***Planned Parenthood v Casey* (1992) - Justice O'Connor** - 5/4.

This case is lengthy. It is also very, very important and includes some of the very best (and worst) legal argument you will ever encounter in ELL. I tried to excise as much as possible, but I found that almost every sentence was a gem.

The *Casey* Court:
Brennan & Marshall are OUT — Souter & Thomas are IN.
Majority (5): Blackmun, Stevens, O'Connor, Kennedy & Souter.
Minority (4): Rehnquist, White, Scalia & Thomas.

Issue: At issue are **five provisions** of the Pennsylvania Abortion Control Act of 1982:

§3205...requires a woman seeking an abortion to 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...mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure.

§3209...commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband.

§3203...defines a "medical emergency" that will excuse compliance with the foregoing requirements.

§§3207(b), 3214(a), and 3214(f)...imposes certain reporting requirements on facilities providing abortion services.

Held: All provisions are constitutional except the spousal notification provision.

O'Connor, Kennedy, Souter, Stevens & Blackmun (**5**):

(1) the statutory provision defining a medical emergency did not violate the due process clause,

(2) the provision requiring spousal notice violated the due process clause, and

(3) the essential holding of *Roe v Wade* --which held that...

(a) a woman has the right to choose to have an abortion before her fetus is viable and to obtain an abortion without undue interference from a state,

(b) a state has the power to restrict abortions after fetal viability, if the state law imposing such a restriction contains exceptions for pregnancies which endanger a woman's life or health, and

(c) a state has legitimate interests from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the fetus that may become a child–...

...**should be retained and reaffirmed**.

Although unable to agree on an opinion as to the other statutory provisions...

O'Connor, Kennedy, Souter, Rehnquist, White, Scalia & Thomas (**7**) agreed that the provisions requiring informed consent, the 24-hour waiting period, and parental consent did not violate the due process clause and...

O'Connor, Kennedy, Souter, Stevens, Rehnquist, White, Scalia & Thomas (**8**) agreed that the provisions requiring record keeping and reporting, at least except for the provision requiring reporting of failure to provide spousal notice, did not violate the due process clause and...

O'Connor, Kennedy, Souter, Stevens & Blackmun (**5**) agreed that the provision requiring reporting of failure to provide spousal notice violated the due process clause.

[The numerous opinions comprising a decision of > 100 pages are detailed, complicated and not provided here in full; however, because they serve to explain the Court's current posture, portions of the Dissents of Blackmun, Rehnquist and Scalia are set out, below.]

Justice Blackmun: Three years ago, in *Webster v. Reproductive Health Services (1989)*[1], four Members of this Court appeared poised to "cast into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. 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. But now, just when so many expected the darkness to fall, the flame has grown bright. 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.

Recall that Justice Blackmun wrote the majority opinion in *Roe v. Wade*.

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*[2], 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." 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."

...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"...Included...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*[3]. "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." 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." The Court's reaffirmation of *Roe's* central holding is also based on the force of *stare decisis*. "No erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the

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[1]Case 9A-AP-15 on this website.

[2]Case 9A-AP-4 on this website.

[3]Case 9A-AP-3 on this website.

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." 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 it." In the 19 years since *Roe* was decided, that case has shaped more than reproductive planning -- "an entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." The Court understands that, having "called the contending sides...to end their national division by accepting a common mandate rooted in the Constitution," 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." 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**...

What strikes as hilarious is that these five particular Justices are "warning" the likes of Scalia, Thomas and Rehnquist against becoming "another political branch." Try and disassociate all abortion issues from the *stare decisis*/political issue when you read Justice Scalia's dissent.

By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption -- that women can simply be forced to accept the "natural" status and incidents of motherhood -- appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with **our** understanding of the **family**, **the individual**, or the Constitution."...

Justice Blackmun, please let us know who comprises the folks that make up the **"our"** in your enlightened conclusion. **"Your"** understanding of the "family" leaves out mom and dad (minor's notification of pregnancy/abortion). **"Your"** understanding of the "individual" leaves out dad. "**Your**" understanding also leaves out the considered judgment of a majority of **elected** representatives in many states (when you strike down legislation) and, I submit, none of **"your"** positions concerning the definition of family or the individual can be found in the Constitution.

Roe's trimester framework does not ignore the State's interest in prenatal life. Like Justice Stevens, I agree 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." But...

> "serious questions arise...when a State attempts to persuade the woman to choose childbirth over abortion. 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 the individual's freedom to make such judgments."

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."

