CONSTITUTION
CLUBS®

DOBBS
v.
JACKSON WOMEN'S HEALTH ORGANIZATION
United States Supreme Court
597 U.S. ____
June 24, 2022
[6 - 3]

OPINION: ALITO/ THOMAS/ GORSUCH/ KAVANAUGH/ BARRETT... Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1973, this Court decided *Roe v. Wade*. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right and its survey of history ranged from the constitutionally irrelevant *(e.g.,* its discussion of abortion in antiquity) to the plainly incorrect *(e.g.,* its assertion that abortion was probably never a crime under the common law). After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the *Roe v. Wade* opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.

Under this scheme, each trimester of pregnancy was regulated differently, but the most critical line was drawn at roughly the end of the second trimester, which, at the time, corresponded to the point at which a fetus was thought to achieve "viability," *i.e.,* the ability to survive outside the womb. Although the *Roe* Court acknowledged that States had a legitimate interest in protecting "potential life," it found that this interest could not justify any

restriction on pre-viability abortions. The Court did not explain the basis for this line, and even abortion supporters have found it hard to defend *Roe's* reasoning. One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court ended up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."

Translation: The *Roe* Court did not interpret the Constitution. Instead, they crafted what they would like to see become law. In other words, they "legislated." They drastically exceeded their power and gave us 50 years of turmoil.

At the time of *Roe,* 30 States still prohibited abortion at all stages. In the years prior to that decision, about a third of the States had liberalized their laws, but *Roe* abruptly ended that political process. It imposed the same highly restrictive regime on the entire Nation, and it effectively struck down the abortion laws of every single State. **As Justice Byron White aptly put it in his dissent, the decision represented the "exercise of raw judicial power"** and it sparked a national controversy that has embittered our political culture for a half century.

Eventually, in *Planned Parenthood v. Casey* (1992), the Court revisited *Roe,* but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way. Four others wanted to overrule the decision in its entirety. And the three remaining Justices, who jointly signed the controlling opinion, took a third position. Their opinion did not endorse *Roe*'s reasoning, and it even hinted that one or more of its authors might have "reservations" about whether the Constitution protects a right to abortion. But the opinion concluded that *stare decisis,* which calls for prior decisions to be followed in most instances, required adherence to what it called *Roe's* "central holding" - that a State may not constitutionally protect fetal life before "viability" - even if that holding was wrong. Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

Paradoxically, the judgment in *Casey* did a fair amount of overruling...[I]t threw out *Roe's* trimester scheme and substituted a new rule of uncertain origin under which States were forbidden to adopt any regulation that imposed an "undue burden" on a woman's right to have an abortion. The decision provided no clear guidance about the difference between a "due" and an "undue" burden. But the three Justices who authored the controlling opinion "called the contending sides of a national controversy to end their

national division" by treating the Court's decision as the final settlement of the question of the constitutional right to abortion.

As has become increasingly apparent in the intervening years, *Casey* did not achieve that goal. Americans continue to hold passionate and widely divergent views on abortion, and state legislatures have acted accordingly. Some have recently enacted laws allowing abortion, with few restrictions, at all stages of pregnancy. Others have tightly restricted abortion beginning well before viability. **And in this case, 26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions.**

Before us now is one such state law. **The State of Mississippi asks us to uphold the constitutionality of a law that generally prohibits an abortion after the 15th week of pregnancy - several weeks before the point at which a fetus is now regarded as "viable" outside the womb.** In defending this law, the State's primary argument is that we should reconsider and overrule *Roe* and *Casey* and once again allow each State to regulate abortion as its citizens wish. On the other side, respondents and the Solicitor General ask us to reaffirm *Roe* and *Casey,* and they contend that the Mississippi law cannot stand if we do so. Allowing Mississippi to prohibit abortions after 15 weeks of pregnancy, they argue, "would be no different than overruling *Casey* and *Roe* entirely." They contend that "no half-measures" are available and that we must either reaffirm or overrule *Roe* and *Casey.*

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely - the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but **any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."**

> It is important to understand that, while the 14th Amendment has guaranteed some rights not mentioned in the Constitution, those rights were upheld only if they were "deeply rooted in our history" and "implicit in the concept of ordered liberty." This Court will now explore these concepts.

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, **when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy.** The abortion

right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe's* defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

***Stare decisis*, the doctrine on which *Casey's* controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.**

The last comment is a response to the *Casey* assertion that sticking with *Roe* would calm things down across the nation. However, I add a cautionary note just to affirm that it is not the job of the Supreme Court to "bring us together." An independent and objective interpretation of the Constitution if their goal, regardless of how enflamed or divided the country becomes.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "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." That is what the Constitution and the rule of law demand.

I

The law at issue in this case, Mississippi's Gestational Age Act, contains this central provision: "Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform ... or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks."

To support this Act, the legislature made a series of factual findings. It began by noting that, at the time of enactment, **only six countries besides the United States** "permitted nontherapeutic or elective abortion-on-demand after the twentieth week of gestation." The legislature then found that at 5 or 6 weeks' gestational age an "unborn human being's heart begins beating"; at 8 weeks the "unborn human being begins to move about in the womb"; at 9 weeks "all basic physiological functions are present"; at 10 weeks "vital organs begin to function," and "hair, fingernails, and toenails . . . begin to form"; at 11 weeks "an unborn human being's diaphragm is developing," and

he or she may "move about freely in the womb"; and at 12 weeks the "unborn human being" has "taken on 'the human form' in all relevant respects." It found that most abortions after 15 weeks employ "dilation and evacuation procedures which involve the use of surgical instruments to crush and tear the unborn child," and it concluded that the "intentional commitment of such acts for nontherapeutic or elective reasons is a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession."

Respondents are an abortion clinic, Jackson Women's Health Organization, and one of its doctors. On the day the Gestational Age Act was enacted, respondents filed suit in Federal District Court against various Mississippi officials, alleging that the Act violated this Court's precedents establishing a constitutional right to abortion. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning 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" and that 15 weeks' gestational age is "prior to viability." The Fifth Circuit affirmed.

In other words, the trial court of original jurisdiction struck down the Mississippi law because it violated the precedent established in *Roe v. Wade*. Mr. Dobbs was Mississippi's health officer. He (Mississippi) appealed that decision and the appellate court (in this instance the Fifth Circuit Court of Appeals) affirmed the trial court's decision. The Supreme Court then accepted *certiorari* and, with this ruling, overturns the Fifth Circuit.

We granted certiorari to resolve the question whether "all pre-viability prohibitions on elective abortions are unconstitutional."...

II

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion. Skipping over that question, the controlling opinion in *Casey* reaffirmed *Roe's* "central holding" based solely on the doctrine of *stare decisis,* but as we will explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which *Roe* was based.

We therefore turn to the question that the *Casey* plurality did not consider, and we address that question in three steps. **First**, we explain the standard that our cases have used in determining whether the Fourteenth Amendment's reference to "liberty" protects a particular right. **Second**, we examine whether the right at issue in this case is rooted in our Nation's history and tradition and whether it is an essential component of what we

have described as "ordered liberty." **Finally**, we consider whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents.

A

1

Constitutional analysis must begin with "the language of the instrument" which offers a "fixed standard" for ascertaining what our founding document means. **The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text.**

Roe, however, was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned. And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions - the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

The Court's discussion left open at least three ways in which some combination of these provisions could protect the abortion right. One possibility was that the right was "founded...in the Ninth Amendment's reservation of rights to the people." Another was that the right was rooted in the First, Fourth, or Fifth Amendment, or in some combination of those provisions, and that this right had been "incorporated" into the Due Process Clause of the Fourteenth Amendment just as many other Bill of Rights provisions had by then been incorporated. And a third path was that the First, Fourth, and Fifth Amendments played no role and that the right was simply a component of the "liberty" protected by the Fourteenth Amendment's Due Process Clause. *Roe* expressed the "feeling" that the Fourteenth Amendment was the provision that did the work, but its message seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance. The *Casey* Court did not defend this unfocused analysis and instead grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause...

[W]e turn to *Casey's* bold assertion that the abortion right is an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment.

2

The underlying theory on which this argument rests - that the Fourteenth Amendment's Due Process Clause provides substantive, as

well as procedural, protection for "liberty" - has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. **The second category - which is the one in question here - comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.**

The "incorporation doctrine" could be difficult to understand, but it really is not. The 14th Amendment provides, in pertinent part, no State shall "deprive any person of life, liberty or property without due process of law..." So, for example, the religion clauses of the 1st Amendment state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." The incorporation doctrine holds that not only is Congress so restricted, but also the States. The doctrine has been held to apply to the first eight amendments. We now also explore the "second category" of "substantive due process." Don't worry, with experience, this will become much easier to understand.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in our history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty." And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue.

Justice Ginsburg's opinion for the Court in *Timbs* is a recent example. In concluding that the Eighth Amendment's protection against excessive fines is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition," her opinion traced the right back to Magna Carta, Blackstone's Commentaries, and 35 of the 37 state constitutions in effect at the ratification of the Fourteenth Amendment.

We inherited much of our law from England (principles established in the Magna Carta). This "law" is sometimes referred to as the "common law." Blackstone was an English legal scholar.

A similar inquiry was undertaken in *McDonald,* which held that the Fourteenth Amendment protects the right to keep and bear arms. The lead opinion surveyed the origins of the Second Amendment, the debates in Congress about the adoption of the Fourteenth Amendment, the state

constitutions in effect when that Amendment was ratified (at least 22 of the 37 States protected the right to keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence. Only then did the opinion conclude that "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."

***Timbs* and *McDonald* concerned the question whether the Fourteenth Amendment protects rights that are expressly set out in the Bill of Rights, and it would be anomalous if similar historical support were not required when a putative right is not mentioned anywhere in the Constitution.** Thus, in *Glucksberg,* which held that the Due Process Clause does not confer a right to assisted suicide, the Court surveyed more than 700 years of "Anglo-American common law tradition" and made clear that a fundamental right must be "objectively, deeply rooted in this Nation's history and tradition."

"Putative" means "assumed" or "reported."

Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the "liberty" protected by the Due Process Clause because the term "liberty" alone provides little guidance. "Liberty" is a capacious term. As Lincoln once said: "We all declare for Liberty; but in using the same word we do not all mean the same thing."...

"Capacious" means "broad."

In interpreting what is meant by the Fourteenth Amendment's reference to "liberty," we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans <u>should</u> enjoy. <u>That is why the Court has long been "reluctant" to recognize rights that are not mentioned in the Constitution</u>. "Substantive due process has at times been a treacherous field for this Court" and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people's elected representatives. As the Court cautioned in *Glucksberg,* "**<u>we must . . . exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court</u>.**"

On occasion, when the Court has ignored the "appropriate limits" imposed by "respect for the teachings of history" it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York* (1905).

