate to a well-trained doctor that intact D & E is the safest procedure. See ibid. In light of this evidence, our unanimous decision just one year ago in *Ayotte* counsels against reversal. See 546 U.S., at 331, 126 S.Ct. 961 (remanding for reconsideration of the remedy for the absence of a health exception, suggesting that an injunction prohibiting unconstitutional applications might suffice).

The Court's allowance only of an "as-applied challenge in a discrete case," *ante,* at 1639—jeopardizes women's health and places doctors in an untenable position. Even if courts were able to carve out exceptions through piecemeal litigation for "discrete and well-defined instances," *ante,* at 1638, women whose circumstances have not been anticipated by prior litigation could well be left unprotected. In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients. The Court is thus gravely mistaken to conclude that narrow as-applied challenges are "the proper manner to protect the health of the woman." Cf. *ibid.*

IV

As the Court wrote in *Casey,* "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." 505 U.S., at 865, 112 S.Ct. 2791. "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, ***191** indispensable." *Id.*, at 854, 112 S.Ct. 2791. See also *id.*, at 867, 112 S.Ct. 2791 ("[T]o 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.").

Though today's opinion does not go so far as to discard *Roe* or *Casey,* the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of "the rule of law" and the "principles of *stare decisis*." Congress imposed a ban despite our clear prior holdings that the State cannot proscribe an abortion procedure when its use is necessary to protect a woman's health. See *supra,* at 1643, n. 4. Although Congress' findings could not withstand the crucible of trial, the Court ****1653** defers to the legislative override of our Constitution-based rulings. See *supra,* at 1643–1644. A decision so at odds with our jurisprudence should not have staying power.

In sum, the notion that the Partial–Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives. See *supra,* at 1641, n. 2; *supra,* at 1643, n. 4. When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue." *Stenberg,* 530 U.S., at 952, 120 S.Ct. 2597 (GINSBURG, J., concurring) (quoting *Hope Clinic v. Ryan,* 195 F.3d 857, 881 (C.A.7 1999) (Posner, C. J., dissenting)).

* * *

For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The term "partial-birth abortion" is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. See *Planned Parenthood Federation of Am. v. Ashcroft,* 320 F.Supp.2d 957, 964 (N.D.Cal.2004), aff'd, 435 F.3d 1163 (C.A.9 2006). The medical community refers to the procedure as either dilation & extraction (D & X) or intact dilation and evacuation (intact D & E). See, *e.g., ante,* at 1621; *Stenberg v. Carhart,* 530 U.S. 914, 927, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000).

2 *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 851–852, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), described more precisely than did *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the impact of abortion restrictions on women's liberty. *Roe's* focus was in considerable measure on "vindicat[ing] the right of the physician to administer medical treatment according to his professional judgment." *Id*., at 165, 93 S.Ct. 705.

3 Dilation and evacuation (D & E) is the most frequently used abortion procedure during the second trimester of pregnancy; intact D & E is a variant of the D & E procedure. See *ante,* at 1620 – 1621, 1621 – 1622; *Stenberg,* 530 U.S., at 924, 927, 120 S.Ct. 2597; *Planned Parenthood,* 320 F.Supp.2d, at 966. Second-trimester abortions (*i.e.,* midpregnancy, previability abortions) are, however, relatively uncommon. Between 85 and 90 percent of all abortions performed in the United States take place during the first three months of pregnancy. See *ante,* at 1620. See also *Stenberg,* 530 U.S., at 923–927, 120 S.Ct. 2597; *National Abortion Federation v. Ashcroft,* 330 F.Supp.2d 436, 464 (S.D.N.Y.2004), aff'd *sub nom. National Abortion Federation v. Gonzales,* 437 F.3d 278 (C.A.2 2006); *Planned Parenthood,* 320 F.Supp.2d, at 960, and n. 4.
Adolescents and indigent women, research suggests, are more likely than other women to have difficulty obtaining an abortion during the first trimester of pregnancy. Minors may be unaware they are pregnant until relatively late in pregnancy, while poor women's financial constraints are an obstacle to timely receipt of services. See Finer, Frohwirth, Dauphinee, Singh, & Moore, Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States, 74 Contraception 334, 341–343 (2006). See also Drey et al., Risk Factors Associated with Presenting for Abortion in the Second Trimester, 107 Obstetrics & Gynecology 128, 133 (Jan.2006) (concluding that women who have second-trimester abortions typically discover relatively late that they are pregnant). Severe fetal anomalies and health problems confronting the pregnant woman are also causes of second-trimester abortions; many such conditions cannot be diagnosed or do not develop until the second trimester. See, *e.g.,* Finer, *supra,* at 344; F. Cunningham et al., Williams Obstetrics 242, 290, 328–329 (22d ed.2005); cf. Schechtman, Gray, Baty, & Rothman, Decision–Making for Termination of Pregnancies with Fetal Anomalies: Analysis of 53,000 Pregnancies, 99 Obstetrics & Gynecology 216, 220–221 (Feb.2002) (nearly all women carrying fetuses with the most serious central nervous system anomalies chose to abort their pregnancies).

4 The Act's sponsors left no doubt that their intention was to nullify our ruling in *Stenberg,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743. See, *e.g.,* 149 Cong. Rec. 5731 (2003) (statement of Sen. Santorum) ("Why are we here? We are here because the Supreme Court defended the indefensible .... We have responded to the Supreme Court."). See also 148 Cong. Rec. 14273 (2002) (statement of Rep. Linder) (rejecting proposition that Congress has "no right to legislate a ban on this horrible practice because the Supreme Court says [it] cannot").

5 Even the District Court for the Southern District of New York, which was more skeptical of the health benefits of intact D & E, see *ante,* at 1635 – 1636, recognized: "[T]he Government's own experts disagreed with almost all of Congress's factual findings"; a "significant body of medical opinion" holds that intact D & E has safety advantages over nonintact D & E; "[p]rofessional medical associations have also expressed their view that [intact D & E] may be the safest procedure for some women"; and "[t]he evidence indicates that the same disagreement among experts found by the Supreme Court in *Stenberg* existed throughout the time that Congress was considering the legislation, despite Congress's findings to the contrary." *National Abortion Federation,* 330 F.Supp.2d, at 480–482.

6 The majority contends that "[i]f the intact D & E procedure is truly necessary in some circumstances, it appears likely an injection that kills the fetus is an alternative under the Act that allows the doctor to perform the procedure." *Ante,* at 1637 – 1638. But a "significant body of medical opinion believes that inducing fetal death by injection is almost always inappropriate to the preservation of the health of women undergoing abortion because it poses tangible risk and provides no benefit to the woman." *Carhart v. Ashcroft,* 331 F.Supp.2d 805, 1028 (Neb.2004) (internal quotation marks omitted), aff'd, 413 F.3d 791 (C.A.8 2005). In some circumstances, injections are "absolutely [medically] contraindicated." 331 F.Supp.2d, at 1027. See also *id*., at 907–912; *National Abortion Federation,* 330 F.Supp.2d, at 474–475; *Planned Parenthood,* 320 F.Supp.2d, at 995–997. The Court also identifies medical induction of labor as an alternative. See *ante,* at 1644. That procedure, however, requires a hospital stay, *ibid.,* rendering it inaccessible to patients who lack financial resources, and it too is considered less safe for many women, and impermissible for others. See *Carhart,* 331 F.Supp.2d,

at 940–949, 1017; *National Abortion Federation,* 330 F.Supp.2d, at 468–470; *Planned Parenthood,* 320 F.Supp.2d, at 961, n. 5, 992–994, 1000–1002.

7 The Court is surely correct that, for most women, abortion is a painfully difficult decision. See *ante,* at 1633 – 1634. But "neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have ... ." Cohen, Abortion and Mental Health: Myths and Realities, 9 Guttmacher Policy Rev. 8 (2006); see generally Bazelon, Is There a Post–Abortion Syndrome? N.Y. Times Magazine, Jan. 21, 2007, p. 40. See also, *e.g.,* American Psychological Association, APA Briefing Paper on the Impact of Abortion (2005) (rejecting theory of a postabortion syndrome and stating that "[a]ccess to legal abortion to terminate an unwanted pregnancy is vital to safeguard both the physical and mental health of women"); Schmiege & Russo, Depression and Unwanted First Pregnancy: Longitudinal Cohort Study, 331 British Medical J. 1303 (2005) (finding no credible evidence that choosing to terminate an unwanted first pregnancy contributes to risk of subsequent depression); Gilchrist, Hannaford, Frank, & Kay, Termination of Pregnancy and Psychiatric Morbidity, 167 British J. of Psychiatry 243, 247–248 (1995) (finding, in a cohort of more than 13,000 women, that the rate of psychiatric disorder was no higher among women who terminated pregnancy than among those who carried pregnancy to term); Stotland, The Myth of the Abortion Trauma Syndrome, 268 JAMA 2078, 2079 (1992) ("Scientific studies indicate that legal abortion results in fewer deleterious sequelae for women compared with other possible outcomes of unwanted pregnancy. There is no evidence of an abortion trauma syndrome."); American Psychological Association, Council Policy Manual: (N)(I)(3), Public Interest (1989) (declaring assertions about widespread severe negative psychological effects of abortion to be "without fact"). But see Cougle, Reardon, & Coleman, Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth, 19 J. Anxiety Disorders 137, 142 (2005) (advancing theory of a postabortion syndrome but acknowledging that "no causal relationship between pregnancy outcome and anxiety could be determined" from study); Reardon et al., Psychiatric Admissions of Low–Income Women Following Abortion and Childbirth, 168 Canadian Medical Assn. J. 1253, 1255–1256 (May 13, 2003) (concluding that psychiatric admission rates were higher for women who had an abortion compared with women who delivered); cf. Major, Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research, 168 Canadian Medical Assn. J. 1257, 1258 (May 13, 2003) (critiquing Reardon study for failing to control for a host of differences between women in the delivery and abortion samples).

8 Notwithstanding the "bond of love" women often have with their children, see *ante,* at 1633 – 1634, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity. See *Casey,* 505 U.S., at 891, 112 S.Ct. 2791 ("[O]n 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."). See also Glander, Moore, Michielutte, & Parsons, The Prevalence of Domestic Violence Among Women Seeking Abortion, 91 Obstetrics & Gynecology 1002 (1998); Holmes, Resnick, Kilpatrick, & Best, Rape–Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women, 175 Am. J. Obstetrics & Gynecology 320 (Aug.1996).

9 Eliminating or reducing women's reproductive choices is manifestly *not* a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies. See, *e.g.,* World Health Organization, Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000, pp. 3, 16 (4th ed. 2004) ("Restrictive legislation is associated with a high incidence of unsafe abortion" worldwide; unsafe abortion represents 13 percent of all "maternal" deaths); Henshaw, Unintended Pregnancy and Abortion: A Public Health Perspective, in A Clinician's Guide to Medical and Surgical Abortion 11, 19 (M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield eds. 1999) ("Before legalization, large numbers of women in the United States died from unsafe abortions."); H. Boonstra, R. Gold, C. Richards, & L. Finer, Abortion in Women's Lives 13, and fig. 2.2 (2006) ("as late as 1965, illegal abortion still accounted for an estimated ... 17% of all officially reported pregnancy-related deaths"; "[d]eaths from abortion declined dramatically after legalization").

10 There is, in short, no fraction because the numerator and denominator are the same: The health exception reaches only those cases where a woman's health is at risk. Perhaps for this reason, in mandating safeguards for women's health, we have never before invoked the "large fraction" test.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Planned Parenthood of Greater Ohio v. Himes, 6th Cir.(Ohio), April 18, 2018

136 S.Ct. 2292
Supreme Court of the United States

WHOLE WOMAN'S HEALTH, et al., Petitioners
v.
John HELLERSTEDT, Commissioner, Texas Department of State Health Services, et al.

No. 15–274.
|
Argued March 2, 2016.
|
Decided June 27, 2016.
|
As Revised June 27, 2016.

Synopsis

Background: Abortion providers, acting on behalf of themselves and their patients, brought action against Texas officials, seeking declaratory and injunctive relief from Texas statutes and their implementing rules, which required providers to have admitting privileges at local hospital located no more than 30 miles from their abortion facility and that abortion facilities meet minimum standards for ambulatory surgical centers. After bench trial, the United States District Court for the Western District of Texas, Lee Yeakel, J., 46 F.Supp.3d 673, granted declaratory and injunctive relief, and parties filed cross-appeals. The Court of Appeals for the Fifth Circuit, 790 F.3d 563, as modified by 790 F.3d 598, affirmed in part, modified in part, vacated in part, and reversed in part. Certiorari was granted.

Holdings: The Supreme Court, Justice Breyer, held that:

[1] claim preclusion did not bar providers' challenge to admitting privileges requirement or facial relief on that challenge;

[2] claim preclusion did not bar providers' challenge to surgical center requirement;

[3] admitting privileges requirement imposed undue burden on women's right to seek previability abortions;

[4] surgical center requirement imposed undue burden on women's right to seek previability abortions; and

[5] severability clause did not save either admitting privileges or surgical center requirement.

Reversed and remanded.

Justice Ginsburg filed concurring opinion.

Justice Thomas filed dissenting opinion.

Justice Alito filed dissenting opinion in which Chief Justice Roberts and Justice Thomas joined.

West Headnotes (21)

[1] Judgment
Effect of change in law or facts

Judgment
Matters which could not have been adjudicated

Claim preclusion did not bar abortion providers from raising post-enforcement, as-applied challenge to Texas law's requirement that providers have admitting privileges at local hospital located no more than 30 miles from their abortion facility, where previous suit involving some of these providers involved pre-enforcement challenge, at time when it was unclear how abortion clinics would be impacted by this requirement, while present challenge arose from later, concrete factual developments, i.e., many clinics had been forced to close post-enforcement. V.T.C.A., Health & Safety Code § 171.0031(a).

6 Cases that cite this headnote

[2] Judgment
Nature and elements of bar or estoppel by former adjudication

"Claim preclusion" prohibits successive litigation of the very same claim by the same parties.

23 Cases that cite this headnote

[3] **Judgment**
Effect of change in law or facts

Where important human issues are at stake, such as the lawfulness of continuing personal disability or restraint, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought without violating the doctrine of claim preclusion. Restatement (Second) of Judgments § 24 comment.

10 Cases that cite this headnote

[4] **Judgment**
Grounds of action or recovery

Judgment
Nature and Extent of Relief Sought or Granted

Res judicata did not bar award of facial relief to abortion providers on post-enforcement, as-applied challenge to Texas law's requirement that providers have admitting privileges at local hospital located no more than 30 miles from their abortion facility, where, in addition to asking for as-applied relief, providers asked for any other relief that court found to be just, proper, and equitable, and there was no bar against facial relief on as-applied challenges. V.T.C.A., Health & Safety Code § 171.0031(a).

6 Cases that cite this headnote

[5] **Injunction**
On ground of invalidity

If the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is proper.

1 Cases that cite this headnote

[6] **Judgment**
Effect of change in law or facts

Judgment
Matters which might have been litigated

Abortion providers were not required to bring post-enforcement, as-applied challenge to Texas law's requirement that any abortion facility satisfy minimum standards for ambulatory surgical center in prior suit raising pre-enforcement challenge to law's admitting privileges requirement, and thus claim preclusion did not bar present challenge, where requirements were independent of each other and had different enforcement dates, surgical center requirement authorized state agency to promulgate rules to implement it, but no such rules had been issued and providers reasonably could have expected that, when issued, such rules would "grandfather" some existing abortion clinics or would grant waivers to others, and, post-enforcement, requirement had forced numerous clinics to close. V.T.C.A., Health & Safety Code § 245.010(a).

3 Cases that cite this headnote

[7] **Judgment**
What constitutes distinct causes of action

Generally, courts will treat challenges to distinct regulatory requirements as separate claims when analyzing a res judicata defense, even when the requirements are part of one overarching regulatory scheme.

7 Cases that cite this headnote

[8] **Abortion and Birth Control**
Health and safety of patient

States have a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that maximize safety for the patient.

6 Cases that cite this headnote

[9] **Abortion and Birth Control**

Scope and standard of review

State statute which, while furthering a legitimate state interest, has the effect of placing a substantial obstacle in the path of a woman's right to a previability abortion cannot be considered a permissible means of serving that interest.

19 Cases that cite this headnote

[10] Abortion and Birth Control

Scope and standard of review

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 to a previability abortion.

27 Cases that cite this headnote

[11] Abortion and Birth Control

Scope and standard of review

Courts must consider the burdens a law imposes on a woman's right to a previability abortion together with the benefits the law confers.

20 Cases that cite this headnote

[12] Abortion and Birth Control

Clinics, facilities, and practitioners

Texas law's requirement that providers have admitting privileges at local hospital located no more than 30 miles from their abortion facility imposed undue burden on women's right to seek previability abortions, where, under prior law requiring providers to have admitting privileges or to have working arrangement with physician having such privileges, abortion was extremely safe in Texas, with particularly low rates of serious complications and virtually no deaths due to procedure, which made it so few providers would have such privileges, as they were typically based on number of admissions per year, and new law caused number of abortion facilities in Texas to drop from about 40 to about 20, thus resulting in longer drives and longer wait times for women to obtain services. V.T.C.A., Health & Safety Code § 171.0031(a).

7 Cases that cite this headnote

[13] Abortion and Birth Control

Clinics, facilities, and practitioners

Texas law's requirement that any abortion facility satisfy minimum standards for ambulatory surgical center did not benefit patients and was not necessary, and thus it imposed undue burden on women's right to seek previability abortions, where complications arising from abortions produced through medication would not arise until patient had left facility, abortions taking place in facility were significantly safer than many other procedures for which state did not impose similar requirement, state declined to grandfather or waive requirement with respect abortion facilities, though it had for other facilities, and requirement would reduce number of clinics in state to seven or eight, requiring women to travel farther and wait longer to obtain services and requiring these clinics to expend significant resources in order to meet demand. V.T.C.A., Health & Safety Code § 245.010(a).

1 Cases that cite this headnote

[14] Evidence

Medical testimony

Expert's testimony that number of abortions performed at each remaining clinic would rise from 14,000 annually to 60,000 to 70,000 was admissible on abortion providers' as-applied challenge to Texas law's requirement that any abortion facility satisfy minimum standards for ambulatory surgical center, even though one of expert's predictions in prior suit challenging law's requirement that providers have admitting privileges at local hospital located no more than 30 miles from their abortion facility proved to be incorrect after that provision went into effect, where expert's opinion was based on research in which he

participated, and his incorrect prediction was merely result of scientific method of making hypothesis and then attempting to verify it through further study. V.T.C.A., Health & Safety Code §§ 171.0031(a), 245.010(a); Fed.Rules Evid.Rule 702, 28 U.S.C.A.

3 Cases that cite this headnote

[15] Abortion and Birth Control
Clinics, facilities, and practitioners

Statutes
Environment and health

Severability clause in Texas law imposing requirements that providers have admitting privileges at local hospital located no more than 30 miles from their abortion facility and that any abortion facility satisfy minimum standards for ambulatory surgical center did not change conclusion that these requirements imposed undue burden on women's right to seek previability abortions, and thus were facially unconstitutional, where these requirements resulted in closing of most abortion facilities in state and placed additional stress on those facilities that were able to remain open, as well as additional obstacles for women seeking abortions without providing any benefits to women's health. V.T.C.A., Health & Safety Code §§ 171.0031(a), 245.010(a).

11 Cases that cite this headnote

[16] Statutes
Effect of severability clause

Severability clauses express the enacting legislature's preference for a judicial remedy, and courts will generally attempt to honor that preference.

Cases that cite this headnote

[17] Statutes
Effect of severability clause

Even when a statute contains a severability clause, courts are not required to proceed, application by conceivable application, when confronted with a facially unconstitutional statutory provision.

Cases that cite this headnote

[18] Statutes
Effect of severability clause

Severability clause in a statute is merely an aid, not an inexorable command.

Cases that cite this headnote

[19] Constitutional Law
Invalidation, annulment, or repeal of statutes

Statutes
Effect of severability clause

Severability clause in a statute is not grounds for a court to devise a judicial remedy that entails quintessentially legislative work.

Cases that cite this headnote

[20] Statutes
Environment and health

Finding that only specific regulations for ambulatory surgical centers that unduly burdened provision of abortions were unconstitutional, rather than finding that entire Texas law imposing requirement that abortion facilities satisfy minimum standards for such centers, was unwarranted based on law's severability clause, where clause referred to severing applications of words and phrases "in the Act," but did not require courts to go through individual components of separate statute providing standards for surgical centers to determine how each component related to abortion facilities. V.T.C.A., Health & Safety Code § 245.010(a).

Cases that cite this headnote

[21] Abortion and Birth Control
Clinics, facilities, and practitioners

Proper denominator when determining whether "large fraction" of persons were affected, and thus whether Texas law's requirements that abortion providers have admitting privileges at local hospital located no more than 30 miles from their abortion facility and that any abortion facility satisfy minimum standards for ambulatory surgical center imposed substantial obstacle to women's right to seek previability abortions, was women for whom these requirements presented actual restriction, rather than all Texas women of reproductive age, as "large fraction" language in *Planned Parenthood of Southeastern Pennsylvania v. Casey* referred to cases in which challenged provision was relevant, which was narrower class than "all women," "pregnant women," or even "women seeking abortions." V.T.C.A., Health & Safety Code §§ 171.0031(a), 245.010(a).

19 Cases that cite this headnote

West Codenotes

Held Unconstitutional
V.T.C.A., Health & Safety Code §§ 171.0031(a), 245.010(a).

***2296** *Syllabus* [*]

A "State has a legitimate interest in seeing to it that abortion ... is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade,* 410 U.S. 113, 150, 93 S.Ct. 705, 35 L.Ed.2d 147. But "a statute which, while furthering [a] 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," *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 877, 112 S.Ct. 2791, 120 L.Ed.2d 674 (plurality opinion), and "[u]nnecessary 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," *id.*, at 878, 112 S.Ct. 2791.

In 2013, the Texas Legislature enacted House Bill 2 (H.B. 2), which contains the two provisions challenged here. The "admitting-privileges requirement" provides that a "physician performing or inducing an abortion ... must, on the date [of service], have active admitting privileges at a hospital ... located not further than 30 miles from the" abortion facility. The "surgical-center requirement" requires an "abortion facility" to meet the "minimum standards ... for ambulatory surgical centers" under Texas law. Before the law took effect, a group of Texas abortion providers filed the *Abbott* case, in which they lost a facial challenge to the constitutionality of the admitting-privileges provision. After the law went into effect, petitioners, another group of abortion providers (including some *Abbott* plaintiffs), filed this suit, claiming that both the admitting-privileges and the surgical-center provisions violated the Fourteenth Amendment, as interpreted in *Casey*. They sought injunctions preventing enforcement of the admitting-privileges provision as applied to physicians at one abortion facility in McAllen and one in El Paso and prohibiting enforcement of the surgical-center provision throughout Texas.

Based on the parties' stipulations, expert depositions, and expert and other trial testimony, the District Court made extensive findings, including, but not limited to: as the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20; this decrease in geographical distribution means that the number of women of reproductive age living more than 50 miles from a clinic has doubled, the number living more than 100 miles away has increased by 150%, the number living more than 150 miles away by more than 350%, and the number living more than 200 miles away by about 2,800%; the number of facilities would drop to seven or eight if the surgical-center provision took effect, and those remaining facilities would see a significant increase in patient traffic; facilities would remain only in five metropolitan areas; before H.B. 2's passage, abortion was an extremely safe procedure with very low rates of complications and virtually no deaths; it was also safer than many more common procedures not subject to the same level of regulation; and the cost of compliance with the surgical-center requirement would most likely exceed $1.5 million to $3 million per clinic. The court enjoined enforcement of the provisions, ***2297** holding that the surgical-center requirement imposed an undue burden on the right of women in Texas to seek previability abortions; that,

together with that requirement, the admitting-privileges requirement imposed an undue burden in the Rio Grande Valley, El Paso, and West Texas; and that the provisions together created an "impermissible obstacle as applied to all women seeking a previability abortion."

The Fifth Circuit reversed in significant part. It concluded that res judicata barred the District Court from holding the admitting-privileges requirement unconstitutional statewide and that res judicata also barred the challenge to the surgical-center provision. Reasoning that a law is "constitutional if (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus and (2) it is reasonably related to ... a legitimate state interest," the court found that both requirements were rationally related to a compelling state interest in protecting women's health.

Held:

1. Petitioners' constitutional claims are not barred by res judicata. Pp. 2302 – 2309.

(a) Res judicata neither bars petitioners' challenges to the admitting-privileges requirement nor prevents the Court from awarding facial relief. The fact that several petitioners had previously brought the unsuccessful facial challenge in *Abbott* does not mean that claim preclusion, the relevant aspect of res judicata, applies. Claim preclusion prohibits "successive litigation of the very same claim," *New Hampshire v. Maine,* 532 U.S. 742, 748, 121 S.Ct. 1808, 149 L.Ed.2d 968, but petitioners' as-applied postenforcement challenge and the *Abbott* plaintiffs' facial preenforcement challenge do not present the same claim. Changed circumstances showing that a constitutional harm is concrete may give rise to a new claim. *Abbott* rested upon facts and evidence presented before enforcement of the admitting-privileges requirement began, when it was unclear how clinics would be affected. This case rests upon later, concrete factual developments that occurred once enforcement started and a significant number of clinics closed.

Res judicata also does not preclude facial relief here. In addition to requesting as-applied relief, petitioners asked for other appropriate relief, and their evidence and arguments convinced the District Court of the provision's unconstitutionality across the board. Federal Rule of Civil Procedure 54(c) provides that a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings," and this Court has held that if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is "proper," *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 333, 130 S.Ct. 876, 175 L.Ed.2d 753. Pp. 2304 – 2307.

(b) Claim preclusion also does not bar petitioners' challenge to the surgical-center requirement. In concluding that petitioners should have raised this claim in *Abbott,* the Fifth Circuit did not take account of the fact that the surgical-center provision and the admitting-privileges provision are separate provisions with two different and independent regulatory requirements. Challenges to distinct regulatory requirements are ordinarily treated as distinct claims. Moreover, the surgical-center provision's implementing regulations had not even been promulgated at the time *Abbott* was filed, and the relevant factual circumstances changed between the two suits. Pp. 2307 – 2309.

***2298** 2. Both the admitting-privileges and the surgical-center requirements place a substantial obstacle in the path of women seeking a previability abortion, constitute an undue burden on abortion access, and thus violate the Constitution. Pp. 2309 – 2320.

(a) The Fifth Circuit's standard of review may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when deciding the undue burden question, but *Casey* requires courts to consider the burdens a law imposes on abortion access together with the benefits those laws confer, see 505 U.S., at 887–898, 112 S.Ct. 2791. The Fifth Circuit's test also mistakenly equates the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable to, *e.g.,* economic legislation. And the court's requirement that legislatures resolve questions of medical uncertainty is inconsistent with this Court's case law, which has placed considerable weight upon evidence and argument presented in judicial proceedings when determining the constitutionality of laws regulating abortion procedures. See *id.,* at 888–894, 112 S.Ct. 2791. Explicit legislative findings must be considered, but there were no such findings in H.B. 2. The District Court applied the correct legal standard here, considering the evidence in the

record—including expert evidence—and then weighing the asserted benefits against the burdens. Pp. 2309 – 2310.

(b) The record contains adequate legal and factual support for the District Court's conclusion that the admitting-privileges requirement imposes an "undue burden" on a woman's right to choose. The requirement's purpose is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure, but the District Court, relying on evidence showing extremely low rates of serious complications before H.B. 2's passage, found no significant health-related problem for the new law to cure. The State's record evidence, in contrast, does not show how the new law advanced the State's legitimate interest in protecting women's health when compared to the prior law, which required providers to have a "working arrangement" with doctors who had admitting privileges. At the same time, the record evidence indicates that the requirement places a "substantial obstacle" in a woman's path to abortion. The dramatic drop in the number of clinics means fewer doctors, longer waiting times, and increased crowding. It also means a significant increase in the distance women of reproductive age live from an abortion clinic. Increased driving distances do not always constitute an "undue burden," but they are an additional burden, which, when taken together with others caused by the closings, and when viewed in light of the virtual absence of any health benefit, help support the District Court's "undue burden" conclusion. Pp. 2310 – 2314.

(c) The surgical-center requirement also provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so. Before this requirement was enacted, Texas law required abortion facilities to meet a host of health and safety requirements that were policed by inspections and enforced through administrative, civil, and criminal penalties. Record evidence shows that the new provision imposes a number of additional requirements that are generally unnecessary in the abortion clinic context; that it provides no benefit when complications arise in the context of a medical abortion, which would generally occur after a patient has left the facility; that abortions taking place in abortion facilities are safer than common ***2299** procedures that occur in outside clinics not subject to Texas' surgical-center requirements; and that Texas has waived no part of the requirement for any abortion clinics as it has done for nearly two-thirds of other covered facilities. This evidence, along with the absence of any contrary evidence, supports the District Court's conclusions, including its ultimate legal conclusion that requirement is not necessary. At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the requirement places a substantial obstacle in the path of women seeking an abortion. The court found that it "strained credulity" to think that the seven or eight abortion facilities would be able to meet the demand. The Fifth Circuit discounted expert witness Dr. Grossman's testimony that the surgical-center requirement would cause the number of abortions performed by each remaining clinic to increase by a factor of about 5. But an expert may testify in the "form of an opinion" as long as that opinion rests upon "sufficient facts or data" and "reliable principles and methods." Fed. Rule Evid. 702. Here, Dr. Grossman's opinion rested upon his participation, together with other university researchers, in research tracking the number of facilities providing abortion services, using information from, among other things, the state health services department and other public sources. The District Court acted within its legal authority in finding his testimony admissible. Common sense also suggests that a physical facility that satisfies a certain physical demand will generally be unable to meet five times that demand without expanding physically or otherwise incurring significant costs. And Texas presented no evidence at trial suggesting that expansion was possible. Finally, the District Court's finding that a currently licensed abortion facility would have to incur considerable costs to meet the surgical-center requirements supports the conclusion that more surgical centers will not soon fill the gap left by closed facilities. Pp. 2314 – 2318.

(d) Texas' three additional arguments are unpersuasive. Pp. 2318 – 2320.

790 F.3d 563 and 598, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN JJ., joined. GINSBURG, J., filed a concurring opinion. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and THOMAS, J., joined.

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Opinion

Justice BREYER delivered the opinion of the Court.

In *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 878, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), a plurality of the Court concluded that there "exists" an "undue burden" on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the "*purpose or effect* " of the provision "*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." (Emphasis added.) The plurality added that "[u]nnecessary 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." *Ibid.*

We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey*. The first provision, which we shall call the "*admitting-privileges requirement,*" says that

> "[a] physician performing or inducing an abortion ... must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that ... is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann. § 171.0031(a) (West Cum. Supp. 2015).

This provision amended Texas law that had previously required an abortion facility to maintain a written protocol "for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital." 38 Tex. Reg. 6546 (2013).

The second provision, which we shall call the "*surgical-center requirement,*" says that

> "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers." Tex. Health & Safety Code Ann. § 245.010(a).

We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, *Casey, supra,* at 878, 112 S.Ct. 2791 (plurality opinion), and each violates the Federal Constitution. Amdt. 14, § 1.

I

A

In July 2013, the Texas Legislature enacted House Bill 2 (H.B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law's admitting-privileges provision. In late October, the District Court granted the injunction. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 951 F.Supp.2d 891, 901 (W.D.Tex.2013). But three days later, the Fifth Circuit vacated the injunction, thereby permitting the provision to take effect. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 734 F.3d 406, 419 (2013).

The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following March. In that opinion, the Fifth Circuit

pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed ***2301** to show that the admitting-privileges requirement "will reduce the delay in treatment and decrease health risk for abortion patients with critical complications," and that it would " 'screen out' untrained or incompetent abortion providers." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 748 F.3d 583, 592 (2014) (*Abbott*). The opinion also explained that the plaintiffs had not provided sufficient evidence "that abortion practitioners will likely be unable to comply with the privileges requirement." *Id.,* at 598. The court said that all "of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio," would "continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." *Ibid.* The *Abbott* plaintiffs did not file a petition for certiorari in this Court.

B

On April 6, one week after the Fifth Circuit's decision, petitioners, a group of abortion providers (many of whom were plaintiffs in the previous lawsuit), filed the present lawsuit in Federal District Court. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman's Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas. They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution's Fourteenth Amendment, as interpreted in *Casey*.

The District Court subsequently received stipulations from the parties and depositions from the parties' experts. The court conducted a 4–day bench trial. It heard, among other testimony, the opinions from expert witnesses for both sides. On the basis of the stipulations, depositions, and testimony, that court reached the following conclusions:

1. Of Texas' population of more than 25 million people, "approximately 5.4 million" are "women" of "reproductive age," living within a geographical area of "nearly 280,000 square miles." *Whole Woman's Health v. Lakey,* 46 F.Supp.3d 673, 681 (W.D.Tex.2014); see App. 244.

2. "In recent years, the number of abortions reported in Texas has stayed fairly consistent at approximately 15–16% of the reported pregnancy rate, for a total number of approximately 60,000–72,000 legal abortions performed annually." 46 F.Supp.3d, at 681; see App. 238.

3. Prior to the enactment of H.B. 2, there were more than 40 licensed abortion facilities in Texas, which "number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013." 46 F.Supp.3d, at 681; App. 228–231.

4. If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that "only seven facilities and a potential eighth will exist in Texas." 46 F.Supp.3d, at 680; App. 182–183.

5. Abortion facilities "will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region." 46 F.Supp.3d, at 681; App. 229–230. These include "one facility in Austin, two in Dallas, one in Fort Worth, two in Houston, and either one or two in San Antonio." 46 F.Supp.3d, at 680; App. 229–230.

