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## ***Cruzan v. Dir., Mo. Dep't of Health***

Supreme Court of the United States

December 6, 1989, Argued ; June 25, 1990, Decided

No. 88-1503

### **Reporter**

497 U.S. 261 \*; 110 S. Ct. 2841 \*\*; 111 L. Ed. 2d 224 \*\*\*; 1990 U.S. LEXIS 3301 \*\*\*\*; 58 U.S.L.W. 4916

CRUZAN, BY HER PARENTS AND CO-GUARDIANS, CRUZAN ET UX. v. DIRECTOR, MISSOURI DEPARTMENT OF HEALTH, ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE SUPREME COURT OF MISSOURI.

**Disposition:** [760 S. W. 2d 408](#), affirmed.

### **Core Terms**

patient, medical treatment, incompetent, artificial, liberty interest, nutrition, terminate, suicide, die, hydrate, life-sustaining, vegetative, clear and convincing evidence, family member, unwanted, tube, best interest, persistent, ad litem, technology, feed, convince, food, withdrawal, guardian, privacy, constitutional right, irreversible, adult, self-determination

### **Case Summary**

#### **Procedural Posture**

Petitioners, parents suing on their behalf and on behalf of their daughter, appealed a decision of the Supreme Court of Missouri which denied their petition for a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment.

#### **Overview**

Petitioners, parents suing on their behalf and on behalf of their daughter, requested a court order

directing the withdrawal of their daughter's artificial feeding and hydration equipment after she was rendered vegetative in an auto accident. The appellate court denied their petition holding that petitioners lacked authority to effectuate the request because there was no clear and convincing evidence of the daughter's desire to have life-sustaining treatment withdrawn as required under the Missouri Living Will statute, [Mo. Rev. Stat. § 459.010 et seq.](#) (1986). The United States Supreme Court affirmed. It said that the [Due Process Clause, U.S. Const. amend. XIV](#), did not require the state to repose judgment on matters concerning the right to refuse treatment with anyone but the patient herself. The Court held that a state could choose to defer only to the patient's wishes rather than confide the decision to close family members.

#### **Outcome**

The Court affirmed the judgment denying a court order directing the withdrawal of petitioners' daughter's artificial feeding and hydration equipment because the U.S. Constitution did not require the state to repose judgment on matters concerning the right to refuse treatment with anyone but the patient herself.

### **LexisNexis® Headnotes**

Healthcare Law > Medical Treatment > General Overview

Healthcare Law > Medical Treatment > Patient

Consent > General Overview

Healthcare Law > Medical Treatment > Patient  
Consent > Informed Consent

Healthcare Law > Medical Treatment > Patient  
Consent > Right to Refuse Treatment

**HN1** No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages. The informed consent doctrine has become firmly entrenched in American tort law. The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

Healthcare Law > Medical Treatment > End-of-Life  
Decisions > Life Support

Healthcare Law > Medical Treatment > Patient  
Consent > General Overview

**HN2** A person has a right of privacy grounded in the Federal Constitution, [U.S. Const. amend. XIV](#), to terminate treatment. Recognizing that this right is not absolute, however, courts balance it against asserted state interests. The state's interest weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims.

Constitutional Law > ... > Fundamental

Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

Constitutional Law > Equal Protection > Disability

Healthcare Law > Medical Treatment > End-of-Life  
Decisions > General Overview

Healthcare Law > Medical Treatment > End-of-Life  
Decisions > Lifesaving Treatment

Healthcare Law > Medical Treatment > Failures &  
Refusals to Treat > General Overview

Healthcare Law > Medical Treatment > Incompetent,  
Mentally Disabled & Minors > General Overview

Healthcare Law > Medical Treatment > Patient  
Consent > General Overview

**HN3** It cannot be disputed that the [Due Process Clause, U.S. Const. amend. XIV](#), protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, there will, of course, be some unfortunate situations in which family members will not act to protect a patient. A state is entitled to guard against potential abuses in such situations. Similarly, a state is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it.