In sum, *Roe's* requirement of strict scrutiny as implemented through a trimester framework should not be disturbed...

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...

The Chief Justice's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more general right of privacy. This constricted view is reinforced by the Chief Justice's exclusive reliance on tradition as a source of fundamental rights. He argues that the record in favor of a right to abortion is no stronger than the record in *Michael H. v. Gerald D. (1989),* where the plurality found no fundamental right to visitation privileges by an adulterous father, or in *Bowers v. Hardwick (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." **In the Chief Justice's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called sexual deviates.** Given the Chief Justice's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts...

Please read Justice Rehnquist's dissent and judge for yourself whether Justice Blackmun's attack is justified.

Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or incest? Is there anything arbitrary or capricious about a State's prohibiting the sins of the father from being visited upon his offspring?

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.

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 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.

Chief Justice Rehnquist (joined by Justices White, Scalia & Thomas):... The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade,* but beats a wholesale retreat from the substance of that case. **We believe that *Roe* was wrongly decided,** and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the plurality in *Webster v. Reproductive Health Services (1989),* and uphold the challenged provisions of the Pennsylvania statute in their entirety...

In arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in *Roe v. Wade* in which we held unconstitutional a Texas statute making it a crime to procure an abortion except to save the life of the mother. **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 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 the potentiality of human life." In...*Doe v. Bolton,* 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." **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**.

In other words, a fair reading of *Roe v. Wade* gave "pro-choice" and "pro-life" advocates reason to believe that both interests would be respected. Whatever else one might conclude from reading the cases that followed *Roe*, one would be hard pressed to deny almost complete victory to the "pro-choice" contingent through the years.

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 (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.*

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." *Danforth.* In *Bellotti v. Baird,* 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. In light of *Bellotti*, we have upheld one parental consent regulation which incorporated a judicial bypass option we viewed as sufficient (*Planned Parenthood v. Ashcroft*), but have invalidated another because of our belief that the judicial procedure did not satisfy the dictates of *Bellotti.* 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...[I]n *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.

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 be made with full knowledge of its nature and consequences." 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. More recently, in *Thornburgh,* 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." 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 non-physician counselors to provide it. 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.

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 (*Simopoulos v. Virginia*), we concluded in *Akron* and *Ashcroft* that a State could not require that such abortions be performed only in hospitals. 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. 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.

Although *Roe* allowed state regulation after the point of viability to protect the potential life of the fetus, the Court subsequently rejected attempts to regulate in this manner. In *Colautti,* the Court struck down a statute that governed the determination of viability. 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. 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 post-viability abortions. In *Thornburgh*, the Court struck down Pennsylvania's requirement that a second physician be present at post-viability abortions to help preserve the health of the unborn child, on the ground that it did not incorporate a sufficient medical emergency exception. Regulations governing the treatment of aborted fetuses have 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."

Dissents in these cases expressed the view that the Court was expanding upon *Roe* in imposing ever greater restrictions on the States. *Thornburgh*...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. *Ohio v. Akron* (1990); *Hodgson v. Minnesota* (1990); *Webster v. Reproductive Health Services* (1989).

...We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "implicit in the concept of ordered liberty." *Palko v. Connecticut (1937).* Three years earlier, in *Snyder v. Massachusetts (1934),* we referred to a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 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,* we held that it included a parent's right to send a child to private school; in *Meyer v. Nebraska,* 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*)*;* a right to procreate (*Skinner v. Oklahoma*)*;* and a right to use contraceptives (*Griswold v. Connecticut*). **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." **We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life."** *Harris v. McRae.* The abortion decision must therefore "be recognized as...different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." *Thornburgh* (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. To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people is like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body."**

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

WE THINK, THEREFORE, BOTH IN VIEW OF THIS HISTORY AND OF OUR DECIDED CASES DEALING WITH SUBSTANTIVE LIBERTY UNDER THE DUE PROCESS CLAUSE, THAT THE COURT WAS MISTAKEN IN *ROE* WHEN IT CLASSIFIED A WOMAN'S DECISION TO TERMINATE HER PREGNANCY AS A "FUNDAMENTAL RIGHT" THAT COULD BE ABRIDGED ONLY IN A MANNER WHICH WITHSTOOD "STRICT SCRUTINY." In so concluding, we repeat the observation made in *Bowers v. Hardwick (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."

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.* **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**.

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." Instead of claiming that *Roe* 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. *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.

Stare decisis is defined...as meaning "to abide by, or adhere to, decided cases." 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* and *Thornburgh,* are frankly overruled in part under the "undue burden" standard expounded in the joint opinion.