6. "Based on historical data pertaining to Texas's average number of abortions, and assuming perfectly equal distribution among the remaining seven or eight providers, ***2302** this would result in each facility serving between 7,500 and 10,000 patients per year. Accounting for the seasonal variations in pregnancy rates and a slightly unequal distribution of patients at each clinic, it is foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities." 46 F.Supp.3d, at 682; cf. App. 238.

7. The suggestion "that these seven or eight providers could meet the demand of the entire state stretches credulity." 46 F.Supp.3d, at 682; see App. 238.

8. "Between November 1, 2012 and May 1, 2014," that is, before and after enforcement of the admitting-privileges requirement, "the decrease in geographical distribution of abortion facilities" has meant that the number of women

of reproductive age living more than 50 miles from a clinic has doubled (from 800,000 to over 1.6 million); those living more than 100 miles has increased by 150% (from 400,000 to 1 million); those living more than 150 miles has increased by more than 350% (from 86,000 to 400,000); and those living more than 200 miles has increased by about 2,800% (from 10,000 to 290,000). After September 2014, should the surgical-center requirement go into effect, the number of women of reproductive age living significant distances from an abortion provider will increase as follows: 2 million women of reproductive age will live more than 50 miles from an abortion provider; 1.3 million will live more than 100 miles from an abortion provider; 900,000 will live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider. 46 F.Supp.3d, at 681–682; App. 238–242.

9. The "two requirements erect a particularly high barrier for poor, rural, or disadvantaged women." 46 F.Supp.3d, at 683; cf. App. 363–370.

10. "The great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." 46 F.Supp.3d, at 684; see, *e.g.,* App. 257–259, 538; see also *id.,* at 200–202, 253–257.

11. "Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny." 46 F.Supp.3d, at 684; see, *e.g.,* App. 223–224 (describing risks in colonoscopies), 254 (discussing risks in vasectomy and endometrial biopsy, among others), 275–277 (discussing complication rate in plastic surgery).

12. "Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities." 46 F.Supp.3d, at 684; App. 202–206, 257–259.

13. "[W]omen will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility." 46 F.Supp.3d, at 684; App. 202–206.

14. "[T]here are 433 licensed ambulatory surgical centers in Texas," of which "336 ... are apparently either 'grandfathered' or enjo[y] the benefit of a waiver of some or all" of the surgical-center "requirements." 46 F.Supp.3d, at 680–681; App. 184.

15. The "cost of coming into compliance" with the surgical-center requirement "for existing clinics is significant," "undisputedly approach[ing] 1 million dollars," and "most likely exceed[ing] 1.5 million dollars," with "[s]ome ... clinics" unable to "comply due to physical size limitations ***2303** of their sites." 46 F.Supp.3d, at 682. The "cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars." *Ibid.*

On the basis of these and other related findings, the District Court determined that the surgical-center requirement "imposes an undue burden on the right of women throughout Texas to seek a previability abortion," and that the "admitting-privileges requirement, ... in conjunction with the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion." *Id.,* at 687. The District Court concluded that the "two provisions" would cause "the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013," and thereby create a constitutionally "impermissible obstacle as applied to all women seeking a previability abortion" by "restricting access to previously available legal facilities." *Id.,* at 687–688. On August 29, 2014, the court enjoined the enforcement of the two provisions. *Ibid.*

C

On October 2, 2014, at Texas' request, the Court of Appeals stayed the District Court's injunction. *Whole Woman's Health v. Lakey,* 769 F.3d 285, 305. Within the next two weeks, this Court vacated the Court of Appeals' stay (in substantial part) thereby leaving in effect the District Court's injunction against enforcement of the surgical-center provision and its injunction against enforcement of the admitting-privileges requirement as applied to the McAllen and El Paso clinics. *Whole Woman's Health v. Lakey,* 574 U.S. ——, 135 S.Ct. 399, 190 L.Ed.2d 247 (2014). The Court of Appeals then heard Texas' appeal.

On June 9, 2015, the Court of Appeals reversed the District Court on the merits. With minor exceptions, it found both provisions constitutional and allowed them to take effect. *Whole Women's Health v. Cole,* 790 F.3d 563, 567 (*per curiam*), modified, 790 F.3d 598 (C.A.5 2015). Because the Court of Appeals' decision rests upon alternative grounds and fact-related considerations, we set forth its basic reasoning in some detail. The Court of Appeals concluded:

• The District Court was wrong to hold the admitting-privileges requirement unconstitutional because (except for the clinics in McAllen and El Paso) the providers had not asked them to do so, and principles of res judicata barred relief. *Id.,* at 580–583.

• Because the providers could have brought their constitutional challenge to the surgical-center provision in their earlier lawsuit, principles of res judicata also barred that claim. *Id.,* at 581–583.

• In any event, a state law "regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." *Id.,* at 572.

• "[B]oth the admitting privileges requirement and" the surgical-center requirement "were rationally related to a legitimate state interest," namely, "rais[ing] the standard and quality of care for women seeking abortions and ... protect[ing] the health and welfare of women seeking abortions." *Id.,* at 584.

• The "[p]laintiffs" failed "to proffer competent evidence contradicting the legislature's statement of a legitimate purpose." *Id.,* at 585.

***2304** • "[T]he district court erred by substituting its own judgment [as to the provisions' effects] for that of the legislature, albeit ... in the name of the undue burden inquiry." *Id.,* at 587.

• Holding the provisions unconstitutional on their face is improper because the plaintiffs had failed to show that either of the provisions "imposes an undue burden on a large fraction of women." *Id.,* at 590.

• The District Court erred in finding that, if the surgical-center requirement takes effect, there will be too few abortion providers in Texas to meet the demand. That factual determination was based upon the finding of one of plaintiffs' expert witnesses (Dr. Grossman) that abortion providers in Texas " 'will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all' " of the clinics failing to meet the surgical-center requirement " 'are forced to close.' " *Id.,* at 589–590. But Dr. Grossman's opinion is (in the Court of Appeals' view) " '*ipse dixit* ' "; the " 'record lacks any actual evidence regarding the current or future capacity of the eight clinics' "; and there is no "evidence in the record that" the providers that currently meet the surgical-center requirement "are operating at full capacity or that they cannot increase capacity." *Ibid.*

For these and related reasons, the Court of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. The Court of Appeals upheld in part the District Court's more specific holding that the requirements are unconstitutional as applied to the McAllen facility and Dr. Lynn (a doctor at that facility), but it reversed the District Court's holding that the surgical-center requirement is unconstitutional as applied to the facility in El Paso. In respect to this last claim, the Court of Appeals said that women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico.

II

Before turning to the constitutional question, we must consider the Court of Appeals' procedural grounds for holding that (but for the challenge to the provisions of H.B. 2 as applied to McAllen and El Paso) petitioners were barred from bringing their constitutional challenges.

A

Claim Preclusion—Admitting–Privileges Requirement

The Court of Appeals held that there could be no facial challenge to the admitting-privileges requirement.

Because several of the petitioners here had previously brought an unsuccessful facial challenge to that requirement (namely, *Abbott,* 748 F.3d, at 605; see *supra,* at 2300 – 2301), the Court of Appeals thought that "the principle of res judicata" applied. 790 F.3d, at 581. The Court of Appeals also held that res judicata prevented the District Court from granting facial relief to petitioners, concluding that it was improper to "facially invalidat[e] the admitting privileges requirement," because to do so would "gran[t] more relief than anyone requested or briefed." *Id.,* at 580. We hold that res judicata neither bars petitioners' challenges to the admitting-privileges requirement nor prevents us from awarding facial relief.

[1] For one thing, to the extent that the Court of Appeals concluded that the principle of res judicata bars any facial challenge to the admitting-privileges requirement, see *ibid.,* the court misconstrued ***2305** petitioners' claims. Petitioners did not bring a facial challenge to the admitting-privileges requirement in this case but instead challenged that requirement as applied to the clinics in McAllen and El Paso. The question is whether res judicata bars petitioners' particular as-applied claims. On this point, the Court of Appeals concluded that res judicata was no bar, see 790 F.3d, at 592, and we agree.

[2] **[3]** The doctrine of claim preclusion (the here-relevant aspect of res judicata) prohibits "successive litigation of the very same claim" by the same parties. *New Hampshire v. Maine,* 532 U.S. 742, 748, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). Petitioners' postenforcement as-applied challenge is not "the very same claim" as their preenforcement facial challenge. The Restatement of Judgments notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim. See Restatement (Second) of Judgments § 24, Comment *f* (1980) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first"); cf. *id.,* § 20(2) ("A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied"); *id.,* § 20, Comment *k* (discussing relationship of this rule with § 24, Comment *f*). The Courts of Appeals have used similar rules to determine the contours of a new claim for purposes of preclusion. See, *e.g., Morgan v. Covington,* 648 F.3d 172, 178 (C.A.3 2011) ("[R]es judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint"); *Ellis v. CCA of Tenn. LLC,* 650 F.3d 640, 652 (C.A.7 2011); *Bank of N.Y. v. First Millennium, Inc.,* 607 F.3d 905, 919 (C.A.2 2010); *Smith v. Potter,* 513 F.3d 781, 783 (C.A.7 2008); *Rawe v. Liberty Mut. Fire Ins. Co.,* 462 F.3d 521, 529 (C.A.6 2006); *Manning v. Auburn,* 953 F.2d 1355, 1360 (C.A.11 1992). The Restatement adds that, where "important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." § 24, Comment *f*; see *Bucklew v. Lombardi,* 783 F.3d 1120, 1127 (C.A.8 2015) (allowing as-applied challenge to execution method to proceed notwithstanding prior facial challenge).

We find this approach persuasive. Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners' treatment violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent. See *Abie State Bank v. Bryan,* 282 U.S. 765, 772, 51 S.Ct. 252, 75 L.Ed. 690 (1931) (where "suit was brought immediately upon the enactment ***2306** of the law," "decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing [its] validity ... in the lights of the later actual experience"); cf. *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) (judgment that "precludes recovery on claims arising prior to its entry" nonetheless "cannot be given the effect of extinguishing claims which did not even then exist"); *United States v. Carolene Products Co.,* 304 U.S. 144, 153, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)

("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist"); *Nashville, C. & St. L.R. Co. v. Walters,* 294 U.S. 405, 415, 55 S.Ct. 486, 79 L.Ed. 949 (1935) ("A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied" (footnote omitted)); *Third Nat. Bank of Louisville v. Stone,* 174 U.S. 432, 434, 19 S.Ct. 759, 43 L.Ed. 1035 (1899) ("A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen"). Justice ALITO'S dissenting opinion is simply wrong that changed circumstances showing that a challenged law has an unconstitutional effect cannot give rise to a new claim. See *post,* at 2328 – 2329 (hereinafter the dissent).

Changed circumstances of this kind are why the claim presented in *Abbott* is not the same claim as petitioners' claim here. The claims in both *Abbott* and the present case involve "important human values." Restatement (Second) of Judgments § 24, Comment *f*. We are concerned with H.B. 2's "effect ... on women seeking abortions." *Post,* at 2345 – 2346 (ALITO, J., dissenting). And that effect has changed dramatically since petitioners filed their first lawsuit. *Abbott* rested on facts and evidence presented to the District Court in October 2013. 748 F.3d, at 599, n. 14 (declining to "consider any arguments" based on "developments since the conclusion of the bench trial"). Petitioners' claim in this case rests in significant part upon later, concrete factual developments. Those developments matter. The *Abbott* plaintiffs brought their facial challenge to the admitting-privileges requirement *prior to its enforcement*—before many abortion clinics had closed and while it was still unclear how many clinics would be affected. Here, petitioners bring an as-applied challenge to the requirement *after its enforcement*—and after a large number of clinics have in fact closed. The postenforcement consequences of H.B. 2 were unknowable before it went into effect. The *Abbott* court itself recognized that "[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues." *Id.,* at 589. And the Court of Appeals in this case properly decided that new evidence presented by petitioners had given rise to a new claim and that petitioners' as-applied challenges are not precluded. See 790 F.3d, at 591 ("We now know with certainty that the non-[surgical-center] abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort").

When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference. Compare the Fifth Circuit's opinion in the earlier case, *Abbott, supra,* at 598 ("All of the major Texas cities ... continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges"), with the facts ***2307** found in this case, 46 F.Supp.3d, at 680 (the two provisions will leave Texas with seven or eight clinics). The challenge brought in this case and the one in *Abbott* are not the "very same claim," and the doctrine of claim preclusion consequently does not bar a new challenge to the constitutionality of the admitting-privileges requirement. *New Hampshire v. Maine,* 532 U.S., at 748, 121 S.Ct. 1808. That the litigants in *Abbott* did not seek review in this Court, as the dissent suggests they should have done, see *post,* at 2326, does not prevent them from seeking review of new claims that have arisen after *Abbott* was decided. In sum, the Restatement, cases from the Courts of Appeals, our own precedent, and simple logic combine to convince us that res judicata does not bar this claim.

[4] **[5]** The Court of Appeals also concluded that the award of facial *relief* was precluded by principles of res judicata. 790 F.3d, at 581. The court concluded that the District Court should not have "granted more relief than anyone requested or briefed." *Id.,* at 580. But in addition to asking for as-applied relief, petitioners asked for "such other and further relief as the Court may deem just, proper, and equitable." App. 167. Their evidence and arguments convinced the District Court that the provision was unconstitutional across the board. The Federal Rules of Civil Procedure state that (with an exception not relevant here) a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Rule 54(c). And we have held that, if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is "proper." *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 333, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); see *ibid.* (in "the exercise of its judicial responsibility" it may be "necessary ... for the Court to consider the facial validity" of a statute, even though a facial challenge was not brought); cf. Fallon, As–Applied and Facial Challenges

and Third–Party Standing, 113 Harv. L. Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases"). Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims.

B

Claim Preclusion—Surgical–Center Requirement

[6] The Court of Appeals also held that claim preclusion barred petitioners from contending that the surgical-center requirement is unconstitutional. 790 F.3d, at 583. Although it recognized that petitioners did not bring this claim in *Abbott,* it believed that they should have done so. The court explained that petitioners' constitutional challenge to the surgical-center requirement and the challenge to the admitting-privileges requirement mounted in *Abbott*

> "arise from the same 'transactio[n] or series of connected transactions.' ... The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts." 790 F.3d, at 581.

***2308** For all these reasons, the Court of Appeals held petitioners' challenge to H.B. 2's surgical-center requirement was precluded.

[7] The Court of Appeals failed, however, to take account of meaningful differences. The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H.B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "[g]overnment regulatory scheme." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4408, p. 52 (2d ed. 2002, Supp. 2015); see *Hamilton's Bogarts, Inc. v. Michigan,* 501 F.3d 644, 650 (C.A.6 2007).

That approach makes sense. The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.

There are other good reasons why petitioners should not have had to bring their challenge to the surgical-center provision at the same time they brought their first suit. The statute gave the Texas Department of State Health Services authority to make rules implementing the surgical-center requirement. H.B. 2, § 11(a), App. to Pet. for Cert. 201a. At the time petitioners filed *Abbott,* that state agency had not yet issued any such rules. Cf. *EPA v. Brown,* 431 U.S. 99, 104, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977) (*per curiam*); 13B Wright, *supra,* § 3532.6, at 629 (3d ed. 2008) (most courts will not "undertake review before rules have been adopted"); *Natural Resources Defense Council, Inc. v. EPA,* 859 F.2d 156, 204 (C.A.D.C.1988).

Further, petitioners might well have expected that those rules when issued would contain provisions grandfathering some then-existing abortion facilities and granting full or partial waivers to others. After all, more than three quarters of non-abortion-related surgical centers had benefited from that kind of provision. See 46 F.Supp.3d, at 680–681 (336 of 433 existing Texas surgical centers have been grandfathered or otherwise enjoy a waiver of some of the surgical-center requirements); see also App. 299–302, 443–447, 468–469.

Finally, the relevant factual circumstances changed between *Abbott* and the present lawsuit, as we previously described. See *supra,* at 2306 – 2307.

The dissent musters only one counterargument. According to the dissent, if statutory provisions "impos[e] the same kind of burden ... on the same kind of right" and have mutually reinforcing effects, "it is evident that" they are "part of the same transaction" and must be challenged together. *Post,* at 2340 – 2341, 2341. But for

the word "evident," the dissent points to no support for this conclusion, and we find it unconvincing. Statutes are often voluminous, with many related, yet distinct, provisions. Plaintiffs, in order to preserve their claims, need not challenge each such provision of, say, the USA PATRIOT Act, the Bipartisan Campaign Reform Act of 2002, the National Labor Relations Act, the Clean Water Act, the Antiterrorism and Effective Death Penalty Act of 1996, or the Patient ***2309** Protection and Affordable Care Act in their first lawsuit.

For all of these reasons, we hold that the petitioners did not have to bring their challenge to the surgical-center provision when they challenged the admitting-privileges provision in *Abbott*. We accordingly hold that the doctrine of claim preclusion does not prevent them from bringing that challenge now.

* * *

In sum, in our view, none of petitioners' claims are barred by res judicata. For all of the reasons described above, we conclude that the Court of Appeals' procedural ruling was incorrect. Cf. Brief for Professors Michael Dorf et al. as *Amici Curiae* 22 (professors in civil procedure from Cornell Law School, New York University School of Law, Columbia Law School, University of Chicago Law School, and Duke University Law School) (maintaining that "the panel's procedural ruling" was "clearly incorrect"). We consequently proceed to consider the merits of petitioners' claims.

III

Undue Burden—Legal Standard

[8] **[9]** **[10]** We begin with the standard, as described in *Casey.* We recognize that the "State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade,* 410 U.S. 113, 150, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). But, we added, "a statute which, while furthering [a] 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." *Casey,* 505 U.S., at 877, 112 S.Ct. 2791 (plurality opinion). Moreover, "[u]nnecessary 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." *Id.*, at 878, 112 S.Ct. 2791.

The Court of Appeals wrote that a state law is "constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest." 790 F.3d, at 572. The Court of Appeals went on to hold that "the district court erred by substituting its own judgment for that of the legislature" when it conducted its "undue burden inquiry," in part because "medical uncertainty underlying a statute is for resolution by legislatures, not the courts." *Id.,* at 587 (citing *Gonzales v. Carhart,* 550 U.S. 124, 163, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007)).

[11] The Court of Appeals' articulation of the relevant standard is incorrect. The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey,* however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer. See 505 U.S., at 887–898, 112 S.Ct. 2791 (opinion of the Court) (performing this balancing with respect to a spousal notification provision); *id.,* at 899–901, 112 S.Ct. 2791 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.) (same balancing with respect to a parental notification provision). And the second part of the test is wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue. See, *e.g., Williamson v. Lee Optical of Okla., Inc.,* ***2310** 348 U.S. 483, 491, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The Court of Appeals' approach simply does not match the standard that this Court laid out in *Casey,* which asks courts to consider whether any burden imposed on abortion access is "undue."

The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court's case law. Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial

proceedings. In *Casey,* for example, we relied heavily on the District Court's factual findings and the research-based submissions of *amici* in declaring a portion of the law at issue unconstitutional. 505 U.S., at 888–894, 112 S.Ct. 2791 (opinion of the Court) (discussing evidence related to the prevalence of spousal abuse in determining that a spousal notification provision erected an undue burden to abortion access). And, in *Gonzales* the Court, while pointing out that we must review legislative "factfinding under a deferential standard," added that we must not "place dispositive weight" on those "findings." 550 U.S., at 165, 127 S.Ct. 1610. *Gonzales* went on to point out that the "*Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake*." *Ibid.* (emphasis added). Although there we upheld a statute regulating abortion, we did not do so solely on the basis of legislative findings explicitly set forth in the statute, noting that "evidence presented in the District Courts contradicts" some of the legislative findings. *Id.,* at 166, 127 S.Ct. 1610. In these circumstances, we said, "[u]ncritical deference to Congress' factual findings ... is inappropriate." *Ibid.*

Unlike in *Gonzales,* the relevant statute here does not set forth any legislative findings. Rather, one is left to infer that the legislature sought to further a constitutionally acceptable objective (namely, protecting women's health). *Id.*, at 149–150, 127 S.Ct. 1610. For a district court to give significant weight to evidence in the judicial record in these circumstances is consistent with this Court's case law. As we shall describe, the District Court did so here. It did not simply substitute its own judgment for that of the legislature. It considered the evidence in the record —including expert evidence, presented in stipulations, depositions, and testimony. It then weighed the asserted benefits against the burdens. We hold that, in so doing, the District Court applied the correct legal standard.

IV

Undue Burden—Admitting–Privileges Requirement

[12] Turning to the lower courts' evaluation of the evidence, we first consider the admitting-privileges requirement. Before the enactment of H.B. 2, doctors who provided abortions were required to "have admitting privileges *or* have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications." Tex. Admin. Code, tit. 25, § 139.56 (2009) (emphasis added). The new law changed this requirement by requiring that a "physician performing or inducing an abortion ... must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that ... is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann. § 171.0031(a). The District Court held that the legislative change imposed an "undue ***2311** burden" on a woman's right to have an abortion. We conclude that there is adequate legal and factual support for the District Court's conclusion.

The purpose of the admitting-privileges requirement is to help ensure that women have easy access to a hospital should complications arise during an abortion procedure. Brief for Respondents 32–37. But the District Court found that it brought about no such health-related benefit. The court found that "[t]he great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure." 46 F.Supp.3d, at 684. Thus, there was no significant health-related problem that the new law helped to cure.

The evidence upon which the court based this conclusion included, among other things:

• A collection of at least five peer-reviewed studies on abortion complications in the first trimester, showing that the highest rate of major complications—including those complications requiring hospital admission—was less than one-quarter of 1%. See App. 269–270.

• Figures in three peer-reviewed studies showing that the highest complication rate found for the much rarer second trimester abortion was less than one-half of 1% (0.45% or about 1 out of about 200). *Id.,* at 270.

• Expert testimony to the effect that complications rarely require hospital admission, much less immediate transfer to a hospital from an outpatient clinic. *Id.*, at 266–267 (citing a study of complications occurring within six weeks after 54,911 abortions that had been paid for by the fee-for-service California Medicaid Program finding that the incidence of complications was 2.1%, the incidence of complications requiring hospital admission was 0.23%,

and that of the 54,911 abortion patients included in the study, only 15 required immediate transfer to the hospital on the day of the abortion).

• Expert testimony stating that "it is extremely unlikely that a patient will experience a serious complication at the clinic that requires emergent hospitalization" and "in the rare case in which [one does], the quality of care that the patient receives is not affected by whether the abortion provider has admitting privileges at the hospital." *Id.*, at 381.

• Expert testimony stating that in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot. See *id.,* at 382; see also *id.*, at 267.

• Expert testimony stating that a delay before the onset of complications is also expected for medical abortions, as "abortifacient drugs take time to exert their effects, and thus the abortion itself almost always occurs after the patient has left the abortion facility." *Id.*, at 278.

• Some experts added that, if a patient needs a hospital in the day or week following her abortion, she will likely seek medical attention at the hospital nearest her home. See, *e.g., id.*, at 153.

We have found nothing in Texas' record evidence that shows that, compared to prior law (which required a "working arrangement" with a doctor with admitting privileges), the new law advanced Texas' legitimate interest in protecting women's health.

We add that, when directly asked at oral argument whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment, Texas admitted that ***2312** there was no evidence in the record of such a case. See Tr. of Oral Arg. 47. This answer is consistent with the findings of the other Federal District Courts that have considered the health benefits of other States' similar admitting-privileges laws. See *Planned Parenthood of Wis., Inc. v. Van Hollen,* 94 F.Supp.3d 949, 953 (W.D.Wis.2015), aff'd *sub nom. Planned Parenthood of Wis., Inc. v. Schimel,* 806 F.3d 908 (C.A.7 2015); *Planned Parenthood Southeast, Inc. v. Strange,* 33 F.Supp.3d 1330, 1378 (M.D.Ala.2014).

At the same time, the record evidence indicates that the admitting-privileges requirement places a "substantial obstacle in the path of a woman's choice." *Casey,* 505 U.S., at 877, 112 S.Ct. 2791 (plurality opinion). The District Court found, as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20. 46 F.Supp.3d, at 681. Eight abortion clinics closed in the months leading up to the requirement's effective date. See App. 229–230; cf. Brief for Planned Parenthood Federation of America et al. as *Amici Curiae* 14 (noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is "unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face"). Eleven more closed on the day the admitting-privileges requirement took effect. See App. 229–230; Tr. of Oral Arg. 58.

Other evidence helps to explain why the new requirement led to the closure of clinics. We read that other evidence in light of a brief filed in this Court by the Society of Hospital Medicine. That brief describes the undisputed general fact that "hospitals often condition admitting privileges on reaching a certain number of admissions per year." Brief for Society of Hospital Medicine et al. as *Amici Curiae* 11. Returning to the District Court record, we note that, in direct testimony, the president of Nova Health Systems, implicitly relying on this general fact, pointed out that it would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because "[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital." App. 730. In a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit.

Other *amicus* briefs filed here set forth without dispute other common prerequisites to obtaining admitting privileges that have nothing to do with ability to perform medical procedures. See Brief for Medical Staff Professionals as *Amici Curiae* 20–25 (listing, for example, requirements that an applicant has treated a high number of patients in the hospital setting in the past year, clinical data requirements, residency requirements, and

other discretionary factors); see also Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 16 (ACOG Brief) ("[S]ome academic hospitals will only allow medical staff membership for clinicians who also ... accept faculty appointments"). Again, returning to the District Court record, we note that Dr. Lynn of the McAllen clinic, a veteran obstetrics and gynecology doctor who estimates that he has delivered over 15,000 babies in his 38 years in practice was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic. App. 390–394. He was refused ***2313** admitting privileges at a nearby hospital for reasons, as the hospital wrote, "not based on clinical competence considerations." *Id.,* at 393–394 (emphasis deleted). The admitting-privileges requirement does not serve any relevant credentialing function.

In our view, the record contains sufficient evidence that the admitting-privileges requirement led to the closure of half of Texas' clinics, or thereabouts. Those closures meant fewer doctors, longer waiting times, and increased crowding. Record evidence also supports the finding that after the admitting-privileges provision went into effect, the "number of women of reproductive age living in a county ... more than 150 miles from a provider increased from approximately 86,000 to 400,000 ... and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000." 46 F.Supp.3d, at 681. We recognize that increased driving distances do not always constitute an "undue burden." See *Casey,* 505 U.S., at 885–887, 112 S.Ct. 2791 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). But here, those increases are but one additional burden, which, when taken together with others that the closings brought about, and when viewed in light of the virtual absence of any health benefit, lead us to conclude that the record adequately supports the District Court's "undue burden" conclusion. Cf. *id.,* at 895, 112 S.Ct. 2791 (opinion of the Court) (finding burden "undue" when requirement places "substantial obstacle to a woman's choice" in "a large fraction of the cases in which" it "is relevant").

The dissent's only argument why these clinic closures, as well as the ones discussed in Part V, *infra,* may not have imposed an undue burden is this: Although "H.B. 2 caused the closure of *some* clinics," *post,* at 2343 (emphasis added), other clinics may have closed for other reasons (so we should not "actually count" the burdens resulting from those closures against H.B. 2), *post,* at 2345 – 2347. But petitioners satisfied their burden to present evidence of causation by presenting direct testimony as well as plausible inferences to be drawn from the timing of the clinic closures. App. 182–183, 228–231. The District Court credited that evidence and concluded from it that H.B. 2 in fact led to the clinic closures. 46 F.Supp.3d, at 680–681. The dissent's speculation that perhaps other evidence, not presented at trial or credited by the District Court, might have shown that some clinics closed for unrelated reasons does not provide sufficient ground to disturb the District Court's factual finding on that issue.

In the same breath, the dissent suggests that one benefit of H.B. 2's requirements would be that they might "force unsafe facilities to shut down." *Post,* at 2343. To support that assertion, the dissent points to the Kermit Gosnell scandal. Gosnell, a physician in Pennsylvania, was convicted of first-degree murder and manslaughter. He "staffed his facility with unlicensed and indifferent workers, and then let them practice medicine unsupervised" and had "[d]irty facilities; unsanitary instruments; an absence of functioning monitoring and resuscitation equipment; the use of cheap, but dangerous, drugs; illegal procedures; and inadequate emergency access for when things inevitably went wrong." Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 24, online at http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf (as last visited June 27, 2016). Gosnell's behavior was terribly wrong. But there is no reason to believe that an extra layer of regulation would have affected that behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced ***2314** to adopt safe practices by a new overlay of regulations. Regardless, Gosnell's deplorable crimes could escape detection only because his facility went uninspected for more than 15 years. *Id.,* at 20. Pre-existing Texas law already contained numerous detailed regulations covering abortion facilities, including a requirement that facilities be inspected at least annually. See *infra,* at 2314 (describing those regulations). The record contains nothing to suggest that H.B. 2 would be more effective than pre-existing Texas law at deterring wrongdoers like Gosnell from criminal behavior.

V

Undue Burden—Surgical–Center Requirement

[13] The second challenged provision of Texas' new law sets forth the surgical-center requirement. Prior to enactment of the new requirement, Texas law required abortion facilities to meet a host of health and safety requirements. Under those pre-existing laws, facilities were subject to annual reporting and recordkeeping requirements, see Tex. Admin. Code, tit. 25, §§ 139.4, 139.5, 139.55, 139.58; a quality assurance program, see § 139.8; personnel policies and staffing requirements, see §§ 139.43, 139.46; physical and environmental requirements, see § 139.48; infection control standards, see § 139.49; disclosure requirements, see § 139.50; patient-rights standards, see § 139.51; and medical- and clinical-services standards, see § 139.53, including anesthesia standards, see § 139.59. These requirements are policed by random and announced inspections, at least annually, see §§ 139.23, 139.31; Tex. Health & Safety Code Ann. § 245.006(a) (West 2010), as well as administrative penalties, injunctions, civil penalties, and criminal penalties for certain violations, see Tex. Admin. Code, tit. 25, § 139.33; Tex. Health & Safety Code Ann. § 245.011 (criminal penalties for certain reporting violations).

H.B. 2 added the requirement that an "abortion facility" meet the "minimum standards ... for ambulatory surgical centers" under Texas law. § 245.010(a) (West Cum. Supp. 2015). The surgical-center regulations include, among other things, detailed specifications relating to the size of the nursing staff, building dimensions, and other building requirements. The nursing staff must comprise at least "an adequate number of [registered nurses] on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of [a registered nurse] for emergency care or for any patient when needed," Tex. Admin. Code, tit. 25, § 135.15(a)(3) (2016), as well as "a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility" for facilities that provide moderate sedation, such as most abortion facilities, § 135.15(b)(2)(A). Facilities must include a full surgical suite with an operating room that has "a clear floor area of at least 240 square feet" in which "[t]he minimum clear dimension between built-in cabinets, counters, and shelves shall be 14 feet." § 135.52(d)(15)(A). There must be a preoperative patient holding room and a postoperative recovery suite. The former "shall be provided and arranged in a one-way traffic pattern so that patients entering from outside the surgical suite can change, gown, and move directly into the restricted corridor of the surgical suite," § 135.52(d)(10)(A), and the latter "shall be arranged to provide a one-way traffic pattern from the restricted surgical corridor to the postoperative recovery suite, and ***2315** then to the extended observation rooms or discharge," § 135.52(d)(9)(A). Surgical centers must meet numerous other spatial requirements, see generally § 135.52, including specific corridor widths, § 135.52(e)(1)(B)(iii). Surgical centers must also have an advanced heating, ventilation, and air conditioning system, § 135.52(g)(5), and must satisfy particular piping system and plumbing requirements, § 135.52(h). Dozens of other sections list additional requirements that apply to surgical centers. See generally §§ 135.1–135.56.

There is considerable evidence in the record supporting the District Court's findings indicating that the statutory provision requiring all abortion facilities to meet all surgical-center standards does not benefit patients and is not necessary. The District Court found that "risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities." 46 F.Supp.3d, at 684. The court added that women "will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility." *Ibid.* And these findings are well supported.

The record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication. That is because, in such a case, complications would almost always arise only after the patient has left the facility. See *supra,* at 2311 – 2312; App. 278. The record also contains evidence indicating that abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements. See, *e.g., id.,* at 223–224, 254, 275–279. The total number of deaths in Texas from abortions was five in the period from 2001 to 2012, or about one every two years (that is to say, one out of about 120,000 to 144,000 abortions). *Id.,* at 272. Nationwide,

childbirth is 14 times more likely than abortion to result in death, *ibid.,* but Texas law allows a midwife to oversee childbirth in the patient's own home. Colonoscopy, a procedure that typically takes place outside a hospital (or surgical center) setting, has a mortality rate 10 times higher than an abortion. *Id.*, at 276–277; see ACOG Brief 15 (the mortality rate for liposuction, another outpatient procedure, is 28 times higher than the mortality rate for abortion). Medical treatment after an incomplete miscarriage often involves a procedure identical to that involved in a nonmedical abortion, but it often takes place outside a hospital or surgical center. App. 254; see ACOG Brief 14 (same). And Texas partly or wholly grandfathers (or waives in whole or in part the surgical-center requirement for) about two-thirds of the facilities to which the surgical-center standards apply. But it neither grandfathers nor provides waivers for any of the facilities that perform abortions. 46 F.Supp.3d, at 680–681; see App. 184. These facts indicate that the surgical-center provision imposes "a requirement that simply is not based on differences" between abortion and other surgical procedures "that are reasonably related to" preserving women's health, the asserted "purpos[e] of the Act in which it is found." *Doe,* 410 U.S., at 194, 93 S.Ct. 739 (quoting *Morey v. Doud,* 354 U.S. 457, 465, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957); internal quotation marks omitted).