In *Lochner*, the Supreme Court struck down a New York statute as unconstutional that limited the working hours of bakers.

The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, **we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.**

B

1

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right...

Not only was there no support for such a constitutional right until shortly before *Roe,* but **abortion had long been a *crime* in every single State**. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. **By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.**

Roe either ignored or misstated this history, and *Casey* declined to reconsider *Roe's* faulty historical analysis. It is therefore important to set the record straight.

2

a

We begin with the common law, under which abortion was a crime at least after "quickening" - *i.e.,* the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.

The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)" *all* describe abortion after quickening as criminal. Henry de Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the

foetus be already formed and animated, and particularly if it be animated, he commits homicide."

...Writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least a very "heinous misdemeanor" (citing Coke)...

In sum, although common-law authorities differed on the severity of punishment for abortions committed at different points in pregnancy, none endorsed the practice. Moreover, we are aware of no common-law case or authority, and the parties have not pointed to any, that remotely suggests a positive *right* to procure an abortion at any stage of pregnancy.

b

In this country, the historical record is similar...The few cases available from the early colonial period corroborate that abortion was a crime...

c

...**In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion at all stages of pregnancy.** By 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening. Of the nine States that had not yet criminalized abortion at all stages, all but one did so by 1910.

The trend in the Territories that would become the last 13 States was similar: All of them criminalized abortion at all stages of pregnancy between 1850 (the Kingdom of Hawaii) and 1919 (New Mexico). By the end of the 1950s, according to the *Roe* Court's own count, statutes in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or preserve the life of the mother."

This overwhelming consensus endured until the day *Roe* was decided. At that time, also by the *Roe* Court's own count, a substantial majority - 30 States - still prohibited abortion at all stages except to save the life of the mother. And though *Roe* discerned a "trend toward liberalization" in about "one-third of the States," those States still criminalized some abortions and regulated them more stringently than *Roe* would allow. In short, **the "Court's opinion in *Roe* itself convincingly refutes the notion that the abortion liberty is deeply rooted in the history or tradition of our people."**

d

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in *Roe* could have said of abortion exactly what *Glucksberg* said of assisted suicide: "Attitudes toward abortion have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, that practice."

Don't forget. The law was clear at the time *Roe* was wrongly decided: an alleged constitutional "right" that was not spelled out in the Constitution could not be recognized unless it was "deeply rooted in our history and tradition." Clearly, abortion did not fit into that category.

3

Respondents and their *amici* have no persuasive answer to this historical evidence...

C

1

Instead of seriously pressing the argument that the abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right. *Roe* termed this a right to privacy and *Casey* described it as the freedom to make "intimate and personal choices" that are "central to personal dignity and autonomy." *Casey* elaborated: "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."

The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *to think* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."...

2

...Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those

arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives.

The *Roe* Court arrogantly assumed powers it did not have. This Court, in contrast, humbly gives that power back to the people of each state.

D

1

...The dissent's failure to engage with this long tradition is devastating to its position. We have held that the "established method of substantive-due-process analysis" requires that an unenumerated right be "deeply rooted in this Nation's history and tradition" before it can be recognized as a component of the "liberty" protected in the Due Process Clause. But despite the dissent's professed fidelity to *stare decisis,* it fails to seriously engage with that important precedent - which it cannot possibly satisfy...

The dissent cannot establish that a right to abortion has *ever* been part of this Nation's tradition.

2

...[I]t is impossible to defend *Roe* based on prior precedent because all of the precedents *Roe* cited, including *Griswold* and *Eisenstadt,* were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called "potential life."

So without support in history or relevant precedent, *Roe's* reasoning cannot be defended even under the dissent's proposed test, and the dissent is forced to rely solely on the fact that a constitutional right to abortion was recognized in *Roe* and later decisions that accepted *Roe's* interpretation. Under the doctrine of *stare decisis,* those precedents are entitled to careful and respectful consideration, and we engage in that analysis below. But as the Court has reiterated time and time again, adherence to precedent is not "an inexorable command." *Kimble v. Marvel Entertainment* (2015). **There are occasions when past decisions should be overruled, and as we will explain, this is one of them.**

3

The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life.

This is evident in the analogy that the dissent draws between the abortion right and the rights recognized in *Griswold* (contraception), *Eisenstadt* (same), *Lawrence* (sexual conduct with member of the same sex), and *Obergefell* (same-sex marriage). Perhaps this is designed to stoke unfounded fear that our decision will imperil those other rights, but the dissent's analogy is objectionable for a more important reason: what it reveals about the dissent's views on the protection of what *Roe* called "potential life." The exercise of the rights at issue in *Griswold, Eisenstadt, Lawrence,* and *Obergefell* does not destroy a "potential life," but an abortion has that effect. So if the rights at issue in those cases are fundamentally the same as the right recognized in *Roe* and *Casey,* the implication is clear: The Constitution does not permit the States to regard the destruction of a "potential life" as a matter of any significance.

That view is evident throughout the dissent. The dissent has much to say about the effects of pregnancy on women, the burdens of motherhood, and the difficulties faced by poor women. These are important concerns. However, the dissent evinces no similar regard for a State's interest in protecting prenatal life. The dissent repeatedly praises the "balance" that the viability line strikes between a woman's liberty interest and the State's interest in prenatal life. But for reasons we discuss later and given in the opinion of THE CHIEF JUSTICE, the viability line makes no sense. It was not adequately justified in *Roe,* and the dissent does not even try to defend it today. Nor does it identify any other point in a pregnancy after which a State is permitted to prohibit the destruction of a fetus.

Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth. The dissent, by contrast, would impose on the people a particular theory about when the rights of personhood begin. According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right-to-live - at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that "theory of life."

III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey.* *Stare decisis*...serves many valuable ends. It protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." It fosters "evenhanded" decisionmaking by requiring that like cases be decided in a like manner. It "contributes to the actual and perceived integrity of the judicial process." And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the

past. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges."

We have long recognized, however, that *stare decisis* is "not an inexorable command" and it "is at its weakest when we interpret the Constitution."

Most of the Supreme Court's rulings do not involve an interpretation of the Constitution. When Congress fails to define a term in a piece of legislation, the Supreme Court may be called upon to investigate legislative intent and "interpret" the term. That does not involve a constitutional issue. The Court is saying that blind adherence to "precedent" is foolish or dangerous when the issue involves the Constitution.

It has been said that it is sometimes more important that an issue "be settled than that it be settled right." But when it comes to the interpretation of the Constitution - the "great charter of our liberties," which was meant "to endure through a long lapse of ages" - we place a high value on having the matter "settled right." In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents...In *Brown v. Board of Education* (1954), the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. In so doing, the Court overruled the infamous decision in *Plessy v. Ferguson* (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule...

[I]n *West Virginia Bd. of Ed. v. Barnette,* after the lapse of only three years, the Court overruled *Minersville School Dist. v. Gobitis* and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. *Barnette* stands out because nothing had changed during the intervening period other than the Court's belated recognition that its earlier decision had been seriously wrong.

On many other occasions, this Court has overruled important constitutional decisions. Without these decisions, American constitutional law as we know it would be unrecognizable, and this would be a different country.

No Justice of this Court has ever argued that the Court should never overrule a constitutional decision, but overruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision.

In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey:* the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.

A

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others.

The infamous decision in *Plessy v. Ferguson* was one such decision. It betrayed our commitment to "equality before the law." It was "egregiously wrong" on the day it was decided, and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity.

Roe was also egregiously wrong and deeply damaging. For reasons already explained, *Roe's* constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed.

Roe was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people. Rather, wielding nothing but "raw judicial power," **the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people. *Casey* described itself as calling both sides of the national controversy to resolve their debate, but in doing so, *Casey* necessarily declared a winning side.** Those on the losing side - those who sought to advance the State's interest in fetal life - could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe. "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." Together, *Roe* and *Casey* represent an error that cannot be allowed to stand...

B

The quality of the reasoning. Under our precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered. In Part II we explained why *Roe* was incorrectly decided, but that decision was more than just wrong. It stood on exceptionally weak grounds.

***Roe* found that the Constitution implicitly conferred a right to obtain an abortion, but it failed to ground its decision in text, history, or precedent. It relied on an erroneous historical narrative; it devoted great attention to and presumably relied on matters that have no bearing on the meaning of the Constitution; it disregarded the fundamental difference between the precedents on which it relied and the question before the Court; it concocted an elaborate set of rules, with different restrictions for each trimester of pregnancy, but it did not explain how this veritable code could be teased out of anything in the Constitution, the history of abortion laws, prior precedent, or any other cited source; and its most important rule (that States cannot protect fetal life prior to "viability") was never raised by any party and has never been plausibly explained. *Roe's* reasoning quickly drew scathing scholarly criticism, even from supporters of broad access to abortion...**

1

a

The weaknesses in *Roe's* reasoning are well-known. Without any grounding in the constitutional text, history, or precedent, it imposed on the entire country a detailed set of rules much like those that one might expect to find in a statute or regulation...

This elaborate scheme was the Court's own brainchild. Neither party advocated the trimester framework; nor did either party or any *amicus* argue that "viability" should mark the point at which the scope of the abortion right and a State's regulatory authority should be substantially transformed.

b

...*Roe* featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to explain why it was included...

After surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee. This included a lengthy account of the "position of the American Medical Association" and "the position of the American Public Health Association," as well as the vote by the American Bar Association's House of Delegates in February 1972 on proposed abortion legislation. Also noted were a British

judicial decision handed down in 1939 and a new British abortion law enacted in 1967. **The Court did not explain why these sources shed light on the meaning of the Constitution, and not one of them adopted or advocated anything like the scheme that *Roe* imposed on the country...**

When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with" the following: (1) "the relative weights of the respective interests involved," (2) "the lessons and examples of medical and legal history," (3) "the lenity of the common law," and (4) "the demands of the profound problems of the present day." Put aside the second and third factors, which were based on the Court's flawed account of history, and what remains are precisely the sort of considerations that **legislative bodies** often take into account when they draw lines that accommodate competing interests...

c

What *Roe* did not provide was any cogent justification for the lines it drew. Why, for example, does a State have no authority to regulate first trimester abortions for the purpose of protecting a woman's health? The Court's only explanation was that mortality rates for abortion at that stage were lower than the mortality rates for childbirth. But the Court did not explain why mortality rates were the only factor that a State could legitimately consider. Many health and safety regulations aim to avoid adverse health consequences short of death. And the Court did not explain why it departed from the normal rule that courts defer to the judgments of legislatures "in areas fraught with medical and scientific uncertainties." *Marshall v. United States* (1974).