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

Healthcare Law > Medical Treatment > End-of-Life  
Decisions > Life Support

**HN4** A state may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.

Constitutional Law > ... > Fundamental  
Rights > Procedural Due Process > General Overview

Constitutional Law > ... > Fundamental  
Rights > Procedural Due Process > Scope of  
Protection

Evidence > Inferences & Presumptions > General  
Overview

Evidence > Burdens of Proof > Clear & Convincing  
Proof

**HN5** The function of a standard of proof, as that concept is embodied in the [Due Process Clause, U.S. Const. amend. XIV](#), and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. An intermediate standard of proof - clear and convincing evidence - is mandated when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money.

Constitutional Law > Substantive Due  
Process > General Overview

Evidence > Inferences & Presumptions > General  
Overview

Labor & Employment Law > ... > Disability  
Discrimination > Evidence > General Overview

**HN6** There is no reason why important individual interests should be afforded less protection simply because the government finds itself in the position of defending them.

Evidence > Inferences & Presumptions > General  
Overview

**HN7** Not only does the standard of proof reflect the importance of a particular adjudication, it also serves as a societal judgment about how the risk of

error should be distributed between the litigants. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

Evidence > Inferences & Presumptions > General  
Overview

Healthcare Law > Medical Treatment > End-of-Life  
Decisions > Life Support

**HN8** A state may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.

Constitutional Law > ... > Fundamental  
Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due  
Process > Privacy > General Overview

Healthcare Law > Medical Treatment > End-of-Life  
Decisions > Life Support

Healthcare Law > Medical Treatment > Failures &  
Refusals to Treat > General Overview

Healthcare Law > Medical Treatment > Patient  
Consent > General Overview

Healthcare Law > Medical Treatment > Patient  
Consent > Right to Refuse Treatment

**HN9** The [Due Process Clause, U.S. Const. amend. XIV](#), does not require a state to repose judgment on matters concerning refusal of medical treatment with anyone but the patient herself. Close family members may have a strong feeling - a feeling not at all ignoble or unworthy, but not entirely disinterested, either - that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will

necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. A state may choose to defer only to the patient's wishes, rather than confide the decision to close family members.

## **Lawyers' Edition Display**

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### **Decision**

Missouri requirement that incompetent's wishes as to withdrawal of life-sustaining treatment be proved by clear and convincing evidence held not violative of due process.

### **Summary**

In January 1983, a woman lost control of her car as she traveled down a Missouri road. The car overturned, and a state trooper discovered the woman, lying face down in a ditch, without detectable respiratory or cardiac function. Paramedics who arrived at the accident scene were able to restore the woman's breathing and heartbeat, and the woman was then transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed the woman as having sustained probable cerebral contusions compounded by significant oxygen deprivation, or anoxia. The estimated length of the period of her anoxia was 12 to 14 minutes; permanent brain damage generally results, the trial court later found, after 6 minutes in an anoxic state. The woman remained in a coma for approximately 3 weeks, and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the woman's recovery, surgeons implanted a gastrostomy feeding and hydration tube with the consent of her then husband. In October 1983, the woman was admitted to a state hospital. Subsequent rehabilitative efforts proved unavailing. After it became apparent that the woman had virtually no chance of regaining her mental faculties, her parents--who had been appointed as her coguardians--asked employees of the state hospital to terminate the artificial nutrition and hydration