Moreover, many surgical-center requirements are inappropriate as applied to surgical abortions. Requiring scrub facilities; maintaining a one-way traffic pattern through the facility; having ceiling, wall, and floor finishes; separating soiled utility and sterilization rooms; and regulating air ***2316** pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin. App. 304. But abortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile. See *id.*, at 302–303. Nor do provisions designed to safeguard heavily sedated patients (unable to help themselves) during fire emergencies, see Tex. Admin. Code, tit. 25, § 135.41; App. 304, provide any help to abortion patients, as abortion facilities do not use general anesthesia or deep sedation, *id.,* at 304–305. Further, since the few instances in which serious complications do arise following an abortion almost always require hospitalization, not treatment at a surgical center, *id.*, at 255–256, surgical-center standards will not help in those instances either.

The upshot is that this record evidence, along with the absence of any evidence to the contrary, provides ample support for the District Court's conclusion that "[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary." 46 F.Supp.3d, at 684. That conclusion, along with the supporting evidence, provides sufficient support for the more general conclusion that the surgical-center requirement "will not [provide] better care or ... more frequent positive outcomes." *Ibid.* The record evidence thus supports the ultimate legal conclusion that the surgical-center requirement is not necessary.

At the same time, the record provides adequate evidentiary support for the District Court's conclusion that the surgical-center requirement places a substantial obstacle in the path of women seeking an abortion. The parties stipulated that the requirement would further reduce the number of abortion facilities available to seven or eight facilities, located in Houston, Austin, San Antonio, and Dallas/Fort Worth. See App. 182–183. In the District Court's view, the proposition that these "seven or eight providers could meet the demand of the entire State stretches credulity." 46 F.Supp.3d, at 682. We take this statement as a finding that these few facilities could not "meet" that "demand."

The Court of Appeals held that this finding was "clearly erroneous." 790 F.3d, at 590. It wrote that the finding rested upon the " '*ipse dixit* ' " of one expert, Dr. Grossman, and that there was no evidence that the current surgical centers (*i.e.,* the seven or eight) are operating at full capacity or could not increase capacity. *Ibid.* Unlike the Court of Appeals, however, we hold that the record provides adequate support for the District Court's finding.

[14] For one thing, the record contains charts and oral testimony by Dr. Grossman, who said that, as a result of the surgical-center requirement, the number of abortions that the clinics would have to provide would rise from " '14,000 abortions annually' " to " '60,000 to 70,000' "—an increase by a factor of about five. *Id.,* at 589–590. The District Court credited Dr. Grossman as an expert witness. See 46 F.Supp.3d, at 678–679, n. 1; *id.,* at 681, n. 4 (finding "indicia of reliability" in Dr. Grossman's conclusions). The Federal Rules of Evidence state that an expert may testify in the "form of an opinion" as long

as that opinion rests upon "sufficient facts or data" and "reliable principles and methods." Rule 702. In this case Dr. Grossman's opinion rested upon his participation, along with other university researchers, in research that tracked "the number of open facilities providing abortion care in the state by ... requesting information from the Texas Department of State Health Services ... [, t]hrough interviews ***2317** with clinic staff[,] and review of publicly available information." App. 227. The District Court acted within its legal authority in determining that Dr. Grossman's testimony was admissible. See Fed. Rule Evid. 702; see also *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ("[U]nder the Rules the trial judge must ensure that any and all [expert] evidence admitted is not only relevant, but reliable"); 29 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6266, p. 302 (2016) ("Rule 702 impose[s] on the trial judge additional responsibility to determine whether that [expert] testimony is likely to promote accurate factfinding").

For another thing, common sense suggests that, more often than not, a physical facility that satisfies a certain physical demand will not be able to meet five times that demand without expanding or otherwise incurring significant costs. Suppose that we know only that a certain grocery store serves 200 customers per week, that a certain apartment building provides apartments for 200 families, that a certain train station welcomes 200 trains per day. While it is conceivable that the store, the apartment building, or the train station could just as easily provide for 1,000 customers, families, or trains at no significant additional cost, crowding, or delay, most of us would find this possibility highly improbable. The dissent takes issue with this general, intuitive point by arguing that many places operate below capacity and that in any event, facilities could simply hire additional providers. See *post,* at 2347. We disagree that, according to common sense, medical facilities, well known for their wait times, operate below capacity as a general matter. And the fact that so many facilities were forced to close by the admitting-privileges requirement means that hiring more physicians would not be quite as simple as the dissent suggests. Courts are free to base their findings on commonsense inferences drawn from the evidence. And that is what the District Court did here.

The dissent now seeks to discredit Dr. Grossman by pointing out that a preliminary prediction he made in his testimony in *Abbott* about the effect of the admitting-privileges requirement on capacity was not borne out after that provision went into effect. See *post,* at 2346 – 2347, n. 22. If every expert who overestimated or underestimated any figure could not be credited, courts would struggle to find expert assistance. Moreover, making a hypothesis—and then attempting to verify that hypothesis with further studies, as Dr. Grossman did—is not irresponsible. It is an essential element of the scientific method. The District Court's decision to credit Dr. Grossman's testimony was sound, particularly given that Texas provided no credible experts to rebut it. See 46 F.Supp.3d, at 680, n. 3 (declining to credit Texas' expert witnesses, in part because Vincent Rue, a nonphysician consultant for Texas, had exercised "considerable editorial and discretionary control over the contents of the experts' reports").

Texas suggests that the seven or eight remaining clinics could expand sufficiently to provide abortions for the 60,000 to 72,000 Texas women who sought them each year. Because petitioners had satisfied their burden, the obligation was on Texas, if it could, to present evidence rebutting that issue to the District Court. Texas admitted that it presented no such evidence. Tr. of Oral Arg. 46. Instead, Texas argued before this Court that one new clinic now serves 9,000 women annually. *Ibid.* In addition to being outside the record, that example is not representative. The clinic to which Texas referred apparently cost $26 million to construct—a fact ***2318** that even more clearly demonstrates that requiring seven or eight clinics to serve five times their usual number of patients does indeed represent an undue burden on abortion access. See Planned Parenthood Debuts New Building: Its $26 Million Center in Houston is Largest of Its Kind in U.S., Houston Chronicle, May 21, 2010, p. B1.

Attempting to provide the evidence that Texas did not, the dissent points to an exhibit submitted in *Abbott* showing that three Texas surgical centers, two in Dallas as well as the $26–million facility in Houston, are each capable of serving an average of 7,000 patients per year. See *post,* at 2347 – 2349. That "average" is misleading. In addition to including the Houston clinic, which does not represent most facilities, it is underinclusive. It ignores the evidence as to the Whole Woman's Health surgical-center facility in San Antonio, the capacity of which is described as "severely limited." The exhibit does nothing to rebut the commonsense inference that the dramatic decline in the number of available facilities will cause a

shortfall in capacity should H.B. 2 go into effect. And facilities that were still operating after the effective date of the admitting-privileges provision were not able to accommodate increased demand. See App. 238; Tr. of Oral Arg. 30–31; Brief for National Abortion Federation et al. as *Amici Curiae* 17–20 (citing clinics' experiences since the admitting-privileges requirement went into effect of 3–week wait times, staff burnout, and waiting rooms so full, patients had to sit on the floor or wait outside).

More fundamentally, in the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered. Healthcare facilities and medical professionals are not fungible commodities. Surgical centers attempting to accommodate sudden, vastly increased demand, see 46 F.Supp.3d, at 682, may find that quality of care declines. Another commonsense inference that the District Court made is that these effects would be harmful to, not supportive of, women's health. See *id.*, at 682–683.

Finally, the District Court found that the costs that a currently licensed abortion facility would have to incur to meet the surgical-center requirements were considerable, ranging from $1 million per facility (for facilities with adequate space) to $3 million per facility (where additional land must be purchased). *Id.*, at 682. This evidence supports the conclusion that more surgical centers will not soon fill the gap when licensed facilities are forced to close.

We agree with the District Court that the surgical-center requirement, like the admitting-privileges requirement, provides few, if any, health benefits for women, poses a substantial obstacle to women seeking abortions, and constitutes an "undue burden" on their constitutional right to do so.

VI

We consider three additional arguments that Texas makes and deem none persuasive.

[15] First, Texas argues that facial invalidation of both challenged provisions is precluded by H.B. 2's severability clause. See Brief for Respondents 50–52. The severability clause says that "every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provision in this Act, are severable from each other." H.B. 2, ***2319** § 10(b), App. to Pet. for Cert. 200a. It further provides that if "any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected." *Ibid.* That language, Texas argues, means that facial invalidation of parts of the statute is not an option; instead, it says, the severability clause mandates a more narrowly tailored judicial remedy. But the challenged provisions of H.B. 2 close most of the abortion facilities in Texas and place added stress on those facilities able to remain open. They vastly increase the obstacles confronting women seeking abortions in Texas without providing any benefit to women's health capable of withstanding any meaningful scrutiny. The provisions are unconstitutional on their face: Including a severability provision in the law does not change that conclusion.

[16] **[17]** **[18]** **[19]** Severability clauses, it is true, do express the enacting legislature's preference for a narrow judicial remedy. As a general matter, we attempt to honor that preference. But our cases have never required us to proceed application by conceivable application when confronted with a facially unconstitutional statutory provision. "We have held that a severability clause is an aid merely; not an inexorable command." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 884–885, n. 49, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (internal quotation marks omitted). Indeed, if a severability clause could impose such a requirement on courts, legislatures would easily be able to insulate unconstitutional statutes from most facial review. See *ibid.* ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government" (internal quotation marks omitted)). A severability clause is not grounds for a court to "devise a judicial remedy that ... entail[s] quintessentially legislative work." *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006). Such an approach would inflict enormous costs on both courts and litigants, who would be required to

proceed in this manner whenever a single application of a law might be valid. We reject Texas' invitation to pave the way for legislatures to immunize their statutes from facial review.

[20] Texas similarly argues that instead of finding the entire surgical-center provision unconstitutional, we should invalidate (as applied to abortion clinics) only those specific surgical-center regulations that unduly burden the provision of abortions, while leaving in place other surgical-center regulations (for example, the reader could pick any of the various examples provided by the dissent, see *post,* at 2352 – 2353). See Brief for Respondents 52–53. As we have explained, Texas' attempt to broadly draft a requirement to sever "applications" does not require us to proceed in piecemeal fashion when we have found the statutory provisions at issue facially unconstitutional.

Nor is that approach to the regulations even required by H.B. 2 itself. The statute was meant to require abortion facilities to meet the integrated surgical-center standards —not some subset thereof. The severability clause refers to severing applications of words and phrases *in the Act,* such as the surgical-center requirement as a whole. See H.B. 2, § 4, App. to Pet. for Cert. 194a. It does not say that courts should go through the individual components ***2320** of the different, surgical-center statute, let alone the individual *regulations* governing surgical centers to see whether those requirements are severable from each other as applied to abortion facilities. Facilities subject to some subset of those regulations do not qualify as surgical centers. And the risk of harm caused by inconsistent application of only a fraction of interconnected regulations counsels against doing so.

[21] Second, Texas claims that the provisions at issue here do not impose a substantial obstacle because the women affected by those laws are not a "large fraction" of Texan women "of reproductive age," which Texas reads *Casey* to have required. See Brief for Respondents 45, 48. But *Casey* used the language "large fraction" to refer to "a large fraction of cases in which [the provision at issue] is *relevant,*" a class narrower than "all women," "pregnant women," or even "the class of *women seeking abortions* identified by the State." 505 U.S., at 894–895, 112 S.Ct. 2791 (opinion of the Court) (emphasis added). Here, as in *Casey,* the relevant denominator is "those [women] for whom [the provision] is an actual rather than an irrelevant restriction." *Id.*, at 895, 112 S.Ct. 2791.

Third, Texas looks for support to *Simopoulos v. Virginia,* 462 U.S. 506, 103 S.Ct. 2532, 76 L.Ed.2d 755 (1983), a case in which this Court upheld a surgical-center requirement as applied to second-trimester abortions. This case, however, unlike *Simopoulos,* involves restrictions applicable to all abortions, not simply to those that take place during the second trimester. Most abortions in Texas occur in the first trimester, not the second. App. 236. More importantly, in *Casey* we discarded the trimester framework, and we now use "viability" as the relevant point at which a State may begin limiting women's access to abortion for reasons unrelated to maternal health. 505 U.S., at 878, 112 S.Ct. 2791 (plurality opinion). Because the second trimester includes time that is both previability and postviability, *Simopoulos* cannot provide clear guidance. Further, the Court in *Simopoulos* found that the petitioner in that case, unlike petitioners here, had waived any argument that the regulation did not significantly help protect women's health. 462 U.S., at 517, 103 S.Ct. 2532.

* * *

For these reasons the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, concurring.

The Texas law called H.B. 2 inevitably will reduce the number of clinics and doctors allowed to provide abortion services. Texas argues that H.B. 2's restrictions are constitutional because they protect the health of women who experience complications from abortions. In truth, "complications from an abortion are both rare and rarely dangerous." *Planned Parenthood of Wis., Inc. v. Schimel,* 806 F.3d 908, 912 (C.A.7 2015). See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 6–10 (collecting studies and concluding "[a]bortion is one of the safest medical procedures performed in the United States"); Brief for Social Science Researchers as *Amici Curiae* 5–9 (compiling studies that show "[c]omplication rates from abortion are very low"). Many medical procedures, including childbirth, are far more dangerous to patients, yet are

not subject to ambulatory-surgical-center or hospital admitting-privileges requirements. See *ante,* at 2315 – 2316; *Planned Parenthood of Wis.,* 806 F.3d, at 921–922. See also Brief for Social Science Researchers 9–11 (comparing statistics on ***2321** risks for abortion with tonsillectomy, colonoscopy, and in-office dental surgery); Brief for American Civil Liberties Union et al. as *Amici Curiae* 7 (all District Courts to consider admitting-privileges requirements found abortion "is at least as safe as other medical procedures routinely performed in outpatient settings"). Given those realities, it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law "would simply make it more difficult for them to obtain abortions." *Planned Parenthood of Wis.,* 806 F.3d, at 910. When a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux,* at great risk to their health and safety. See Brief for Ten Pennsylvania Abortion Care Providers as *Amici Curiae* 17–22. So long as this Court adheres to *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), Targeted Regulation of Abortion Providers laws like H.B. 2 that "do little or nothing for health, but rather strew impediments to abortion," *Planned Parenthood of Wis.,* 806 F.3d, at 921, cannot survive judicial inspection.

Justice THOMAS, dissenting.

Today the Court strikes down two state statutory provisions in all of their applications, at the behest of abortion clinics and doctors. That decision exemplifies the Court's troubling tendency "to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue." *Stenberg v. Carhart,* 530 U.S. 914, 954, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (Scalia, J., dissenting). As Justice ALITO observes, see *post* (dissenting opinion), today's decision creates an abortion exception to ordinary rules of res judicata, ignores compelling evidence that Texas' law imposes no unconstitutional burden, and disregards basic principles of the severability doctrine. I write separately to emphasize how today's decision perpetuates the Court's habit of applying different rules to different constitutional rights —especially the putative right to abortion.

To begin, the very existence of this suit is a jurisprudential oddity. Ordinarily, plaintiffs cannot file suits to vindicate the constitutional rights of others. But the Court employs a different approach to rights that it favors. So in this case and many others, the Court has erroneously allowed doctors and clinics to vicariously vindicate the putative constitutional right of women seeking abortions.

This case also underscores the Court's increasingly common practice of invoking a given level of scrutiny—here, the abortion-specific undue burden standard—while applying a different standard of review entirely. Whatever scrutiny the majority applies to Texas' law, it bears little resemblance to the undue-burden test the Court articulated in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated.

Ultimately, this case shows why the Court never should have bent the rules for favored rights in the first place. Our law is now so riddled with special exceptions for special rights that our decisions deliver neither predictability nor the promise of a judiciary bound by the rule of law.

I

This suit is possible only because the Court has allowed abortion clinics and physicians to invoke a putative constitutional right that does not belong to them—a ***2322** woman's right to abortion. The Court's third-party standing jurisprudence is no model of clarity. See *Kowalski v. Tesmer,* 543 U.S. 125, 135, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (THOMAS, J., concurring). Driving this doctrinal confusion, the Court has shown a particular willingness to undercut restrictions on third-party standing when the right to abortion is at stake. And this case reveals a deeper flaw in straying from our normal rules: when the wrong party litigates a case, we end up resolving disputes that make for bad law.

For most of our Nation's history, plaintiffs could not challenge a statute by asserting someone else's constitutional rights. See *ibid.* This Court would "not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect and who has therefore no interest in defeating it." *Clark v. Kansas*

City, 176 U.S. 114, 118, 20 S.Ct. 284, 44 L.Ed. 392 (1900) (internal quotation marks omitted). And for good reason: "[C]ourts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma,* 413 U.S. 601, 610–611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

In the 20th century, the Court began relaxing that rule. But even as the Court started to recognize exceptions for certain types of challenges, it stressed the strict limits of those exceptions. A plaintiff could assert a third party's rights, the Court said, but only if the plaintiff had a "close relation to the third party" and the third party faced a formidable "hindrance" to asserting his own rights. *Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991); accord, *Kowalski, supra,* at 130–133, 125 S.Ct. 564 (similar).

Those limits broke down, however, because the Court has been "quite forgiving" in applying these standards to certain claims. *Id.,* at 130, 125 S.Ct. 564. Some constitutional rights remained "personal rights which ... may not be vicariously asserted." *Alderman v. United States,* 394 U.S. 165, 174, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969) (Fourth Amendment rights are purely personal); see *Rakas v. Illinois,* 439 U.S. 128, 140, n. 8, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (so is the Fifth Amendment right against self-incrimination). But the Court has abandoned such limitations on other rights, producing serious anomalies across similar factual scenarios. Lawyers cannot vicariously assert potential clients' Sixth Amendment rights because they lack any current, close relationship. *Kowalski, supra,* at 130–131, 125 S.Ct. 564. Yet litigants can assert potential jurors' rights against race or sex discrimination in jury selection even when the litigants have never met potential jurors and do not share their race or sex. *Powers, supra,* at 410–416, 111 S.Ct. 1364; *J.E.B. v. Alabama ex rel. T. B.,* 511 U.S. 127, 129, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). And vendors can sue to invalidate state regulations implicating potential customers' equal protection rights against sex discrimination. *Craig v. Boren,* 429 U.S. 190, 194–197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (striking down sex-based age restrictions on purchasing beer).

Above all, the Court has been especially forgiving of third-party standing criteria for one particular category of cases: those involving the purported substantive due process right of a woman to abort her unborn child. In *Singleton v. Wulff,* 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), a plurality of this Court fashioned a blanket rule allowing third-party standing in abortion cases. *Id.,* at 118, 96 S.Ct. 2868. "[I]t generally is appropriate," said the Court, "to allow a physician to assert the rights of women patients as against governmental interference with the abortion decision." *Ibid.* Yet the plurality conceded ***2323** that the traditional criteria for an exception to the third-party standing rule were not met. There are no "insurmountable" obstacles stopping women seeking abortions from asserting their own rights, the plurality admitted. Nor are there jurisdictional barriers. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), held that women seeking abortions fell into the mootness exception for cases " 'capable of repetition, yet seeking review,' " enabling them to sue after they terminated their pregnancies without showing that they intended to become pregnant and seek an abortion again. *Id.,* at 125, 93 S.Ct. 705. Yet, since *Singleton,* the Court has unquestioningly accepted doctors' and clinics' vicarious assertion of the constitutional rights of hypothetical patients, even as women seeking abortions have successfully and repeatedly asserted their own rights before this Court. [1]

Here too, the Court does not question whether doctors and clinics should be allowed to sue on behalf of Texas women seeking abortions as a matter of course. They should not. The central question under the Court's abortion precedents is whether there is an undue burden on a woman's access to abortion. See *Casey,* 505 U.S., at 877, 112 S.Ct. 2791 (plurality opinion); see Part II, *infra*. But the Court's permissive approach to third-party standing encourages litigation that deprives us of the information needed to resolve that issue. Our precedents encourage abortion providers to sue—and our cases then relieve them of any obligation to prove what burdens women actually face. I find it astonishing that the majority can discover an "undue burden" on women's access to abortion for "those [women] for whom [Texas' law] is an actual rather than an irrelevant restriction," *ante,* at 2320 (internal quotation marks omitted), without identifying how many women fit this description; their proximity to open clinics; or their preferences as to where they obtain abortions, and from whom. "[C]ommonsense inference[s]" that such a burden exists, *ante,* at 2318, are no substitute for actual evidence. There should be no surer sign that our jurisprudence has gone off the rails than this: After creating a constitutional right to abortion because

it "involve[s] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," *Casey, supra,* at 851, 112 S.Ct. 2791 (majority opinion), the Court has created special rules that cede its enforcement to others.

II

Today's opinion also reimagines the undue-burden standard used to assess the constitutionality of abortion restrictions. Nearly 25 years ago, in ***2324** *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, a plurality of this Court invented the "undue burden" standard as a special test for gauging the permissibility of abortion restrictions. *Casey* held that a law is unconstitutional if it imposes an "undue burden" on a woman's ability to choose to have an abortion, meaning that it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.,* at 877, 112 S.Ct. 2791. *Casey* thus instructed courts to look to whether a law substantially impedes women's access to abortion, and whether it is reasonably related to legitimate state interests. As the Court explained, "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power" to regulate aspects of abortion procedures, "all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales v. Carhart,* 550 U.S. 124, 158, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007).

I remain fundamentally opposed to the Court's abortion jurisprudence. *E.g., id.,* at 168–169, 127 S.Ct. 1610 (THOMAS, J., concurring); *Stenberg,* 530 U.S., at 980, 982, 120 S.Ct. 2597 (THOMAS, J., dissenting). Even taking *Casey* as the baseline, however, the majority radically rewrites the undue-burden test in three ways. First, today's decision requires courts to "consider the burdens a law imposes on abortion access together with the benefits those laws confer." *Ante,* at 2309. Second, today's opinion tells the courts that, when the law's justifications are medically uncertain, they need not defer to the legislature, and must instead assess medical justifications for abortion restrictions by scrutinizing the record themselves. *Ibid.* Finally, even if a law imposes no "substantial obstacle" to women's access to abortions, the law now must have more than a "reasonabl[e] relat[ion] to ... a legitimate state interest." *Ibid.* (internal quotation marks omitted). These precepts are nowhere to be found in *Casey* or its successors, and transform the undue-burden test to something much more akin to strict scrutiny.

First, the majority's free-form balancing test is contrary to *Casey*. When assessing Pennsylvania's recordkeeping requirements for abortion providers, for instance, *Casey* did not weigh its benefits and burdens. Rather, *Casey* held that the law had a legitimate purpose because data collection advances medical research, "so it cannot be said that the requirements serve no purpose other than to make abortions more difficult." 505 U.S., at 901, 112 S.Ct. 2791 (joint opinion of O'Connor, KENNEDY, and Souter, JJ.). The opinion then asked whether the recordkeeping requirements imposed a "substantial obstacle," and found none. *Ibid.* Contrary to the majority's statements, see *ante,* at 2309, *Casey* did not balance the benefits and burdens of Pennsylvania's spousal and parental notification provisions, either. Pennsylvania's spousal notification requirement, the plurality said, imposed an undue burden because findings established that the requirement would "likely ... prevent a significant number of women from obtaining an abortion"—not because these burdens outweighed its benefits. 505 U.S., at 893, 112 S.Ct. 2791 (majority opinion); see *id.,* at 887–894, 112 S.Ct. 2791. And *Casey* summarily upheld parental notification provisions because even pre-*Casey* decisions had done so. *Id.,* at 899–900, 112 S.Ct. 2791 (joint opinion).

Decisions in *Casey*' s wake further refute the majority's benefits-and-burdens balancing test. The Court in *Mazurek v. Armstrong,* 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*), had no difficulty upholding a Montana law authorizing ***2325** only physicians to perform abortions—even though no legislative findings supported the law, and the challengers claimed that "all health evidence contradict[ed] the claim that there is any health basis for the law." *Id.,* at 973, 117 S.Ct. 1865 (internal quotation marks omitted). *Mazurek* also deemed objections to the law's lack of benefits "squarely foreclosed by *Casey* itself." *Ibid.* Instead, the Court explained, " '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*.' " *Ibid.* (quoting *Casey, supra,* at 885, 112 S.Ct. 2791; emphasis in original);

see *Gonzales, supra,* at 164, 127 S.Ct. 1610 (relying on *Mazurek*).

Second, by rejecting the notion that "legislatures, and not courts, must resolve questions of medical uncertainty," *ante,* at 2310, the majority discards another core element of the *Casey* framework. Before today, this Court had "given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales,* 550 U.S., at 163, 127 S.Ct. 1610. This Court emphasized that this "traditional rule" of deference "is consistent with *Casey*." *Ibid.* This Court underscored that legislatures should not be hamstrung "if some part of the medical community were disinclined to follow the proscription." *Id.,* at 166, 127 S.Ct. 1610. And this Court concluded that "[c]onsiderations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Ibid.*; see *Stenberg, supra,* at 971, 120 S.Ct. 2597 (KENNEDY, J., dissenting) ("the right of the legislature to resolve matters on which physicians disagreed" is "establish[ed] beyond doubt"). This Court could not have been clearer: Whenever medical justifications for an abortion restriction are debatable, that "provides a sufficient basis to conclude in [a] facial attack that the [law] does not impose an undue burden." *Gonzales,* 550 U.S., at 164, 127 S.Ct. 1610. Otherwise, legislatures would face "too exacting" a standard. *Id.,* at 166, 127 S.Ct. 1610.

Today, however, the majority refuses to leave disputed medical science to the legislature because past cases "placed considerable weight upon the evidence and argument presented in judicial proceedings." *Ante,* at 2310. But while *Casey* relied on record evidence to uphold Pennsylvania's spousal-notification requirement, that requirement had nothing to do with debated medical science. 505 U.S., at 888–894, 112 S.Ct. 2791 (majority opinion). And while *Gonzales* observed that courts need not blindly accept all legislative findings, see *ante,* at 2309 – 2310, that does not help the majority. *Gonzales* refused to accept Congress' finding of "a medical consensus that the prohibited procedure is never medically necessary" because the procedure's necessity was debated within the medical community. 550 U.S., at 165–166, 127 S.Ct. 1610. Having identified medical uncertainty, *Gonzales* explained how courts should resolve conflicting positions: by respecting the legislature's judgment. See *id.,* at 164, 127 S.Ct. 1610.

Finally, the majority overrules another central aspect of *Casey* by requiring laws to have more than a rational basis even if they do not substantially impede access to abortion. *Ante,* at 2309 – 2310. "Where [the State] *has a rational basis to act* and it does not impose an undue burden," this Court previously held, "the State may use its regulatory power" to impose regulations "in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." ***2326** *Gonzales, supra,* at 158, 127 S.Ct. 1610 (emphasis added); see *Casey, supra,* at 878, 112 S.Ct. 2791 (plurality opinion) (similar). No longer. Though the majority declines to say how substantial a State's interest must be, *ante,* at 2309 – 2310, one thing is clear: The State's burden has been ratcheted to a level that has not applied for a quarter century.

Today's opinion does resemble *Casey* in one respect: After disregarding significant aspects of the Court's prior jurisprudence, the majority applies the undue-burden standard in a way that will surely mystify lower courts for years to come. As in *Casey,* today's opinion "simply ... highlight[s] certain facts in the record that apparently strike the ... Justices as particularly significant in establishing (or refuting) the existence of an undue burden." 505 U.S., at 991, 112 S.Ct. 2791 (Scalia, J., concurring in judgment in part and dissenting in part); see *ante,* at 2311 – 2312, 2315 – 2317. As in *Casey,* "the opinion then simply announces that the provision either does or does not impose a 'substantial obstacle' or an 'undue burden.' " 505 U.S., at 991, 112 S.Ct. 2791 (opinion of Scalia, J); see *ante,* at 2313, 2318. And still "[w]e do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been appropriate." 505 U.S., at 991, 112 S.Ct. 2791 (opinion of Scalia, J.); cf. *ante,* at 2313, 2315 – 2316. All we know is that an undue burden now has little to do with whether the law, in a "real sense, deprive[s] women of the ultimate decision," *Casey, supra,* at 875, 112 S.Ct. 2791 and more to do with the loss of "individualized attention, serious conversation, and emotional support," *ante,* at 2318.

The majority's undue-burden test looks far less like our post-*Casey* precedents and far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion.

See *Casey, supra,* at 871, 874–875, 112 S.Ct. 2791 (plurality opinion). One searches the majority opinion in vain for any acknowledgment of the "premise central" to *Casey* 's rejection of strict scrutiny: "that the government has a legitimate and substantial interest in preserving and promoting fetal life" from conception, not just in regulating medical procedures. *Gonzales, supra,* at 145, 127 S.Ct. 1610 (internal quotation marks omitted); see *Casey, supra,* at 846, 112 S.Ct. 2791 (majority opinion), 871, 112 S.Ct. 2791 (plurality opinion). Meanwhile, the majority's undue-burden balancing approach risks ruling out even minor, previously valid infringements on access to abortion. Moreover, by second-guessing medical evidence and making its own assessments of "quality of care" issues, *ante,* at 2311 – 2312, 2315 – 2316, 2318, the majority reappoints this Court as "the country's *ex officio* medical board with powers to disapprove medical and operative practices and standards throughout the United States." *Gonzales, supra,* at 164, 127 S.Ct. 1610 (internal quotation marks omitted). And the majority seriously burdens States, which must guess at how much more compelling their interests must be to pass muster and what "commonsense inferences" of an undue burden this Court will identify next.

III

The majority's furtive reconfiguration of the standard of scrutiny applicable to abortion restrictions also points to a deeper problem. The undue-burden standard is just one variant of the Court's tiers-of-scrutiny approach to constitutional adjudication. And the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given ***2327** right—be it "rational basis," intermediate, strict, or something else —is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat.

Though the tiers of scrutiny have become a ubiquitous feature of constitutional law, they are of recent vintage. Only in the 1960's did the Court begin in earnest to speak of "strict scrutiny" versus reviewing legislation for mere rationality, and to develop the contours of these tests. See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274, 1284–1285 (2007). In short order, the Court adopted strict scrutiny as the standard for reviewing everything from race-based classifications under the Equal Protection Clause to restrictions on constitutionally protected speech. *Id.,* at 1275–1283. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, then applied strict scrutiny to a purportedly "fundamental" substantive due process right for the first time. *Id.,* at 162–164, 93 S.Ct. 705; see Fallon, *supra,* at 1283; accord, *Casey, supra,* at 871, 112 S.Ct. 2791 (plurality opinion) (noting that post-*Roe* cases interpreted *Roe* to demand "strict scrutiny"). Then the tiers of scrutiny proliferated into ever more gradations. See, *e.g., Craig,* 429 U.S., at 197–198, 97 S.Ct. 451 (intermediate scrutiny for sex-based classifications); *Lawrence v. Texas,* 539 U.S. 558, 580, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring in judgment) ("a more searching form of rational basis review" applies to laws reflecting "a desire to harm a politically unpopular group"); *Buckley v. Valeo,* 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*) (applying " 'closest scrutiny' " to campaign-finance contribution limits). *Casey* 's undue-burden test added yet another right-specific test on the spectrum between rational-basis and strict-scrutiny review.

The illegitimacy of using "made-up tests" to "displace longstanding national traditions as the primary determinant of what the Constitution means" has long been apparent. *United States v. Virginia,* 518 U.S. 515, 570, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (Scalia, J., dissenting). The Constitution does not prescribe tiers of scrutiny. The three basic tiers—"rational basis," intermediate, and strict scrutiny—"are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case." *Id.,* at 567, 116 S.Ct. 2264; see also *Craig, supra,* at 217–221, 97 S.Ct. 451 (Rehnquist, J., dissenting).

But the problem now goes beyond that. If our recent cases illustrate anything, it is how easily the Court tinkers with levels of scrutiny to achieve its desired result. This Term, it is easier for a State to survive strict scrutiny despite discriminating on the basis of race in college admissions than it is for the same State to regulate how abortion doctors and clinics operate under the putatively less stringent undue-burden test. All the State apparently needs to show to survive strict scrutiny is a list of aspirational educational goals (such as the "cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry") and a "reasoned, principled explanation" for

why it is pursuing them—then this Court defers. *Fisher v. University of Tex. at Austin,* —— U.S. ——, ——, 136 S.Ct. 2198, ——, ——L.Ed.2d ——, 2016 WL 3434399 (2016) *ante,* at 7, 12 (internal quotation marks omitted). Yet the same State gets no deference under the undue-burden test, despite producing evidence that abortion safety, one rationale for Texas' law, is medically debated. See ***2328** *Whole Woman's Health v. Lakey,* 46 F.Supp.3d 673, 684 (W.D.Tex.2014) (noting conflict in expert testimony about abortion safety). Likewise, it is now easier for the government to restrict judicial candidates' campaign speech than for the Government to define marriage—even though the former is subject to strict scrutiny and the latter was supposedly subject to some form of rational-basis review. Compare *Williams–Yulee v. Florida Bar,* 575 U.S. ——, ——–——, 135 S.Ct. 1656, 1665–1666, 191 L.Ed.2d 570 (2015), with *United States v. Windsor,* 570 U.S. ——, ——, 133 S.Ct. 2675, 2692–2693, 186 L.Ed.2d 808 (2013).

These more recent decisions reflect the Court's tendency to relax purportedly higher standards of review for less-preferred rights. *E.g., Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 421, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (THOMAS, J., dissenting) ("The Court makes no effort to justify its deviation from the tests we traditionally employ in free speech cases" to review caps on political contributions). Meanwhile, the Court selectively applies rational-basis review—under which the question is supposed to be whether "any state of facts reasonably may be conceived to justify" the law, *McGowan v. Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)—with formidable toughness. *E.g., Lawrence,* 539 U.S., at 580, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) (at least in equal protection cases, the Court is "most likely" to find no rational basis for a law if "the challenged legislation inhibits personal relationships"); see *id.,* at 586, 123 S.Ct. 2472 (Scalia, J., dissenting) (faulting the Court for applying "an unheard-of form of rational-basis review").

These labels now mean little. Whatever the Court claims to be doing, in practice it is treating its "doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied." *Williams–Yulee, supra,* at ——, 135 S.Ct., at 1673 (BREYER, J., concurring). The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case.