An even more glaring deficiency was *Roe's* failure to justify the critical distinction it drew between pre- and post-viability abortions. Here is the Court's entire explanation:

> "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 womb."

As Professor Laurence Tribe has written, "clearly, this mistakes 'a definition for a syllogism.'" The definition of a "viable" fetus is one that is capable of surviving outside the womb, but why is this the point at which the State's interest becomes compelling? If, as *Roe* held, a State's interest in protecting prenatal life is compelling "after viability," why isn't that interest "equally compelling before viability"? *Roe* did not say, and no explanation is apparent...

d

All in all, *Roe's* reasoning was exceedingly weak, and academic commentators, including those who agreed with the decision as a matter of policy, were unsparing in their criticism. John Hart Ely famously wrote that *Roe* was "not constitutional law and gave almost no sense of an obligation to try to be." Archibald Cox, who served as Solicitor General under President Kennedy, commented that *Roe* "reads like a set of hospital rules and regulations" that "neither historian, layman, nor lawyer will be persuaded . . . are part of. . . the Constitution." Laurence Tribe wrote that "even if there is a need to divide pregnancy into several segments with lines that clearly identify the limits of governmental power, 'interest-balancing' of the form the Court pursues fails to justify any of the lines actually drawn." Mark Tushnet termed *Roe* a "totally unreasoned judicial opinion."

Despite *Roe's* weaknesses, its reach was steadily extended in the years that followed. The Court struck down laws requiring that second-trimester abortions be performed only in hospitals, *Akron v. Akron Center for Reproductive Health* (1983); that minors obtain parental consent, *Planned Parenthood v. Danforth* (1976); that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion; that women wait 24 hours for an abortion; that a physician determine viability in a particular manner, *Colautti*; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus; and that fetal remains be treated in a humane and sanitary manner, *Akron*...

2

When *Casey* revisited *Roe* almost 20 years later, very little of *Roe's* reasoning was defended or preserved...*Casey* also deployed a novel version of the doctrine of *stare decisis.* This new doctrine did not account for the profound wrongness of the decision in *Roe,* and placed great weight on an intangible form of reliance with little if any basis in prior case law. *Stare decisis* does not command the preservation of such a decision.

C

Workability. Our precedents counsel that another important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable - that is, whether it can be understood and applied in a consistent and predictable manner. *Casey's* "undue burden" test has scored poorly on the workability scale.

1

Problems begin with the very concept of an "undue burden." As Justice Scalia noted in his *Casey* partial dissent, determining whether a burden is "due" or "undue" is "inherently standardless."...

2

...This Court's experience applying *Casey* has confirmed Chief Justice Rehnquist's prescient diagnosis that the undue-burden standard was "not built to last." *Casey*.

3

The experience of the Courts of Appeals provides further evidence that *Casey's* "line between" permissible and unconstitutional restrictions "has proved to be impossible to draw with precision." *Janus*.

...*Casey's* "undue burden" test has proved to be unworkable. "Plucked from nowhere" it "seems calculated to perpetuate give-it-a-try litigation" before judges assigned an unwieldy and inappropriate task. Continued adherence to that standard would undermine, not advance, the "evenhanded, predictable, and consistent development of legal principles."

D

Effect on other areas of law. *Roe* and *Casey* have led to the distortion of many important but unrelated legal doctrines, and that effect provides further support for overruling those decisions...

E

Reliance interests. We last consider whether overruling *Roe* and *Casey* will upend substantial reliance interests.

1

...

2

...Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power. It is noteworthy that the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so. In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi, constituted 55.5 percent of the voters who cast ballots.

...Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.

IV

Having shown that traditional *stare decisis* factors do not weigh in favor of retaining *Roe* or *Casey,* we must address one final argument that featured prominently in the *Casey* plurality opinion.

The argument was cast in different terms, but stated simply, it was essentially as follows. The American people's belief in the rule of law would be shaken if they lost respect for this Court as an institution that decides important cases based on principle, not "social and political pressures." There is a special danger that the public will perceive a decision as having been made for unprincipled reasons when the Court overrules a controversial "watershed" decision, such as *Roe.* A decision overruling *Roe* would be perceived as having been made "under fire" and as a "surrender to political pressure," and therefore the preservation of public approval of the Court weighs heavily in favor of retaining *Roe.*

This analysis starts out on the right foot but ultimately veers off course. The *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach. But **we cannot exceed the scope of our authority under the Constitution, and we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work.** That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. As Chief Justice Rehnquist explained, **"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 suggesting otherwise, the *Casey* plurality went beyond this Court's role in our constitutional system...

Justice Rehnquist was absolutely correct. This commitment to the Constitution is vital to the integrity of the Supreme Court.

Neither decision has ended debate over the issue of a constitutional right to obtain an abortion. Indeed, in this case, 26 States expressly ask us to overrule

Roe and *Casey* and to return the issue of abortion to the people and their elected representatives. This Court's inability to end debate on the issue should not have been surprising. **This Court cannot bring about the permanent resolution of a rancorous national controversy simply by dictating a settlement and telling the people to move on. Whatever influence the Court may have on public attitudes must stem from the strength of our opinions, not an attempt to exercise "raw judicial power."**

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

V

A

1

The dissent argues that we have "abandoned" *stare decisis*, but we have done no such thing, and it is the dissent's understanding of *stare decisis* that breaks with tradition. The dissent's foundational contention is that the Court should never (or perhaps almost never) overrule an egregiously wrong constitutional precedent unless the Court can "point to major legal or factual changes undermining the decision's original basis." To support this contention, the dissent claims that *Brown v. Board of Education* and other landmark cases overruling prior precedents "responded to changed law and to changed facts and attitudes that had taken hold throughout society." The unmistakable implication of this argument is that only the passage of time and new developments justified those decisions. Recognition that the cases they overruled were egregiously wrong on the day they were handed down was not enough.

The Court has never adopted this strange new version of *stare decisis* - and with good reason. Does the dissent really maintain that overruling *Plessy* was not justified until the country had experienced more than a half-century of state-sanctioned segregation and generations of Black school children had suffered all its effects?...

Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong. When that happens, *stare decisis* is not a straitjacket. And indeed, the dissent eventually admits that a decision *could* "be overruled just because it is terribly wrong," though the dissent does not explain when that would be so.

2

Even if the dissent were correct in arguing that an egregiously wrong decision should (almost) never be overruled unless its mistake is later highlighted by "major legal or factual changes," reexamination of *Roe* and *Casey* would be amply justified. We have already mentioned a number of *post-Casey* developments, but the most profound change may be the failure of the *Casey* plurality's call for "the contending sides" in the controversy about abortion "to end their national division." That has not happened, and there is no reason to think that another decision sticking with *Roe* would achieve what *Casey* could not.

The dissent, however, is undeterred. It contends that the "very controversy surrounding *Roe* and *Casey*" is an important *stare decisis* consideration that requires upholding those precedents. The dissent characterizes *Casey* as a "precedent about precedent" that is permanently shielded from further evaluation under traditional *stare decisis* principles. But as we have explained, *Casey* broke new ground when it treated the national controversy provoked by *Roe* as a ground for refusing to reconsider that decision, and no subsequent case has relied on that factor. Our decision today simply applies longstanding *stare decisis* factors instead of applying a version of the doctrine that seems to apply only in abortion cases.

3

Finally, the dissent suggests that our decision calls into question *Griswold, Eisenstadt, Lawrence,* and *Obergefell.* But we have stated unequivocally that "nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."...It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, there is a further point that the dissent ignores: Each precedent is subject to its own *stare decisis* analysis, and the factors that our doctrine instructs us to consider like reliance and workability are different for these cases than for our abortion jurisprudence.

B

1

We now turn to the concurrence in the judgment, which reproves us for deciding whether *Roe* and *Casey* should be retained or overruled. That opinion (which for convenience we will call simply "the concurrence") recommends a "more measured course," which it defends based on what it claims is "a straightforward *stare decisis* analysis." The concurrence would "leave for another day whether to reject any right to an abortion at all" and would hold only that if the Constitution protects any such right, the right ends once women have had "a reasonable opportunity" to obtain an abortion. The concurrence does not specify what period of time is sufficient to provide such an opportunity, but it would hold that 15 weeks, the period allowed under Mississippi's law, is enough - at least "absent rare circumstances."

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party...**The concurrence would do exactly what it criticizes *Roe* for doing: pulling "out of thin air" a test that "no party or *amicus* asked the Court to adopt."**

2

The concurrence's most fundamental defect is its failure to offer any principled basis for its approach...*Stare decisis* cannot justify the new "reasonable opportunity" rule propounded by the concurrence. If that rule is to become the law of the land, it must stand on its own, but the concurrence makes no attempt to show that this rule represents a correct interpretation of the Constitution. The concurrence does not claim that the right to a reasonable opportunity to obtain an abortion is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." Nor does it propound any other theory that could show that the Constitution supports its new rule. And if the Constitution protects a woman's right to obtain an abortion, the opinion does not explain why that right should end after the point at which all "reasonable" women will have decided whether to seek an abortion. While the concurrence is moved by a desire for judicial minimalism, "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right." For the reasons that we have explained, the concurrence's approach is not.

3

...In sum, the concurrence's quest for a middle way would only put off the day when we would be forced to confront the question we now decide. The turmoil wrought by *Roe* and *Casey* would be prolonged. It is far better - for this Court and the country - to face up to the real issue without further delay.

This is all referring to the Justice Roberts' concurrence, below.

VI

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

A

Under our precedents, "rational basis review" is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance.

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

B

These legitimate interests justify Mississippi's Gestational Age Act. Except "in a medical emergency or in the case of a severe fetal abnormality," the statute prohibits abortion "if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks." The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the State's interest in "protecting the life of the unborn." The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons to be a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." **These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.**

VII

We end this opinion where we began. Abortion presents a profound moral question. **The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.** *Roe* and *Casey* arrogated that authority.

arrogated: to take or claim something without justification.

We now overrule those decisions and return that authority to the people and their elected representatives.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion. *It is so ordered.*

So, in addition to overruling *Roe* and *Casey* and, thus, returning these issues to the states, the Mississippi 15 week limit on abortion was upheld as having a rational bases and, therefore, constitutional.

APPENDICES

A

This appendix contains statutes criminalizing abortion at all stages of pregnancy in the States existing in 1868. The statutes appear in chronological order.