IN OUR VIEW, AUTHENTIC PRINCIPLES OF *STARE DECISIS* DO NOT REQUIRE THAT ANY PORTION OF THE REASONING IN *ROE* BE KEPT INTACT. "*Stare decisis* is not...a universal, inexorable command," especially in cases involving the interpretation of the Federal Constitution. Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. **It is therefore our duty to reconsider constitutional interpretations that "depart from a proper understanding" of the Constitution ...**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. *West Virginia Bd. of Ed. v. Barnette.*

The joint opinion discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe*. Two of these factors are that the main "factual underpinning" of *Roe* has remained

the same, and that its doctrinal foundation is no weaker now than it was in 1973. Of course, what might be called the basic facts which gave rise to *Roe* have remained the same -- women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

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

The joint opinion also points to the reliance interests involved in this context in its effort to explain why precedent must be followed for precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "considerations in favor of *stare decisis* are at their acme." But, as the joint opinion apparently agrees, 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 immediate account of" this action.

The joint opinion thus turns to what can only be described as an unconventional -- and unconvincing -- notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. The joint opinion's assertion of this fact is undeveloped and totally conclusory. 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 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.

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. 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 (*Plessy v. Ferguson* (1896)... The "separate but equal" doctrine lasted 58 years after *Plessy*...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. *Brown v. Board of Education (1954)* (rejecting the "separate but equal" doctrine)...

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

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

The first difficulty with this principle lies in its assumption that cases 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 in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of *stare decisis* when urged to reconsider earlier decisions. **Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions.**

The joint opinion picks out and discusses two prior Court rulings that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to *Roe.* It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose *not* to adhere to erroneous constitutional precedent, but instead enhanced its stature by acknowledging and

correcting its error, apparently in violation of the joint opinion's "legitimacy" principle. 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 than *Roe* did. There were undoubtedly large segments of the bench and bar who agreed with the dissenting views in those cases, but surely that cannot be what the Court means when it uses the term "intensely divisive," or many other cases would have to be added to the list. In terms of public protest, however, *Roe*, so far as we know, was unique. **But just as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the decision at all costs lest it *seem* to be retreating under fire. Public protests should not alter the normal application of *stare decisis*, lest perfectly lawful protest activity be penalized by the Court itself.**

Taking the joint opinion on its own terms, we doubt that its distinction between *Roe*, on the one hand, and *Plessy* and *Lochner*, on the other, withstands analysis. The joint opinion acknowledges that the Court improved its stature by overruling *Plessy* in *Brown* on a deeply divisive issue. And our decision in *West Coast Hotel*, which overruled *Adkins v. Children's Hospital* and *Lochner*, was rendered at a time when Congress was considering President Franklin Roosevelt's proposal to "reorganize" this Court and enable him to name six additional Justices in the event that any Member of the Court over the age of 70 did not elect to retire. It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time, and, under the general principle proclaimed in the joint opinion, the Court seemingly should have responded to this opposition by stubbornly refusing to re-examine the *Lochner* rationale, lest it lose legitimacy by appearing to "overrule under fire."

The joint opinion agrees that the Court's stature would have been seriously damaged if in *Brown* and *West Coast Hotel* it had dug in its heels and refused to apply normal principles of *stare decisis* to the earlier decisions. But the opinion contends that the Court was entitled to overrule *Plessy* and *Lochner* in those cases, despite the existence of opposition to the original decisions, only because both the Nation and the Court had learned new lessons in the interim. This is at best a feebly supported, *post hoc* rationalization for those decisions.

For example, the opinion asserts that the Court could justifiably overrule its decision in *Lochner* only because the Depression had convinced "most people" that constitutional protection of contractual freedom contributed to an economy that failed to protect the welfare of all. Surely the joint opinion does not mean to suggest that people saw this Court's failure to uphold minimum wage statutes as the cause of the Great Depression! In any event, the *Lochner* Court did not base its rule upon the policy judgment that an unregulated market was fundamental to a stable economy; it simple believed, erroneously, that "liberty" under the Due Process Clause protected the "right to make a contract." Nor is it the case that the people of this Nation only discovered the dangers of extreme laissez-faire economics because of the Depression. State laws regulating maximum hours and minimum wages were in existence well before that time. A Utah statute of that sort enacted in 1896 was involved in

our decision in *Holden v. Hardy* (1898) and other States followed suit shortly afterwards...These statutes were indeed enacted because of a belief on the part of their sponsors that "freedom of contract" did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before the Great Depression. Whether "most people" had come to share it in the hard times of the 1930's is, insofar as anything the joint opinion advances, entirely speculative. The crucial failing at that time was not that workers were not paid a fair wage, but that there was no work available at *any* wage.