IV

It is tempting to identify the Court's invention of a constitutional right to abortion in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, as the tipping point that transformed third-party standing doctrine and the tiers of scrutiny into an unworkable morass of special exceptions and arbitrary applications. But those roots run deeper, to the very notion that some constitutional rights demand preferential treatment. During the *Lochner* era, the Court considered the right to contract and other economic liberties to be fundamental requirements of due process of law. See *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). The Court in 1937 repudiated *Lochner* 's foundations. See *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 386–387, 400, 57 S.Ct. 578, 81 L.Ed. 703 (1937). But the Court then created a new taxonomy of preferred rights.

In 1938, seven Justices heard a constitutional challenge to a federal ban on shipping adulterated milk in interstate commerce. Without economic substantive due process, the ban clearly invaded no constitutional right. See *United States v. Carolene Products Co.,* 304 U.S. 144, 152–153, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). Within Justice Stone's opinion for the Court, however, was a footnote that just three other Justices joined—the famous *Carolene Products* Footnote 4. See *ibid.,* n. 4; Lusky, Footnote Redux: A *Carolene Products* Reminiscence, 82 Colum. L. Rev. 1093, 1097 (1982). The footnote's first ***2329** paragraph suggested that the presumption of constitutionality that ordinarily attaches to legislation might be "narrower ... when legislation appears on its face to be within a specific prohibition of the Constitution." 304 U.S., at 152–153, n. 4, 58 S.Ct. 778. Its second paragraph appeared to question "whether legislation which restricts those political processes, which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the [14th] Amendment than are most other types of legislation." *Ibid.* And its third and most familiar paragraph raised the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Ibid.*

Though the footnote was pure dicta, the Court seized upon it to justify its special treatment of certain personal liberties like the First Amendment and the right against discrimination on the basis of race—but also rights not enumerated in the Constitution. [2] As the Court identified which rights deserved special protection, it developed the tiers of scrutiny as part of its equal protection (and, later, due process) jurisprudence as a way to demand extra justifications for encroachments on these rights. See Fallon, 54 UCLA L. Rev., at 1270–1273, 1281–1285. And, having created a new category of fundamental rights, the Court loosened the reins to recognize even putative rights like abortion, see *Roe,* 410 U.S., at 162–164, 93 S.Ct. 705 which hardly implicate "discrete and insular minorities."

The Court also seized upon the rationale of the *Carolene Products* footnote to justify exceptions to third-party standing doctrine. The Court suggested that it was tilting the analysis to favor rights involving actual or perceived minorities—then seemingly counted the right to contraception as such a right. According to the Court, what matters is the "relationship between one who acted to protect the rights of a minority and the minority itself"—which, the Court suggested, includes the relationship "between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." *Eisenstadt v. Baird,* 405 U.S. 438, 445, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (citing Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599, 631 (1962)).

Eighty years on, the Court has come full circle. The Court has simultaneously transformed judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution. But our Constitution renounces the notion that some constitutional rights are more equal than others. A plaintiff either possesses the constitutional right he is asserting, or not—and if not, the judiciary has no business creating ad hoc exceptions so that others can assert rights that seem especially important to vindicate. A law either infringes a constitutional right, or not; there is no room for the judiciary ***2330** to invent tolerable degrees of encroachment. Unless the Court abides by one set of rules to adjudicate constitutional rights, it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear.

* * *

Today's decision will prompt some to claim victory, just as it will stiffen opponents' will to object. But the entire Nation has lost something essential. The majority's embrace of a jurisprudence of rights-specific exceptions and balancing tests is "a regrettable concession of defeat—an acknowledgement that we have passed the point where 'law,' properly speaking, has any further application." Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1182 (1989). I respectfully dissent.

Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

The constitutionality of laws regulating abortion is one of the most controversial issues in American law, but this case does not require us to delve into that contentious dispute. Instead, the dispositive issue here concerns a workaday question that can arise in any case no matter the subject, namely, whether the present case is barred by res judicata. As a court of law, we have an obligation to apply such rules in a neutral fashion in all cases, regardless of the subject of the suit. If anything, when a case involves a controversial issue, we should be especially careful to be scrupulously neutral in applying such rules.

The Court has not done so here. On the contrary, determined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases.

Here is the worst example. Shortly after Texas enacted House Bill 2 (H.B. 2) in 2013, the petitioners in this case brought suit, claiming, among other things, that a provision of the new law requiring a physician performing an abortion to have admitting privileges at a nearby hospital is "facially" unconstitutional and thus totally unenforceable. Petitioners had a fair opportunity to make their case, but they lost on the merits in the United States Court of Appeals for the Fifth Circuit, and they chose not to petition this Court for review. The judgment against them became final. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* 951 F.Supp.2d 891 (W.D.Tex.2013), aff'd in part and rev'd in part, 748 F.3d 583 (C.A.5 2014) (*Abbott*).

Under the rules that apply in regular cases, petitioners could not relitigate the exact same claim in a second

suit. As we have said, "a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Sav. & Loan Assn. v. Solimino,* 501 U.S. 104, 107, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991).

In this abortion case, however, that rule is disregarded. The Court awards a victory to petitioners on the very claim that they unsuccessfully pressed in the earlier case. The Court does this even though petitioners, undoubtedly realizing that a rematch would not be allowed, did not presume to include such a claim in their complaint. The Court favors petitioners with a victory that they did not have the audacity to seek.

Here is one more example: the Court's treatment of H.B. 2's "severability clause." When part of a statute is held to be unconstitutional, the question arises whether other parts of the statute must also go. If ***2331** a statute says that provisions found to be unconstitutional can be severed from the rest of the statute, the valid provisions are allowed to stand. H.B. 2 contains what must surely be the most emphatic severability clause ever written. This clause says that every single word of the statute and every possible application of its provisions is severable. But despite this language, the Court holds that no part of the challenged provisions and no application of any part of them can be saved. Provisions that are indisputably constitutional—for example, provisions that require facilities performing abortions to follow basic fire safety measures—are stricken from the books. There is no possible justification for this collateral damage.

The Court's patent refusal to apply well-established law in a neutral way is indefensible and will undermine public confidence in the Court as a fair and neutral arbiter.

I

Res judicata—or, to use the more modern terminology, "claim preclusion"—is a bedrock principle of our legal system. As we said many years ago, "[p]ublic policy dictates that there be an end of litigation[,] that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Assn.,* 283 U.S. 522, 525, 51 S.Ct. 517, 75 L.Ed. 1244 (1931). This doctrine "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.... To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). These are "vital public interests" that should be " 'cordially regarded and enforced.' " *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

The basic rule of preclusion is well known and has been frequently stated in our opinions. Litigation of a "cause of action" or "claim" is barred if (1) the same (or a closely related) party (2) brought a prior suit asserting the same cause of action or claim, (3) the prior case was adjudicated by a court of competent jurisdiction and (4) was decided on the merits, (5) a final judgment was entered, and (6) there is no ground, such as fraud, to invalidate the prior judgment. See *Montana, supra,* at 153, 99 S.Ct. 970; *Commissioner v. Sunnen,* 333 U.S. 591, 597, 68 S.Ct. 715, 92 L.Ed. 898 (1948); *Cromwell v. County of Sac,* 94 U.S. 351, 352–353, 24 L.Ed. 195 (1877).

A

I turn first to the application of this rule to petitioners' claim that H.B. 2's admitting privileges requirement is facially unconstitutional.

Here, all the elements set out above are easily satisfied based on *Abbott,* the 2013 case to which I previously referred. That case (1) was brought by a group of plaintiffs that included petitioners in the present case, (2) asserted the same cause of action or claim, namely, a facial challenge to the constitutionality of H.B. 2's admitting privileges requirement, (3) was adjudicated by courts of competent jurisdiction, (4) was decided on the merits, (5) resulted in the entry of a final judgment against petitioners, and (6) was not otherwise subject to invalidation. All of this is clear, and that is undoubtedly why petitioners' ***2332** attorneys did not even include a facial attack on the admitting privileges requirement in their complaint in this case. To have done so would have

risked sanctions for misconduct. See *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1131 (C.A.5 1987) (a party's "persistence in litigating [a claim] when res judicata clearly barred the suit violated rule 11"); *McLaughlin v. Bradlee,* 602 F.Supp. 1412, 1417 (D.D.C.1985) ("It is especially appropriate to impose sanctions in situations where the doctrines of *res judicata* and collateral estoppel plainly preclude relitigation of the suit").

Of the elements set out above, the Court disputes only one. The Court concludes that petitioners' prior facial attack on the admitting privileges requirement and their current facial attack on that same requirement are somehow not the same cause of action or claim. But that conclusion is unsupported by authority and plainly wrong.

B

Although the scope of a cause of action or claim for purposes of res judicata is hardly a new question, courts and scholars have struggled to settle upon a definition. [1] But the outcome of the present case does not depend upon the selection of the proper definition from among those adopted or recommended over the years because the majority's holding is not supported by any of them.

In *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927), we defined a cause of action as an "actionable wrong." *Id.,* at 321, 47 S.Ct. 600; see also *ibid.* ("A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show"). On this understanding, the two claims at issue here are indisputably the same.

The same result is dictated by the rule recommended by the American Law Institute (ALI) in the first Restatement of Judgments, issued in 1942. Section 61 of the first Restatement explains when a claim asserted by a plaintiff in a second suit is the same for preclusion purposes as a claim that the plaintiff unsuccessfully litigated in a prior case. Under that provision, "the plaintiff is precluded from subsequently maintaining a second action based upon the same transaction, if the evidence needed to sustain the second action would have sustained the first action." Restatement of Judgments § 61. There is no doubt that this rule is satisfied here.

The second Restatement of Judgments, issued by the ALI in 1982, adopted a new approach for determining the scope of a cause of action or claim. In *Nevada v. United States,* 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983), we noted that the two Restatements differ in this regard, but we had no need to determine which was correct. *Id.,* at 130–131, and n. 12, 103 S.Ct. 2906. Here, the majority simply assumes that we should follow the second Restatement even though that Restatement—on the Court's reading, at least—leads to a conclusion that differs from the conclusion clearly dictated by the first Restatement.

If the second Restatement actually supported the majority's holding, the Court would surely be obligated to explain why it chose to follow the second Restatement's approach. But here, as in *Nevada, supra,* at 130–131, 103 S.Ct. 2906 application of the rule set out in the second Restatement does not change the result. While the Court relies almost entirely on a comment ***2333** to one section of the second Restatement, the Court ignores the fact that a straightforward application of the provisions of that Restatement leads to the conclusion that petitioners' two facial challenges to the admitting privileges requirement constitute a single claim.

Section 19 of the second Restatement sets out the general claim-preclusion rule that applies in a case like the one before us: "A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." Section 24(1) then explains the scope of the "claim" that is extinguished: It "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Section 24's Comment *b,* in turn, fleshes out the key term "transaction," which it defines as "a natural grouping or common nucleus of operative facts." Whether a collection of events constitutes a single transaction is said to depend on "their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." *Ibid.*

Both the claim asserted in petitioners' first suit and the claim now revived by the Court involve the same "nucleus of operative facts." Indeed, they involve the very same "operative facts," namely, the enactment of the admitting privileges requirement, which, according to the theory underlying petitioners' facial claims, would

inevitably have the effect of causing abortion clinics to close. This is what petitioners needed to show—and what they attempted to show in their first facial attack: not that the admitting privileges requirement had *already* imposed a substantial burden on the right of Texas women to obtain abortions, but only that it *would have* that effect once clinics were able to assess whether they could practicably comply.

The Court's decision in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), makes that clear. *Casey* held that Pennsylvania's spousal notification requirement was facially unconstitutional even though that provision had been enjoined prior to enforcement. See *id.,* at 845, 112 S.Ct. 2791. And the Court struck down the provision because it "*will impose* a substantial obstacle." *Id.*, at 893–894, 112 S.Ct. 2791 (emphasis added). See also *id.,* at 893, 112 S.Ct. 2791 ("The spousal notification requirement *is thus likely to prevent* a significant number of women from obtaining an abortion" (emphasis added)); *id.*, at 894, 112 S.Ct. 2791 (Women "*are likely to be deterred* from procuring an abortion" (emphasis added)).

Consistent with this understanding, what petitioners tried to show in their first case was that the admitting privileges requirement would cause clinics to close. They claimed that their evidence showed that "at least one-third of the State's licensed providers *would stop* providing abortions once the privileges requirement took effect." [2] Agreeing with petitioners, the District Court enjoined enforcement of the requirement on the ground that "there *will be* abortion clinics ***2334** *that will close*." *Abbott,* 951 F.Supp.2d, at 900 (emphasis added). The Fifth Circuit found that petitioners' evidence of likely effect was insufficient, stating that petitioners failed to prove that "any woman *will lack* reasonable access to a clinic within Texas." *Abbott,* 748 F.3d, at 598 (some emphasis added; some emphasis deleted). The correctness of that holding is irrelevant for present purposes. What matters is that the "operative fact" in the prior case was the enactment of the admitting privileges requirement, and that is precisely the same operative fact underlying petitioners' facial attack in the case now before us. [3]

C

In light of this body of authority, how can the Court maintain that the first and second facial claims are really two different claims? The Court's first argument is that petitioners did not bring two facial claims because their complaint in the present case sought only as-applied relief and it was the District Court, not petitioners, who injected the issue of facial relief into the case. *Ante,* at 2304 – 2305. (After the District Court gave them statewide relief, petitioners happily accepted the gift and now present their challenge as a facial one. See Reply Brief 24–25 ("[F]acial invalidation is the only way to ensure that the Texas requirements do not extinguish women's liberty").) The thrust of the Court's argument is that a trial judge can circumvent the rules of claim preclusion by granting a plaintiff relief on a claim that the plaintiff is barred from relitigating. Not surprisingly, the Court musters no authority for this proposition, which would undermine the interests that the doctrine of claim preclusion is designed to serve. A "fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Arizona v. California,* 460 U.S. 605, 619, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). This interest in finality is equally offended regardless of whether the precluded claim is included in a complaint or inserted into the case by a judge. [4]

Another argument tossed off by the Court is that the judgment on the admitting privileges claim in the first case does not have preclusive effect because it was based on " 'the prematurity of the action.' " See *ante,* at 2304 – 2305 (quoting Restatement (Second) of Judgments § 20(2)). ***2335** But this argument grossly mischaracterizes the basis for the judgment in the first case. The Court of Appeals did not hold that the facial challenge was premature. It held that the evidence petitioners offered was insufficient. See *Abbott,* 748 F.3d, at 598–599; see also n. 9, *infra*. Petitioners could have sought review in this Court, but elected not to do so.

This brings me to the Court's main argument—that the second facial challenge is a different claim because of "changed circumstances." What the Court means by this is that petitioners now have better evidence than they did at the time of the first case with respect to the number of clinics that would have to close as a result of the admitting privileges requirement. This argument is contrary to a cardinal rule of res judicata, namely, that a plaintiff who loses in a first case cannot later bring the same case simply because it has now gathered better evidence. Claim

preclusion does not contain a "better evidence" exception. See, *e.g., Torres v. Shalala,* 48 F.3d 887, 894 (C.A.5 1995) ("If simply submitting new evidence rendered a prior decision factually distinct, *res judicata* would cease to exist"); *Geiger v. Foley Hoag LLP Retirement Plan,* 521 F.3d 60, 66 (C.A.1 2008) (Claim preclusion "applies even if the litigant is prepared to present different evidence ... in the second action"); *Saylor v. United States,* 315 F.3d 664, 668 (C.A.6 2003) ("The fact that ... new evidence might change the outcome of the case does not affect application of claim preclusion doctrine"); *International Union of Operating Engineers–Employers Constr. Industry Pension, Welfare and Training Trust Funds v. Karr,* 994 F.2d 1426, 1430 (C.A.9 1993) ("The fact that some different evidence may be presented in this action ..., however, does not defeat the bar of res judicata"); Restatement (Second) of Judgments § 25, Comment *b* ("A mere shift in the evidence offered to support a ground held unproved in a prior action will not suffice to make a new claim avoiding the preclusive effect of the judgment"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4403, p. 33 (2d ed. 2002) (Wright & Miller) (Res judicata "ordinarily applies despite the availability of new evidence"); Restatement of Judgments § 1, Comment *b* (The ordinary rules of claim preclusion apply "although the party against whom a judgment is rendered is later in a position to produce better evidence so that he would be successful in a second action").

In an effort to get around this hornbook rule, the Court cites a potpourri of our decisions that have no bearing on the question at issue. Some are not even about res judicata.[5] And the cases that do concern res judicata, *Abie State Bank v. Bryan,* 282 U.S. 765, 772, 51 S.Ct. 252, 75 L.Ed. 690 (1931), *Lawlor v. National Screen Service Corp.,* 349 U.S. 322, 328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955), and *Third Nat. Bank of Louisville v. Stone,* 174 U.S. 432, 434, 19 S.Ct. 759, 43 L.Ed. 1035 (1899), endorse the unremarkable proposition that a prior judgment does not preclude new claims based on acts occurring after the time of the first judgment.[6] But petitioners' second ***2336** facial challenge is not based on new acts postdating the first suit. Rather, it is based on the same underlying act, the enactment of H.B. 2, which allegedly posed an undue burden.

I come now to the authority on which the Court chiefly relies, Comment *f* to § 24 of the second Restatement. This is how it reads:

> "Material operative facts occurring after the decision of an action with respect to the same subject matter *may* in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which *may* be made the basis of a second action not precluded by the first. See Illustrations 10–12. Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances *may* afford a sufficient basis for concluding that a second action may be brought." (Emphasis added.)

As the word I have highlighted—"may"—should make clear, this comment does not say that "[m]aterial operative facts occurring after the decision of an action" always or even usually form "the basis of a second action not precluded by the first." Rather, the comment takes the view that this "may" be so. Accord, *ante,* at 2305 ("[D]evelopment of new material facts *can* mean that a new case and an otherwise similar previous case do not present the same claim" (emphasis added)). The question, then, is *when* the development of new material facts should lead to this conclusion. And there are strong reasons to conclude this should be a very narrow exception indeed. Otherwise, this statement, relegated to a mere comment, would revolutionize the rules of claim preclusion—by permitting a party to relitigate a lost claim whenever it obtains better evidence. Comment *f* was surely not meant to upend this fundamental rule.

What the comment undoubtedly means is far more modest—only that in a few, limited circumstances the development of new material facts should (in the opinion of the ALI) permit relitigation. What are these circumstances? Section 24 includes three illustrative examples in the form of hypothetical cases, and none resembles the present case.

In the first hypothetical case, the subsequent suit is based on new events that provide a basis for relief under a different legal theory. Restatement (Second) of Judgments § 24, Illustration 10.

In the second case, a father who lost a prior child custody case brings a second action challenging his wife's fitness as a mother based on "subsequent experience," which I take to mean subsequent conduct by the mother. *Id.,* Illustration 11. This illustration is expressly linked to a determination of a person's "status"—and not even status

in general, but a particular status, fitness as a parent, that the law recognizes as changeable. See Reporter's Note, *id.*, § 24, Comment *f* (Illustration 11 "exemplifies the effect of changed circumstances in an action relating to status").

In the final example, the government loses a civil antitrust conspiracy case but then brings a second civil antitrust conspiracy case based on new conspiratorial acts. The illustration does not suggest that the legality of acts predating the end of the first case is actionable in the second case, only that the subsequent acts give rise to a new claim and that proof of earlier acts may be admitted as evidence ***2337** to explain the significance of the later acts. *Id.*, Illustration 12.

The present claim is not similar to any of these illustrations. It does not involve a claim based on postjudgment acts and a new legal theory. It does not ask us to adjudicate a person's status. And it does not involve a continuing course of conduct to be proved by the State's new acts.

The final illustration actually undermines the Court's holding. The Reporter's Note links this illustration to a Fifth Circuit case, *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (1970). In that case, the court distinguished between truly postjudgment acts and "acts which have been completed [prior to the previous judgment] except for their consequences." *Id.*, at 1318. Only postjudgment acts—and not postjudgment consequences—the Fifth Circuit held, can give rise to a new cause of action. See *ibid.* [7]

Here, the Court does not rely on any new acts performed by the State of Texas after the end of the first case. Instead, the Court relies solely on what it takes to be new consequences, the closing of additional clinics, that are said to have resulted from the enactment of H.B. 2.

D

For these reasons, what the Court has done here is to create an entirely new exception to the rule that a losing plaintiff cannot relitigate a claim just because it now has new and better evidence. As best I can tell, the Court's new rule must be something like this: If a plaintiff initially loses because it failed to provide adequate proof that a challenged law will have an unconstitutional effect and if subsequent developments tend to show that the law will in fact have those effects, the plaintiff may relitigate the same claim. Such a rule would be unprecedented, and I am unsure of its wisdom, but I am certain of this: There is no possible justification for such a rule unless the plaintiff, at the time of the first case, could not have reasonably shown what the effects of the law would be. And that is not the situation in this case.

1

The Court does not contend that petitioners, at the time of the first case, could not have gathered and provided evidence that was sufficient to show that the admitting privileges requirement *would cause* a sufficient number of clinic closures. Instead, the Court attempts to argue that petitioners could not have shown at that time that a sufficient number of clinics *had already closed*. As I have explained, that is not what petitioners need to show or what they attempted to prove.

Moreover, the Court is also wrong in its understanding of petitioners' proof in the first case. In support of its holding that the admitting privileges requirement now "places a 'substantial obstacle in the path of a woman's choice,' " the Court relies on two facts: "Eight abortion clinics closed in ***2338** the months leading up to the requirement's effective date" and "[e]leven more closed on the day the admitting-privileges requirement took effect." *Ante,* at 2312. But petitioners put on evidence addressing exactly this issue in their first trial. They apparently surveyed 27 of the 36 abortion clinics they identified in the State, including all 24 of the clinics owned by them or their coplaintiffs, to find out what impact the requirement would have on clinic operations. See Appendix, *infra* (App. K to Emergency Application To Vacate Stay in *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,* O.T. 2013, No. 13A452, Plaintiffs' Trial Exh. 46).

That survey claimed to show that the admitting privileges requirement would cause 15 clinics to close. [8] See *ibid.* The Fifth Circuit had that evidence before it, and did not refuse to consider it. [9] If that evidence was sufficient to show that the admitting privileges rule created an unlawful impediment to abortion access (and the District Court indeed thought it sufficient), then the decision of the Fifth Circuit in the first case was wrong as a matter of law.

Petitioners could have asked us to review that decision, but they chose not to do so. A tactical decision of that nature has consequences. While it does not mean that the admitting privileges requirement is immune to a facial challenge, it does mean that these petitioners and the other plaintiffs in the first case cannot mount such a claim.

2

Even if the Court thinks that petitioners' evidence in the first case was insufficient, ***2339** the Court does not claim that petitioners, with reasonable effort, could not have gathered sufficient evidence to show with some degree of accuracy what the effects of the admitting privileges requirement would be. As I have just explained, in their first trial petitioners introduced a survey of 27 abortion clinics indicating that 15 would close because of the admitting privileges requirement. The Court does not identify what additional evidence petitioners needed but were unable to gather. There is simply no reason why petitioners should be allowed to relitigate their facial claim.

E

So far, I have discussed only the first of the two sentences in Comment *f,* but the Court also relies on the second sentence. I reiterate what that second sentence says:

> "Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." Restatement (Second) of Judgments § 24, Comment *f*.

The second Restatement offers no judicial support whatsoever for this suggestion, and thus the comment "must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States court." *United States v. Stuart,* 489 U.S. 353, 375, 109 S.Ct. 1183, 103 L.Ed.2d 388 (1989) (Scalia, J., concurring in judgment). The sentence also sits in considerable tension with our decisions stating that res judicata must be applied uniformly and without regard to what a court may think is just in a particular case. See, *e.g., Moitie,* 452 U.S., at 401, 101 S.Ct. 2424 ("The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case"). Not only did this sentence seemingly come out of nowhere, but it appears that no subsequent court has relied on this sentence as a ground for decision. And while a few decisions have cited the "important human values" language, those cases invariably involve the relitigation of personal status determinations, as discussed in Comment *f*'s Illustration 11. See, *e.g., People ex rel. Leonard HH. v. Nixon,* 148 App.Div.2d 75, 79–80, 543 N.Y.S.2d 998, 1001 (1989) ("[B]y its very nature, litigation concerning the *status* of a person's mental capacity does not lend itself to strict application of res judicata on a transactional analysis basis"). [10]

In sum, the Court's holding that petitioners' second facial challenge to the admitting privileges requirement is not barred by claim preclusion is not supported by any of our cases or any body of lower court precedent; is contrary to the bedrock rule that a party cannot relitigate ***2340** a claim simply because the party has obtained new and better evidence; is contrary to the first Restatement of Judgments and the actual rules of the second Restatement of Judgment; and is purportedly based largely on a single comment in the second Restatement, but does not even represent a sensible reading of that comment. In a regular case, an attempt by petitioners to relitigate their previously unsuccessful facial challenge to the admitting privileges requirement would have been rejected out of hand—indeed, might have resulted in the imposition of sanctions under Federal Rule of Civil Procedure 11. No court would even think of reviving such a claim on its own. But in this abortion case, ordinary rules of law—and fairness—are suspended.

II

A

I now turn to the application of principles of claim preclusion to a claim that petitioners did include in their second complaint, namely, their facial challenge to the requirement in H.B. 2 that abortion clinics comply with the rules that govern ambulatory surgical centers (ASCs). As we have said many times, the doctrine of claim preclusion not only bars the relitigation of previously

litigated claims; it can also bar claims that are closely related to the claims unsuccessfully litigated in a prior case. See *Moitie, supra,* at 398, 101 S.Ct. 2424; *Montana,* 440 U.S., at 153, 99 S.Ct. 970.

As just discussed, the Court's holding on the admitting privileges issue is based largely on a comment to § 24 of the second Restatement, and therefore one might think that consistency would dictate an examination of what § 24 has to say on the question whether the ASC challenge should be barred. But consistency is not the Court's watchword here.

Section 24 sets out the general rule regarding the " '[s]plitting' " of claims. This is the rule that determines when the barring of a claim that was previously litigated unsuccessfully also extinguishes a claim that the plaintiff could have but did not bring in the first case. Section 24(1) states that the new claim is barred if it is "any part of the transaction, or series of connected transactions, out of which the action arose."

Here, it is evident that petitioners' challenges to the admitting privileges requirement and the ASC requirement are part of the same transaction or series of connected transactions. If, as I believe, the "transaction" is the enactment of H.B. 2, then the two facial claims are part of the very same transaction. And the same is true even if the likely or actual effects of the two provisions constitute the relevant transactions. Petitioners argue that the admitting privileges requirement and the ASC requirements *combined* have the effect of unconstitutionally restricting access to abortions. Their brief repeatedly refers to the collective effect of the "requirements." Brief for Petitioners 40, 41, 42, 43, 44. They describe the admitting privileges and ASC requirements as delivering a "one-two punch." *Id.*, at 40. They make no effort whatsoever to separate the effects of the two provisions.

B

The Court nevertheless holds that there are two "meaningful differences" that justify a departure from the general rule against splitting claims. *Ante,* at 2307 – 2308. Neither has merit.

1

First, pointing to a statement in a pocket part to a treatise, the Court says that "courts normally treat challenges to distinct regulatory requirements as 'separate ***2341** claims,' even when they are part of one overarching '[g]overnment regulatory scheme.' " *Ante,* at 2308 (quoting 18 Wright & Miller § 4408, at 54 (2d ed. 2002, Supp. 2016)). As support for this statement, the treatise cites one case, *Hamilton's Bogarts, Inc. v. Michigan,* 501 F.3d 644, 650 (C.A.6 2007). Even if these authorities supported the rule invoked by the Court (and the Court points to no other authorities), they would hardly be sufficient to show that "courts normally" proceed in accordance with the Court's rule. But in fact neither the treatise nor the Sixth Circuit decision actually supports the Court's rule.

What the treatise says is the following:

> "Government *regulatory schemes* provide regular examples of circumstances in which regulation of a single business by many different provisions *should lead* to recognition of separate claims when the business challenges different regulations." 18 Wright & Miller § 4408, at 54 (emphasis added).

Thus, the treatise expresses a view about what the law "should" be; it does not purport to state what courts "normally" do. And the recommendation of the treatise authors concerns different provisions of a "regulatory scheme," which often embodies an accumulation of legislative enactments. Petitioners challenge two provisions of one law, not just two provisions of a regulatory scheme.

The Sixth Circuit decision is even further afield. In that case, the plaintiff had previously lost a case challenging one rule of a state liquor control commission. 501 F.3d, at 649–650. On the question whether the final judgment in that case barred a subsequent claim attacking another rule, the court held that the latter claim was "likely" not barred because, "although [the first rule] was challenged in the first lawsuit, [the other rule] was not," and "[t]he state has not argued or made any showing that [the party] should also have challenged [the other rule] at the time." *Id.,* at 650. To say that these authorities provide meager support for the Court's reasoning would be an exaggeration.

Beyond these paltry authorities, the Court adds only the argument that we should not "encourage a kitchen-sink approach to any litigation challenging the validity of statutes." *Ante,* at 2308. I agree—but that is not the situation in this case. The two claims here are very closely related. They are two parts of the same bill. They both impose new requirements on abortion clinics. They are justified by the State on the same ground, protection of the safety of women seeking abortions. They are both challenged as imposing the same kind of burden (impaired access to clinics) on the same kind of right (the right to abortion, as announced in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), and *Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674). And petitioners attack the two provisions as a package. According to petitioners, the two provisions were both enacted for the same illegitimate purpose—to close down Texas abortion clinics. See Brief for Petitioners 35–36. And as noted, petitioners rely on the combined effect of the two requirements. Petitioners have made little effort to identify the clinics that closed as a result of each requirement but instead aggregate the two requirements' effects.

For these reasons, the two challenges "form a convenient trial unit." Restatement (Second) of Judgments § 24(2). In fact, for a trial court to accurately identify the effect of each provision it would also need to identify the effect of the other provision. Cf. *infra,* at 2345 – 2346.

2

Second, the Court claims that, at the time when petitioners filed their complaint ***2342** in the first case, they could not have known whether future rules implementing the surgical center requirement would provide an exemption for existing abortion clinics. *Ante,* at 2308. This argument is deeply flawed.

"Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 143, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). And here, there was never any real chance that the Texas Department of State Health Services would exempt existing abortion clinics from all the ASC requirements. As the Court of Appeals wrote, "it is abundantly clear from H.B. 2 that all abortion facilities must meet the standards already promulgated for ASCs." *Whole Woman's Health v. Cole,* 790 F.3d 563, 583 (C.A.5 2015) (*per curiam*) (case below). See Tex. Health & Safety Code Ann. § 245.010(a) (West Cum. Supp. 2015) (Rules implementing H.B. 2 "must contain minimum standards ... for an abortion facility [that are] equivalent to the minimum standards ... for ambulatory surgical centers"). There is no apparent basis for the argument that H.B. 2 permitted the state health department to grant blanket exemptions.

Whether there was any real likelihood that clinics would be exempted from *particular* ASC requirements is irrelevant because both petitioners and the Court view the ASC requirements as an indivisible whole. Petitioners told the Fifth Circuit in unequivocal terms that they were "challeng[ing] H.B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they f[ou]nd onerous or otherwise infirm." 790 F.3d, at 582. Similarly, the majority views all the ASC provisions as an indivisible whole. See *ante,* at 2319 ("The statute was meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof"). On this view, petitioners had no reason to wait to see whether the Department of State Health Services might exempt them from some of the ASC rules. Even if exemptions from some of the ASC rules had been granted, petitioners and the majority would still maintain that the provision of H.B. 2 making the ASC rules applicable to abortion facilities is facially unconstitutional. Thus, exemption from some of the ASC requirements would be entirely inconsequential. The Court has no response to this point. See *ante,* at 2308.

For these reasons, petitioners' facial attack on the ASC requirements, like their facial attack on the admitting privileges rule, is precluded.

III

Even if res judicata did not bar either facial claim, a sweeping, statewide injunction against the enforcement of the admitting privileges and ASC requirements would still be unjustified. Petitioners in this case are abortion clinics and physicians who perform abortions. If they

were simply asserting a constitutional right to conduct a business or to practice a profession without unnecessary state regulation, they would have little chance of success. See, *e.g., Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Under our abortion cases, however, they are permitted to rely on the right of the abortion patients they serve. See *Doe v. Bolton,* 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); but see *ante,* at 2321 – 2323 (THOMAS, J., dissenting).

Thus, what matters for present purposes is not the effect of the H.B. 2 provisions on petitioners but the effect on their patients. ***2343** Under our cases, petitioners must show that the admitting privileges and ASC requirements impose an "undue burden" on women seeking abortions. *Gonzales v. Carhart,* 550 U.S. 124, 146, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007). And in order to obtain the sweeping relief they seek—facial invalidation of those provisions—they must show, at a minimum, that these provisions have an unconstitutional impact on at least a "large fraction" of Texas women of reproductive age. [11] *Id.,* at 167–168, 127 S.Ct. 1610. Such a situation could result if the clinics able to comply with the new requirements either lacked the requisite overall capacity or were located too far away to serve a "large fraction" of the women in question.

Petitioners did not make that showing. Instead of offering direct evidence, they relied on two crude inferences. First, they pointed to the number of abortion clinics that closed after the enactment of H.B. 2, and asked that it be inferred that all these closures resulted from the two challenged provisions. See Brief for Petitioners 23–24. They made little effort to show why particular clinics closed. Second, they pointed to the number of abortions performed annually at ASCs before H.B. 2 took effect and, because this figure is well below the total number of abortions performed each year in the State, they asked that it be inferred that ASC-compliant clinics could not meet the demands of women in the State. See App. 237–238. Petitioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compliance with the new law—even though they provided this type of evidence in their first case to the District Court at trial and then to this Court in their application for interim injunctive relief. Appendix, *infra*.