1. Missouri (1825)
2. Illinois (1827)
3. New York (1828)
4. Ohio (1834)
5. Indiana (1835)
6. Maine (1840)
7. Alabama (1841)
8. Massachusetts (1845)
9. Michigan (1846)
10. Vermont (1846)
11. Virginia (1848)
12. New Hampshire (1849)
13. New Jersey (1849)
14. California (1850)
15. Texas (1854)
16. Louisiana (1856)
17. Iowa (1858)

18. Wisconsin (1858)
19. Kansas (1859)
20. Connecticut (1860)
21. Pennsylvania (1860)
22. Rhode Island (1861)
23. Nevada (1861)
24. West Virginia (1863)
25. Oregon (1864)
26. Nebraska (1866)
27. Maryland (1868)
28. Minnesota (1873)
29. Arkansas (1875)
30. Georgia (1876)
31. North Carolina (1881)
32. Delaware (1883)
33. Tennessee (1883)
34. South Carolina (1883)
35. Kentucky (1910)
36. Mississippi (1952)

B

This appendix contains statutes criminalizing abortion at all stages in each of the Territories that became States and in the District of Columbia. The statutes appear in chronological order of enactment.

1. Hawaii (1850)
2. Washington (1854)
3. Colorado (1861)
4. Idaho (1864)
5. Montana (1864)
6. Arizona (1865)
7. Wyoming (1869)
8. Utah (1876)
9. North Dakota (1877)
10. South Dakota (1877)
11. Oklahoma (1890)
12. Alaska (1899)
13. New Mexico (1919)
14. District of Columbia (1901)

CONCURRENCE: THOMAS...I join the opinion of the Court because it correctly holds that there is no constitutional right to abortion. Respondents invoke one source for that right: the Fourteenth Amendment's guarantee that no State shall "deprive any person of life, liberty, or property without due process of law." The Court well explains why, under our substantive due process precedents, the purported right to abortion is not a form of "liberty"

protected by the Due Process Clause. Such a right is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty.""**The idea that the Framers of the Fourteenth Amendment understood the Due Process Clause to protect a right to abortion is farcical."**

I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the Due Process Clause...[T]he Due Process Clause at most guarantees *process*. It does not, as the Court's substantive due process cases suppose, "forbid the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided."

As I have previously explained, "substantive due process" is an oxymoron that "lacks any basis in the Constitution." "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." The resolution of this case is thus straightforward. Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.

The Court today declines to disturb substantive due process jurisprudence generally or the doctrine's application in other, specific contexts. Cases like *Griswold v. Connecticut* (right of married persons to obtain contraceptives); *Lawrence v. Texas* (right to engage in private, consensual sexual acts); and *Obergefell v. Hodges* (right to same-sex marriage), are not at issue. The Court's abortion cases are unique and no party has asked us to decide "whether our entire Fourteenth Amendment jurisprudence must be preserved or revised." Thus, I agree that "nothing in the Court's opinion should be understood to cast doubt on precedents that do not concern abortion."

...Moreover, apart from being a demonstrably incorrect reading of the Due Process Clause, the "legal fiction" of substantive due process is "particularly dangerous." At least three dangers favor jettisoning the doctrine entirely.

First, "substantive due process exalts judges at the expense of the People from whom they derive their authority." Because the Due Process Clause "speaks only to 'process,' the Court has long struggled to define what substantive rights it protects." In practice, the Court's approach for identifying those "fundamental" rights "unquestionably involves policymaking rather than neutral legal analysis." (**substantive due process is "a jurisprudence devoid of a guiding principle"**). The Court divines new rights in line with "its own, extraconstitutional value preferences" and nullifies state laws that do not align with the judicially created guarantees.

Nowhere is this exaltation of judicial policymaking clearer than this Court's abortion jurisprudence. In *Roe v. Wade* the Court divined a right to abortion because it "felt" that "the Fourteenth Amendment's concept of personal liberty" included a "right of privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." In *Casey* the Court likewise identified an abortion guarantee in "the liberty protected by the Fourteenth Amendment," but, rather than a "right of privacy," it invoked an ethereal "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." As the Court's preferred manifestation of "liberty" changed, so, too, did the test used to protect it, as *Roe*'s author lamented. ("The *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard").

Now, in this case, the nature of the purported "liberty" supporting the abortion right has shifted yet again. Respondents and the United States propose no fewer than three different interests that supposedly spring from the Due Process Clause. They include "bodily integrity," "personal autonomy in matters of family, medical care, and faith" and "women's equal citizenship." That 50 years have passed since *Roe* and abortion advocates still cannot coherently articulate the right (or rights) at stake proves the obvious: **The right to abortion is ultimately a policy goal in desperate search of a constitutional justification.**

Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a "fundamental" right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. See *Eisenstadt* (relying on *Griswold* to invalidate a state statute prohibiting distribution of contraceptives to unmarried persons). Statutory classifications implicating certain "nonfundamental" rights, meanwhile, receive only cursory review. Similarly, this Court deems unconstitutionally "vague" or "overbroad" those laws that impinge on its preferred rights, while letting slide those laws that implicate supposedly lesser values. "In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in *Roe v. Wade,"* and it since has been "deployed ... to nullify even mild regulations of the abortion industry." Therefore, regardless of the doctrinal context, the Court often "demands extra justifications for encroachments" on "preferred rights" while "relaxing purportedly higher standards of review for less-preferred rights." Substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments.

Third, substantive due process is often wielded to "disastrous ends." For instance, in *Dred Scott v. Sandford* the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate slaves brought into the federal territories. While *Dred Scott* "was overruled on the battlefields of the Civil War and by constitutional

amendment after Appomattox," that overruling was "purchased at the price of immeasurable human suffering." Now today, **the Court rightly overrules *Roe* and *Casey* - two of this Court's "most notoriously incorrect" substantive due process decisions - after more than 63 million abortions have been performed. The harm caused by this Court's forays into substantive due process remains immeasurable.**

Because the Court properly applies our substantive due process precedents to reject the fabrication of a constitutional right to abortion, and because this case does not present the opportunity to reject substantive due process entirely, I join the Court's opinion. But, in future cases, we should "follow the text of the Constitution, which sets forth certain substantive rights that cannot be taken away, and adds, beyond that, a right to due process when life, liberty, or property is to be taken away." Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity.

CONCURRENCE: KAVANAUGH...I write separately to explain my additional views...

I

...When it comes to abortion, one interest must prevail over the other at any given point in a pregnancy. Many Americans of good faith would prioritize the interests of the pregnant woman. Many other Americans of good faith instead would prioritize the interests in protecting fetal life - at least unless, for example, an abortion is necessary to save the life of the mother. Of course, many Americans are conflicted or have nuanced views that may vary depending on the particular time in pregnancy, or the particular circumstances of a pregnancy.

The issue before this Court, however, is not the policy or morality of abortion. The issue before this Court is what the Constitution says about abortion.

> But the American public believes the majority did weigh in on the morality/policy issues which they decidedly did NOT. The majority gave up the unconstitutional power to do so that had been so arrogantly assumed by the *Roe* and *Casey* Courts. Yet, the majority has been excoriated when all they did do was give up power. See what I mean by ignorance controlling our very existence?

The Constitution does not take sides on the issue of abortion. The text of the Constitution does not refer to or encompass abortion. To be sure, this

Court has held that the Constitution protects un-enumerated rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty. But a right to abortion is not deeply rooted in American history and tradition, as the Court today thoroughly explains.

On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. **The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress...**

> Oops! Justice Kavanaugh may regret implicitly concluding that Congress might be able to craft a national pro-choice or pro-life statute. I doubt Congress has the votes to do so, even if the filibuster rule is avoided; however, Congress cannot act on any measure without the constitutional power to do so. I do not believe Congress has any such constitutional power to enact a national pro-choice or pro-life statute.

Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. **The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.**

Instead of adhering to the Constitution's neutrality, the Court in *Roe* took sides on the issue and unilaterally decreed that abortion was legal throughout the United States up to the point of viability...The Court's decision today properly returns the Court to a position of neutrality and restores the people's authority to address the issue of abortion through the processes of democratic self-government established by the Constitution...

To be clear, then, the Court's decision today *does not outlaw* abortion throughout the United States. On the contrary, the Court's decision properly leaves the question of abortion for the people and their elected representatives in the democratic process. Through that democratic process, the people and their representatives may decide to allow or limit abortion. As Justice Scalia stated, the "States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so." *Casey*.

Today's decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion...After today's decision, all of the States may evaluate the competing interests and decide how to address this consequential issue...
The Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new

rights and liberties based on our own moral or policy views... This Court therefore does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion...In my respectful view, the Court in *Roe* therefore erred by taking sides on the issue of abortion.

II

...

III

After today's decision, the nine Members of this Court will no longer decide the basic legality of pre-viability abortion for all 330 million Americans...The *Roe* Court took sides on a consequential moral and policy issue that this Court had no constitutional authority to decide. By taking sides, the *Roe* Court distorted the Nation's understanding of this Court's proper role in the American constitutional system and thereby damaged the Court as an institution. As Justice Scalia explained, *Roe* "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."

The Court's decision today properly returns the Court to a position of judicial neutrality on the issue of abortion, and properly restores the people's authority to resolve the issue of abortion through the processes of democratic self-government established by the Constitution...

CONCURRENCE: ROBERTS...We granted certiorari to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." That question is directly implicated here: Mississippi's Gestational Age Act generally prohibits abortion after the fifteenth week of pregnancy - several weeks before a fetus is regarded as "viable" outside the womb. In urging our review, Mississippi stated that its case was "an ideal vehicle" to "reconsider the bright-line viability rule," and that a judgment in its favor would "not require the Court to overturn" *Roe v. Wade* and *Casey.*

Today, the Court nonetheless rules for Mississippi by doing just that. I would take a more measured course. I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded under a straightforward *stare decisis* analysis. That line never made any sense. Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should therefore extend far enough to ensure a reasonable opportunity to choose, but need not extend any further - certainly not all the way to viability. Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered "late" to discover a pregnancy. (pregnancy is discoverable and ordinarily

discovered by six weeks of gestation). I see no sound basis for questioning the adequacy of that opportunity.

But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them. Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. The Court's opinion is thoughtful and thorough, but those virtues cannot compensate for the fact that its dramatic and consequential ruling is unnecessary to decide the case before us.

I

...The Court rightly rejects the arbitrary viability rule today.

II

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in *Roe*...Here, there is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all...

III

...The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system - regardless of how you view those cases. A narrower decision rejecting the misguided viability line would be markedly less unsettling, and nothing more is needed to decide this case...

I therefore concur only in the judgment.

Hmmm??? What does that mean? Well, the precise "judgment" of the majority is that the Mississippi statute is constitutional inspite of the fact that it limits the legal ability to abort to a time well in advance of *Roe's* viability line. But, the majority also overruled *Roe* and *Casey*, thus turning these issues over to the states. Justice Roberts wouldn't have gone that far.

DISSENT: BREYER/ SOTOMAYOR/ KAGAN...For half a century, *Roe v. Wade* and *Planned Parenthood v. Casey*, have protected the liberty and

equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child...[and] that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a woman's body or the course of a woman's life: It could not determine what the woman's future would be. Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.