When the Court finally recognized its error in *West Coast Hotel*, it did not engage in the *post hoc* rationalization that the joint opinion attributes to it today; it did not state that *Lochner* had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that "the Constitution does not speak of freedom of contract."...Although the Court did acknowledge in the last paragraph of its opinion the state of affairs during the then-current Depression, the theme of the opinion is that the Court had been mistaken as a matter of constitutional law when it embraced "freedom of contract" 32 years previously.

The joint opinion also agrees that the Court acted properly in rejecting the doctrine of "separate but equal" in *Brown*. In fact, the opinion lauds *Brown* in comparing it to *Roe.* This is strange, in that under the opinion's "legitimacy" principle the Court would seemingly have been forced to adhere to its erroneous decision in *Plessy* because of its "intensely divisive" character. To us, adherence to *Roe* today under the guise of "legitimacy" would seem to resemble more closely adherence to *Plessy* on the same ground. Fortunately, the Court did not choose that option in *Brown*, and instead frankly repudiated *Plessy*. The joint opinion concludes that such repudiation was justified only because of newly discovered evidence that segregation had the effect of treating one race as inferior to another. But it can hardly be argued that this was not urged upon those who decided *Plessy*, as Justice Harlan observed in his dissent that the law at issue "puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law." It is clear that the same arguments made before the Court in *Brown* were made in *Plessy* as well. The Court in *Brown* simply recognized, as Justice Harlan had recognized beforehand, that the Fourteenth Amendment does not permit racial segregation. The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground alone the Court was justified in properly concluding that the *Plessy* Court had erred.

There is also a suggestion in the joint opinion that the propriety of overruling a "divisive" decision depends in part on whether "most people" would now agree that it should be overruled. Either the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision. How such agreement would be ascertained, short of a public opinion poll, the joint opinion does not say. But surely even the suggestion is totally at war with the idea of "legitimacy" in whose name it is invoked. **THE JUDICIAL BRANCH DERIVES ITS LEGITIMACY, NOT FROM FOLLOWING PUBLIC OPINION, BUT FROM DECIDING BY ITS BEST LIGHTS**

WHETHER LEGISLATIVE ENACTMENTS OF THE POPULAR BRANCHES OF GOVERNMENT COMPORT WITH THE CONSTITUTION. THE DOCTRINE OF *STARE DECISIS* IS AN ADJUNCT OF THIS DUTY, AND SHOULD BE NO MORE SUBJECT TO THE VAGARIES OF PUBLIC OPINION THAN IS THE BASIC JUDICIAL TASK...

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

Roe is not this Court's only decision to generate conflict. Our decisions in some recent capital cases, and in *Bowers v. Hardwick (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 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." 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 in the sort of "simple limitation," easily applied, which the joint opinion anticipates. 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. 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. Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views. For example, in the very matter before us now, the authors of the joint opinion would uphold Pennsylvania's 24-hour waiting period, concluding that a "particular burden" on some women is not a substantial obstacle. But the authors would at the same time strike down Pennsylvania's spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. And, while the authors conclude that the informed consent provisions do not constitute an "undue burden," Justice Stevens would hold that they do.

Furthermore, while striking down the spousal *notice* regulation, the joint opinion would uphold a parental *consent* restriction that certainly places very substantial obstacles in the path of a minor's abortion choice. The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between parental consent and 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 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.

[Potemkin Village : something that appears elaborate and impressive, but in actual fact, lacks substance. Potemkin was a Russian army officer who loved Catherine II and helped her seize power in 1972. He had elaborate fake villages constructed for Catherine the Great's tours of the Ukraine and the Crimea.]

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. With this rule in mind, we examine each of the challenged provisions.

Section 3205 of the Act imposes certain requirements related to the informed consent of a woman seeking an abortion. 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 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...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 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.

We first emphasize that Pennsylvania has not imposed a spousal *consent* requirement of the type the Court struck down in *Danforth.* Missouri's spousal consent provision was invalidated in that case because of the Court's view that it unconstitutionally granted to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." 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." *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. 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...

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 *Danforth* ("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")...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, "the Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems -- such as economic constraints, future plans, or the husbands' previously expressed opposition -- that may be obviated by discussion prior to the abortion."