A

I do not dispute the fact that H.B. 2 caused the closure of some clinics. Indeed, it seems clear that H.B. 2 was intended to force unsafe facilities to shut down. The law was one of many enacted by States in the wake of the Kermit Gosnell scandal, in which a physician who ran an abortion clinic in Philadelphia was convicted for the first-degree murder of three infants who were born alive and for the manslaughter of a patient. Gosnell had ***2344** not been actively supervised by state or local authorities or by his peers, and the Philadelphia grand jury that investigated the case recommended that the Commonwealth adopt a law requiring abortion clinics to comply with the same regulations as ASCs. [12] If Pennsylvania had had such a requirement in force, the Gosnell facility may have been shut down before his crimes. And if there were any similarly unsafe facilities in Texas, H.B. 2 was clearly intended to put them out of business. [13]

While there can be no doubt that H.B. 2 caused some clinics to cease operation, the absence of proof regarding the reasons for particular closures is a problem because some clinics have or may have closed for at least four reasons other than the two H.B. 2 requirements at issue here. These are:

1. *H.B. 2's restriction on medication abortion.* In their first case, petitioners challenged the provision of H.B. 2 that regulates medication abortion, but that part of the statute was upheld by the Fifth Circuit and not relitigated in this case. The record in this case indicates that in the first six months after this restriction took effect, the number of medication abortions dropped by 6,957 (compared to the same period the previous year). App. 236.

2. *Withdrawal of Texas family planning funds.* In 2011, Texas passed a law preventing family planning grants to providers that perform abortions and their affiliates. In the first case, petitioners' expert admitted that some clinics closed "as a result of the defunding," [14] and as discussed below, this withdrawal appears specifically to have caused multiple clinic closures in West Texas. See *infra,* at 2345, and n. 18.

3. *The nationwide decline in abortion demand.* Petitioners' expert testimony relies [15] on a study from the Guttmacher Institute which concludes that " '[t]he national abortion rate has resumed its decline, and *no evidence was found that the overall drop in abortion incidence was related to the decrease in providers or to restrictions implemented between 2008 and 2011*.' " App. 1117 (direct testimony of Dr. Peter Uhlenberg) (quoting R. Jones & J. Jerman, Abortion Incidence and Service Availability In the United States, 2011, 46 Perspectives on Sexual and Reproductive Health 3 (2014); emphasis in testimony). Consistent with that trend, "[t]he number of abortions to residents of Texas declined by 4,956 between 2010 and 2011 and by 3,905 between 2011 and 2012." App. 1118.

4. *Physician retirement (or other localized factors).* Like everyone else, most physicians eventually retire, and the retirement of a physician who performs ***2345** abortions can cause the closing of a clinic or a reduction in the number of abortions that a clinic can perform. When this happens, the closure of the clinic or the reduction in capacity cannot be attributed to H.B. 2 unless it is shown that the retirement was caused by the admitting privileges or surgical center requirements as opposed to age or some other factor.

At least nine Texas clinics may have ceased performing abortions (or reduced capacity) for one or more of the reasons having nothing to do with the provisions challenged here. For example, in their first case, petitioners alleged that the medication-abortion restriction would cause at least three medication-only abortion clinics to cease performing abortions, [16] and they predicted that "[o]ther facilities that offer both surgical and medication abortion will be unable to offer medication abortion," [17] presumably reducing their capacity. It also appears that several clinics (including most of the clinics operating in West Texas, apart from El Paso) closed in response to the unrelated law restricting the provision of family planning funds. [18] And there is reason to question whether at least two closures (one in Corpus Christi and one in Houston) may have been prompted by physician retirements. [19]

Neither petitioners nor the District Court properly addressed these complexities in assessing causation—and for no good reason. The total number of abortion clinics in the State was not large. Petitioners could have put on evidence (as they did for 27 individual clinics in their first case, see Appendix, *infra*) about the challenged provisions' role in causing the closure of each clinic, [20] and the court could have made a factual finding as to the cause of each closure.

Precise findings are important because the key issue here is not the number or percentage of clinics affected, but the effect of the closures on women seeking ***2346** abortions, *i.e.,* on the capacity and geographic distribution of clinics used by those women. To the extent that clinics closed (or experienced a reduction in capacity) for any reason unrelated to the challenged provisions of H.B. 2, the corresponding burden on abortion access may not be factored into the access analysis. Because there was ample reason to believe that some closures were caused by these other factors, the District Court's failure to ascertain the reasons for clinic closures means that, on the record before us, there is no way to tell which closures actually count. Petitioners—who, as plaintiffs, bore the burden of proof —cannot simply point to temporal correlation and call it causation.

B

Even if the District Court had properly filtered out immaterial closures, its analysis would have been incomplete for a second reason. Petitioners offered scant evidence on the capacity of the clinics that are able to comply with the admitting privileges and ASC requirements, or on those clinics' geographic distribution. Reviewing the evidence in the record, it is far from clear that there has been a material impact on access to abortion.

On clinic capacity, the Court relies on petitioners' expert Dr. Grossman, who compared the number of abortions performed at Texas ASCs before the enactment of H.B. 2 (about 14,000 per year) with the total number of abortions per year in the State (between 60,000–70,000 per year). *Ante,* at 2316 – 2317. [21] Applying what the Court terms "common sense," the Court infers that the ASCs that performed abortions at the time of H.B. 2's enactment lacked the capacity to perform all the abortions sought by women in Texas.

The Court's inference has obvious limitations. First, it is not unassailable "common ***2347** sense" to hold that

current utilization equals capacity; if all we know about a grocery store is that it currently serves 200 customers per week, *ante,* at 2316 – 2317, that fact alone does not tell us whether it is an overcrowded minimart or a practically empty supermarket. Faced with increased demand, ASCs could potentially increase the number of abortions performed without prohibitively expensive changes. Among other things, they might hire more physicians who perform abortions, [22] utilize their facilities more intensively or efficiently, or shift the mix of services provided. Second, what matters for present purposes is not the capacity of just those ASCs that performed abortions prior to the enactment of H.B. 2 but the capacity of those that would be available to perform abortions after the statute took effect. And since the enactment of H.B. 2, the number of ASCs performing abortions has increased by 50%—from six in 2012 to nine today. [23]

The most serious problem with the Court's reasoning is that its conclusion is belied by petitioners' own submissions to this Court. In the first case, when petitioners asked this Court to vacate the Fifth Circuit's stay of the District Court's injunction of the admitting privileges requirement pending appeal, they submitted a chart previously provided in the District Court that detailed the capacity of abortion clinics after the admitting privileges requirement was to take effect. [24] This chart is included as an Appendix to this opinion. [25] Three of the facilities listed on ***2348** the chart were ASCs, and their capacity was shown as follows:

- Southwestern Women's Surgery Center in Dallas was said to have the capacity for 5,720 abortions a year (110 per week);
- Planned Parenthood Surgical Health Services Center in Dallas was said to have the capacity for 6,240 abortions a year (120 per week); and
- Planned Parenthood Center for Choice in Houston was said to have the capacity for 9,100 abortions a year (175 per week). [26] See Appendix, *infra*.

The average capacity of these three ASCs was 7,020 abortions per year. [27] If the nine ASCs now performing abortions in Texas have the same average capacity, they have a total capacity of 63,180. Add in the assumed capacity for two other clinics that are operating pursuant to the judgment of the Fifth Circuit (over 3,100 abortions per year), [28] and the total for the State is 66,280 abortions per year. That is comparable to the 68,298 total abortions performed in Texas in 2012, the year before H.B. 2 was enacted, App. 236, [29] and well in excess of the abortion rate one would expect—59,070—if subtracting the apparent impact of the medication abortion restriction, see n. 21, *supra*.

To be clear, I do not vouch for the accuracy of this calculation. It might be too high or too low. The important point is that petitioners put on evidence of actual clinic capacity in their earlier case, and there is no apparent reason why they could not have done the same here. Indeed, the Court asserts that, after the admitting privileges requirement took effect, clinics "were not able to accommodate increased demand," *ante,* at 2318, but petitioners' own evidence suggested that the ***2349** requirement had *no* effect on capacity, see n. 21, *supra*. On this point, like the question of the reason for clinic closures, petitioners did not discharge their burden, and the District Court did not engage in the type of analysis that should have been conducted before enjoining an important state law.

So much for capacity. The other [30] potential obstacle to abortion access is the distribution of facilities throughout the State. This might occur if the two challenged H.B. 2 requirements, by causing the closure of clinics in some rural areas, led to a situation in which a "large fraction" [31] of women of reproductive age live too far away from any open clinic. Based on the Court's holding in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674, it appears that the need to travel up to 150 miles is not an undue burden, [32] and the evidence in this case shows that if the only clinics in the State were those that would have remained open if the judgment of the Fifth Circuit had not been enjoined, roughly 95% of the women of reproductive age in the State would live within 150 miles of an open facility (or lived outside that range before H.B. 2). [33] Because the record does not show why particular facilities closed, the real figure may be even higher than 95%.

We should decline to hold that these statistics justify the facial invalidation of the H.B. 2 requirements. The possibility that the admitting privileges requirement *might* have caused a closure in Lubbock is ***2350** no reason to

issue a facial injunction exempting Houston clinics from that requirement. I do not dismiss the situation of those women who would no longer live within 150 miles of a clinic as a result of H.B. 2. But under current doctrine such localized problems can be addressed by narrow as-applied challenges.

IV

Even if the Court were right to hold that res judicata does not bar this suit and that H.B. 2 imposes an undue burden on abortion access—it is, in fact, wrong on both counts—it is still wrong to conclude that the admitting privileges and surgical center provisions must be enjoined in their entirety. H.B. 2 has an extraordinarily broad severability clause that must be considered before enjoining any portion or application of the law. Both challenged provisions should survive in substantial part if the Court faithfully applies that clause. Regrettably, it enjoins both in full, heedless of the (controlling) intent of the state legislature. Cf. *Leavitt v. Jane L.,* 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (*per curiam*) ("Severability is of course a matter of state law").

A

Applying H.B. 2's severability clause to the admitting privileges requirement is easy. Simply put, the requirement must be upheld in every city in which its application does not pose an undue burden. It surely does not pose that burden anywhere in the eastern half of the State, where most Texans live and where virtually no woman of reproductive age lives more than 150 miles from an open clinic. See App. 242, 244 (petitioners' expert testimony that 82.5% of Texas women of reproductive age live within 150 miles of open clinics in Austin, Dallas, Fort Worth, Houston, and San Antonio). (Unfortunately, the Court does not address the State's argument to this effect. See Brief for Respondents 51.) And petitioners would need to show that the requirement caused specific West Texas clinics to close (but see *supra,* at 2345, and n. 18) before they could be entitled to an injunction tailored to address those closures.

B

Applying severability to the surgical center requirement calls for the identification of the particular provisions of the ASC regulations that result in the imposition of an undue burden. These regulations are lengthy and detailed, and while compliance with some might be expensive, compliance with many others would not. And many serve important health and safety purposes. Thus, the surgical center requirements cannot be judged as a package. But the District Court nevertheless held that all the surgical center requirements are unconstitutional in all cases, and the Court sustains this holding on grounds that are hard to take seriously.

When the Texas Legislature passed H.B. 2, it left no doubt about its intent on the question of severability. It included a provision mandating the greatest degree of severability possible. The full provision is reproduced below, [34] but it is enough to ***2351** note that under this provision "every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other." H.B. 2, § 10(b), App. to Pet. for Cert. 200a. And to drive home the point about the severability of applications of the law, the provision adds:

> "If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone." *Ibid.*

This provision indisputably requires that all surgical center regulations that are not themselves unconstitutional be left standing. Requiring an abortion facility to comply with any provision of the regulations applicable to surgical centers is an "application of the provision" of H.B. 2 that requires abortion clinics to meet surgical center standards. Therefore, if some such applications are unconstitutional, the severability clause plainly requires that those applications be severed and that the rest be left intact.

How can the Court possibly escape this painfully obvious conclusion? Its main argument is that it need not honor

the severability provision because doing so would be too burdensome. See *ante,* at 2319 – 2320. This is a remarkable argument.

Under the Supremacy Clause, federal courts may strike down state laws that violate the Constitution or conflict with federal statutes, Art. VI, cl. 2, but in exercising this power, federal courts must take great care. The power to invalidate a state law implicates sensitive federal-state relations. Federal courts have no authority to carpet-bomb state laws, knocking out provisions that are perfectly consistent ***2352** with federal law, just because it would be too much bother to separate them from unconstitutional provisions.

In any event, it should not have been hard in this case for the District Court to separate any bad provisions from the good. Petitioners should have identified the particular provisions that would entail what they regard as an undue expense, and the District Court could have then concentrated its analysis on those provisions. In fact, petitioners *did* do this in their trial brief, Doc. 185, p. 8 in *Lakey* (Aug. 12, 2014) ("It is the construction and nursing requirements that form the basis of Plaintiffs' challenge"), but they changed their position once the District Court awarded blanket relief, see 790 F.3d, at 582 (petitioners told the Fifth Circuit that they "challenge H.B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they find onerous or otherwise infirm"). In its own review of the ASC requirement, in fact, the Court follows petitioners' original playbook and focuses on the construction and nursing requirements as well. See *ante,* at 2314 – 2315 (detailed walkthrough of Tex. Admin. Code, tit. 25, §§ 135.15 (2016) (nursing), 135.52 (construction)). I do not see how it "would inflict enormous costs on both courts and litigants," *ante,* at 2319, to single out the ASC regulations that this Court and petitioners have both targeted as the core of the challenge.

By forgoing severability, the Court strikes down numerous provisions that could not plausibly impose an undue burden. For example, surgical center patients must "be treated with respect, consideration, and dignity." Tex. Admin. Code, tit. 25, § 135.5(a). That's now enjoined. Patients may not be given misleading "advertising regarding the competence and/or capabilities of the organization." § 135.5(g). Enjoined. Centers must maintain fire alarm and emergency communications systems, §§ 135.41(d), 135.42(e), and eliminate "[h]azards that might lead to slipping, falling, electrical shock, burns, poisoning, or other trauma," § 135.10(b). Enjoined and enjoined. When a center is being remodeled while still in use, "[t]emporary sound barriers shall be provided where intense, prolonged construction noises will disturb patients or staff in the occupied portions of the building." § 135.51(b)(3)(B)(vi). Enjoined. Centers must develop and enforce policies concerning teaching and publishing by staff. §§ 135.16(a), (c). Enjoined. They must obtain informed consent before doing research on patients. § 135.17(e). Enjoined. And each center "shall develop, implement[,] and maintain an effective, ongoing, organization-wide, data driven patient safety program." § 135.27(b). Also enjoined. These are but a few of the innocuous requirements that the Court invalidates with nary a wave of the hand.

Any responsible application of the H.B. 2 severability provision would leave much of the law intact. At a minimum, both of the requirements challenged here should be held constitutional as applied to clinics in any Texas city that will have a surgical center providing abortions (*i.e.,* those areas in which there cannot possibly have been an undue burden on abortion access). Moreover, as even the District Court found, the surgical center requirement is clearly constitutional as to new abortion facilities and facilities already licensed as surgical centers. *Whole Woman's Health v. Lakey,* 46 F.Supp.3d 673, 676 (W.D.Tex.2014). And we should uphold every application of every surgical center regulation that does not pose an undue burden—at the very least, all of the regulations as to which petitioners have never made a specific complaint supported by specific evidence. ***2353** The Court's wholesale refusal to engage in the required severability analysis here revives the "antagonistic 'canon of construction under which in cases involving abortion, a permissible reading of a statute is to be avoided at all costs.' " *Gonzales,* 550 U.S., at 153–154, 127 S.Ct. 1610 (quoting *Stenberg v. Carhart,* 530 U.S. 914, 977, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (KENNEDY, J., dissenting); some internal quotation marks omitted).

If the Court is unwilling to undertake the careful severability analysis required, that is no reason to strike down all applications of the challenged provisions. The proper course would be to remand to the lower courts for a remedy tailored to the specific facts shown in this case, to "try to limit the solution to the problem." *Ayotte v.*

Planned Parenthood of Northern New Eng., 546 U.S. 320, 328, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006).

V

When we decide cases on particularly controversial issues, we should take special care to apply settled procedural rules in a neutral manner. The Court has not done that here.

I therefore respectfully dissent.

APPENDIX

App. K to Emergency Application To Vacate Stay in O.T. 2013, No. 13A452, Plaintiffs' Trial Exh. 46

Clinic Name	Clinic Location	Capacity after Privileges Requirement
Austin Women's Health Center	Austin, TX	100% of prior capacity
International Healthcare Solutions	Austin, TX	
South Austin Health Center (PP)	Austin, TX	none
Whole Women's Health Austin	Austin, TX	100% of prior capacity
Whole Women's Health Beaumont	Beaumont, TX	100% of prior capacity
Coastal Birth Control Center	Corpus Christi, TX	prob. 100% of prior capacity
Abortion Advantage	Dallas, TX	none
Northpark Medical Group	Dallas, TX	
Dallas Surgical Health Services Center	Dallas, TX	120 per week
Routh Street Women's Clinic	Dallas, TX	20 per week
Southwestern Women's	Dallas, TX	110 per week
Hill Top Women's Reproductive Health Services	El Paso, TX	prob. 100% of prior capacity
Reproductive Services	El Paso, TX	none
Southwest Fort Worth Health Center (PP)	Fort Worth, TX	none
West Side Clinic	Fort Worth, TX	none
Whole Woman's Health Fort Worth	Fort Worth, TX	none
Harlingen Reproductive Services	Harlingen, TX	none
Affordable Women's Health Center	Houston, TX	
AAA Concerned Women's Center	Houston, TX	
Aaron Women's Clinic	Houston, TX	
Texas Ambulatory Surgical Center	Houston, TX	
Alto Women's Center	Houston, TX	
Houston Women's Clinic	Houston, TX	130 per week
Planned Parenthood Center for Choice	Houston, TX	175 per week
Suburban Women's Clinic (SW)	Houston, TX	
Suburban Women's Clinic (NW)	Houston, TX	
Planned Parenthood Center for Choice Stafford	Stafford (not in county)	none
Killeen Women's Health Center	Killeen, TX	none
Planned Parenthood Women's Health Center	Lubbock, TX	none
Whole Women's Health of McAllen	McAllen, TX	none
Dr. Braid (Alamo Women's Reproductive Services)	San Antonio, TX	100% of prior capacity
Planned Parenthood Babock Sexual Healthcare	San Antonio, TX	40/week for ALL San Antonio locations
Planned Parenthood Bandera Rd Sexual Healthcare	San Antonio, TX	none
Planned Parenthood Northeast Sexual Healthcare	San Antonio, TX	none
Whole Woman's Health San Antonio	San Antonio, TX	severely limited
Audre Rapoport Women's Health Center (PP)	Waco, TX	none

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Compare, *e.g., Gonzales v. Carhart,* 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007), and *Stenberg v. Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (assuming that physicians and clinics can vicariously assert women's right to abortion), with, *e.g., Leavitt v. Jane L.,* 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (*per curiam*); *Hodgson v. Minnesota,* 497 U.S. 417, 429, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990); *H.L. v. Matheson,* 450 U.S. 398, 400, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981); *Williams v. Zbaraz,* 448 U.S. 358, 361, 100 S.Ct. 2694, 65 L.Ed.2d 831 (1980); *Harris v. McRae,* 448 U.S. 297, 303, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *Bellotti v. Baird,* 428 U.S. 132, 137–138, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976); *Poelker v. Doe,* 432 U.S. 519, 519, 97 S.Ct. 2391, 53 L.Ed.2d 528 (1977) (*per curiam*); *Beal v. Doe,* 432 U.S. 438, 441–442, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977); *Maher v. Roe,* 432 U.S. 464, 467, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) (women seeking abortions have capably asserted their own rights, as plaintiffs).

2 See Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1278–1291 (2007); see also Linzer, The *CaroleneProducts* Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, 12 Const. Commentary 277, 277–278, 288–300 (1995); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 544, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (Stone, C.J., concurring) (citing the *Carolene Products* footnote to suggest that the presumption of constitutionality did not fully apply to encroachments on the unenumerated personal liberty to procreate).

1 See, *e.g.,* Note, Developments in the Law: Res Judicata, 65 Harv. L. Rev. 818, 824 (1952); Cleary, Res Judicata Reexamined, 57 Yale L.J. 339, 339–340 (1948).

2 Brief for Plaintiffs–Appellees in *Abbott,* No. 13–51008 (CA5), p. 5 (emphasis added); see also *id.,* at 23–24 ("[T]he evidence established that as a result of the admitting privileges requirement, approximately one-third of the licensed abortion providers in Texas *would stop* providing abortions.... As a result, one in three women in Texas *would be unable* to access desired abortion services.... [T]he immediate, widespread reduction of services caused by the admitting privileges requirement *would produce* a shortfall in the capacity of providers to serve all of the women seeking abortions" (emphasis added)).

3 Even if the "operative facts" were actual clinic closures, the claims in the two cases would still be the same. The Court suggests that many clinics closed between the time of the Fifth Circuit's decision in the first case and the time of the District Court's decision in the present case by comparing what the Court of Appeals said in *Abbott* about the effect of the admitting privileges requirement alone, 748 F.3d, at 598 ("All of the major Texas cities ... continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges"), with what the District Court said in this case about the combined effect of the admitting privileges requirement and the ambulatory surgical center requirement, 46 F.Supp.3d 673, 680 (W.D.Tex.2014) (Were the surgical center requirement to take effect on September 1, 2014, only seven or eight clinics would remain open). See *ante,* at 2306 – 2307. Obviously, this comparison does not show that the effect of the admitting privileges requirement alone was greater at the time of the District Court's decision in this second case. Simply put, the Court presents no new clinic closures allegedly caused by the admitting privileges requirement beyond those already accounted for in *Abbott,* as I discuss, *infra,* at 2307 – 2308, and accompanying notes.

4 I need not quibble with the Court's authorities stating that facial relief can sometimes be appropriate even where a plaintiff has requested only as-applied relief. *Ante,* at 2307. Assuming that this is generally proper, it does not follow that this may be done where the plaintiff is precluded by res judicata from bringing a facial claim.

5 See *ante,* at 2306 (citing *United States v. Carolene Products Co.,* 304 U.S. 144, 153, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), and *Nashville, C. & St. L.R. Co. v. Walters,* 294 U.S. 405, 415, 55 S.Ct. 486, 79 L.Ed. 949 (1935)).

6 The Court's contaminated-water hypothetical, see *ante,* at 2305 – 2306, may involve such a situation. If after their loss in the first suit, the same prisoners continued to drink the water, they would not be barred from suing to recover for subsequent injuries suffered as a result. But if the Court simply means that the passage of time would allow the prisoners to present better evidence in support of the same claim, the successive suit would be barred for the reasons I have given. In that event, their recourse would be to move for relief from the judgment. See Restatement (Second) of Judgments § 73.

7 See also *Sutliffe v. Epping School Dist.,* 584 F.3d 314, 328 (C.A.1 2009) ("[W]hen a defendant is accused of ... acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action, and the events are said to constitute but one transaction" (internal quotation marks omitted)); *Monahan v. New York City Dept. of Corrections,*

214 F.3d 275, 289 (C.A.2 2000) ("Plaintiffs' assertion of new incidents arising from the application of the challenged policy is also insufficient to bar the application of *res judicata* "); *Huck v. Dawson,* 106 F.3d 45, 49 (C.A.3 1997) (applying res judicata where "the same facts that resulted in the earlier judgment have caused continued damage").

8 As I explain, *infra,* at 2345, and n. 18, some of the closures presumably included in the Court's count of 19 were not attributed to H.B. 2 at the first trial, even by petitioners.

9 The *Abbott* panel's refusal to consider "developments since the conclusion of the bench trial," 748 F.3d, at 599, n. 14, was not addressed to the evidence of 15 closures presented at trial. The Court of Appeals in fact credited that evidence by *assuming* "some clinics may be required to shut their doors," but it nevertheless concluded that "there is no showing whatsoever that *any* woman will lack reasonable access to a clinic within Texas." *Id.,* at 598. The *Abbott* decision therefore accepted the factual premise common to these two actions—namely, that the admitting privileges requirement would cause some clinics to close—but it concluded that petitioners had not proved a burden on access regardless. In rejecting *Abbott* 's conclusion, the Court seems to believe that *Abbott* also must have refused to accept the factual premise. See *ante,* at 2306 – 2307.

Instead, *Abbott* 's footnote 14 appears to have addressed the following post-trial developments: (1) the permanent closure of the Lubbock clinic, Brief for Plaintiffs–Appellees in *Abbott* (CA5), at 5, n. 3 (accounted for among the 15 anticipated closures, see Appendix, *infra*); (2) the *resumption* of abortion services in Fort Worth, Brief for Plaintiffs–Appellees, at 5, n. 3; (3) the *acquisition* of admitting privileges by an Austin abortion provider, *id.,* at 6, n. 4; (4) the *acquisition* of privileges by physicians in Dallas and San Antonio, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Jan. 3, 2014); (5) the *acquisition* of privileges by physicians in El Paso and Killeen, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Mar. 21, 2014); and (6) the enforcement of the requirement against one Houston provider who lacked privileges, see *ibid.* (citing Texas Medical Board press release). In the five months between the admitting privileges requirement taking effect and the Fifth Circuit's *Abbott* decision, then, the parties had ample time to inform that court of post-trial developments—and petitioners never identified the 15 closures as new (because the closures were already accounted for in their trial evidence). In fact, the *actual* new developments largely favored the State's case: In that time, physicians in Austin, Dallas, El Paso, Fort Worth, Killeen, and San Antonio were able to come into compliance, while only one in Houston was not, and one clinic (already identified at trial as expected to close) closed permanently. So *Abbott* 's decision to ignore post-trial developments quite likely favored petitioners.

10 See also *In re Marriage of Shaddle,* 317 Ill.App.3d 428, 430–432, 251 Ill.Dec. 444, 740 N.E.2d 525, 528–529 (2000) (child custody); *In re Hope M.,* 1998 ME 170, ¶ 5, 714 A.2d 152, 154 (termination of parental rights); *In re Connors,* 255 Ill.App.3d 781, 784–785, 194 Ill.Dec. 529, 627 N.E.2d 1171, 1173–1174 (1994) (civil commitment); *Kent V. v. State,* 233 P.3d 597, 601, and n. 12 (Alaska 2010) (applying Comment *f* to termination of parental rights); *In re Juvenile Appeal (83–DE),* 190 Conn. 310, 318–319, 460 A.2d 1277, 1282 (1983) (same); *In re Strozzi,* 112 N.M. 270, 274, 814 P.2d 138, 142 (App.1991) (guardianship and conservatorship); *Andrulonis v. Andrulonis,* 193 Md.App. 601, 617, 998 A.2d 898, 908 (2010) (modification of alimony); *In re Marriage of Pedersen,* 237 Ill.App.3d 952, 957, 178 Ill.Dec. 835, 605 N.E.2d 629, 633 (1992) (same); *Friederwitzer v. Friederwitzer,* 55 N.Y.2d 89, 94–95, 447 N.Y.S.2d 893, 432 N.E.2d 765, 768 (1982) (child custody).

* * *

11 The proper standard for facial challenges is unsettled in the abortion context. See *Gonzales,* 550 U.S., at 167–168, 127 S.Ct. 1610 (comparing *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) ("[B]ecause appellees are making a facial challenge to a statute, they must show that no set of circumstances exists under which the Act would be valid" (internal quotation marks omitted)), with *Casey,* 505 U.S., at 895, 112 S.Ct. 2791 (opinion of the Court) (indicating a spousal-notification statute would impose an undue burden "in a large fraction of the cases in which [it] is relevant" and holding the statutory provision facially invalid)). Like the Court in *Gonzales, supra,* at 167–168, 127 S.Ct. 1610 I do not decide the question, and use the more plaintiff-friendly "large fraction" formulation only because petitioners cannot meet even that test.

The Court, by contrast, applies the "large fraction" standard without even acknowledging the open question. *Ante,* at 2320. In a similar vein, it holds that the fraction's "relevant denominator is 'those [women] for whom [the provision] is an actual rather than an irrelevant restriction.' " *Ibid.* (quoting *Casey,* 505 U.S., at 895, 112 S.Ct. 2791). I must confess that I do not understand this holding. The purpose of the large-fraction analysis, presumably, is to compare the number of women *actually* burdened with the number *potentially* burdened. Under the Court's holding, we are supposed to use the same figure (women actually burdened) as both the numerator and the denominator. By my math, that fraction is always "1," which is pretty large as fractions go.

12 Report of Grand Jury in No. 0009901–2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 248–249, online at http://www.phila.gov/districtattorney/pdfs/grandjurywomensmedical.pdf (all Internet materials as last visited June 24, 2016).

13 See House Research Org., Laubenberg et al., Bill Analysis 10 (July 9, 2013), online at http://www.hro.house.state.tx.us/pdf/ba832/hb0002.pdf ("Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic"). The Court attempts to distinguish the Gosnell horror story by pointing to differences between Pennsylvania and Texas law. See *ante,* at 2313 – 2314. But Texas did not need to be in Pennsylvania's precise position for the legislature to rationally conclude that a similar law would be helpful.

14 Rebuttal Decl. of Dr. Joseph E. Potter, Doc. 76–2, p. 12, ¶ 32, in *Abbott* (WD Tex., Oct. 18, 2013) (Potter Rebuttal Decl.).

15 See App. 234, 237, 253.

16 Complaint and Application for Preliminary and Permanent Injunction in *Abbott* (WD Tex.), ¶¶ 10, 11 (listing one clinic in Stafford and two in San Antonio).

17 *Id.,* ¶ 88.

18 In the first case, petitioners apparently did not even believe that the abortion clinics in Abilene, Bryan, Midland, and San Angelo were made to close because of H.B. 2. In that case, petitioners submitted a list of 15 clinics they believed would close (or have severely limited capacity) because of the admitting privileges requirement—and those four West Texas clinics are *not* on the list. See Appendix, *infra*. And at trial, a Planned Parenthood executive specifically testified that the Midland clinic closed because of the funding cuts and because the clinic's medical director retired. See 1 Tr. 91, 93, in *Abbott* (WD Tex., Oct. 21, 2013). Petitioners' list and Planned Parenthood's testimony both fit with petitioners' expert's admission in the first case that some clinics closed "as a result of the defunding." Potter Rebuttal Decl. ¶ 32.

19 See Stoelje, Abortion Clinic Closes in Corpus Christi, San Antonio Express–News (June 10, 2014), online at http://www.mysanantonio.com/news/local/article/Abortion–clinic–closes–in–Corpus–Christi–5543125.php (provider "retiring for medical reasons"); 1 Plaintiffs' Exh. 18, p. 2, in *Whole Woman's Health v. Lakey,* No. 1:14–cv–284 (WD Tex., admitted into evidence Aug. 4, 2014) (e-mail stating Houston clinic owner "is retiring his practice"). Petitioners should have been required to put on proof about the reason for the closure of particular clinics. I cite the extrarecord Corpus Christi story only to highlight the need for such proof.

20 This kind of evidence was readily available; in fact, petitioners deposed at least one nonparty clinic owner about the burden posed by H.B. 2. See App. 1474. And recall that in their first case, petitioners put on evidence purporting to show how the admitting privileges requirement would (or would not) affect 27 clinics. See Appendix, *infra* (petitioners' chart of clinics).

21 In the first case, petitioners submitted a report that Dr. Grossman coauthored with their testifying expert, Dr. Potter. 1 Tr. 38 in *Lakey* (Aug. 4, 2014) (*Lakey* Tr.). That report predicted that "the shortfall in capacity due to the admitting privileges requirement will prevent at least 22,286 women" from accessing abortion. Decl. of Dr. Joseph E. Potter, Doc. 9–8, p. 4, in *Abbott* (WD Tex., Oct. 1, 2013). The methodology used was questionable. See Potter Rebuttal Decl. ¶ 18. As Dr. Potter admitted: "There's no science there. It's just evidence." 2 Tr. 23 in *Abbott* (WD Tex., Oct. 22, 2013). And in this case, in fact, Dr. Grossman admitted that their prediction turned out to be wildly inaccurate. Specifically, he provided a new figure (approximately 9,200) that was less than half of his earlier prediction. 1 *Lakey* Tr. 41. And he then admitted that he had not proven any causal link between the admitting privileges requirement and that smaller decline. *Id.,* at 54 (quoting Grossman et al., Change in Abortion Services After Implementation of a Restrictive Law in Texas, 90 Contraception 496, 500 (2014)).

Dr. Grossman's testimony in this case, furthermore, suggested that H.B. 2's restriction on medication abortion (whose impact on clinics cannot be attributed to the provisions challenged in this case) was a major cause in the decline in the abortion rate. After the medication abortion restriction and admitting privileges requirement took effect, over the next six months the number of medication abortions dropped by 6,957 compared to the same period in the previous year. See App. 236. The corresponding number of surgical abortions rose by 2,343. See *ibid.* If that net decline of 4,614 in six months is doubled to approximate the annual trend (which is apparently the methodology Dr. Grossman used to arrive at his 9,200 figure, see 90 Contraception, *supra,* at 500), then the year's drop of 9,228 abortions seems to be *entirely* the product of the medication abortion restriction. Taken together, these figures make it difficult to conclude that the admitting privileges requirement actually depressed the abortion rate *at all*.

In light of all this, it is unclear why the Court takes Dr. Grossman's testimony at face value.

22 The Court asserts that the admitting privileges requirement is a bottleneck on capacity, *ante,* at 2317, but it musters no evidence and does not even dispute petitioners' own evidence that the admitting privileges requirement may have had *zero* impact on the Texas abortion rate, n. 21, *supra*.