Roe and *Casey* well understood the difficulty and divisiveness of the abortion issue. The Court knew that Americans hold profoundly different views about the "morality" of "terminating a pregnancy, even in its earliest stage." And the Court recognized that "the State has legitimate interests from the outset of the pregnancy in protecting" the "life of the fetus that may become a child." So the Court struck a balance, as it often does when values and goals compete. It held that the State could prohibit abortions after fetal viability, so long as the ban contained exceptions to safeguard a woman's life or health. It held that even before viability, the State could regulate the abortion procedure in multiple and meaningful ways. But until the viability line was crossed, the Court held, a State could not impose a "substantial obstacle" on a woman's "right to elect the procedure" as she (not the government) thought proper, in light of all the circumstances and complexities of her own life.

Today, the Court discards that balance. It says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority's ruling, though, another State's law could do so after ten weeks, or five or three or one - or, again, from the moment of fertilization. States have already passed such laws, in anticipation of today's ruling. More will follow. Some States have enacted laws extending to all forms of abortion procedure, including taking medication in one's own home. They have passed laws without any exceptions for when the woman is the victim of rape or incest. Under those laws, a woman will have to bear her rapist's child or a young girl her father's - no matter if doing so will destroy her life. So too, after today's ruling, some States may compel women to carry to term a fetus with severe physical anomalies - for example, one afflicted with Tay-Sachs disease, sure to die within a few years of birth. States may even argue that a prohibition on abortion need make no provision for protecting a woman from risk of death or physical harm. Across a vast array of circumstances, a State will be able

to impose its moral choice on a woman and coerce her to give birth to a child.

Enforcement of all these draconian restrictions will also be left largely to the States' devices. A State can of course impose criminal penalties on abortion providers, including lengthy prison sentences. But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion. And as Texas has recently shown, a State can turn neighbor against neighbor, enlisting fellow citizens in the effort to root out anyone who tries to get an abortion, or to assist another in doing so.

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure. Above all others, women lacking financial resources will suffer from today's decision. In any event, interstate restrictions will also soon be in the offing. After this decision, some States may block women from traveling out of State to obtain abortions, or even from receiving abortion medications from out of State. Some may criminalize efforts, including the provision of information or funding, to help women gain access to other States' abortion services. Most threatening of all, no language in today's decision stops the Federal Government from prohibiting abortions nationwide, once again from the moment of conception and without exceptions for rape or incest. If that happens, "the views of an individual State's citizens" will not matter. The challenge for a woman will be to finance a trip not to "New York or California" but to Toronto.

Just as I contend that Congress does not have the power to enact a national right to abortion, I also believe Congress does not have the power to enact a national ban on abortion. The dissent hysterically overstates the majority opinion. Ironically, if the *Roe* Court could determine that a fetus is not a person, this Court could have determined otherwise and, then, could have judicially banned abortion altogether. Additionally, if the dissent is happy with unelected judges deciding the abortion rules, the *Roe* court could have limited abortion to 15 days or 10 or 5. That is the problem, there is no constitutional basis for this Court to set those rules.

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens.

The curtailment of women's rights? How absurd. If the *Roe* Court took it upon itself to determine the abortion rules, this Court could have determined that all states could limit abortion "rights" to the first two weeks of pregnancy. But the Majority is saying that any state could enact far more liberal abortion laws than even *Roe* set up. For example, New York and Illinois presently permit abortion all the way to birth. Would liberal women rather rely upon the Supreme Court for their supposed "rights"? I think not. The radical left has given very little thought to the gift this Court has given to them, inclusive of Breyer, Kagan and Sotomayor.

Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "the ability of women to participate equally in this Nation's economic and social life." *Casey*. But no longer. As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare.

The far left conveniently always casts aside the nightmare of death for the unborn child.

Some women, especially women of means, will find ways around the State's assertion of power. Others - those without money or childcare or the ability to take time off from work - will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives. The Constitution will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all.

Doesn't it strike you as odd that all of the legitimate concerns outlined by the dissent are couched in terms of policy decisions and that women had these same issues of expense and distance before this decision? These are decisions that should be made by elected legislators, not unelected judges.

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily

integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "casts doubt on precedents that do not concern abortion." (advocating the overruling of *Griswold, Lawrence,* and *Obergefell).* But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history": Not until *Roe,* the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain contraceptives." So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

I call this irresponsible exaggeration. The majority "could not have been more clear" in limiting their decision to abortion based in large part upon its belief that *stare decisis* would not support overruling the left's list of other victories.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents.

To suggest that the majority's approach was cavalier is nothing short of cavalier.

Stare decisis is the Latin phrase for a foundation stone of the rule of law: that things decided should stay decided unless there is a very good reason for change. It is a doctrine of judicial modesty and humility. Those qualities are not evident in today's opinion. The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. The legal framework *Roe* and *Casey* developed to balance the competing interests in this sphere has proved workable in courts across the country. No recent developments, in either law or fact, have eroded or cast doubt on

those precedents. Nothing, in short, has changed. Indeed, the Court in *Casey* already found all of that to be true. *Casey* is a precedent about precedent. It reviewed the same arguments made here in support of overruling *Roe,* and it found that doing so was not warranted. The Court reverses course today for one reason and one reason only: because the composition of this Court has changed. *Stare decisis,* this Court has often said, "contributes to the actual and perceived integrity of the judicial process" by ensuring that decisions are "founded in the law rather than in the proclivities of individuals." Today, the proclivities of individuals rule. The Court departs from its obligation to faithfully and impartially apply the law. We dissent.

Hard to believe!

I

We start with *Roe* and *Casey,* and with their deep connections to a broad swath of this Court's precedents. To hear the majority tell the tale, *Roe* and *Casey* are aberrations: They came from nowhere, went nowhere - and so are easy to excise from this Nation's constitutional law. That is not true. After describing the decisions themselves, we explain how they are rooted in - and themselves led to - other rights giving individuals control over their bodies and their most personal and intimate associations. The majority does not wish to talk about these matters for obvious reasons; to do so would both ground *Roe* and *Casey* in this Court's precedents and reveal the broad implications of today's decision. But the facts will not so handily disappear. *Roe* and *Casey* were from the beginning, and are even more now, embedded in core constitutional concepts of individual freedom, and of the equal rights of citizens to decide on the shape of their lives. Those legal concepts, one might even say, have gone far toward defining what it means to be an American.

So, Justice Breyer, just what is it about *Roe* that defines what it means to be an American? Perhaps that 26 states wanted to see *Roe* overruled? Hmmm! That doesn't seem to work, does it? The fact that a majority of states considered abortion to be a crime when *Roe* came into being? No, that doesn't seem to work, either. Maybe it's the idea that a very large percentage of "Americans" fervently believe abortion is murder. I guess you forgot all of these Americans, Justice Breyer.

For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So we do not (as the majority insists today) place everything within "the reach of majorities and government officials." *West Virginia Bd. of Ed. v. Barnette*. We believe in a

Constitution that puts some issues off limits to majority rule. Even in the face of public opposition, we uphold the right of individuals - yes, including women - to make their own choices and chart their own futures. Or at least, we did once.

A

Some half-century ago, *Roe* struck down a state law making it a crime to perform an abortion unless its purpose was to save a woman's life. The *Roe* Court knew it was treading on difficult and disputed ground. It understood that different people's "experiences," "values," and "religious training" and beliefs led to "opposing views" about abortion. But by a 7-to-2 vote, the Court held that in the earlier stages of pregnancy, that contested and contestable choice must belong to a woman, in consultation with her family and doctor.

In consultation with her "family"? Justice Breyer, that has a nice good old American ring to it, golly gee, but you know how quickly this Court's subsequent decisions left out the father and either parent from this "family" consultation. This Court even eventually ruled that a minor could avoid even notifying her parent as long as a judge determined she was "mature" enough to make this decision on her own.

The Court explained that a long line of precedents, "founded in the Fourteenth Amendment's concept of personal liberty," protected individual decisionmaking related to "marriage, procreation, contraception, family relationships, and child rearing and education." For the same reasons, the Court held, the Constitution must protect "a woman's decision whether or not to terminate her pregnancy." The Court recognized the myriad ways bearing a child can alter the "life and future" of a woman and other members of her family. A State could not, "by adopting one theory of life," override all "rights of the pregnant woman."

At the same time, though, the Court recognized "valid interest" of the State "in regulating the abortion decision." The Court noted in particular "important interests" in "protecting potential life," "maintaining medical standards," and "safeguarding the health" of the woman. No "absolutist" account of the woman's right could wipe away those significant state claims.

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur.

Striking a balance is the type of compromise normally contemplated by elected legislators, not jurists.

The Court explained that early on, a woman's choice must prevail, but that "at some point the state interests" become "dominant." It then set some guideposts. In the first trimester of pregnancy, the State could not interfere at all with the decision to terminate a pregnancy. At any time after that point, the State could regulate to protect the pregnant woman's health, such as by insisting that abortion providers and facilities meet safety requirements. And after the fetus's viability - the point when the fetus "has the capability of meaningful life outside the mother's womb" - the State could ban abortions, except when necessary to preserve the woman's life or health.

> Who didn't know that the phrase "necessary to preserve the woman's health" would soon turn into "convenience" and ultimately into abortion on demand?

...Like *Roe, Casey* grounded [the] right [to choose] in the Fourteenth Amendment's guarantee of "liberty." That guarantee encompasses realms of conduct not specifically referenced in the Constitution: "Marriage is mentioned nowhere" in that document, yet the Court was "no doubt correct" to protect the freedom to marry "against state interference." And the guarantee of liberty encompasses conduct today that was not protected at the time of the Fourteenth Amendment. "It is settled now," the Court said- though it was not always so - that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." Especially important in this web of precedents protecting an individual's most "personal choices" were those guaranteeing the right to contraception. In those cases, the Court had recognized "the right of the individual" to make the vastly consequential "decision whether to bear" a child. So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision about abortion was central, in the same way, to her capacity to chart her life's course.

In reaffirming the right *Roe* recognized, the Court took full account of the diversity of views on abortion, and the importance of various competing state interests. Some Americans, the Court stated, "deem abortion nothing short of an act of violence against innocent human life." And each State has an interest in "the protection of potential life" - as *Roe* itself had recognized. On the one hand, that interest was not conclusive. The State could not "resolve" the "moral and spiritual" questions raised by abortion in "such a definitive way that a woman lacks all choice in the matter." It could not force her to bear the "pain" and "physical constraints" of "carrying a child to full term" when she would have chosen an early abortion. But on the other hand, the State had, as *Roe* had held, an exceptionally significant interest in disallowing abortions in the later phase of a pregnancy. And it had an ever-present interest in "ensuring that the woman's choice is informed" and in presenting the case for "choosing childbirth over abortion."