The State also has a legitimate interest in promoting "the integrity of the marital relationship."... 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* (1971) ("The power to make rules to establish, protect, and strengthen family life" is committed to the state legislatures.) Petitioners argue that the

notification requirement does not further any such interest; 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...The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but "the existence of particular cases in which a feature of a statute performs no function (or is even counterproductive) ordinarily does not render the statute unconstitutional or even constitutionally suspect." *Thornburgh.* 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. *Harris v. McRae* ("It is not the mission of this Court or any other to decide whether the balance of competing interests...is wise social policy")...

Justice Scalia (joined by Chief Justice Rehnquist and Justices White & Thomas):... My views on this matter are unchanged from those I set forth in my separate opinions in *Webster* and *Ohio v. Akron Center for Reproductive Health (1990)* (*Akron II*). 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." The Court is correct in adding the qualification that this "assumes a state of affairs in which the choice does not intrude upon a protected liberty," -- but the crucial part of that qualification 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." 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.**

The Court destroys the proposition, evidently meant to represent my position, that "liberty" includes "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified." That is not, however, what *Michael H.* says; it merely observes that, in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right." But the Court does not wish to be fettered by any such limitations on its preferences. The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "curb the discretion of federal judges," is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction -- towards systematically eliminating checks upon its own power; and it succumbs.

Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have 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 in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."**

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.* 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." 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." 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.* But in their exhaustive discussion of all the factors that go into the determination of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "the Court's power lies...in its legitimacy, a product of substance and perception," 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"; it involves a "most intimate and personal choice"*;* it is "central to personal dignity and autonomy"*;* it "originates within the zone of conscience and belief"*;* it is "too intimate and personal" for state interference*;* it reflects "intimate views" of a "deep, personal character"; it involves "intimate relationships" and notions of "personal autonomy and bodily integrity"; and it concerns a particularly "important decision." But it is obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court...has held are *not* entitled to constitutional protection -- because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deeply personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. **It is not reasoned judgment that supports the Court's decision; only personal predilection. Justice Curtis's warning is as timely today as it was 135 years ago:**

> "When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Dred Scott v. Sandford (1857)* (dissenting opinion).

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

One of the foremost goals of ELL is to enable "*We, the People*" to discern whether or not the Supreme Court Majority on a given case or series of cases has abused their power. For, if "personal predilection" becomes the standard of interpretation, have we not lost our Constitution?

Justice Blackmun's parade of adjectives is similarly empty: Abortion is among "the most intimate and personal choices"*;* it is a matter "central to personal dignity and autonomy"*;* and it involves "personal decisions that profoundly affect bodily integrity, identity, and destiny." Justice Stevens is not much less conclusory: The decision to choose abortion is a matter of "the highest privacy and

the most personal nature"*;* it involves a "difficult choice having serious and personal consequences of major importance to a woman's future"*;* the authority to make this "traumatic and yet empowering decision" is "an element of basic human dignity"*;* and it is "nothing less than a matter of conscience."

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 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.* Because the three Justices now wish to "set forth a standard of general application," the joint opinion announces that "it is important to clarify what is meant by an undue burden." 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 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." An obstacle is "substantial," we are told, if it is "calculated, not to inform the woman's free choice, but to hinder it." This latter statement cannot 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 test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation...

To the extent I can discern *any* meaningful content in the "undue burden" standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the "undue burden" analysis is whether the regulation "prevents a significant number of women from obtaining an abortion"*;* whether a "significant number of women...are likely to be deterred from procuring an abortion;" and whether the regulation often "deters" women from seeking abortions. We are not told, however, what forms of "deterrence" are impermissible or what degree of success in deterrence is too much to be tolerated. 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), the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "expressing a preference for childbirth over abortion." Reason finds no refuge in this jurisprudence of confusion.

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

THE COURT'S RELIANCE UPON *STARE DECISIS* CAN BEST BE DESCRIBED AS CONTRIVED. IT INSISTS UPON THE NECESSITY OF ADHERING NOT TO ALL OF *ROE*, BUT ONLY TO WHAT IT CALLS THE "CENTRAL HOLDING." IT SEEMS TO ME THAT *STARE DECISIS* OUGHT TO BE APPLIED EVEN TO THE DOCTRINE OF *STARE DECISIS*, AND I CONFESS NEVER TO HAVE HEARD OF THIS NEW, KEEP-WHAT-YOU-WANT-AND-THROW-AWAY-THE-REST VERSION. I WONDER WHETHER, AS APPLIED TO *MARBURY V. MADISON,* 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.'" I suppose the 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; Akron I.* Under the joint opinion's "undue burden" regime (as applied today, at least) such a requirement is constitutional.
>
> . Under *Roe*, requiring that information be provided by a doctor, rather than by nonphysician counselors, is unconstitutional. *Akron I.* Under the "undue burden" regime (as applied today, at least) it is not.