23 See Brief for Petitioners 23–24 (six centers in 2012, compared with nine today). Two of the three new surgical centers opened since this case was filed are operated by Planned Parenthood (which now owns five of the nine surgical centers in the State). See App. 182–183, 1436. Planned Parenthood is obviously able to comply with the challenged H.B. 2 requirements. The president of petitioner Whole Woman's Health, a much smaller entity, has complained that Planned Parenthood " 'put[s] local independent businesses in a tough situation.' " Simon, Planned Parenthood Hits Suburbia, Wall Street Journal Online (June 23, 2008) (cited in Brief for CitizenLink et al. as *Amici Curiae* 15–16, and n. 23). But as noted, petitioners in this case are not asserting their own rights but those of women who wish to obtain an abortion, see *supra,* at 2342 – 2343, and thus the effect of the H.B. 2 requirements on petitioners' business and professional interests are not relevant.

24 See Appendix, *infra*. The Court apparently brushes off this evidence as "outside the record," *ante,* at 2317, but it was filed with this Court by the same petitioners in litigation closely related to this case. And "we may properly take judicial notice of the record in that litigation between the same parties who are now before us." *Shuttlesworth v. Birmingham,* 394 U.S. 147, 157, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); see also, *e.g., United States v. Pink,* 315 U.S. 203, 216, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *Freshman v. Atkins,* 269 U.S. 121, 124, 46 S.Ct. 41, 70 L.Ed. 193 (1925).

25 The chart lists the 36 abortion clinics apparently open at the time of trial, and identifies the "Capacity after Privileges Requirement" for 27 of those clinics. Of those 27 clinics, 24 were owned by plaintiffs in the first case, and 3 (Coastal Birth Control Center, Hill Top Women's Reproductive Health Services, and Harlingen Reproductive Services) were owned by nonparties. It is unclear why petitioners' chart did not include capacity figures for the other nine clinics (also owned by non-parties). Under Federal Rule of Civil Procedure 30(b)(6), petitioners should have been able to depose representatives of those clinics to determine those clinics' capacity and their physicians' access to admitting privileges. In the present case, petitioners in fact deposed at least one such nonparty clinic owner, whose testimony revealed that he was able to comply with the admitting privileges requirement. See App. 1474 (testimony of El Paso abortion clinic owner, confirming that he possesses admitting privileges "at every hospital in El Paso" (filed under seal)). The chart states that 14 of those clinics would not be able to perform abortions if the requirement took effect, and that another clinic would have "severely limited" capacity. See Appendix, *infra*.

26 The Court nakedly asserts that this clinic "does not represent most facilities." *Ante,* at 2318. Given that in this case petitioners did not introduce evidence on "most facilities," I have no idea how the Court arrives at this conclusion.

27 The Court chides me, *ante,* at 2317 – 2318, for omitting the Whole Woman's Health ASC in San Antonio from this average. As of the *Abbott* trial in 2013, that ASC's capacity was (allegedly) to be "severely limited" by the admitting privileges requirement. See Appendix, *infra* (listing "Capacity after Privileges Requirement"). But that facility came into compliance with that requirement a few months later, see Letter from J. Crepps to L. Cayce, Clerk of Court in *Abbott* (CA5, Jan. 3, 2014), so its precompliance capacity is irrelevant here.

28 Petitioner Whole Woman's Health performed over 14,000 abortions over 10 years in McAllen. App. 128. Petitioner Nova Health Systems performed over 17,000 abortions over 10 years in El Paso. *Id.,* at 129. (And as I explain at n. 33, *infra,* either Nova Health Systems or another abortion provider will be open in the El Paso area however this case is decided.)

29 This conclusion is consistent with public health statistics offered by petitioners. These statistics suggest that ASCs have a much higher capacity than other abortion facilities. In 2012, there were 14,361 abortions performed by six surgical centers, meaning there were 2,394 abortions per center. See Brief for Petitioners 23; App. 236. In 2012, there were approximately 35 other abortion clinics operating in Texas, see *id.,* at 228 (41 total clinics as of Nov. 1, 2012), which performed 53,937 abortions, *id.,* at 236 (68,298 total minus 14,361 performed in surgical centers). On average, those other clinics each performed 53,937 ÷ 35=1,541 abortions per year. So surgical centers in 2012 performed 55% more abortions per facility (2,394 abortions) than the average (1,541) for other clinics.

30 The Court also gives weight to supposed reductions in "individualized attention, serious conversation, and emotional support" in its undue-burden analysis. *Ante,* at 2318. But those "facts" are not in the record, so I have no way of addressing them.

31 See n. 11, *supra*.

32 The District Court in *Casey* found that 42% of Pennsylvania women "must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider." 744 F.Supp. 1323, 1352 (E.D.Pa.1990), aff'd in part, rev'd in part, 947 F.2d 682 (C.A.3 1991), aff'd in part, rev'd in part, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). In that case, this Court recognized that the challenged 24–hour waiting period would require some women to make that trip twice, and yet upheld the law regardless. See *id.,* at 886–887, 112 S.Ct. 2791.

33 Petitioners' expert testified that 82.5% of Texas women of reproductive age live within 150 miles of a Texas surgical center that provides abortions. See App. 242 (930,000 women living more than 150 miles away), 244 (5,326,162 women

total). The State's expert further testified, without contradiction, that an additional 6.2% live within 150 miles of the McAllen facility, and another 3.3% within 150 miles of an El Paso-area facility. *Id.,* at 921–922, 112 S.Ct. 2791. (If the Court did not award statewide relief, I assume it would instead either conclude that the availability of abortion on the New Mexico side of the El Paso metropolitan area satisfies the Constitution, or it would award as-applied relief allowing petitioner Nova Health Systems to remain open in El Paso. Either way, the 3.3% figure would remain the same, because Nova's clinic and the New Mexico facility are so close to each other. See *id.,* at 913, 916, 921, 112 S.Ct. 2791 (only six women of reproductive age live within 150 miles of Nova's clinic but not New Mexico clinic).) Together, these percentages add up to 92.0% of Texas women of reproductive age.

Separately, the State's expert also testified that 2.9% of women of reproductive age lived more than 150 miles from an abortion clinic before H.B. 2 took effect. *Id.,* at 916, 112 S.Ct. 2791.

So, at most, H.B. 2 affects no more than (100% - 2.9%) - 92.0%=5.1% of women of reproductive age. Also recall that many rural clinic closures appear to have been caused by other developments—indeed, petitioners seemed to believe that themselves—and have certainly not been shown to be caused by the provisions challenged here. See *supra,* at 2345, and n. 18. So the true impact is almost certainly smaller than 5.1%.

34 The severability provision states:

"(a) If some or all of the provisions of this Act are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of Texas law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; provided, however, that whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or otherwise ceases to have effect, the provisions shall have full force and effect.

"(b) *Mindful of Leavitt v. Jane L.,* 518 U.S. 137 [116 S.Ct. 2068, 135 L.Ed.2d 443] (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The legislature further declares that it would have passed this Act, and each provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to be declared unconstitutional or to represent an undue burden.

"(c) [omitted—applies to late-term abortion ban only]

"(d) If any provision of this Act is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force." H.B. 2, § 10, App. to Pet. for Cert. 199a–201a.

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874 F.3d 735
United States Court of Appeals,
District of Columbia Circuit.

Rochelle GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of herself and others similarly situated, Appellee
v.
Eric D. HARGAN, Acting Secretary, Health and Human Services, et al., Appellants

No. 17-5236
|
Filed on: October 24, 2017

On Petition for Rehearing En Banc

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Before: Garland, Chief Judge; Henderson [*], Rogers, Tatel, Griffith [**], Kavanaugh [**], Srinivasan, Millett [***], Pillard [****], and Wilkins, Circuit Judges

ORDER

Per Curiam

Upon consideration of appellee's petition for rehearing en banc and the supplements thereto, the response to the petition and the supplement to the response, the corrected ***736** brief for amici curiae States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Massachusetts, Oregon, Pennsylvania, Vermont, and Washington, and the District of Columbia in support of appellee's petition, and the vote in favor of the petition by a majority of the judges eligible to participate; and appellee's motion to recall the mandate and petition for en banc consideration of appellee's motion to recall the mandate, it is

ORDERED that the mandate be recalled. The Clerk of the district court is directed to return forthwith the mandate issued October 20, 2017. It is

FURTHER ORDERED that appellee's petition for rehearing en banc be granted. This case has been considered by the court sitting en banc without oral argument, no judge having requested oral argument. It is

FURTHER ORDERED that the order filed October 20, 2017 be vacated, except that the administrative stay remains dissolved. It is

FURTHER ORDERED that appellants' emergency motion for stay pending appeal be denied because appellants have not met the stringent requirements for a stay pending appeal, *see Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009), substantially for the reasons set forth in the October 20, 2017 dissenting statement of Circuit Judge Millett. [1] The case is hereby remanded to the district court for further proceedings to amend the effective dates in paragraph 1 of its injunction. The dates in paragraph 1 have now passed, and the parties have proffered new evidence and factual assertions concerning the expected duration of custody and other matters. The district court is best suited to promptly determine in the first instance the appropriate dates for compliance with the injunction. In so doing, the district court retains full discretion to conduct proceedings and make any factual findings deemed necessary and appropriate to the district court's exercise of its equitable judgment, consistent with this order, including with regard to any of the factual disputes that were raised for the first time on appeal. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330-31, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 305 (D.C. Cir. 2006).

Millett, Circuit Judge, concurring:
While I disagreed with the panel order, I recognize that my colleagues labored hard under extremely pressured conditions to craft a disposition that comported with their considered view of the law's demands.

Fortunately, today's decision rights a grave constitutional wrong by the government. Remember, we are talking about a child here. A child who is alone in a foreign land. A child who, after her arrival here in a search for safety and after the government took her into custody, learned that she is pregnant. J.D. then made a considered decision, presumably in light of her dire circumstances, to terminate that pregnancy. Her capacity to make the decision about what is in her best interests by herself was approved by a Texas court consistent with state law. She did everything that Texas law requires to obtain an ***737** abortion. That has been undisputed in this case.

What has also been expressly and deliberately uncontested by the government throughout this litigation is that the Due Process Clause of the Fifth Amendment fully protects J.D.'s right to decide whether to continue or terminate her pregnancy. The government—to its credit—has never argued or even suggested that J.D.'s status as an unaccompanied minor who entered the United States without documentation reduces or eliminates her constitutional right to an abortion in compliance with state law requirements.

Where the government bulldozed over constitutional lines was its position that—accepting J.D.'s constitutional right and accepting her full compliance with Texas law—J.D., an unaccompanied child, *has the burden of extracting herself from custody* if she wants to exercise the right to an abortion that the government does not dispute she has. The government has insisted that it may categorically blockade exercise of her constitutional right unless this child (like some kind of legal Houdini) figures her own way out of detention by either (i) surrendering any legal right she has to stay in the United States and returning to the abuse from which she fled, or (ii) finding a sponsor—effectively, a foster parent—willing to take custody of her and to not interfere in any practical way with her abortion decision.

That is constitutionally untenable, as the en banc court agrees. Settled precedent from *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), to *Whole Woman's Health v. Hellerstedt*, —— U.S. ——, 136 S.Ct. 2292, 195 L.Ed.2d 665 (2016), establishes that the government may not put substantial and unjustified obstacles in the way of a woman's exercise of her right to an abortion pre-viability. The government, however, has identified no constitutionally sufficient justification for asserting a veto right over J.D. and Texas law.

Judge Kavanaugh's dissenting opinion claims that the court has somehow broken new constitutional ground by authorizing "immediate abortion on demand" by "unlawful immigrant minors" (Judge Kavanaugh's Dissent Op. 752). What new law? It cannot be J.D.'s status as an undocumented immigrant because the government has accepted that her status does not affect her constitutional right to an abortion, as Judge Kavanaugh's opinion acknowledges on the next page (Dissent Op. 752). Accordingly, in this litigation, J.D.,

like other minors in the United States who satisfy state-approved procedures, is entitled under binding Supreme Court precedent to choose to terminate her pregnancy. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979). The court's opinion gives effect to that concession; it does not create a "radical" "new right" (Judge Kavanaugh Dissent Op. 752) by doing so. [1]

Beyond that, it is unclear why undocumented status should change everything. Surely the mere act of entry into the United States without documentation does not mean that an immigrant's body is no longer her or his own. Nor can the sanction for ***738** unlawful entry be forcing a child to have a baby. The bedrock protections of the Fifth Amendment's Due Process Clause cannot be that shallow.

Abortion on demand? Hardly. Here is what this case holds: a pregnant minor who (i) has an unquestioned constitutional right to choose a pre-viability abortion, and (ii) has satisfied every requirement of state law to obtain an abortion, need not wait additional weeks just because she—in the government's inimitably ironic phrasing—"refuses to leave" its custody, Appellants' Opp'n to Reh'g Pet. 11. That sure does not sound like "on demand" to me. Unless Judge Kavanaugh's dissenting opinion means the demands of the Constitution and Texas law. With that I would agree.

1. Sponsorship

The centerpiece of the panel order (and now Judge Kavanaugh's dissenting opinion at 2-3) was the conclusion that forcing J.D. to continue her pregnancy for multiple more weeks is not an "undue burden" as long as the sponsorship search is undertaken "expeditiously." Panel Order at 1. The panel order then treated its ordered eleven-day delay as just such an expeditious process.

But that starts the clock long after the horses have left the gate. The sponsorship search has already been underway for now-almost *seven weeks*. Throughout all of that time, the government was under a statutory obligation to find a sponsor if one was available. *See* 8 U.S.C. § 1232(c)(2). None materialized. Tacking on another eleven days to an already nearly seven-week sponsorship hunt—that is, enforcing an almost *nine week* delay before J.D. can even start again the process of trying to exercise her right—is the antithesis of expedition. A nine-week waiting period before litigation can start or resume, if adopted by a State, would plainly be unconstitutional. *Cf. Whole Woman's Health*, 136 S.Ct. at 2318 (striking restrictions on abortion providers as unduly burdensome, noting in part "clinics' experiences since the admitting-privileges requirement went into effect of 3-week wait times") (citations omitted).

For very good reason, the sponsorship process is anything but expeditious. The sponsor is much like a foster parent, someone who chooses to house and provide for a child throughout her time in the United States, and who promises to ensure her appearance at all immigration proceedings. To protect these acutely vulnerable children from trafficking, sexual exploitation, abuse, and neglect, Congress requires the Department of Health and Human Services to be careful in its review and restrictive in who can apply. *See* 8 U.S.C. § 1232. To that end, agency regulations provide that potential sponsors must either be related to J.D. or have some "bona fide social relationship" with the child that "existed before" her arrival in the United States. [2]

On top of that, the panel's order did not say that, at the end of its eleven days, J.D. could terminate her pregnancy if no sponsor were found. Quite the opposite: The order just stopped everything—except, critically, the continuation of J.D.'s pregnancy—until October 31st, at which time J.D. would have to restart the litigation all ***739** over again unless a sponsor was lucked upon. There is nothing expeditious about the prolonged and complete barrier to J.D.'s exercise of her right to terminate her pregnancy that the panel order allowed the government to perpetuate.

Nor was any constitutionally sound justification for the order's imposition of eleven more days on top of the already elapsed seven weeks ever advanced by the government. In fact, the government (i) never requested a stay to find a sponsor; (ii) never asked for a remand; (iii) never suggested in briefing or oral argument that there was any prospect of finding a sponsor at all, let alone finding one in the next eleven days or even in the foreseeable future; (iv) never even hinted, since no family member has been approved as a sponsor, that a non-family member could be identified, vetted, and take custody of J.D. within eleven days; and (v) never made any factual or legal argument contending that the already-seven-week-long-and-counting sponsorship process was an "expeditious" process or the type of short-term burden that could plausibly pass muster under Supreme Court precedent to bar an abortion.

All the government argues with respect to sponsorship was that its flat and categorical prohibition of J.D.'s abortion was permissible because she could leave government custody if a sponsor were found or she surrendered any claim of legal right to stay here and voluntarily departed. Oral Arg. 12:35; 24:30–25:15. Custody, the government insists, is the unaccompanied child's problem to solve.

A detained, unaccompanied minor, however, has precious little control over the sponsorship process. The Department of Health and Human Services is statutorily charged with finding, vetting, and approving sponsors. *See* 8 U.S.C. § 1232(c); 6 U.S.C. § 279. So the government's position that J.D. cannot exercise her constitutional right unless the government approves a sponsor imposes a flat prohibition on her reproductive freedom that J.D. has no independent ability to overcome.

Nor does sponsorship bear any logical relationship to J.D.'s decision to terminate the pregnancy. Because J.D. has obtained a judicial bypass order from a Texas court that allows her to decide for herself whether an abortion is in her own best interests, a sponsor would have no ability to control or influence J.D.'s decision. *See* Texas Family Code § 33.003(i-3). Accordingly, finding a sponsor and allowing J.D. to exercise her unchallenged constitutional right are not mutually exclusive. The two can and should proceed simultaneously.

Judge Kavanaugh's dissenting opinion (at 755) suggests that it would be good to put J.D. "in a better place when deciding whether to have an abortion." That, however, is not any argument the government ever advanced. The only value of sponsorship identified by the government was that sponsorship, like voluntary departure from the United States, would get J.D. and her pregnancy out of the government's hands.

In any event, even if sponsorship, as Judge Kavanaugh supposes, might be more optimal in a policy sense, J.D. has already made her decision, and neither the government nor the dissenting opinion identifies a constitutionally sufficient justification consistent with Supreme Court precedent for requiring J.D. to wait for what may or may not be a better environment. The dissenting opinion further assumes that J.D. is different because she lacks a "support network of friends and family." Judge Kavanaugh's Dissent Op. 755. Unfortunately, the central reason for the bypass process is that pregnant girls and women too often find themselves in dysfunctional and sometimes dangerous situations—such as with sexually or physically ***740** abusive parents and spouses—in which those networks have broken down. *See* Texas Family Code § 33.003(i-3) (authorizing bypass when the court finds that "the notification and attempt to obtain consent would not be in the best interest of the minor[ ]"). It thus would require a troubling and dramatic rewriting of Supreme Court precedent to make the sufficiency of someone's "network" an added factor in delaying the exercise of reproductive choice even after compliance with all state-mandated procedures.

"Voluntary" departure is not a constitutionally adequate choice either given both the life-threatening abuse that J.D. claims to face upon return, and her potential claims of legal entitlement to remain in the United States. *See* Sealed Decl.; 8 U.S.C. § 1101(a)(27)(J) (special immigrant juvenile status); 8 C.F.R. § 204.11.[3] Notably, while presenting a legal argument that relied heavily on voluntary departure to defend its abortion prohibition, government counsel was unable to confirm at oral argument whether or how voluntary departure actually works for unaccompanied minors over whom the government is exercising custody. *See* Oral Arg. 28:15–28:50; *cf.* 6 U.S.C. § 279(b)(2)(B) (restricting the release of unaccompanied minors on their own recognizance). The government has put nothing in the record to suggest that it is in the practice of putting children on airplanes all alone and just shipping them back to abusive and potentially life-endangering situations.

2. Facilitation

The government argues that it need not "facilitate" J.D.'s decision to terminate her pregnancy. But the government is engaged in verbal alchemy. To "facilitate" something means "[t]o make (an action, process, *etc.*) easy or easier; to promote, help forward; to assist in bringing about (a particular end or result)."[4] This case does not ask the government to make things easier for J.D. The government need not pay for J.D.'s abortion; she has that covered (with the assistance of her guardian *ad litem*). The government need not transport her at any stage of the process; J.D. and her guardian *ad litem* have arranged for that. Government officials themselves do not even have to do any paperwork or undertake any other administrative

measures. The contractor detaining J.D. has advised that it is willing to handle any necessary logistics, just as it would for medical appointments if J.D. were to continue her pregnancy. The government also admitted at oral argument that, in light of the district court's order, the Department of Health and Human Services does not even need to complete its own self-created internal "best interests" form. *See* Oral Arg. 31:40–33:15. So on the record of this case, the government does not have to facilitate—make easier—J.D.'s termination of ***741** her pregnancy. It just has to not interfere or make things *harder*.

The government's suggestion of sponsorship as a facilitation-free panacea also overlooks that it would require substantial governmental effort and resources for J.D. to be placed into the hands of a sponsor who must enter into an agreement with the government and is responsible for ensuring the minor's appearance at all immigration proceedings.[5] While after expending all of its resources to find, vet and approve the transfer, the government's ongoing ties to sponsors are presumably less than for a grantee, the government has put no facts in the record or any argument as to why that difference in degree should be constitutionally sufficient. In any event, transferring J.D. into the custody of the guardian *ad litem* to obtain the abortion would require far *less* use of governmental resources and personnel and far less facilitation. The government's desire to have as little to do as possible with J.D.'s exercise of her constitutional right while in custody thus seems erratic.

The government's claim that it does not think that an abortion is in J.D.'s best interests does not work either. The judicial bypass already put that best interests decision in J.D.'s hands. On top of that, the government does not even claim that it is making an individualized "best interests" judgment in forbidding J.D.'s abortion. It is simply supplanting her legally authorized best interests judgment with its own categorical position against abortion—which is something not even a parent or spouse or State could do. Only the big federal government gets this veto, we are told.

The government unquestionably is fully entitled to have its own view preferring the continuation of pregnancy, and to even require the disclosure of information expressing that view. But the government's mere opposition to J.D.'s decision is not an individualized "best interests" judgment within any legally recognized meaning of that term, and its asserted categorical bar to abortion is without constitutional precedent.

3. Abuse of Discretion Review

In resolving this case, it must be remembered that this case arises on abuse-of-discretion review of a district court's injunctive order. *See*, *e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). And the expedition with which the panel and now the en banc court have acted underscores that time is a zero-sum matter in this case. J.D. is already into the second trimester of her pregnancy, which means that, as days slip by, the danger that the delayed abortion procedure poses to her health increases materially. We are told that waiting even another week could increase the risk to J.D.'s health, the potential complexity of the procedure, and the great difficulty of locating an abortion provider in Texas.[6] ***742** The sealed declaration filed in this case attests that a compelled return to her country at this time would expose her to even more life-threatening physical abuse.

The irreparable injury to J.D. of postponing termination of her pregnancy—the weekly magnification of the risks to her health and the ever-increasing practical barriers to obtaining an abortion in Texas—have never been factually contested by the government. J.D.'s counsel has advised, and the government has not disputed, that she is on the cusp of having to travel hundreds of miles to obtain an abortion. *See* Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 9 (representing that, as of October 19, 2017, depending on which doctor is available, it may be that J.D.'s "only option next week would be to travel hundreds of miles to a more remote clinic"); Reh'g Pet. 5; *supra* note 6. Likewise, at no time before the district court or the panel did the government's briefing or oral argument dispute J.D.'s claim of severe child abuse or ask for fact finding on that claim.

On the other side of the balance, the government asserts only its opposition to an abortion by J.D. as an unaccompanied minor in the custody of a Department of Health and Human Services grantee. That is an acutely selective form of resistance since the government acknowledges it would not apply were J.D. to turn 18 and be moved to Immigration and Customs Enforcement custody or were she a convicted criminal in Bureau of

Prisons custody. Oral Arg. 9:20–11:45. Under current governmental policy and regulations, those women are permitted to terminate their pregnancies.[7] Given that dissonance in the government's position, the balancing of interests weighs heavily in J.D.'s favor.

In short, I fully agree with the en banc court's decision to deny the government's motion for a stay and to remand for further expeditious proceedings and any appropriate fact finding, especially in light of the factual disputes surfaced for the first time in the rehearing papers.

Because J.D.'s right to an abortion under the Due Process Clause is unchallenged and because J.D. has done everything that Texas law requires (and more) to obtain an abortion, the government bore the burden of coming forward with a constitutionally sufficient justification for flatly forbidding termination of her pregnancy. The government's mere hope that an unaccompanied, abused child would ***743** make the problem go away for it by either (i) surrendering all of her legal rights and leaving the United States, or (ii) finding a sponsor the government itself could never find is not a remotely constitutionally sufficient reason for depriving J.D. of any control over this most intimate and life-altering decision. The court today correctly recognizes that J.D.'s unchallenged right under the Due Process Clause affords this 17-year-old a modicum of the dignity, sense of self-worth, and control over her own destiny that life seems to have so far denied her.

Karen LeCraft Henderson, Circuit Judge, dissenting:

Does an alien minor who attempts to enter the United States eight weeks pregnant—and who is immediately apprehended and then in custody for 36 days between arriving and filing a federal suit—have a constitutional right to an elective abortion? The government has inexplicably and wrongheadedly failed to take a position on that antecedent question. I say wrongheadedly because at least to me the answer is plainly—and easily—no. To conclude otherwise rewards lawlessness and erases the fundamental difference between citizenship and illegal presence in our country.

The en banc Court endorses or at least has no problem with this result. By virtue of my colleagues' decision, a pregnant alien minor who attempts to enter the United States illegally is entitled to an abortion, assuming she complies with state abortion restrictions once she is here. Under my colleagues' decision, the minor need not have "developed substantial connections with this country," *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), as the plaintiff here plainly has not. Under my colleagues' decision, the minor need not have "effected an entry into the United States," *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), because the plaintiff here did not, *see id.* (alien "paroled into the United States pending admissibility," without having "gained [a] foothold," has "not effected an entry"). Under my colleagues' decision, it is difficult to imagine an alien minor anywhere in the world who will not have a constitutional right to an abortion in this country. Their action is at odds with Supreme Court precedent. It plows new and potentially dangerous ground. Accordingly, I dissent from the vacatur of the stay pending appeal.

I. BACKGROUND

In or about early July 2017, 17-year-old Jane Doe (J.D.) became pregnant. On or about September 7, 2017, she attempted to enter the United States illegally and unaccompanied. By J.D.'s own admission, authorities detained her "upon arrival." District Court Docket Entry (Dkt. No.) 1-13 at 1. She has since remained in federal custody—in a federally funded shelter—because she is an "unaccompanied alien child." 6 U.S.C. § 279(g)(2) ("unaccompanied alien child" is "a child who," *inter alia*, "has no lawful immigration status in the United States" and "has not attained 18 years of age").

The Office of Refugee Resettlement (ORR) of the United States Department of Health and Human Services (HHS) is responsible for "unaccompanied alien children who are in Federal custody by reason of their immigration status." 6 U.S.C § 279(b)(1)(A). In March 2008, HHS announced a "[p]olicy" that "[s]erious medical services, including ... abortions, ... require heightened ORR involvement." HHS, *Medical Services Requiring Heightened ORR Involvement* (Mar. 21, 2008), perma.cc/LDN8-JNL5. In March 2017, ***744** consistent with that policy, ORR further announced that shelter personnel "are prohibited from taking any action that facilitates an abortion without direction and approval from the Director of ORR." Dkt. No. 3-5 at 2.

According to the declaration of an ORR official, J.D. was physically examined while in custody and "was informed that she [is] pregnant." Dkt. No. 10-1 at 2. J.D.'s counsel interprets the declaration to say that "J.D. did not learn that she was pregnant until after her arrival in the United States." Pl.'s Opp. to Defs.' Emergency Mot. for Stay Pending Appeal (Opp.) 22-23; *see also* Panel Dissent of Millett, J. (Panel Dissent) 2 ("After entering the United States, [J.D.] ... learned that she is pregnant."). But the declaration does not rule out that J.D. knew she was pregnant even before the examination. Nor has J.D. herself alleged that she first learned of her pregnancy in this country. *See generally* Dkt. No. 1-13 at 1 (J.D.'s declaration in support of complaint). And it is highly likely she knew when she attempted to enter the United States that she was pregnant, as she was at least eight weeks pregnant at the time. [1] Notably, elective abortion is illegal in J.D.'s home country. Oral Arg. Recording 29:19-29:34.

J.D. requested an abortion. The evidence before us is that it is an elective abortion: nothing indicates it is necessary to preserve J.D.'s health. [2] J.D.'s request was relayed to the ORR Director, who denied it. On October 13, 2017—having spent a mere 36 days in the United States, all of them in custody—J.D. filed suit in district court, enlisting this country's courts to vindicate (*inter alia*) her alleged Fifth Amendment right to an abortion. The next day, she applied for a temporary restraining order (TRO) and moved for a preliminary injunction.

The government opposed J.D.'s application and motion. For reasons known only to the government, it did not take a position on whether J.D.—as an alien who attempted to enter the United States illegally and who has no substantial connections with this country—has any constitutional right to an abortion. Instead the government argued that ORR has placed no "undue burden" on the alleged right. Dkt. No. 10 at 11-16 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)). At the TRO hearing, the district court repeatedly pressed the government about whether J.D. has a constitutional right to an abortion. The government emphasized that it was "not taking a ... position" but was "not going to give [the court] a concession" either. Opp., Supplement 14.

The district court issued a TRO requiring that the government allow J.D. to be transported to an abortion provider for performance of the procedure. The government appealed the TRO to this Court and sought a stay pending appeal. At oral argument, the government repeatedly stated that it takes no position on whether J.D. has a constitutional right to an abortion, Oral Arg. Recording 8:10-8:46, 16:43-17:12, and that it instead "assume[s] for the purposes of ... argument" that she has such a right, Oral Arg. Recording 17:27-17:52. [3]

***745** On October 20, 2017, over a dissent, a motions panel of this Court issued an order directing the district court to allow HHS until close of business October 31 to find a suitable sponsor to take custody of J.D. so that HHS can release her from its custody. Without deciding whether J.D. has a constitutional right to an abortion, the panel concluded that a short delay to secure a sponsor does not unduly burden any alleged right if the process is expeditiously completed by close of business October 31.

On October 22, 2017, J.D. filed a petition for rehearing en banc. Today, the Court grants the petition, vacates the panel's October 20 order and denies the government's motion for stay pending appeal "substantially for the reasons set forth in" the panel dissent.

II. ANALYSIS

As I noted at the outset, the en banc Court's decision in effect means that a pregnant alien minor who attempts to enter the United States illegally is entitled to an abortion, assuming she complies with state abortion restrictions once she is here. Although the government has for some reason failed to dispute that proposition, it is not the law.

A. WE CAN AND MUST DECIDE THE ANTECEDENT QUESTION OF WHETHER J.D. HAS A CONSTITUTIONAL RIGHT TO AN ABORTION.

The Supreme Court has held that if a party "fail[s] to identify and brief" "an issue 'antecedent to ... and ultimately dispositive of' the dispute," an appellate court may consider the issue *sua sponte*. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990)); *cf. United States v. Bowie*, 198 F.3d 905, 913 (D.C. Cir. 1999) ("We are never bound to accept

the government's confession of error" (citing *Young v. United States*, 315 U.S. 257, 258, 62 S.Ct. 510, 86 L.Ed. 832 (1942), *United States v. Pryce*, 938 F.2d 1343, 1351-52 (D.C. Cir. 1991) (Randolph, J., concurring))). Here, the question of whether J.D. has a constitutional right to an abortion is "antecedent to" any issue of undue burden. And the antecedent question is "dispositive of" J.D.'s Fifth Amendment claim, at least now that my colleagues have reinstated the TRO on the apparent theory that the claim is likely meritorious. Accordingly, we can and should expressly decide the antecedent question.

True, we should not ordinarily confront a broad constitutional question "if there is also present some other ground upon which the case may be disposed of," *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring), including if the alternative is a "narrower" constitutional ground, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999).[4] But in the analogous ***746** context of qualified immunity, we are "permitted ... to avoid avoidance—that is, to determine whether a right exists before examining" the narrower question of whether the right "was clearly established" at the time an official acted. *Camreta v. Greene*, 563 U.S. 692, 706, 131 S.Ct. 2020, 179 L.Ed.2d 1118 (2011). Our discretion in that area rests on the recognition that it "is sometimes beneficial to clarify the legal standards governing public officials." *Id.* at 707, 131 S.Ct. 2020. The same interest is, to put it mildly, implicated here. Border authorities, immigration officials and HHS itself would be well served to know ex ante whether pregnant alien minors who come to the United States in search of an abortion are constitutionally entitled to one. And under today's decision, pregnant alien minors the world around seeking elective abortions will be on notice that they should make the trip.[5]

Granted, because of the government's failure to take a position,[6] we in theory have discretion *not* to decide the antecedent question. But in reality the ship has sailed: as a result of my colleagues' decision, J.D. will soon be on her way to an abortion procedure she would not receive absent her invocation of the Fifth Amendment. If ever there were a case in which the public interest compels us to exercise our "independent power to identify and apply the proper construction of governing law" irrespective of a party's litigating position, *U.S. Nat'l Bank of Or.*, 508 U.S. at 446, 113 S.Ct. 2173 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991)), this is it. The stakes, both in the short run and the long, could scarcely be higher.

B. J.D. HAS NO CONSTITUTIONAL RIGHT TO AN ABORTION.

J.D. is not a U.S. citizen. She is not a permanent resident, legal or otherwise. According to the record, she has no connection to the United States, let alone "substantial" connections. Despite her physical presence in the United States, J.D. has never entered the United States ***747** as a matter of law and cannot avail herself of the constitutional rights afforded those legally within our borders. Accordingly, under a correct interpretation of the law, J.D. has virtually no likelihood of success on the merits and the TRO issued by the district court should remain stayed. *See Mazurek v. Armstrong*, 520 U.S. 968, 970, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (preliminary injunctive relief unavailable if the plaintiff cannot establish a likelihood of success on the merits).

"The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). Thus a young girl detained at Ellis Island for a year, and then released to live with her father in the United States for nearly a decade, "was to be regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared." *Kaplan v. Tod*, 267 U.S. 228, 230, 45 S.Ct. 257, 69 L.Ed. 585 (1925). Even after she was no longer detained, "[s]he was still in theory of law at the boundary line and had gained no foothold in the United States." *Id.* Nearly six decades ago the Supreme Court had already said that "[f]or over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." *Leng May Ma v. Barber*, 357 U.S. 185, 188, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958).

Aliens who have entered the United States—even if illegally—enjoy "additional rights and privileges not extended to those ... who are merely 'on the threshold of initial entry.' " *Id.* at 187, 78 S.Ct. 1072 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S.

206, 212, 73 S.Ct. 625, 97 L.Ed. 956 (1953)). "[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). Until then—before developing the "substantial connections" that constitute "entry" for an illegally present alien—"[t]he Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon*, 326 U.S. 135, 161, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945) (Murphy, J., concurring).