So *Casey* again struck a balance, differing from *Roe's* in only incremental ways. It retained *Roe's* "central holding" that the State could bar abortion only after viability. The viability line, *Casey* thought, was "more workable" than any other in marking the place where the woman's liberty interest gave way to a State's efforts to preserve potential life. At that point, a "second life" was capable of "independent existence." If the woman even by then had not acted, she lacked adequate grounds to object to "the State's intervention on the developing child's behalf." At the same time, *Casey* decided, based on two decades of experience, that the *Roe* framework did not give States sufficient ability to regulate abortion prior to viability. In that period, *Casey* now made clear, the State could regulate not only to protect the woman's health but also to "promote prenatal life." In particular, the State could ensure informed choice and could try to promote childbirth. But the State still could not place an "undue burden" - or "substantial obstacle" - "in the path of a woman seeking an abortion." Prior to viability, the woman, consistent with the constitutional "meaning of liberty," must "retain the ultimate control over her destiny and her body."

We make one initial point about this analysis in light of the majority's insistence that *Roe* and *Casey,* and we in defending them, are dismissive of a "State's interest in protecting prenatal life." Nothing could get those decisions more wrong. As just described, *Roe* and *Casey* invoked powerful state interests in that protection, operative at every stage of the pregnancy and overriding the woman's liberty after viability. The strength of those state interests is exactly why the Court allowed greater restrictions on the abortion right than on other rights deriving from the Fourteenth Amendment. But what *Roe* and *Casey* also recognized - which today's majority does not - is that a woman's freedom and equality are likewise involved. That fact - the presence of countervailing interests - is what made the abortion question hard, and what necessitated balancing. The majority scoffs at that idea, castigating us for "repeatedly praising the 'balance'" the two cases arrived at (with the word "balance" in scare quotes). To the majority "balance" is a dirty word, as moderation is a foreign concept. The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman's rights to equality and freedom.

That is just simply not true. What is true is that the majority does not believe it (the Court) has the power to make those determinations. This is truly over the top.

Today's Court, that is, does not think there is anything of constitutional significance attached to a woman's control of her body and the path of her life. *Roe* and *Casey* thought that one-sided view misguided. In some sense, that is the difference in a nutshell between our precedents and the majority opinion. The constitutional regime we have lived in for the last 50 years

recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's).

B

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

Of course, the majority opinion refers as well to some later and earlier history. On the one side of 1868, it goes back as far as the 13th (the 13th!) century. But that turns out to be wheel-spinning. First, it is not clear what relevance such early history should have, even to the majority. See *New York State Rifle & Pistol Assn., Inc. v. Bruen* ("Historical evidence that long predates ratification may not illuminate the scope of the right"). If the early history obviously supported abortion rights, the majority would no doubt say that only the views of the Fourteenth Amendment's ratifiers are germane. (It is "better not to go too far back into antiquity," except if olden "law survived to become our Founders' law"). Second - and embarrassingly for the majority - early law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before "quickening" - the point when the fetus moved in the womb. And early American law followed the common-law rule. So the criminal law of that early time might be taken as roughly consonant with *Roe's* and *Casey's* different treatment of early and late abortions. Better, then, to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the time of *Roe*. That is convenient for the majority, but it is window dressing. As the same majority (plus one) just informed us, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text." Had the *pre-Roe* liberalization of abortion laws occurred more quickly and more widely in the 20th century, the majority would say (once again) that only the ratifiers' views are germane.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again. ("The most important historical fact is how the States regulated abortion when the Fourteenth Amendment was adopted"). If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of

liberty conferred in the Fourteenth Amendment, then those rights do not exist.

> Just about as unfair as it gets. The correct statement of the law and of the majority position is this: If the Constitution does not guarantee a "right," then for this Court to create such right out of thin air, that right must be "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty." That had always been the rule of law prior to Dobbs and continues to be so. No, Justice Breyer, you do not have the power to create a right not provided in the Constitution in the absence of these parameters.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers - both in 1868 and when the original Constitution was approved in 1788 - did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told - of course by men - that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point. Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

Casey itself understood this point, as will become clear. It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendment's ratification, approving a State's decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. "There was a time," *Casey* explained, when the Constitution did not protect "men and women alike." But times had changed. A woman's place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was "no longer consistent with our understanding" of the Constitution. Now, "the Constitution protects all individuals, male or

female," from "the abuse of governmental power" or "unjustified state interference."

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened judicial scrutiny? How is it that our Constitution, through the Fourteenth Amendment's liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman's right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were writing a document designed to apply to ever-changing circumstances over centuries." Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

And that is also why the Framers provided for a method of amendment in Article V; however, the left knows they cannot muster the votes in Congress or the States to amend the Constitution in favor of any aspect of abortion, let alone abortion on demand. The extremists now have a far better chance at abortion on demand in a state receptive to same than they did before this case reversed *Roe*.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment - the guarantees of "liberty" and "equality" for all. And nowhere has that approach produced prouder moments, for this country and the Court. Consider an example *Obergefell* used a few years ago. The Court there confronted a claim that the Fourteenth Amendment "must be defined in a most circumscribed manner, with central reference to specific historical practices" - exactly the view today's majority follows. And the Court specifically rejected that view. In doing so, the Court reflected on what the proposed,

historically circumscribed approach would have meant for interracial marriage. The Fourteenth Amendment's ratifiers did not think it gave black and white people a right to marry each other. To the contrary, contemporaneous practice deemed that act quite as unprotected as abortion. Yet the Court in *Loving v. Virginia* read the Fourteenth Amendment to embrace the Lovings' union. If, *Obergefell* explained, "rights were defined by who exercised them in the past, then received practices could serve as their own continued justification" - even when they conflict with "liberty" and "equality" as later and more broadly understood. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.

That does not mean anything goes. The majority wishes people to think there are but two alternatives: (1) accept the original applications of the Fourteenth Amendment and no others, or (2) surrender to judges' "own ardent views," ungrounded in law, about the "liberty that Americans should enjoy." At least, that idea is what the majority *sometimes* tries to convey. At other times, the majority (or, rather, most of it) tries to assure the public that it has no designs on rights (for example, to contraception) that arose only in the back half of the 20th century - in other words, that it is happy to pick and choose, in accord with individual preferences. But that is a matter we discuss later. For now, our point is different: It is that applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents. The second Justice Harlan discussed how to strike the right balance when he explained why he would have invalidated a State's ban on contraceptive use. Judges, he said, are not "free to roam where unguided speculation might take them." Yet they also must recognize that the constitutional "tradition" of this country is not captured whole at a single moment. Rather, its meaning gains content from the long sweep of our history and from successive judicial precedents - each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions. That is why Americans, to go back to *Obergefell's* example, have a right to marry across racial lines. And it is why, to go back to Justice Harlan's case, Americans have a right to use contraceptives so they can choose for themselves whether to have children.

Obergefell was a 5 to 4 decision (upholding same sex marriage) that, in my estimation, was wrongly decided. We will cover it down the road.

All that is what *Casey* understood. *Casey* explicitly rejected the present majority's method. "The specific practices of States at the time of the adoption of the Fourteenth Amendment," *Casey* stated, do not "mark the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." To hold otherwise - as the majority does today - "would be inconsistent with our law." Why? Because the Court has

"vindicated the principle" over and over that (no matter the sentiment in 1868) "there is a realm of personal liberty which the government may not enter" - especially relating to "bodily integrity" and "family life." *Casey* described in detail the Court's contraception cases. It noted decisions protecting the right to marry, including to someone of another race. ("Interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference"). In reviewing decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, "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."

And that conclusion still held good, until the Court's intervention here. It was settled at the time of *Roe,* settled at the time of *Casey,* and settled yesterday that the Constitution places limits on a State's power to assert control over an individual's body and most personal decisionmaking. A multitude of decisions supporting that principle led to *Roe's* recognition and *Casey's* reaffirmation of the right to choose; and *Roe* and *Casey* in turn supported additional protections for intimate and familial relations. The majority has embarrassingly little to say about those precedents. It (literally) rattles them off in a single paragraph; and it implies that they have nothing to do with each other, or with the right to terminate an early pregnancy (asserting that recognizing a relationship among them, as addressing aspects of personal autonomy, would ineluctably "license fundamental rights" to illegal "drug use and prostitution"). But that is flat wrong. The Court's precedents about bodily autonomy, sexual and familial relations, and procreation are all interwoven - all part of the fabric of our constitutional law, and because that is so, of our lives. Especially women's lives, where they safeguard a right to self-determination.

And eliminating that right, we need to say before further describing our precedents, is not taking a "neutral" position, as JUSTICE KAVANAUGH tries to argue. His idea is that neutrality lies in giving the abortion issue to the States, where some can go one way and some another. But would he say that the Court is being "scrupulously neutral" if it allowed New York and California to ban all the guns they want?

> Justice Breyer is normally better than this. Perhaps he has forgotten that, unlike the supposed "right to an abortion," the "right to bear arms" is a right specifically granted in the 2nd Amendment. Poor form, Justice Breyer. Your analogy is grotesquely irrelevant here.

If the Court allowed some States to use unanimous juries and others not? If the Court told the States: Decide for yourselves whether to put restrictions on

church attendance? We could go on - and in fact we will. Suppose JUSTICE KAVANAUGH were to say (in line with the majority opinion) that the rights we just listed are more textually or historically grounded than the right to choose.

> You see, this is the type of jurisprudence I call "oath-breaking." He has no shame. He knows full well that the examples to which he alludes are, in fact, set forth in the Constitution, unlike the "right" to choose.

What, then, of the right to contraception or same-sex marriage? Would it be "scrupulously neutral" for the Court to eliminate those rights too? The point of all these examples is that when it comes to rights, the Court does not act "neutrally" when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers. And to apply that point to the case here: When the Court decimates a right women have held for 50 years, the Court is not being "scrupulously neutral." It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so. JUSTICE Kavanaugh cannot obscure that point by appropriating the rhetoric of even-handedness. His position just is what it is: A brook-no-compromise refusal to recognize a woman's right to choose, from the first day of a pregnancy. And that position, as we will now show, cannot be squared with this Court's longstanding view that women indeed have rights (whatever the state of the world in 1868) to make the most personal and consequential decisions about their bodies and their lives.

> To the contrary, the Court has also given the states, if they so choose, the authority to adopt abortion laws so liberal that they never would stand if the Court were not neutral. This dissent doesn't deserve the light of day. It reminds me more of a stump speech of someone running for office than a justice who took an oath to support the Constitution.