procedures. The employees refused to honor the request without court approval. The parents then filed a declaratory judgment action in a Missouri trial court, in which they sought judicial authorization of their request. A guardian ad litem was appointed for the woman. The trial court, following a hearing, entered an order directing the employees to cause the parents' request to be carried out, based upon its findings that (1) the woman (a) had unassisted respiration and circulation function within the normal limits of a 30-year-old female, (b) was oblivious to her environment except for reflexive responses to sound and perhaps to painful stimuli, (c) suffered anoxia of the brain resulting in a massive enlargement of the ventricles filling with cerebrospinal fluid where the brain had degenerated, and cerebral cortical atrophy which was irreversible, permanent, progressive, and ongoing, (d) exhibited her highest cognitive brain function by grimacing, perhaps in recognition of ordinarily painful stimuli, which indicated the experience of pain and apparent response to sound, (e) was a spastic quadriplegic, (f) suffered contracture of her four extremities, with irreversible muscle and tendon damage, and (g) had no cognitive or reflex ability to swallow food or water to maintain her daily essential needs, and would never recover such ability; (2) a person in the woman's condition had a fundamental right under the Missouri and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures"; and (3) the woman's expressed thoughts at age 25, in somewhat serious conversation with her housemate, that if sick or injured, she would not wish to continue her life unless she could live at least halfway normally, suggested that the woman would not wish to continue on with her nutrition and hydration given her present condition. Both the state and the guardian ad litem appealed. The Supreme Court of Missouri, reversing, expressed the view that (1) although the woman was in a "persistent vegetative state," she was neither dead within the meaning of Missouri's statutory definition of death nor

terminally ill; (2) the woman's right to refuse treatment--whether such right proceeded from a constitutional right of privacy or a common-law right to refuse treatment--did not outweigh Missouri's strong policy favoring the preservation of life, as embodied in the Missouri living will statute; (3) the woman's conversation with her housemate was unreliable for the purpose of determining her intent, and thus insufficient to support the parents' claim to exercise substituted judgment on the woman's behalf; and (4) no person could assume the choice of terminating medical treatment for an incompetent person in the absence of either the formalities required under the living will statute or "clear and convincing, inherently reliable evidence," which was absent in the case at hand ([760 SW2d 408](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Rehnquist, Ch. J., joined by White, O'Connor, Scalia, and Kennedy, JJ., it was held that (1) the due process clause of the [Federal Constitution's Fourteenth Amendment](#) did not forbid a state from requiring that evidence of an incompetent individual's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence, and thus a state could apply such standard in proceedings where a guardian sought to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state, because (a) a state could legitimately seek to safeguard the personal element of the choice between life and death of an incompetent individual through the imposition of heightened evidentiary requirements, since a state was entitled (i) to guard against potential abuses in situations such as where family members either were unavailable to serve as surrogate decisionmakers or would not act to protect a patient, (ii) to consider that a judicial proceeding to make a determination regarding an incompetent's wishes might very well not be an adversarial one, and (iii) to assert an unqualified interest in the preservation of human life, which interest would be weighed against the constitutionally protected interests of the individual, and (b) a state could

place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment, since (i) the interests at stake were more substantial, on both the individual and societal level, than those involved in a run-of-the-mine civil dispute, and (ii) an erroneous decision not to terminate would result in a maintenance of the status quo, while an erroneous decision to withdraw life-sustaining treatment was not susceptible of correction; (2) the Missouri Supreme Court did not commit constitutional error in deciding that the woman's desire to have hydration and nutrition withdrawn was not proved at trial pursuant to the standard of clear and convincing evidence enunciated by that court in its decision, where the testimony adduced at trial consisted primarily of (a) the woman's statement to her housemate, and (b) other observations to the same effect, which observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition; and (3) since the due process clause did not require a state to repose the right to judge whether an incompetent patient wishes to have life-sustaining medical treatment withdrawn with anyone but the patient herself, a state was not required to repose a right of substituted judgment as to such decision with close family members of the patient, and it could choose to defer to only the patient's wishes.

O'Connor, J., concurring, joined the court's opinion, and also expressed the view that (1) the liberty guaranteed by the due process clause protected an individual's personal decision to refuse medical treatment, including the artificial delivery of food and water, and (2) nothing in the court's decision (a) precluded a future determination by the United States Supreme Court that the Federal Constitution required the states to implement the decisions of incompetent individuals' duly appointed surrogates, or (b) prevented the states from developing other approaches for protecting such individuals' liberty interest in refusing medical treatment.