We have repeatedly recognized this principle, as have our sister circuits and, most important, as has the Supreme Court. *See Kerry v. Din*, —— U.S. ——, 135 S.Ct. 2128, 2140, 192 L.Ed.2d 183 (2015) (Kennedy, J., concurring in the judgment); *Demore v. Kim*, 538 U.S. 510, 546, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003); *Shaughnessy*, 345 U.S. at 215, 73 S.Ct. 625; *Kaplan*, 267 U.S. at 230, 45 S.Ct. 257; *United States v. Ju Toy*, 198 U.S. 253, 263, 25 S.Ct. 644, 49 L.Ed. 1040 (1905) (alien petitioner, "although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate"); *Kiyemba v. Obama*, 555 F.3d 1022, 1036-37 n.6 (D.C. Cir. 2009) (Rogers, J., concurring in the judgment) (quoting *Mezei*, *Leng May Ma* and *Ju Toy* in support of proposition that habeas court can order detainee brought within U.S. territory without thereby effecting detainee's "entry" for any other purpose), *vacated on other grounds*, 559 U.S. 131, 130 S.Ct. 1235, 175 L.Ed.2d 1070 (2010); *Ukrainian-Am. Bar Ass'n, Inc. v. Baker*, 893 F.2d 1374, 1383 (D.C. Cir. 1990) (Sentelle, J., concurring) (summarizing the ***748** entry doctrine).[7] Because she has never entered the United States, J.D. is not entitled to the due process protections of the Fifth Amendment. *See Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003) ("As an unadmitted alien present in the United States, Albathani's due process rights are limited"). This is, or should be, clear from the controlling and persuasive authorities marshaled above, which are only a fraction of the whole.

Even if J.D. did enjoy the protections of the Due Process Clause, however, due process is not an "all or nothing" entitlement. In some cases "[i]nformal procedures will suffice," *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); "consideration of what procedures due process may require" turns on "the precise nature of the government function" and the private interest. *Cafeteria Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). What the Congress and the President have legitimately deemed appropriate for aliens "on the threshold" of our territory, the judiciary may not contravene. "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter.... As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, *are due process of law*." *Nishimura Ekiu v. United States*, 142 U.S. 651, 660, 12 S.Ct. 336, 35 L.Ed. 1146 (1892) (emphasis added). There is a "class of cases" in which "the acts of executive officers, done under the authority of congress, [are] conclusive." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 284, 15 L.Ed. 372 (1855). Among that class of cases are those brought by aliens abroad, including those who are "abroad" under the entry doctrine. *See Din*, 135 S.Ct. at 2139-40 (Kennedy, J., concurring in the judgment); *Kleindienst v. Mandel*, 408 U.S. 753, 769-70, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972).

Mandel teaches that the Congress's "plenary power" over immigration requires the courts to strike a balance between private and public interests different from the due process that typically ***749** obtains. The Supreme Court "without exception has sustained" the Congress's power to exclude aliens, a power "inherent in sovereignty," consistent with "ancient principles" of international law and "to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765-66, 92 S.Ct. 2576. Indeed, "over no conceivable subject is the legislative power of Congress more complete." *Id.* at 766, 92 S.Ct. 2576 (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 53 L.Ed. 1013 (1909)) (alteration omitted). The Congress's power to exclude includes the power "to prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention." *Id.* (quoting *Lem Moon Sing v. United States*, 158 U.S. 538, 547, 15 S.Ct. 967, 39 L.Ed. 1082 (1895)). Whatever the merits of different applications of due process "were we writing on a clean slate," "the slate is not clean." *Id.* (quoting *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 98 L.Ed. 911 (1954)). We must therefore yield to the Executive, exercising the power lawfully delegated

to him, when he "exercises this power negatively on the basis of a facially legitimate and bona fide reason." *Id.* at 770, 92 S.Ct. 2576. Moreover, this deference is required even when the constitutional rights of U.S. citizens are affected: we may not "look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests" of *citizens* "who seek personal communication with" the excluded alien. *Id.* Thus in *Mandel*, the Executive permissibly prohibited an alien communist intellectual to travel to the United States, where he had been scheduled to speak at several universities.

Applying *Mandel*, the Supreme Court recently approved the Executive's denial of entry to an Afghan man whose U.S.-citizen wife was waiting for him in this country. *Din*, 135 S.Ct. at 2131 (plurality opinion). The Court in *Din* was divided not only over whether the wife had any due process interest in her husband's attempt to immigrate but also over whether that hypothetical interest had been infringed. *Compare id.* (plurality opinion) (three justices concluding that there is no due process right "to live together with [one's] spouse in America"), *with id.* at 2139 (Kennedy, J., concurring in the judgment) (two justices concluding that, even if such a right exists, the Government's visa-denial notice is all that due process can require). Citing *Mandel*, Justice Kennedy reasoned that the government's action in *Din* was valid, even though it "burden[ed] a citizen's own constitutional rights," because it was made "on the basis of a facially legitimate and bona fide reason." *Id.* at 2139 (Kennedy, J., concurring in the judgment) (quoting *Mandel*, 408 U.S. at 770, 92 S.Ct. 2576).[8] Justice Scalia, writing for himself, the Chief Justice and Justice Thomas, criticized the dissent's endorsement of the novel substantive due process right asserted by the plaintiff, which he characterized as, "in any world other than the artificial world of ever-expanding constitutional rights, nothing more than a deprivation of her spouse's freedom to immigrate into America." *Id.* at 2131 (plurality opinion).

Mandel applies with all the more force here, where a substantive due process right is asserted not by a U.S. citizen, nor by a lawful-permanent-resident alien, nor even by an *illegally* resident alien, but by ***750** an alien minor apprehended attempting to cross the border illegally and thereafter detained by the federal government. If J.D. can be detained indefinitely—which she can be, *see Zadvydas*, 533 U.S. at 693, 121 S.Ct. 2491 (distinguishing *Shaughnessy*, 345 U.S. 206, 73 S.Ct. 625)—and if she can be returned to her home country to prevent her from engaging in disfavored political speech in this country—which she can be, *Mandel*, 408 U.S. at 770, 92 S.Ct. 2576—and if she can be paroled into the United States for a decade or more, *Kaplan*, 267 U.S. at 230, 45 S.Ct. 257, register for the draft, *Ng Lin Chong v. McGrath*, 202 F.2d 316, 317 (D.C. Cir. 1952), and see her parents naturalized, *Gonzalez v. Holder*, 771 F.3d 238, 239 (5th Cir. 2014), only for her *still* to be deported with cursory notice, 8 U.S.C. § 1225—then she cannot successfully assert a due process right to an elective abortion.

In concluding otherwise, the Court elevates the right to elective abortion above every other constitutional entitlement. Freedom of expression, *Mandel*, 408 U.S. at 770, 92 S.Ct. 2576, freedom of association, *Galvan*, 347 U.S. at 523, 74 S.Ct. 737, freedom to keep and bear arms, *United States v. Carpio-Leon*, 701 F.3d 974, 975 (4th Cir. 2012), freedom from warrantless search, *Verdugo-Urquidez*, 494 U.S. at 274-75, 110 S.Ct. 1056, and freedom from trial without jury, *Johnson v. Eisentrager*, 339 U.S. 763, 784-85, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) all must yield to the "plenary authority" of the Congress and the Executive, acting in concert, to regulate immigration; but the freedom to terminate one's pregnancy is more fundamental than them all? This is not the law.[9]

The panel dissent warned of outlandish scenarios that will follow from staying the TRO,[10] Panel Dissent 9, but a stay maintains the legal status quo. The United States remains a signatory to the U.N. Convention Against Torture; our law imposes civil liability on government agents who commit torts and criminal liability on those who commit crimes; and counsel ***751** have access to detained alien minors, as have J.D.'s counsel. The Constitution does not, and need not, answer every question but diabetics, rape victims and women whose pregnancies threaten their lives are nevertheless provided for. *Contra* Panel Dissent 9.

Although the panel dissent found "deeply troubling" the argument "that J.D. is not a person in the eyes of our Constitution," the argument is nevertheless correct.[11] The panel dissent's contrary conclusion is based on a misunderstanding of the Supreme Court's immigration due process decisions, including a mistaken reliance on the dissent in *Jean v. Nelson*, 472 U.S. 846, 875, 105 S.Ct.

2992, 86 L.Ed.2d 664 (1985) (Marshall, J., dissenting). Writing for the Court in *Jean*, then-Justice Rehnquist expressly declined to opine on the alien plaintiffs' due process rights, *see id.* at 857, 105 S.Ct. 2992 (majority opinion), much less to hold—as Justice Marshall would have done—that "regardless of immigration status, aliens within the territorial jurisdiction of the United States are 'persons' entitled to due process under the Constitution." The Supreme Court has never so held. [12] *Contra* Panel Dissent 9.

It is the panel dissent's (and now the Court's) position that will unsettle the law, potentially to dangerous effect. Having discarded centuries of precedent and policy, the majority offers no limiting principle to constrain this Court or any other from following today's decision to its logical end. If the Due Process Clause applies to J.D. with full force, there will be no reason she cannot donate to political campaigns, despite 52 U.S.C. § 30121's prohibition on contributions by nonresident foreign nationals inasmuch as freedom of political expression is plainly fundamental to our system of ordered liberty. *See Citizens United v. FEC*, 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010). I see no reason that she may not possess a firearm, notwithstanding 18 U.S.C. § 922(g)(5)'s prohibition on doing so while "illegally or unlawfully in the United States," *see Carpio-Leon*, 701 F.3d at 975, inasmuch as "the Second Amendment conferred an individual right to keep and bear arms," *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), in recognition of the "basic right" of self-defense, *McDonald v. City of Chicago*, 561 U.S. 742, 767, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). Even the government's ability to try accused war criminals before U.S. military commissions in theater must be reconsidered as it is premised on the Fifth Amendment's territoriality requirement, which today, by vacating the stay, the Court has so summarily eroded. *See Eisentrager*, 339 U.S. at 784-85, 70 S.Ct. 936.

Heedless of the entry doctrine, its extensive pedigree in our own precedent and its ***752** controlling effect in this case, the Court today assumes away the question of what (if any) process is due J.D. and proceeds to a maximalist application of some of the most controverted case law in American jurisprudence. It does so over the well-founded objections of an Executive authorized to pursue its legitimate interest in protecting fetal life. *See Gonzales v. Carhart*, 550 U.S. 124, 145, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) ("the government has a legitimate and substantial interest in preserving and promoting fetal life"); *Casey*, 505 U.S. at 853, 112 S.Ct. 2791 (recognizing States' "legitimate interests in protecting prenatal life"); *Roe v. Wade*, 410 U.S. 113, 150, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (recognizing "the State's interest—some phrase it in terms of duty—in protecting prenatal life"). Far from faithfully applying the Supreme Court's abortion cases, this result contradicts them, along with a host of immigration and due-process cases the Court declines even to acknowledge. *Garza v. Hargan* today takes its place in the pantheon of abortion-exceptionalism cases.

Accordingly, I respectfully dissent.

Kavanaugh, Circuit Judge, with whom Circuit Judges Henderson and Griffith join, dissenting:
The en banc majority has badly erred in this case.

The three-judge panel held that the U.S. Government, when holding a pregnant unlawful immigrant minor in custody, may seek to expeditiously transfer the minor to an immigration sponsor before the minor makes the decision to obtain an abortion. That ruling followed from the Supreme Court's many precedents holding that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion. The Supreme Court has repeatedly held that the Government may further those interests so long as it does not impose an undue burden on a woman seeking an abortion.

Today's majority decision, by contrast, "substantially" adopts the panel dissent and is ultimately based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision. The majority's decision represents a radical extension of the Supreme Court's abortion jurisprudence. It is in line with dissents over the years by Justices Brennan, Marshall, and Blackmun, not with the many majority opinions of the Supreme Court that have repeatedly upheld reasonable regulations that do not impose an undue burden on the abortion right recognized by the Supreme Court in *Roe v. Wade*. [1]

To review: Jane Doe is 17 years old. She is a foreign citizen. Last month, she was detained shortly after she illegally crossed the border into Texas. She is now in a U.S. Government detention facility in Texas for unlawful immigrant minors. She is 15-weeks ***753** pregnant and wants to have an abortion. Her home country does not allow elective abortions.

All parties to this case recognize *Roe v. Wade* and *Planned Parenthood v. Casey* as precedents we must follow. All parties have assumed for purposes of this case, moreover, that Jane Doe has a right under Supreme Court precedent to obtain an abortion in the United States. One question before the en banc Court at this point is whether the U.S. Government may expeditiously transfer Jane Doe to an immigration sponsor before she makes the decision to have an abortion. Is that an undue burden on the abortion right, or not?

Contrary to a statement in the petition for rehearing en banc, the three-judge panel's order did not avoid that question. The panel confronted and resolved that question.

First, the Government has assumed, presumably based on its reading of Supreme Court precedent, that an unlawful immigrant minor such as Jane Doe who is in Government custody has a right to an abortion. The Government has also expressly assumed, again presumably based on its reading of Supreme Court precedent, that the Government lacks authority to block Jane Doe from obtaining an abortion. For purposes of this case, all parties have assumed, in other words, that unlawful immigrant minors such as Jane Doe have a right under Supreme Court precedent to obtain an abortion in the United States.

Second, under Supreme Court precedent in analogous contexts, it is not an undue burden for the U.S. Government to transfer an unlawful immigrant minor to an immigration sponsor before she has an abortion, so long as the transfer is expeditious.

For minors such as Jane Doe who are in U.S. Government custody, the Government has stated that it will not provide, pay for, or otherwise facilitate the abortion but will transfer custody of the minor to a sponsor pursuant to the regular immigration sponsor program. Under the regular immigration sponsor program, an unlawful immigrant minor leaves Government custody and ordinarily goes to live with or near a sponsor. The sponsor often is a family member, relative, friend, or acquaintance. Once Jane Doe is transferred to a sponsor in this case, the Government accepts that Jane Doe, in consultation with her sponsor if she so chooses, will be able to decide to carry to term or to have an abortion. [2]

The panel order had to make a decision about how "expeditious" the transfer had to be. Given the emergency posture in which this case has arisen, the panel order prudently did not purport to define "expeditious" for all future cases. But the panel order set a date of October 31—which is 7 days from now—by which the transfer had to occur. For future cases, the term "expeditious" presumably would entail some combination of (i) expeditious from the time the Government learns of the pregnant minor's desire to have an abortion and (ii) expeditious in the sense that the transfer to the sponsor does not occur too late in the pregnancy for a safe abortion to occur. [3] In this case, although the process by which the case has arrived here has been marked by understandable confusion over the law and by litigation filed by plaintiff in multiple forums, the panel order ***754** concluded that a transfer by October 31—which is 7 days from now—was permissibly expeditious. This would entail transfer in week 16 or 17 of Jane Doe's pregnancy, and the Government agrees that she could have the abortion immediately after transfer, if she wishes.

Third, what happens, however, if a sponsor is not found by October 31 in this case? What happens generally if transfer to a sponsor does not occur expeditiously? To begin with, a declaration we just received from the Government states: "while difficult, it is possible to complete a sponsorship process for J.D. by 5 P.M. Eastern on October 31, 2017." The declaration also lists several ongoing efforts regarding the sponsorship process. The declaration adds that all components of the U.S. Government "are willing to assist in helping expedite the process."

But if transfer does not work, given existing Supreme Court precedent and the position the Government has so far advanced in this litigation, it could turn out that the Government will be required by existing Supreme Court precedent to allow the abortion, even though the minor at that point would still be residing in a U.S. Government detention facility. If so, the Government

would be in a similar position as it is in with adult women prisoners in federal prison and with adult women unlawful immigrants in U.S. Government custody. The U.S. Government allows women in those circumstances to obtain an abortion. In any event, we can immediately consider any additional arguments from the Government if and when transfer to a sponsor is unsuccessful.

In sum, under the Government's arguments in this case and the Supreme Court's precedents, the unlawful immigrant minor is assumed to have a right under precedent to an abortion; the Government may seek to expeditiously transfer the minor to a sponsor before the abortion occurs; and if no sponsor is expeditiously located, then it could turn out that the Government will be required by existing Supreme Court precedent to allow the abortion, depending on what arguments the Government can make at that point. These rules resulting from the panel order are consistent with and dictated by Supreme Court precedent.

The three-judge panel reached a careful decision that prudently accommodated the competing interests of the parties.

By contrast, under the panel dissent, which is "substantially" adopted by the majority today, the Government has to *immediately* allow the abortion upon the request of an unlawful immigrant minor in its custody, and cannot take time to first seek to expeditiously transfer the minor to an immigrant sponsor before the abortion occurs. [4]

The majority seems to think that the United States has no good reason to want to transfer an unlawful immigrant minor to an immigration sponsor before the minor has an abortion. But consider the circumstances here. The minor is alone and without family or friends. She is in a U.S. Government detention facility in a country that, for her, is foreign. She is 17 years old. She is pregnant and has to make a major life decision. Is it really absurd for ***755** the United States to think that the minor should be transferred to her immigration sponsor—ordinarily a family member, relative, or friend—before she makes that decision? And keep in mind that the Government is not forcing the minor to talk to the sponsor about the decision, or to obtain consent. It is merely seeking to place the minor in a better place when deciding whether to have an abortion. I suppose people can debate as a matter of policy whether this is always a good idea. But unconstitutional? That is far-fetched. After all, the Supreme Court has repeatedly said that the Government has permissible interests in favoring fetal life, protecting the best interests of the minor, and not facilitating abortion, so long as the Government does not impose an undue burden on the abortion decision.

It is important to stress, moreover, that this case involves a minor. We are not dealing with adults, although the majority's rhetoric speaks as if Jane Doe were an adult. The law does not always treat minors in the same way as adults, as the Supreme Court has repeatedly emphasized in the abortion context.

The majority points out that, in States such as Texas, the minor will have received a judicial bypass. That is true, but is irrelevant to the current situation. The judicial bypass confirms that the minor is capable of making a decision. For most teenagers under 18, of course, they are living in the State in question and have a support network of friends and family to rely on, if they choose, to support them through the decision and its aftermath, even if the minor does not want to inform her parents or her parents do not consent. For a foreign minor in custody, there is no such support network. It surely seems reasonable for the United States to think that transfer to a sponsor would be better than forcing the minor to make the decision in an isolated detention camp with no support network available. Again, that may be debatable as a matter of policy. But unconstitutional? I do not think so.

The majority apparently thinks that the Government must allow unlawful immigrant minors to have an immediate abortion on demand. Under this vision of the Constitution, the Government may not seek to first expeditiously transfer the minor to the custody of an immigration sponsor before she has an abortion. [5] The majority's approach is radically inconsistent with 40 years of Supreme Court precedent. The Supreme Court has repeatedly upheld a wide variety of abortion regulations that entail some delay in the abortion but that serve permissible Government purposes. These include parental consent laws, parental notice laws, informed consent laws, and waiting periods, among other regulations. Those laws, of course, may have the effect of delaying an abortion. Indeed, parental consent laws in practice can occasion real-world delays of several weeks for the minor to decide whether to seek her parents' consent and then either to

obtain that consent or instead to seek a judicial bypass. Still, the Supreme Court has upheld those laws, over vociferous dissents. *See, e.g.*, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 532, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting) ("Ohio's judicial-bypass procedure can consume up to three weeks of a young woman's pregnancy.") (citation ***756** omitted); *Hodgson v. Minnesota*, 497 U.S. 417, 465, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) ("[T]he prospect of having to notify a parent causes many young women to delay their abortions...."); *H.L. v. Matheson*, 450 U.S. 398, 439, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981) (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) ("[T]he threat of parental notice may cause some minor women to delay past the first trimester of pregnancy....").

To be sure, this case presents a new situation not yet directly confronted by the Supreme Court. But that happens all the time. When it does, our job as lower court judges is to apply the precedents and principles articulated in Supreme Court decisions to the new situations. Here, as I see it and the panel saw it, the situation of a pregnant unlawful immigrant minor in a U.S. Government detention facility is a situation where the Government may reasonably seek to expeditiously transfer the minor to a sponsor before she has an abortion.

It is undoubtedly the case that many Americans—including many Justices and judges—disagree with one or another aspect of the Supreme Court's abortion jurisprudence. From one perspective, some disagree with cases that allow the Government to refuse to fund abortions and that allow the Government to impose regulations such as parental consent, informed consent, and waiting periods. That was certainly the position of Justices Brennan, Marshall, and Blackmun in many cases. From the other perspective, some disagree with cases holding that the U.S. Constitution provides a right to an abortion.

As a lower court, our job is to follow the law as it is, not as we might wish it to be. The three-judge panel here did that to the best of its ability, holding true to the balance struck by the Supreme Court. The en banc majority, by contrast, reflects a philosophy that unlawful immigrant minors have a right to immediate abortion on demand, not to be interfered with even by Government efforts to help minors navigate what is undeniably a difficult situation by expeditiously transferring them to their sponsors. The majority's decision is inconsistent with the precedents and principles of the Supreme Court—for example, the many cases upholding parental consent laws—allowing the Government to impose reasonable regulations so long as they do not unduly burden the right to abortion that the Court has recognized.

This is a novel and highly fraught case. The case came to us in an emergency posture. The panel reached a careful decision in a day's time that, in my view, was correct as a legal matter and sound as a prudential matter. I regret the en banc Court's decision and many aspects of how the en banc Court has handled this case. [6]

I respectfully dissent.

All Citations

874 F.3d 735 (Mem)

Footnotes

* A statement by Circuit Judge Henderson, dissenting from the disposition of the case, is attached to this order.

** A statement by Circuit Judge Kavanaugh, joined by Circuit Judges Henderson and Griffith, dissenting from the disposition of the case, is attached to this order.

*** A statement by Circuit Judge Millett, concurring in the disposition of the case, is attached to this order.

**** Circuit Judge Pillard did not participate in this matter.

1 As both parties agree, the court has jurisdiction over this appeal because the district court's temporary restraining order was more akin to preliminary injunctive relief and is therefore appealable under 28 U.S.C. § 1292(a)(1). See Sampson v. Murray, 415 U.S. 61, 86 n.58, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974).

1 Because at no point in its briefing or oral argument in this court or the district court did the government dispute that J.D. has a constitutional right to obtain an abortion, the government has forfeited any argument to the contrary. *See*, *e.g.*, *Koszola v. FDIC*, 393 F.3d 1294, 1299 n.1 (D.C. Cir. 2005). In fact, at oral argument, government counsel affirmed, in

response to a direct question, that the argument was waived in this case. Oral Arg. 17:50; *see*, *e.g.*, *GSS Group Ltd. v. National Port Auth. of Liberia*, 822 F.3d 598, 608 (D.C. Cir. 2016).

2 Office of Refugee Resettlement, Section 2: Safe and Timely Release from ORR Care, available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2 (last visited Oct. 24, 2017) ("In the absence of sufficient evidence of a *bona fide social relationship* with the child and/or the child's family that existed *before* the child migrated to the United States, the child will *not* be released to that individual.") (emphases added).

3 While the government now objects that J.D. has not previously identified on which statutory basis she would seek relief from removal, Appellants' Opp'n to Reh'g Pet. 5–6, 14, J.D. has argued all along that her exercise of her unchallenged right under the Due Process Clause to an abortion could not be conditioned on her "giv[ing] up her opportunity to be reunited with family here in the United States, or forcing her to return to her home country and abuse." Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 18; *see* Pl.'s Reply in Supp. of Mot. for TRO 6 ("The government should not be allowed to use her constitutional right to access abortion as a bargaining chip to trade for immigration status[.]"). While she had not yet cited to particular statutory provisions, that presumably is because the government has not yet initiated removal proceedings.

4 *See* OXFORD ENGLISH DICTIONARY ONLINE ("facilitate" def. 1(a)), http://www.oed.com/view/Entry/67460?redirectedFrom=facilitate#eid (last visited Oct. 24, 2017).

5 *See* Office of Refugee Resettlement, Section 2.8.1: After Care Planning, available at https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2 (last visited Oct. 24, 2017).

6 Oral Arg. 1:13:45-1:15:10 (Counsel for J.D.: "Texas law requires counseling at least 24 hours in advance of the procedure by the same doctor who is to provide the abortion. Because of the limited availability of doctors to provide abortions in Texas, the same doctor is not always at the facility in south Texas. So, for example, the doctor that provided the counseling yesterday to J.D. is there today and on Saturday, but is not the same doctor who is there next week. So next week, there is a different doctor there on Monday and Tuesday, so if J.D. were allowed to have the abortion next week, she would have to be, unless this court declares otherwise, * * * counseled by this different doctor there on Monday and wait 24 hours to have the abortion on Tuesday. * * * [After Tuesday October 24, 2017], we are looking at the following week. The doctor that is there Thursday, Friday and Saturday, the following week * * * [is the doctor that only performs abortions at 15.6 weeks]. And we are very concerned that she is on the cusp, so even if she is able to go next week, she may be past the limit for that particular doctor."); Reh'g Pet. 4–5; Appellee's Opp'n to Appellants' Mot. for a Stay Pending Appeal 3; *see Williams v. Zbaraz*, 442 U.S. 1309, 1314–1315, 99 S.Ct. 2095, 60 L.Ed.2d 1033 (1979) (Stevens, J., sitting as Circuit Justice) (evidence of an increased risk of "maternal morbidity and mortality" supports a claim of irreparable injury); Linda A. Bartlett, *et al.*, *Risk Factors for Legal Induced Abortion—Related Mortality in the United States*, 103:4 OBSTETRICS & GYNECOLOGY 729 (April 2004) (relative risk from abortion increases 38% each gestational week); Cates, W. Jr, Schulz, K.F., Grimes, D.A., Tyler, C.W. Jr., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, FAMILY PLANNING PERSPECTIVES 1977; 9:266, 273 ("[I]f a woman delays beyond the eighth week up to 10 weeks, the major morbidity rate is 0.36, which is 57 percent higher than her risk at eight or fewer weeks. Similarly, if she delays her abortion procedure until the 11-12-week interval, she increases her relative risk of major morbidity by 91 percent.").

7 *See* ICE Guidelines, Detention Standard 4.4, Medical Care, available at https://www.ice.gov/doclib/detentionstandards/2011/medical_care_women.pdf; 28 C.F.R. § 551.23.

1 A recent declaration filed under seal by J.D.'s attorney ad litem provides further circumstantial evidence that J.D. left her home country because of her pregnancy. Cortez Decl. ¶ 8.

2 At oral argument, HHS stated its policy is that an emergency abortion, which it interprets to include a "medically necessary" abortion, would be allowed. Oral Arg. Recording 20:00-20:27.

3 Under insistent pressure to state whether the government was "waiving" the issue, counsel for the government said yes in the heat of the moment. Oral Arg. Recording 17:41-17:52. But the next moment, when reminded of the difference between forfeiture and waiver—a distinction that lawyers often overlook or misunderstand, *cf. Kontrick v. Ryan*, 540 U.S. 443, 458 n.13, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (even "jurists often use the words interchangeably")—counsel effectively retracted the foregoing statement, saying she was "not authorized to take a position" on whether J.D. has a constitutional right to an abortion, Oral Arg. Recording 17:52-18:51.

4 We cannot duck a broad constitutional question if the alternative ground is not "an adequate basis for decision." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 184, 119 S.Ct. 1923. At the panel stage, the possibility of expeditious sponsorship was an adequate narrower basis for our decision to briefly *delay* J.D.'s abortion. By contrast, today's result—which has the real-world effect of *entitling* J.D. to an abortion—is difficult to explain unless it rests at least in part on the proposition

that J.D. has a constitutional right to an abortion. Even if I were to assume, without in any way conceding, that J.D. had such a constitutional right, I would nonetheless stand by the panel order.

5 The panel dissent paid lip service to constitutional avoidance, Panel Dissent 8, before sweepingly declaring that when alien minors "find themselves on our shores and pregnant" and seeking an abortion, "the *Constitution* forbids the government from directly or effectively prohibiting their exercise of that *right* in the manner it has done here." Panel Dissent 9-10 (emphases added). That is not judicial modesty.

6 I could not disagree more strongly with Judge Millett's characterization of the government's position on the merits—i.e., that it outright "waived" any contention that J.D. has no constitutional right to an abortion. Millett Concurrence 737 n.1. She must have read different papers and listened to a different argument from the ones I read and listened to. A waived argument "is one that a party has knowingly and intelligently relinquished." *Wood v. Milyard*, 566 U.S. 463, 132 S.Ct. 1826, 1832 n.4, 182 L.Ed.2d 733 (2012). The government has declared time and again that it is not taking a position on whether J.D. has a constitutional right to an abortion. That is not waiver. Government counsel in the district court stated that he was neither raising nor conceding the point. That is not waiver. Government counsel in this Court stated that she lacked authority to take a position. That, too, is not waiver: counsel who disclaims such authority cannot relinquish an argument any more than she can advance one. All this is beside the point, however, because of our independent duty to declare the law. *See U.S. Nat'l Bank of Or.*, 508 U.S. at 446, 113 S.Ct. 2173.

7 *See also Albathani v. INS*, 318 F.3d 365, 375 (1st Cir. 2003); *Nwozuzu v. Holder*, 726 F.3d 323, 330 n.6 (2d Cir. 2013) (discussing *Kaplan*); *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954) ("in a literal and physical sense a person coming from abroad enters the United States whenever he reaches any land, water or air space within the territorial limits of this nation" but "those who have come from abroad directly to [an inspection] station seeking admission in regular course have not been viewed by the courts as accomplishing an 'entry' by crossing the national boundary in transit or even by arrival at a port so long as they are detained there pending formal disposition of their requests for admission"); *United States v. Carpio-Leon*, 701 F.3d 974, 981 (4th Cir. 2012) ("the crime of illegal entry inherently carries this additional aspect that leaves an illegal alien's status substantially unprotected by the Constitution in many respects"); *Gonzalez v. Holder*, 771 F.3d 238, 245 (5th Cir. 2014) (alien who entered the United States illegally at age seven and remained for the next 17 years was, under *Kaplan*, deportable and ineligible for derivative citizenship despite his father's intervening naturalization); *Vitale v. INS*, 463 F.2d 579, 582 (7th Cir. 1972) (paroled alien "did not effect an entry into the United States"); *Montgomery v. Ffrench*, 299 F.2d 730, 733 (8th Cir. 1962) (discussing *Kaplan*); *United States v. Argueta-Rosales*, 819 F.3d 1149, 1158 (9th Cir. 2016) ("for immigration purposes, 'entry' is a term of art requiring not only physical presence in the United States but also freedom from official restraint"); *United States v. Canals-Jimenez*, 943 F.2d 1284, 1286, 1288 (11th Cir. 1991) (reversing conviction of alien "found in" the United States illegally because alien never "entered" the United States in the sense of *Kaplan* and *Leng May Ma*).

8 Justice Kennedy's opinion in *Din*, because it is narrower than the plurality opinion, is controlling. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

9 The panel dissent simply assumed that the Supreme Court's abortion decisions involving U.S. citizen women—from *Roe v. Wade* to *Whole Woman's Health*—apply *mutatis mutandis* to illegal alien minors. There is no legal analysis to support this assumption, *see generally* Panel Dissent 3-6, which is untenable for the reasons I have described. Judge Millett's subsequent opinion concurring in the Court's en banc disposition does nothing to address that deficit, offering scarce authority to support its assertion of the thwarting of a "grave constitutional wrong" by the government and none that addresses the antecedent constitutional question, which the Court must decide but which Judge Millett dismisses as waived. Millett Concurrence 737 n.1.

I cannot improve on the Chief Justice's criticism of the "false premise" that

> our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law. It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that "[i]f it is not necessary to decide more, it is necessary not to decide more," sometimes it *is* necessary to decide more. There is a difference between judicial restraint and judicial abdication. When constitutional questions are "indispensably necessary" to resolving the case at hand, "the court must meet and decide them."

Citizens United v. FEC, 558 U.S. 310, 375, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (Roberts, C.J., concurring) (quoting *Ex parte Randolph*, 20 F.Cas. 242, 254 (No. 11558) (CC Va. 1833) (Marshall, C.J.)).

10 My colleague's characterization of this case, *see, e.g.*, Millett Concurrence 13, gives it an undeservedly melodramatic flavor—and indeed, from the record, especially the sealed affidavit of ORR's Jonathan White, is contrary to fact. Sealed

Supp. to Defs.' Resp. to Pl.'s Pet. for Reh'g En Banc (Oct. 23, 2017). J.D. may be sympathetic. But even the sympathetic are bound by longstanding law.

11 J.D.'s "personhood" has nothing to do with it. "American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans." *Eisentrager*, 339 U.S. at 783, 70 S.Ct. 936. No one suggests that members of the military—or here, J.D.—are thereby not "persons."

12 The panel dissent's handling of *Zadvydas v. Davis* also merits clarification. *See* Panel Dissent 9. *Zadvydas* is careful to distinguish "an alien who has *effected an entry* into the United States and one who has never entered" and restates *Kaplan*'s holding that "despite nine years' presence in the United States, an 'excluded' alien 'was still in theory of law at the boundary line and had gained no foothold in the United States' " only three sentences before observing, in the passage quoted by the panel dissent, that "once an alien *enters* the country, the legal circumstance changes." *Zadvydas*, 533 U.S. at 693, 121 S.Ct. 2491 (emphasis added). *Zadvydas* uses "entry" in its technical sense.

1 The majority's decision rules against the Government "substantially for the reasons set forth in" the panel dissent. Given this ambiguity, the precedential value of this order for future cases will be debated. But for present purposes, we have no choice but to assume that the majority agrees with and adopts the main reasoning for the panel dissent. Otherwise, the majority would have no explanation for the extraordinary step it is taking today. For accuracy, I therefore use the word "majority" when describing the main points of the panel dissent. (If any members of the majority disagreed with any of the main points of the panel dissent, they were of course free to say as much.)