Consider first, then, the line of this Court's cases protecting "bodily integrity." *Casey*. "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every individual to the possession and control of his own person." *Union Pacific R. Co. v. Botsford* (1891); see *Cruzan* (Every adult "has a right to determine what shall be done with his own body"). Or to put it more simply: Everyone, including women, owns their own bodies. So the Court has restricted the power of government to interfere with a person's medical decisions or compel her to undergo medical procedures or treatments.

Is there a person who believes these three oath-breakers would ever support a person's "right" to reject a forced Covid vaccination?

Casey recognized the "doctrinal affinity" between those precedents and *Roe.* And that doctrinal affinity is born of a factual likeness. There are few greater incursions on a body than forcing a woman to complete a pregnancy and give birth. For every woman, those experiences involve all manner of physical changes, medical treatments (including the possibility of a cesarean section), and medical risk. Just as one example, an American woman is 14 times more likely to die by carrying a pregnancy to term than by having an abortion. That women happily undergo those burdens and hazards of their own accord does not lessen how far a State impinges on a woman's body when it compels her to bring a pregnancy to term. And for some women, as *Roe* recognized, abortions are medically necessary to prevent harm. The majority does not say - which is itself ominous - whether a State may prevent a woman from obtaining an abortion when she and her doctor have determined it is a needed medical treatment.

The far left never discusses the medical risk of death to an unborn child.

So too, *Roe* and *Casey* fit neatly into a long line of decisions protecting from government intrusion a wealth of private choices about family matters, child rearing, intimate relationships, and procreation. See *Casey*; *Roe*; (listing the myriad decisions of this kind that *Casey* relied on). Those cases safeguard particular choices about whom to marry; whom to have sex with; what family members to live with; how to raise children - and crucially, whether and when to have children. In varied cases, the Court explained that those choices - "the most intimate and personal" a person can make - reflect fundamental aspects of personal identity; they define the very "attributes of personhood." And they inevitably shape the nature and future course of a person's life (and often the lives of those closest to her). So, the Court held, those choices belong to the individual, and not the government. That is the essence of what liberty requires.

And liberty may require it, this Court has repeatedly said, even when those living in 1868 would not have recognized the claim - because they would not have seen the person making it as a full-fledged member of the community. Throughout our history, the sphere of protected liberty has expanded, bringing in individuals formerly excluded. In that way, the constitutional values of liberty and equality go hand in hand; they do not inhabit the hermetically sealed containers the majority portrays. So before *Roe* and *Casey,* the Court expanded in successive cases those who could claim the right to marry - though their relationships would have been outside the law's protection in the mid-19th century. *Loving* (interracial couples); *Turner v.*

Safley (1987) (prisoners); *Stanley v. Illinois* (1972) (offering constitutional protection to untraditional "family units"). And after *Roe* and *Casey,* of course, the Court continued in that vein. With a critical stop to hold that the Fourteenth Amendment protected same-sex intimacy, the Court resolved that the Amendment also conferred on same-sex couples the right to marry. In considering that question, the Court held, "history and tradition," especially as reflected in the course of our precedent, "guide and discipline the inquiry." But the sentiments of 1868 alone do not and cannot "rule the present."

Casey similarly recognized the need to extend the constitutional sphere of liberty to a previously excluded group. The Court then understood, as the majority today does not, that the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens. A woman then, *Casey* wrote, "had no legal existence separate from her husband." Women were seen only "as the center of home and family life," without "full and independent legal status under the Constitution." But that could not be true any longer: The State could not now insist on the historically dominant "vision of the woman's role." And equal citizenship, *Casey* realized, was inescapably connected to reproductive rights. "The ability of women to participate equally" in the "life of the Nation" - in all its economic, social, political, and legal aspects - "has been facilitated by their ability to control their reproductive lives." Without the ability to decide whether and when to have children, women could not - in the way men took for granted - determine how they would live their lives, and how they would contribute to the society around them.

For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving contraception. Over the course of three cases, the Court had held that a right to use and gain access to contraception was part of the Fourteenth Amendment's guarantee of liberty. That clause, we explained, necessarily conferred 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." *Casey* saw *Roe* as of a piece: In "critical respects the abortion decision is of the same character." "Reasonable people," the Court noted, could also oppose contraception; and indeed, they could believe that "some forms of contraception" similarly implicate a concern with "potential life." Yet the views of others could not automatically prevail against a woman's right to control her own body and make her own choice about whether to bear, and probably to raise, a child. When an unplanned pregnancy is involved - because either contraception or abortion is outlawed - "the liberty of the woman is at stake in a sense unique to the human condition." No State could undertake to resolve the moral questions raised "in such a definitive way" as to deprive a woman of all choice.

Faced with all these connections between *Roe/Casey* and judicial decisions recognizing other constitutional rights, the majority tells everyone not to worry. It can (so it says) neatly extract the right to choose from the constitutional edifice without affecting any associated rights. (Think of someone telling you that the Jenga tower simply will not collapse.) Today's decision, the majority first says, "does not undermine" the decisions cited by *Roe* and *Casey* - the ones involving "marriage, procreation, contraception, and family relationships" - "in any way." Note that this first assurance does not extend to rights recognized after *Roe* and *Casey,* and partly based on them - in particular, rights to same-sex intimacy and marriage. On its later tries, though, the majority includes those too: "Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion." That right is unique, the majority asserts, "because abortion terminates life or potential life." So the majority depicts today's decision as "a restricted railroad ticket, good for this day and train only." Should the audience for these too-much-repeated protestations be duly satisfied? We think not.

The first problem with the majority's account comes from Justice Thomas's concurrence - which makes clear he is not with the program. In saying that nothing in today's opinion casts doubt on non-abortion precedents, JUSTICE THOMAS explains, he means only that they are not at issue in this very case. ("This case does not present the opportunity to reject" those precedents). But he lets us know what he wants to do when they are. "In future cases," he says, "we should reconsider all of this Court's substantive due process precedents, including *Griswold, Lawrence,* and *Obergefell."* And when we reconsider them? Then "we have a duty" to "overrule these demonstrably erroneous decisions." So at least one Justice is planning to use the ticket of today's decision again and again and again.

Even placing the concurrence to the side, the assurance in today's opinion still does not work. Or at least that is so if the majority is serious about its sole reason for overturning *Roe* and *Casey:* the legal status of abortion in the 19th century. Except in the places quoted above, the state interest in protecting fetal life plays no part in the majority's analysis. To the contrary, the majority takes pride in not expressing a view "about the status of the fetus." The majority's departure from *Roe* and *Casey* rests instead - and only - on whether a woman's decision to end a pregnancy involves any Fourteenth Amendment liberty interest (against which *Roe* and *Casey* balanced the state interest in preserving fetal life).

According to the majority, no liberty interest is present - because (and only because) the law offered no protection to the woman's choice in the 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other things. It did not protect the rights recognized

in *Lawrence* and *Obergefell* to same-sex intimacy and marriage. It did not protect the right recognized in *Loving* to marry across racial lines. It did not protect the right recognized in *Griswold* to contraceptive use. For that matter, it did not protect the right recognized in *Skinner* not to be sterilized without consent. So if the majority is right in its legal analysis, all those decisions were wrong, and all those matters properly belong to the States too - whatever the particular state interests involved. And if that is true, it is impossible to understand (as a matter of logic and principle) how the majority can say that its opinion today does not threaten - does not even "undermine" - any number of other constitutional rights.

Nor does it even help just to take the majority at its word. Assume the majority is sincere in saying, for whatever reason, that it will go so far and no further. Scout's honor. Still, the future significance of today's opinion will be decided in the future. And law often has a way of evolving without regard to original intentions - a way of actually following where logic leads, rather than tolerating hard-to-explain lines.

> Perhaps Justice Thomas is right. Perhaps logic does, in fact, lead to overruling numerous other so-called constitutional rights that do not exist. The point being that "policy", no matter how "good for the nation" must be either supported by the Constitution or properly created by legislation. It cannot...it should not...be created by a majority of nine unelected jurists. That, in my mind, best defines the difference between an oath-taker and an oath-breaker. For example, there is a movement afoot to ban all conservative speech on college campuses. Would this dissent team dare say, therefore, that the Constitution must evolve with the times, so free speech is no longer free when the mob says its not?

...Consider, as our last word on this issue, contraception. The Constitution, of course, does not mention that word. And there is no historical right to contraception, of the kind the majority insists on. To the contrary, the American legal landscape in the decades after the Civil War was littered with bans on the sale of contraceptive devices. So again, there seem to be two choices. If the majority is serious about its historical approach, then *Griswold* and its progeny are in the line of fire too. Or if it is not serious, then . . . what *is* the basis of today's decision? If we had to guess, we suspect the prospects of this Court approving bans on contraception are low. But once again, the future significance of today's opinion will be decided in the future. At the least, today's opinion will fuel the fight to get contraception, and any other issues with a moral dimension, out of the Fourteenth Amendment and into state legislatures.

The *Griswold* case was, in my opinion, incorrectly decided. The dissent said words to the effect, "I think this law banning contraception is uncommonly silly, but for the life of me, I cannot find where the Constitution mandates its demise." The dissent, here, and the majority in *Griswold* were disingenuous, for if left to democratic rule, Connecticut would have repealed its outdated law soon enough. There is no serious threat to the availability of the means of contraception.

Anyway, today's decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds.

Translation: Breyer prefers to assume the role of king - to overstep his constitutional power to say the Constitution means whatever he says it means. That is the quickest road to self-destruction of this nation I can imagine.

As a matter of constitutional substance, the majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today. Because those laws prevented women from charting the course of their own lives, the majority says States can do the same again. Because in 1868, the government could tell a pregnant woman - even in the first days of her pregnancy - that she could do nothing but bear a child, it can once more impose that command. Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. Even before we get to *stare decisis,* we dissent.

II

By overruling *Roe, Casey,* and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis,* a principle central to the rule of law...

Stare decisis..."contributes to the integrity of our constitutional system of government" by ensuring that decisions "are founded in the law rather than in the proclivities of individuals." As Hamilton wrote: It "avoids an arbitrary discretion in the courts." The Federalist No. 78. And as Blackstone said before him: It "keeps the scale of justice even and steady, and not liable to waver with every new judge's opinion." The "glory" of our legal system is that it "gives preference to precedent rather than . . . jurists." That is why, the story goes, Chief Justice John Marshall donned a plain black robe when he swore the oath of office. That act personified an American tradition. Judges' personal preferences do not make law; rather, the law speaks through them.

Ah, but that is the problem, Justice Breyer, for the *Roe* Court's personal preferences did, in fact, make law - contrary to the Constitution's demands.

That means the Court may not overrule a decision, even a constitutional one, without a "special justification." *Stare decisis* is, of course, not an "inexorable command"; it is sometimes appropriate to overrule an earlier decision. But the Court must have a good reason to do so over and above the belief "that the precedent was wrongly decided." "It is not alone sufficient that we would decide a case differently now than we did then."...