. 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.* Under the "undue burden" regime (as applied today, at least) it is not.

. 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.* Under the "undue burden" regime (as applied today, at least) it generally is not.

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

THE COURT'S DESCRIPTION OF THE PLACE OF *ROE* IN THE SOCIAL HISTORY OF THE UNITED STATES IS UNRECOGNIZABLE. NOT ONLY DID *ROE* NOT, AS THE COURT SUGGESTS, *RESOLVE* THE DEEPLY DIVISIVE ISSUE OF ABORTION; IT DID MORE THAN ANYTHING ELSE TO NOURISH IT, BY ELEVATING IT TO THE NATIONAL LEVEL WHERE IT IS INFINITELY MORE DIFFICULT TO RESOLVE. NATIONAL POLITICS WERE NOT PLAGUED BY ABORTION PROTESTS, NATIONAL ABORTION LOBBYING, OR ABORTION MARCHES ON CONGRESS BEFORE *ROE V. WADE* WAS DECIDED. PROFOUND DISAGREEMENT EXISTED AMONG OUR CITIZENS OVER THE ISSUE -- AS IT DOES OVER OTHER ISSUES, SUCH AS THE DEATH PENALTY -- BUT THAT DISAGREEMENT WAS BEING WORKED OUT AT THE STATE LEVEL. AS WITH MANY OTHER ISSUES, THE DIVISION OF SENTIMENT WITHIN EACH STATE WAS NOT AS CLOSELY BALANCED AS IT WAS AMONG THE POPULATION OF THE NATION AS A WHOLE, MEANING NOT ONLY THAT MORE PEOPLE WOULD BE SATISFIED WITH THE RESULTS OF STATE-BY-STATE RESOLUTION, BUT ALSO THAT THOSE RESULTS WOULD BE MORE STABLE. PRE-*ROE*, MOREOVER, POLITICAL COMPROMISE WAS POSSIBLE.

***Roe's* mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution *guarantees* abortion, how can it be bad?" -- not an accurate line of thought, but a natural one.) Many favor all of those developments, and it is not for me to say that they are wrong. But to portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia[4] that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. 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...**

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[4]Peace Treaty that ended the Thirty Years' War in 1648.

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges -- leading a Volk who will be "tested by following," and whose very "belief in themselves" is mystically bound up in their "understanding" of a Court that "speaks before all others for their constitutional ideals" -- with the somewhat more modest role envisioned for these lawyers by the Founders.

> "The judiciary...has...no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment..." The Federalist No. 78.

Or, again, to compare this ecstasy of a Supreme Court in which there is, especially on controversial matters, no shadow of change or hint of alteration. "There is a limit to the amount of error that can plausibly be imputed to prior Courts," with the more democratic views of a more humble man:

> "The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be 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.

We must not let this happen, but we cannot prevent it unless we know it is happening.

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" of "remaining steadfast" and adhering to "principle." 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.* To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions. 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." **The only principle the Court "adheres" 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.**

Realpolitik : politics based on practical and material factors rather than on theoretical or ethical objectives.

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 (1857),* an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish (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*."

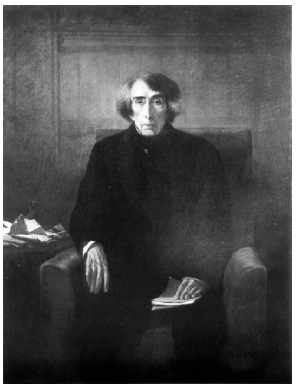
But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes 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 has an evolving meaning; that the Ninth Amendment's reference to "other" rights is not a disclaimer, but a charter for action; 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. 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,* -- about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional

adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment" which turns out to be nothing but philosophical predilection and moral intuition. 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. Why even the Ninth Amendment -- which says only that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" -- is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at "rights," definable and enforceable by us, through "reasoned judgment."

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 ceremonies, ***Lee v. Weisman*** *(1992);* if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school -- maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow 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. **There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "call the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."**



There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and

staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case -- its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation -- burning on his mind. I expect that two years earlier he, too, had thought himself "calling the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this litigation, than it was for him in that, to think that an issue of the sort they both involved -- an issue involving life and death, freedom and subjugation -- can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish. We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.