2 The minor of course also has to satisfy whatever state-law requirements are imposed on the decision to obtain an abortion.

3 To be clear, under Supreme Court precedent, the Government cannot use the transfer process as some kind of ruse to unreasonably delay the abortion past the point where a safe abortion could occur.

4 The majority's order denies the Government's emergency motion for stay pending appeal and thus does not disturb the District Judge's injunction (with adjusted dates), which required the Government to facilitate an immediate abortion for Jane Doe. Therefore, unless the Government can somehow convince the District Judge to suddenly reconsider her decision, which is extremely unlikely given the District Judge's prior ruling on this matter, the majority's order today necessarily means that the Government must allow an immediate abortion while Jane Doe remains in Government custody.

5 The precedential value of the majority's decision for future cases is unclear and no doubt will be the subject of debate. But one limit appears clear and warrants mention: The majority's decision requires the Government to allow the abortion even while the minor is residing in Government custody, but it does not require the Government to pay for the abortion procedure itself. The Government's policy on that issue remains undisturbed.

6 The Court never should have reheard this case en banc in the first place. As the Supreme Court has instructed, "En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, 689, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960). Federal Rule 35 provides that rehearing en banc is reserved for cases that involve "a question of exceptional importance." This Court's judges have adhered to that principle, even while entertaining doubts about a panel's application of the law to individual litigants. Here, on the law, the three-judge panel's order was unpublished; therefore, it constituted no legal precedent for future cases. As to the facts of this one case, if the panel's order had blocked Jane Doe from obtaining an abortion, the en banc consideration might be different. If the panel's order had forced Jane Doe to the cusp of Texas's 20-week abortion cutoff, the en banc consideration might be different. If the panel's order had significantly delayed Jane Doe's decision, the en banc consideration might be different.

But the panel's order did none of those things. The panel was faced with an emergency motion involving an under-developed factual record that is still unclear and hotly contested. Indeed, the parties have submitted new evidence by the hour over the past two days—none of which was presented to the panel. The panel's unpublished order recognized Jane Doe's interests without prematurely requiring the Government to act against its interests. The panel decision was prudent and reasonable, given all of the circumstances. Indeed, as noted above, the Government represents that, while difficult, it is possible for Jane Doe to obtain a sponsor by "5:00 P.M. Eastern on October 31, 2017." This case, as handled by the three-judge panel, therefore was on a path to a prompt resolution that would respect the interests of all parties—until the en banc Court unwisely intervened. This case did not meet the standard for rehearing en banc.

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138 S.Ct. 1790
Supreme Court of the United States

Alex M. AZAR, II, Secretary of Health and Human Services, et al.
v.
Rochelle GARZA, as guardian ad litem to unaccompanied minor J.D.

No. 17–654.
|
June 4, 2018.

Synopsis

Background: Minor's guardian ad litem filed putative class action on behalf of minor and all other pregnant unaccompanied minors in the custody of the Office of Refugee Resettlement (ORR), which is part of the Department of Health and Human Services, challenging the constitutionality of ORR's policy, which absent emergency medical situations, prohibited shelter personnel from taking any action facilitating an abortion without direction and approval from the ORR's director. The United States District Court for the District of Columbia, Tanya S. Chutkan, J., 2017 WL 4707287, issued temporary restraining order allowing minor to obtain abortion immediately. A panel of the United States Court of Appeals for the District of Columbia Circuit vacated the order, and the Court of Appeals, sitting en banc, 874 F.3d 735, vacated the panel order and remanded the case. After minor obtained an abortion, the government filed petition for certiorari.

[Holding:] Upon granting certiorari, the Supreme Court held that vacatur of Court of Appeals' order was warranted.

Certiorari granted; vacated and remanded with directions.

West Headnotes (3)

[1] Federal Courts
Reversal, Vacation, and Remand

When a civil case from a court in the federal system has become moot while on its way to the Supreme Court, the Supreme Court's established practice is to reverse or vacate the judgment below and remand with a direction to dismiss; because this practice is rooted in equity, the decision whether to vacate turns on the conditions and circumstances of the particular case.

2 Cases that cite this headnote

[2] Federal Courts
Reversal, Vacation, and Remand

One clear example where vacatur of a moot order by the Supreme Court is in order is when mootness occurs through the unilateral action of the party who prevailed in the lower court.

Cases that cite this headnote

[3] Federal Courts
Particular cases

Where action brought by minor's guardian, challenging constitutionality of policy of Office of Refugee Resettlement (ORR), which prohibited shelter personnel from facilitating abortions without approval from ORR's director, became moot due to minor obtaining abortion, Supreme Court would follow its established practice by vacating judgment below, which had upheld temporary restraining order allowing minor to obtain abortion, and by remanding with direction to dismiss; minor retained benefit of Court of Appeals' favorable judgment by taking voluntary, unilateral action to undergo abortion sooner than initially expected, and Supreme Court's discretion was not limited by fact that minor's claim became moot before certiorari.

Cases that cite this headnote

Opinion

***1791** PER CURIAM.

Jane Doe, a minor, was eight weeks pregnant when she unlawfully crossed the border into the United States. She was detained and placed into the custody of the Office of Refugee Resettlement (ORR), part of the Department of Health and Human Services. ORR placed her in a federally funded shelter in Texas. After an initial medical examination, Doe requested an abortion. But ORR did not allow Doe to go to an abortion clinic. Absent "emergency medical situations," ORR policy prohibits shelter personnel from "taking any action that facilitates an abortion without direction and approval from the Director of ORR." Plaintiff's Application for TRO and Motion for Preliminary Injunction in *Garza v. Hargan,* No. 17–cv–2122 (D DC), Dkt. No. 3–5, p. 2 (decl. of Brigitte Amiri, Exh. A). According to the Government, a minor may "le[ave] government custody by seeking voluntary departure, or by working with the government to identify a suitable sponsor who could take custody of her in the United States." Pet. for Cert. 18; see also 8 U.S.C. § 1229c; 8 CFR §§ 236.3, 1240.26 (2018).

Respondent Rochelle Garza, Doe's guardian ad litem, filed a putative class action on behalf of Doe and "all other pregnant unaccompanied minors in ORR custody" challenging the constitutionality of ORR's policy. Complaint in *Garza v. Hargan,* No. 17–cv–2122 (D DC), Dkt. No. 1, p. 11. On October 18, 2017, the District Court issued a temporary restraining order ***1792** allowing Doe to obtain an abortion immediately. On October 19, Doe attended preabortion counseling, required by Texas law to occur at least 24 hours in advance with the same doctor who performs the abortion. The clinic she visited typically rotated physicians on a weekly basis.

The next day, a panel of the Court of Appeals for the District of Columbia Circuit vacated the relevant portions of the temporary restraining order. Noting that the Government had assumed for purposes of this case that Doe had a constitutional right to an abortion, the panel concluded that ORR's policy was not an "undue burden," *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 876, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion).

Four days later, on October 24, the Court of Appeals, sitting en banc, vacated the panel order and remanded the case to the District Court. *Garza v. Hargan,* 874 F.3d 735, 735–736 (C.A.D.C.2017). The same day, Garza sought an amended restraining order. Garza's lawyers asked the District Court to order the Government to make Doe available "in order to obtain the counseling required by state law and to obtain the abortion procedure." Pet. for Cert. 12 (emphasis deleted). The District Court agreed and ordered the Government to act accordingly. Doe's representatives scheduled an appointment for the next morning and arranged for Doe to be transported to the clinic on October 25 at 7:30 a.m.

The Government planned to ask this Court for emergency review of the en banc order. Believing the abortion would not take place until October 26 after Doe had repeated the state-required counseling with a new doctor, the Government informed opposing counsel and this Court that it would file a stay application early on the morning of October 25. The details are disputed, but sometime over the course of the night both the time and nature of the appointment were changed. The doctor who had performed Doe's earlier counseling was available to perform the abortion after all and the 7:30 a.m. appointment was moved to 4:15 a.m. At 10 a.m., Garza's lawyers informed the Government that Doe "had the abortion this morning." *Id.*, at 15 (internal quotation marks omitted). The abortion rendered the relevant claim moot, so the Government did not file its emergency stay application. Instead, the Government filed this petition for certiorari.

[1] **[2]** When "a civil case from a court in the federal system ... has become moot while on its way here," this Court's "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950). Because this practice is rooted in equity, the decision whether to vacate turns on "the conditions and circumstances of the particular case." *United States v. Hamburg–Amerikanische Packetfahrt–Actien Gesellschaft,* 239 U.S. 466, 478, 36 S.Ct. 212, 60 L.Ed. 387 (1916). One clear example where "[v]acatur is in order" is "when mootness occurs through ... the 'unilateral action of the party who prevailed in the lower court.' " *Arizonans for Official English v. Arizona,* 520 U.S. 43, 71–72, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,*

513 U.S. 18, 23, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994)). " 'It would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.' " 520 U.S., at 75, 117 S.Ct. 1055 (alterations omitted).

***1793** **[3]** The litigation over Doe's temporary restraining order falls squarely within the Court's established practice. Doe's individual claim for injunctive relief—the only claim addressed by the D.C. Circuit—became moot after the abortion. It is undisputed that Garza and her lawyers prevailed in the D.C. Circuit, took voluntary, unilateral action to have Doe undergo an abortion sooner than initially expected, and thus retained the benefit of that favorable judgment. And although not every moot case will warrant vacatur, the fact that the relevant claim here became moot before certiorari does not limit this Court's discretion. See, *e.g., LG Electronics, Inc. v. InterDigital Communications, LLC,* 572 U.S. ——, 134 S.Ct. 1876, 188 L.Ed.2d 905 (2014) (after the certiorari petition was filed, respondents withdrew the complaint they filed with the International Trade Commission); *United States v. Samish Indian Nation,* 568 U.S. 936, 133 S.Ct. 423, 184 L.Ed.2d 253 (2012) (after the certiorari petition was filed, respondent voluntarily dismissed its claim in the Court of Federal Claims); *Eisai Co. v. Teva Pharmaceuticals USA, Inc.,* 564 U.S. 1001, 131 S.Ct. 2991, 180 L.Ed.2d 818 (2011) (before the certiorari petition was filed, respondent's competitor began selling the drug at issue, which was the relief that respondent had sought); *Indiana State Police Pension Trust v. Chrysler LLC,* 558 U.S. 1087, 130 S.Ct. 1015, 175 L.Ed.2d 614 (2009) (before the certiorari petition was filed, respondent completed a court-approved sale of assets, which mooted the appeal). The unique circumstances of this case and the balance of equities weigh in favor of vacatur.

The Government also suggests that opposing counsel made "what appear to be material misrepresentations and omissions" that were "designed to thwart this Court's review." Pet. for Cert. 26. Respondent says this suggestion is "baseless." Brief in Opposition 23. The Court takes allegations like those the Government makes here seriously, for ethical rules are necessary to the maintenance of a culture of civility and mutual trust within the legal profession. On the one hand, all attorneys must remain aware of the principle that zealous advocacy does not displace their obligations as officers of the court. Especially in fast-paced, emergency proceedings like those at issue here, it is critical that lawyers and courts alike be able to rely on one another's representations. On the other hand, lawyers also have ethical obligations to their clients and not all communication breakdowns constitute misconduct. The Court need not delve into the factual disputes raised by the parties in order to answer the *Munsingwear* question here.

The petition for a writ of certiorari is granted. The Court vacates the en banc order and remands the case to the United States Court of Appeals for the District of Columbia Circuit with instructions to direct the District Court to dismiss the relevant individual claim for injunctive relief as moot. See *Munsingwear, supra*.

It is so ordered.

All Citations

138 S.Ct. 1790, 201 L.Ed.2d 118, 86 USLW 4367, 18 Cal. Daily Op. Serv. 5322, 2018 Daily Journal D.A.R. 5289, 27 Fla. L. Weekly Fed. S 314

489 F.3d 376
United States Court of Appeals,
District of Columbia Circuit.

Jane DOE, I, by her next friend
Linda J. TARLOW, et al., Appellees
v.
DISTRICT OF COLUMBIA and Mental
Retardation and Developmental
Disabilities Administration, Appellants.

No. 05-7190.
|
Argued Feb. 6, 2007.
|
Decided June 12, 2007.
|
Rehearing En Banc Denied Oct. 3, 2007.

Synopsis

Background: Mentally retarded adult women who received medical services from the District of Columbia through the Mental Retardation and Developmental Disabilities Administration (MRDDA) brought action against MRDDA for violations of their constitutional and civil rights. The United States District Court for the District of Columbia, Henry H. Kennedy, Jr., J., 374 F.Supp.2d 107, issued preliminary injunction requiring use of "substituted judgment" standard in granting consent for elective surgical procedures to be performed on incompetent patients. Later the court, 232 F.R.D. 18, granted summary judgment for women and made injunction permanent. MRDDA appealed.

Holdings: The Court of Appeals, Kavanaugh, Circuit Judge, held that:

[1] wishes of patient who never had been competent did not have to be considered under District of Columbia law by person charged with making medical decisions on his or her behalf;

[2] consideration of the wishes of patients who are not and have never been competent in deciding whether to authorize surgery is not required by procedural due process; and

[3] consideration of the wishes of patients who are not and have never been competent in deciding whether to authorize surgery is not required by substantive due process.

Reversed in part.

West Headnotes (3)

[1] Health
Incompetent Persons in General

Wishes of patient who never had been competent did not have to be considered under District of Columbia law by person charged with making medical decisions on his or her behalf; "best interests" standard, particularly medical needs as determined by medical doctors, applied to medical decisions for intellectually disabled individuals who always had lacked mental capacity to make those decisions for themselves. D.C. Official Code, 2001 Ed. §§ 21-2202(5), 21-2210(b).

3 Cases that cite this headnote

[2] Constitutional Law
Refusal of Medical Treatment

Consideration of the wishes of patients who are not and have never been competent in deciding whether to authorize surgery is not required by procedural due process. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[3] Constitutional Law
Refusal of Medical Treatment

Consideration of the wishes of patients who are not and have never been competent in deciding whether to authorize surgery is not required by substantive due process; such consideration is not deeply rooted in this Nation's history and tradition or implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if

the asserted right were sacrificed. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

***377** Appeal from the United States District Court for the District of Columbia (No. 01cv02398).

Attorneys and Law Firms

Mary T. Connelly, Assistant Attorney General, Office of Attorney General for the District of Columbia, argued the cause for appellants. With her on the brief were Robert J. Spagnoletti, Attorney General at the time the brief was filed, Todd S. Kim, Solicitor General, and Edward E. Schwab, Deputy Solicitor General.

Robert A. Dybing, pro hac vice, argued the cause for appellees. With him on the brief was Harvey S. Williams.

Before: GRIFFITH and KAVANAUGH, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion

Opinion for the Court filed by Circuit Judge KAVANAUGH.

KAVANAUGH, Circuit Judge:

****369** This case involves the District of Columbia's 2003 policy for authorizing surgeries for intellectually disabled persons who are in the District's care and have never had the mental capacity to make medical decisions for themselves. The District of Columbia authorizes surgeries for such persons when: (i) two physicians have certified that the proposed surgery is "clinically indicated to maintain the health" of the patient; (ii) D.C. caregivers have made efforts to discuss the surgery with the patient at the level of patient comprehension; and (iii) no guardian, family member, or other close relative, friend, or associate is available to otherwise consent or withhold consent. Plaintiffs argue that the 2003 policy is inconsistent with D.C. statutes and the Due Process Clause of the Fifth Amendment. We disagree and therefore reverse the judgment of the District Court.

I

1. Jane Doe I, Jane Doe II, and Jane Doe III live in District of Columbia facilities for the intellectually disabled. They are plaintiffs here, and they represent a class certified by the District Court of ****370** ***378** intellectually disabled persons who live in District of Columbia facilities and receive medical services from the District of Columbia. These individuals have never had the mental capacity to make medical decisions for themselves. (Some District of Columbia statutes and cases use the term "mentally retarded"; we will use the more common term " intellectually disabled.")

The District of Columbia Mental Retardation and Developmental Disabilities Administration (commonly referred to as the MRDDA although the official name has now changed to the Department of Disability Services) ensures that those intellectually disabled individuals receive necessary medical services, including necessary surgeries. Many of the surgeries MRDDA authorizes are relatively routine; MRDDA also authorizes more significant surgeries when medically necessary.

The District of Columbia's Health Care Decisions Act provides that any individual, including persons who have been determined to be intellectually disabled, "shall be presumed capable of making health-care decisions unless certified otherwise" in accordance with D.C. law. D.C.Code § 21-2203. Of course, some individuals may not have the mental capacity to make healthcare decisions for themselves. The D.C.Code sets out a procedure to make the mental incapacity determination. The Code provides: "Mental incapacity to make a health-care decision shall be certified by 2 physicians who are licensed to practice in the District and qualified to make a determination of mental incapacity." *Id.* § 21-2204(a). At least one of the two certifying physicians must be a psychiatrist, and at least one must have examined the individual in question within one day of the certification of incapacity. *Id.* The physicians must apply the following standard: A person lacks mental capacity to make healthcare decisions if he or she "lacks sufficient mental capacity to appreciate the nature and implications of a health-care decision, make a choice regarding the alternatives presented or communicate that choice in an unambiguous manner." *Id.* § 21-2202(5). "All professional findings and opinions forming the basis of [the] certification ... shall be expressed

in writing ... and provide clear evidence that the person is incapable of understanding the health-care choice, making a decision concerning the particular treatment or services in question, or communicating a decision even if capable of making it." *Id.* § 21-2204(b).

Mental incapacity to make a healthcare decision "shall not be inferred from the fact that an individual ... [i]s mentally retarded." *Id.* § 21-2203(2). In other words, under D.C. law, not all intellectually disabled persons lack the mental capacity to make healthcare decisions. The two inquiries are separate. Plaintiffs' counsel here agrees, however, that all of the class members in this case lack the mental capacity to make healthcare decisions. *See* Tr. of Oral Arg. at 21, 27; *see also Does I Through III v. District of Columbia,* 232 F.R.D. 18, 32 (D.D.C.2005).

D.C. law creates a hierarchy of individuals authorized to make healthcare decisions for persons who have been certified under § 21-2204 as lacking mental capacity. *See* D.C.Code § 21-2210(a), (d), (f). That list includes, in order of priority: a court-appointed guardian or conservator; a spouse or domestic partner; an adult child; a parent; an adult sibling; a religious superior, if applicable; a close friend; or the nearest living relative. *Id.* § 21-2210(a). The MRDDA Administrator makes healthcare decisions for an incapacitated patient only if none of the above individuals is available and willing to do so. *See In re Estate of Gillis,* 849 A.2d 1015, 1018-19 (D.C.2004) (providing overview of ****371 *379** MRDDA's statutory authority to make healthcare decisions for intellectually disabled patients). The D.C.Code also explicitly provides that abortions, sterilizations, and psycho-surgeries may not be authorized, at least absent a court order. D.C.Code § 21-2211.

Of relevance to this case, D.C. law distinguishes between two categories of persons who lack mental capacity: (i) those who once possessed mental capacity, such as those in a coma or who have lost their mental capacity due to age, disease, or an accident; and (ii) those who have *always* lacked mental capacity, such as certain intellectually disabled persons. For patients who once had mental capacity, the decision must be based on the "known wishes of the patient" if those wishes can be "ascertained"-for example, as expressed in a durable power of attorney. *Id.* § 21-2210(b); *see also id.* §§ 21-2206(c)(1), 21-2207. For those who have never had the mental capacity, the decision must be based on "a good faith belief as to the best interests of the patient." *Id.*

In 2003, MRDDA adopted a new policy for medical care of intellectually disabled persons in order to meet-and exceed-the statutory requirements. The policy, entitled "Procedures for Securing Medical and Dental Care for MRDDA Consumers," provides that those intellectually disabled patients who are "deemed competent to make informed decisions" are "allowed to refuse examination/ treatment." Joint Appendix at 196-97.

For intellectually disabled patients who do not have the mental capacity to make medical decisions, the 2003 policy allows the MRDDA Administrator to authorize medical treatment only when, among other requirements, the patient has been "certified as an incapacitated individual" and "two (2) licensed physicians have certified, in writing, that the health care service, treatment, or procedure is clinically indicated to maintain the health of the [patient]." *Id.* at 204. The policy further provides that "[e]fforts should be made to provide information and explanations at the level of [patient] comprehension." *Id.* at 203. In other words, MRDDA must discuss the proposed treatment with the intellectually disabled patient. The policy also states that family members and guardians should receive notice of recommended medical treatment and be "given an opportunity to grant consent." *Id.* at 204. If "there is no family member[ ] or other person available or willing to provide consent," however, the MRDDA Administrator may authorize the surgery. *Id.*

2. Plaintiffs filed suit and alleged that MRDDA violated District of Columbia law, as well as their due process rights under the Fifth Amendment, by authorizing surgeries on them without considering their wishes. It is undisputed that plaintiffs have always lacked "sufficient mental capacity to appreciate the nature and implications of a health-care decision, make a choice regarding the alternatives presented or communicate that choice in an unambiguous manner." D.C.Code § 21-2202(5); *see also Does I Through III,* 232 F.R.D. at 32; Tr. of Oral Arg. at 21, 27. The District of Columbia has argued that it legally and logically cannot consider the wishes of patients who lack-and always have lacked-mental capacity to make independent medical decisions because "there is no information about what they would want if they were *not* incapacitated." *Does v. District of Columbia,* 374 F.Supp.2d 107, 115 (D.D.C.2005) (internal quotation

marks omitted) (emphasis in original). The District of Columbia points out that consideration of the wishes of a patient who lacks mental capacity to make healthcare decisions could lead to denial of essential medical care to a patient who purportedly did **372 *380 not want it-even though the patient by law has always lacked the mental capacity to make such a decision.

The District Court concluded that "[e]ven a legally incompetent, mentally retarded individual may be capable of expressing or manifesting a choice or preference regarding medical treatment." *Id.* (internal quotation marks omitted). The court thus held that the District of Columbia's 2003 policy-which is based on the statutory "best interests" standard rather than the "known wishes" standard-is inconsistent with D.C. statutory law, "violates plaintiffs' and the class members' liberty interest to accept or refuse medical treatment and is therefore an unconstitutional infringement of the substantive and procedural due process rights of plaintiffs and their fellow class members." *Does I Through III,* 232 F.R.D. at 34. The District Court permanently enjoined the District of Columbia from authorizing elective surgeries for MRDDA patients under its present policy, ruling that MRDDA must follow the "known wishes of the patient" standard in determining whether to authorize surgeries on MRDDA patients. *Id.* The court ordered the District of Columbia to make "documented reasonable efforts to communicate" with patients "regarding [their] wishes." *Id.* If a patient's wishes still remain unknown after such inquiry, however, the court held that the District of Columbia should determine the patient's "best interests" by considering the "totality of [the] circumstances." *Id.*

On appeal, the District of Columbia argues that neither (i) D.C. statutory law nor (ii) the Due Process Clause of the Fifth Amendment requires MRDDA to consider the healthcare wishes of intellectually disabled patients (such as the plaintiffs here) who have always lacked mental capacity to make healthcare decisions for themselves. We exercise de novo review over those legal questions. *Arrington v. United States,* 473 F.3d 329, 333 (D.C.Cir.2006).

II

[1] We first consider whether the 2003 policy is consistent with D.C. statutory law. Under the 2003 D.C. policy, the MRDDA Administrator may authorize medical treatment for an intellectually disabled patient who has always lacked the mental capacity to make medical decisions only if: (i) two physicians have certified that the proposed surgery is "clinically indicated to maintain the health" of the patient; (ii) D.C. caregivers have made efforts to discuss the surgery with the patient at the level of patient comprehension; and (iii) no guardian, family member, or other close relative, friend, or associate is available to otherwise consent or withhold consent. When those conditions are met, the Administrator's practice is to authorize the surgery, because the surgery is deemed in the patient's "best interests" under D.C. law.

The class representatives argue that D.C. statutory law requires more, however, and that MRDDA must consider the wishes even of persons who have always lacked mental capacity to make medical decisions, such as the class members here. In other words, plaintiffs argue that the "known wishes" standard of the D.C.Code applies rather than the "best interests" standard. The District of Columbia responds that D.C. statutes do not (and logically could not) require MRDDA to consider the wishes of those intellectually disabled patients who have always lacked the mental capacity to make medical decisions for themselves. *See* D.C.Code § 21-2204(b) (providing that determination of incapacity requires certifying physicians to provide in writing "clear evidence that the person is incapable of understanding the health-care choice, **373 *381 making a decision concerning the particular treatment or services in question, or communicating a decision even if capable of making it"). Moreover, the District of Columbia points out that considering the wishes of a patient who has always lacked mental capacity could result in the incorrect denial of medical treatment, cause the death or serious injury of patients, and trigger a host of ethical and legal problems.

We agree with the District of Columbia that the "best interests" standard-not the "known wishes" standard-applies to medical decisions for intellectually disabled individuals who have always lacked the mental capacity to make those decisions for themselves. The D.C.Code provides that a "decision to grant, refuse or withdraw consent" on behalf of a patient who lacks the mental capacity to make medical decisions "*shall be based on* the known wishes of the patient" if those wishes are ascertainable. *Id.* § 21-2210(b) (emphasis added). But "if the wishes of the patient are unknown and cannot be

ascertained," the decision "*shall be based on ... a good faith belief as to the best interests of the patient.*" *Id.* (emphasis added). It is undisputed here that plaintiffs have always lacked "sufficient mental capacity to appreciate the nature and implications of a health-care decision, make a choice regarding the alternatives presented or communicate that choice in an unambiguous manner." *Id.* § 21-2202(5); *see also Does I Through III v. District of Columbia,* 232 F.R.D. 18, 32 (D.D.C.2005); Tr. of Oral Arg. at 21, 27. Because plaintiffs have never been able to make informed choices regarding their medical treatment, their true wishes with respect to a recommended surgery "are unknown and cannot be ascertained" for purposes of § 21-2210(b). Therefore, the District of Columbia is correct that the "best interests" standard applies to the class of plaintiffs in this case.

D.C. case law confirms our reading of the statutory text. As the D.C. Court of Appeals has stated, those statutes were "designed to address situations in which doctors, family members, and the courts may be required to make treatment decisions for a patient *who has become unable* to decide such matters for himself or herself." *Khiem v. United States,* 612 A.2d 160, 169 (D.C.1992) (emphasis added). As that court has explained, an incompetent patient can fall into one of two categories: (i) those who were once competent to make healthcare decisions for themselves; and (ii) those who have never been competent. The distinction is critical because the competent person's pre-existing wishes (as best they can be determined) must be followed "in cases of adults who at one time were competent but later became incompetent." *In re K.I.,* 735 A.2d 448, 455 (D.C.1999). By contrast, if a patient has *never* been competent to make medical decisions, D.C. courts have concluded that D.C. statutes require the decision be made by assessing the patient's "best interests," particularly their medical needs as determined by medical doctors. In *In re K.I.,* the court thus affirmed the trial judge's determination that "the best interests of the child rather than the substituted judgment standard applied 'in cases involving minor respondents who have lacked, and will forever lack, the ability to express a preference regarding their course of medical treatment.' " *Id.* at 452, 456.

The class representatives rely on the decision of the D.C. Court of Appeals in *In re A.C.* But that case involved a patient who had once been competent to make healthcare decisions on her own. *See* 573 A.2d 1235, 1249 (D.C.1990). The decision in *In re A.C.* therefore does not support the conclusion that MRDDA must somehow try to ascertain the wishes of patients who have never had the mental capacity to ****374 *382** make decisions for themselves. *See id.* at 1246 ("incompetent patients ... have just as much right as competent patients to have their decisions made *while competent* respected") (emphasis added); *id.* at 1243 (observing "the tenet common to all medical treatment cases: that any person has the right to make an informed choice, *if competent to do so,* to accept or [forgo] medical treatment") (emphasis added). Indeed, as explained above, the D.C. Court of Appeals has noted that the standard set forth in *In re A.C.* applies "in cases of adults who at one time were competent but later become incompetent." *In re K.I.,* 735 A.2d at 455. Contrary to plaintiffs' suggestion, therefore, nothing in the *In re A.C.* decision supports the conclusion that the wishes of a patient who has never been competent must be considered by a person charged with making medical decisions on his or her behalf.

It bears mention that the approach of plaintiffs' counsel has the potential for grave consequences. Their position would require MRDDA to give effect, at least in some cases, to the medical wishes of patients who by definition lack "sufficient mental capacity to appreciate the nature and implications" of the preference expressed. D.C.Code § 21-2202(5). As a result, MRDDA could be required to deny essential medical care to a patient who purportedly did not want it-even though the patient by law lacked the mental capacity to make that decision. The result could be serious injury or death to the patient, and great potential for abuse and confusion. Not surprisingly, so far as we are aware, no state applies the rule suggested by plaintiffs.

In sum, we hold that the 2003 policy complies with D.C. law.

III

Plaintiffs also contend that the District of Columbia's 2003 policy is inconsistent with what they describe as their procedural and substantive due process rights.

To reiterate, under the 2003 policy at issue here, the MRDDA Administrator authorizes surgery for an intellectually disabled patient who has always lacked mental capacity to make medical decisions only if: (i)

two physicians have certified that the proposed surgery is "clinically indicated to maintain the health" of the patient; (ii) D.C. caregivers have made efforts to discuss the surgery with the patient at the level of patient comprehension; and (iii) no guardian, family member, or other close relative, friend, or associate is available to otherwise consent or withhold consent.

[2] Plaintiffs argue that this policy violates their right to due process because it does not require the MRDDA Administrator to consider an intellectually disabled patient's wishes in deciding whether to authorize surgery. But as we explained above, accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions-with harmful or even deadly consequences to intellectually disabled persons. Consideration of the wishes of patients who are not and have never been competent is therefore not required by the Supreme Court's procedural due process cases. *Cf. Washington v. Harper,* 494 U.S. 210, 226, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (upholding state policy allowing prison to administer medication to mentally ill prisoners); *see also Heller v. Doe,* 509 U.S. 312, 332, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) ("At least to the extent protected by the Due Process Clause, the interest of a person subject to governmental action is in the accurate determination of the matters before the court ....").

***383** **[3]** ****375** Plaintiffs also try to make out a *substantive* due process claim (as distinct from their procedural due process claim). Even assuming their complaint about procedures used by MRDDA can be properly shoehorned into a substantive due process claim, plaintiffs have not shown that consideration of the wishes of a never-competent patient is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [the asserted right] were sacrificed." *Washington v. Glucksberg,* 521 U.S. 702, 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (internal citations and quotation marks omitted).

Plaintiffs rely on *Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990), which held that the Due Process Clause permits a state to require clear and convincing evidence of an incompetent patient's wishes-articulated when she was competent-as to the withdrawal of life-sustaining treatment. *Id.* at 284, 110 S.Ct. 2841. As the Second Circuit has correctly explained, however, nothing in *Cruzan* supports the view that a person who has *never* had the capacity "to make an informed and voluntary choice" with respect to medical treatment has a constitutional right under the Due Process Clause to have his or her wishes considered. *Id.* at 280, 110 S.Ct. 2841; *see Blouin v. Spitzer,* 356 F.3d 348, 360 (2d Cir.2004) ("*Cruzan* ... rests solely on the patient's capacity to express her intention regarding the course of her medical treatment; a capacity that Nancy Cruzan once possessed but that Sheila Pouliot [the plaintiff] never did.").

Finally, we note that the breadth of plaintiffs' constitutional claims is extraordinary because no state of which we are aware applies the rule suggested by plaintiffs. Plaintiffs apparently are arguing, therefore, that all states' laws and practices with respect to medical treatment for intellectually disabled individuals who have never been competent are inconsistent with the Constitution. *Cf., e.g., In re Christopher,* 106 Cal.App.4th 533, 549, 131 Cal.Rptr.2d 122 (2003) (test based on the presumed wishes of the patient "assumes some understanding of the patient's wants, desires, feelings, and previous mental and physical states," and "is therefore an inappropriate tool for making medical decisions for patients ... who [have] never been competent to make [their] own decisions or express [their] emotions and feelings on the subject"); *Guardianship of Doe,* 411 Mass. 512, 583 N.E.2d 1263, 1268 (1992) (requirement that state determine what incompetent patient would have wanted if competent is a "legal fiction" as applied to a never-competent person); *In re Storar,* 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64, 72 (1981) ("it is unrealistic to attempt to determine whether [a patient suffering from cancer] would want to continue potentially life prolonging treatment if he were competent" if patient has been profoundly intellectually disabled for most of his life); *see also* Norman L. Cantor, *The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons,* 13 ANNALS HEALTH L. 37, 42 (2004) (surrogate "cannot protect a never-competent patient's right of self-determination" because a "profoundly disabled person has never been able to make autonomous choices"); John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients,* 25 GA. L. REV. 1139, 1194 (1991) (best interests test "has wide support when the patient

never was previously competent but a decision must be made, as occurs with pediatric patients and patients who have always been retarded"); American Association on Mental Retardation/Association for Retarded Citizens ****376** ***384** Position Statement on Health Care for the Intellectually Disabled, *available at* http://www.aamr.org/Policies/pos_ health-care.shtml ("decision to accept or refuse treatment requires informed consent," which means that "the individual decision-maker or surrogate decision-maker" must have "the legal capacity to give consent"; decisionmaking in those circumstances "must always be consistent with the best interests of the individual").

In sum, plaintiffs' constitutional claims are meritless.

IV

We conclude that, to the extent challenged in this case, the 2003 policy is consistent with D.C. statutory law and the Due Process Clause of the Fifth Amendment. We therefore reverse the District Court's grant of summary judgment, vacate the District Court's injunction, and direct the entry of judgment for defendants with respect to plaintiffs' claims for declaratory and injunctive relief. Pending before the District Court are also individual damages claims brought by Jane Doe I, Jane Doe II, and Jane Doe III based on alleged incidents that occurred more than a decade ago, before adoption of the 2003 policy. The damages claims are not before us, and we therefore do not address them.

So ordered.

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