A

Contrary to the majority's view, there is nothing unworkable about *Casey's* "undue burden" standard...

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision's original basis...Most "successful proponents of overruling precedent," this Court once said, have carried "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." Certainly, that was so of the main examples the majority cites: *Brown v. Board of Education* and *West Coast Hotel Co. v. Parrish.* But it is not so today. Although nodding to some arguments others have made about "modern developments," the majority does not really rely on them, no doubt seeing their slimness. The majority briefly invokes the current controversy over abortion. But it has to acknowledge that the same dispute has existed for decades: Conflict over abortion is not a change but a constant. (And as we will later discuss, the presence of that continuing

division provides more of a reason to stick with, than to jettison, existing precedent.) In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed to justify its radical reshaping of the law.

1

...Moreover, no subsequent factual developments have undermined *Roe* and *Casey.* Women continue to experience unplanned pregnancies and unexpected developments in pregnancies. Pregnancies continue to have enormous physical, social, and economic consequences. Even an uncomplicated pregnancy imposes significant strain on the body, unavoidably involving significant physiological change and excruciating pain. For some women, pregnancy and childbirth can mean life-altering physical ailments or even death. Today, as noted earlier, the risks of carrying a pregnancy to term dwarf those of having an abortion. Experts estimate that a ban on abortions increases maternal mortality by 21 percent, with white women facing a 13 percent increase in maternal mortality while black women face a 33 percent increase. Pregnancy and childbirth may also impose large-scale financial costs. The majority briefly refers to arguments about changes in laws relating to healthcare coverage, pregnancy discrimination, and family leave. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away. Women also continue to face pregnancy discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20 percent of private-sector workers have access to paid family leave, including a mere 8 percent of workers in the bottom quartile of wage earners.

Justice Breyer, these are legislative concerns, not judicial ones. That is, unless you believe you have the power to legislate.

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, but, to the degree that these are changes at all, they too are irrelevant. Neither reduces the health risks or financial costs of going through pregnancy and childbirth. Moreover, the choice to give up parental rights after giving birth is altogether different from the choice not to carry a pregnancy to term. The reality is that few women denied an abortion will choose adoption. The vast majority will continue, just as in *Roe* and *Casey's* time, to shoulder the costs of childrearing. Whether or not they choose to parent, they will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.

And they will be relieved of the life-long guilt of killing their own child which coerced pregnancy most always prevents. Odd the left never discusses this very real component of abortion. Furthermore, Justice Breyer, why do you presume that all women fall into the pro-choice category? Of course, I forgot. You believe in judicial legislation, but not "for all," just for those you favor. That is another reason to leave these decisions up to representatives of the people.

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey,* notwithstanding the majority's supposed "modern developments." Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from demonstrating proper contraceptive use. The State neither bans pregnancy discrimination nor requires provision of paid parental leave. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without basic medical care or enough food. Although 86 percent of pregnancy-related deaths in the State are due to postpartum complications, Mississippi rejected federal funding to provide a year's worth of Medicaid coverage to women after giving birth. Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and some of the highest rates for preterm birth, low birth-weight, cesarean section, and maternal death. It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. We do not say that every State is Mississippi, and we are sure some have made gains since *Roe* and *Casey* in providing support for women and children. But a state-by-state analysis by public health professionals shows that States with the most restrictive abortion policies also continue to invest the least in women's and children's health.

And your solution, Justice Breyer, is to impose a 100% mortality rate on unborn children. Utterly disgusting.

The only notable change we can see since *Roe* and *Casey* cuts in favor of adhering to precedent: It is that American abortion law has become more and more aligned with other nations. The majority, like the Mississippi Legislature, claims that the United States is an extreme outlier when it comes to abortion regulation. The global trend, however, has been toward increased provision of legal and safe abortion care. A number of countries, including New Zealand, the Netherlands, and Iceland, permit abortions up to a roughly similar time as *Roe* and *Casey* set. Canada has decriminalized abortion at any point in a pregnancy. Most Western European countries impose

restrictions on abortion after 12 to 14 weeks, but they often have liberal exceptions to those time limits, including to prevent harm to a woman's physical or mental health. They also typically make access to early abortion easier, for example, by helping cover its cost. Perhaps most notable, more than 50 countries around the world - in Asia, Latin America, Africa, and Europe - have expanded access to abortion in the past 25 years. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

> Vive la difference. Justice Breyer, you seem to be in favor in varying degrees of "other ways" to do things, but despise how Americans in the various states may wish to do things, inclusive of women in those states. How can anyone fail to understand the arrogance of this brand of jurisprudence? Should the Constitution change with the political winds of other countries?

In sum, the majority can point to neither legal nor factual developments in support of its decision...

2

...That is just as much so today, because *Roe* and *Casey* continue to reflect, not diverge from, broad trends in American society. It is, of course, true that many Americans, including many women, opposed those decisions when issued and do so now as well. Yet the fact remains: *Roe* and *Casey* were the product of a profound and ongoing change in women's roles in the latter part of the 20th century. Only a dozen years before *Roe,* the Court described women as "the center of home and family life," with "special responsibilities" that precluded their full legal status under the Constitution. By 1973, when the Court decided *Roe,* fundamental social change was underway regarding the place of women - and the law had begun to follow. (recognizing that the Equal Protection Clause prohibits sex-based discrimination). By 1992, when the Court decided *Casey,* the traditional view of a woman's role as only a wife and mother was "no longer consistent with our understanding of the family, the individual, or the Constitution." Under that charter, *Casey* understood, women must take their place as full and equal citizens. And for that to happen, women must have control over their reproductive decisions. Nothing since *Casey* - no changed law, no changed fact - has undermined that promise.

Says who, just exactly? It would seem, Justice Breyer, that your definition of your oath to support the Constitution requires you to hold your finger to the winds of public approval as the ultimate answer. Not only is that so very wrong, but if public approval is the answer, don't forget that the majority of states disagree with you.

You say, "women must have control over their reproductive decisions." While this won't be popular, dare I say that, with the exception of an unplanned child of rape (which most states are likely to except from their ban on abortion), just exactly where do women lose control? There are a plethora of means of contraception, along with old fashioned abstinence. That is, unless one feels a poor decision on the front end justifies killing an innocent child on the back end. Hard words, but true.

C

The reasons for retaining *Roe* and *Casey* gain further strength from the overwhelming reliance interests those decisions have created. The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is "an essential thread in the mantle of protection that the law affords the individual." So when overruling precedent "would dislodge individuals' settled rights and expectations," *stare decisis* has "added force." *Casey* understood that to deny individuals' reliance on *Roe* was to "refuse to face the facts." Today the majority refuses to face the facts. "The most striking feature of the majority is the absence of any serious discussion" of how its ruling will affect women.

For heaven's sake, the majority do not "seriously" discuss how their ruling will affect women for the precise reason that such a discussion has literally nothing to do with Constitutional interpretation. They have given up power and handed it to state legislatures to have those very important and meaningful discussions in the proper constitutional venue. The dissents arguments are spurious.

By characterizing *Casey's* reliance arguments as "generalized assertions about the national psyche," it reveals how little it knows or cares about women's lives or about the suffering its decision will cause...

Just awful. "All women" do not agree with your off-the-wall conclusion. How dare you so readily dismiss that sector of the nation who believe abortion to be a sin ... yes, and that includes Christian women. How dare you! You are simply not equipped to make these decisions for "all women." That is perhaps the best reason to place this into the hands of elected representatives who are closer to their constituents. While I respect Justice Breyer as a child of God, I cannot pretend to be disappointed in his retirement.

The disruption of overturning *Roe* and *Casey* will therefore be profound. Abortion is a common medical procedure and a familiar experience in women's lives. About 18 percent of pregnancies in this country end in abortion, and about one quarter of American women will have an abortion before the age of 45. Those numbers reflect the predictable and life-changing effects of carrying a pregnancy, giving birth, and becoming a parent. As *Casey* understood, people today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations. In so doing, it diminishes women's opportunities to participate fully and equally in the Nation's political, social, and economic life. (showing that abortion availability has "large effects on women's education, labor force participation, occupations, and earnings").

These are all arguments that have their proper place in the halls of state legislatures.

The majority's response to these obvious points exists far from the reality American women actually live. The majority proclaims that "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions." The facts are: 45 percent of pregnancies in the United States are unplanned. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible. Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. The Mississippi law at issue here, for example, has no

exception for rape or incest, even for underage women. Finally, the majority ignores, as explained above, that some women decide to have an abortion because their circumstances change during a pregnancy. Human bodies care little for hopes and plans. Events can occur after conception, from unexpected medical risks to changes in family circumstances, which profoundly alter what it means to carry a pregnancy to term. In all these situations, women have expected that they will get to decide, perhaps in consultation with their families or doctors but free from state interference, whether to continue a pregnancy. For those who will now have to undergo that pregnancy, the loss of *Roe* and *Casey* could be disastrous.

That is especially so for women without money. When we "count the cost of *Roe's* repudiation" on women who once relied on that decision, it is not hard to see where the greatest burden will fall. In States that bar abortion, women of means will still be able to travel to obtain the services they need. It is women who cannot afford to do so who will suffer most. These are the women most likely to seek abortion care in the first place. Women living below the federal poverty line experience unintended pregnancies at rates five times higher than higher income women do, and nearly half of women who seek abortion care live in households below the poverty line.

Even with *Roe's* protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. After today, in States where legal abortions are not available, they will lose any ability to obtain safe, legal abortion care. They will not have the money to make the trip necessary; or to obtain childcare for that time; or to take time off work. Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives...

After today, young women will come of age with fewer rights than their mothers and grandmothers had.

> And many will come of age with more rights than their mothers and grandmothers had in states that adopt even more liberal laws than that permitted by *Roe* or *Casey*.

The majority accomplishes that result without so much as considering how women have relied on the right to choose or what it means to take that right away. The majority's refusal even to consider the life-altering consequences of reversing *Roe* and *Casey* is a stunning indictment of its decision.

D

...Justice Jackson once called a decision he dissented from a "loaded weapon," ready to hand for improper uses. *Korematsu v. United States*. We fear that today's decision, departing from *stare decisis* for no legitimate reason, is its own loaded weapon...

Congratulations for fanning the flames of violence. Fortunately, this majority will not let fear control their duty.

III

...With sorrow - for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection - we dissent.

The truth of the matter is that these dissenters (Breyer, Kagan and Sotomayor) have betrayed not only their oath to support the Constitution, but the American people as well. They do not believe that any woman dares to disagree with them because of their arrogant power grab. They also place no faith in the democratic process within each state. And, finally, they would rather have this sitting court determine what is or is not an undue burden on women seeking an abortion than leaving those decisions up to state legislators.