Scalia, J., concurring, joined the court's opinion, and also expressed the view that (1) it would have

been preferable for the United States Supreme Court to announce that the federal courts have no business in the field of preserving life, insofar as (a) American law had always accorded states the power to prevent suicide--including suicide by refusing to take appropriate measures necessary to preserve one's life--by force if necessary, and (b) the Federal Constitution had nothing to say about the subject; (2) what was sought in the woman's case was indistinguishable from ordinary suicide; and (3) even when it was demonstrated by clear and convincing evidence that a patient no longer wished certain measures to be taken to preserve her life, it was up to the citizens of Missouri to decide, through their elected representatives, whether such wish would be honored.

Brennan, J., joined by Marshall and Blackmun, JJ., dissenting, expressed the view that (1) the woman had a fundamental right, under the due process clause, to be free of unwanted artificial nutrition and hydration; (2) such right was not outweighed by Missouri's asserted interest in the preservation of life, since (a) a general interest in someone's life which was completely abstracted from the interest of the person living that life could not outweigh the person's choice to avoid medical treatment, (b) an inability to withdraw life-sustaining treatment absent clear and convincing evidence might discourage starting such treatment, which would impair rather than serve the state's interest, and (c) in any event, such interest was not even well supported by Missouri's own enactments; (3) the evidentiary standard imposed by the Missouri Supreme Court impermissibly burdened the woman's right to avoid further medical treatment, since such standard neither enhanced the accuracy of a determination of the woman's wishes nor was consistent with an accurate determination; (4) in concluding that no clear and convincing, inherently reliable evidence had been presented to show that the woman would want to avoid further treatment, the Missouri Supreme Court failed to consider (a) the woman's statements to her housemate and to family members, (b) testimony from the woman's mother and sister that they were certain that the

woman would want to discontinue artificial nutrition and hydration, and (c) the conclusion of the guardian ad litem that there was clear and convincing evidence that the woman would want to discontinue medical treatment and that such discontinuance was in the woman's best interests; and (5) the due process clause--while it permitted a state to insure that a person making the decision to refuse medical treatment on behalf of an incompetent patient be one whom the patient would have selected to do so, and to exclude from consideration anyone having improper motives--generally required that the state either repose the choice with the person whom the patient would most likely have chosen as proxy or leave the decision to the patient's family.

Stevens, J., dissenting, expressed the view that (1) the Federal Constitution required Missouri to care for the woman's life in a way that gave appropriate respect to the woman's own best interests; (2) focusing the entire inquiry as to whether an incompetent person would refuse medical treatment on the person's prior unambiguous expressions of intent while competent afforded no protection to children, young people who were victims of unexpected accidents or illnesses, or elderly persons who either failed to decide or failed to explain how they would want to be treated; (3) there was no reasonable ground for believing that the woman had any personal interest in the perpetuation of what the state had decided was her life; (4) the failure of Missouri's policy to heed the woman's interests with respect to private matters was ample evidence of the policy's illegitimacy; and (5) the court's deference to such policy was patently unconstitutional, insofar as it seemed to derive from the premise that chronically incompetent persons had no constitutionally cognizable interests at all, and so were not persons within the meaning of the Constitution.

## Headnotes

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CONSTITUTIONAL LAW §514 > due process --  
 intent of incompetent person -- withdrawal of life-  
 sustaining treatment -- clear and convincing evidence --  
 > Headnote:

[LEdHN\[1A\]](#) [1A][LEdHN\[1B\]](#) [1B][LEdHN\[1C\]](#)  
[\[1C\]LEdHN\[1D\]](#) [1D][LEdHN\[1E\]](#)  
[\[1E\]LEdHN\[1F\]](#) [1F]

The due process clause of the [Federal Constitution's Fourteenth Amendment](#) does not forbid a state from requiring that evidence of an incompetent individual's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence, and thus a state may apply such standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state; consistent with the due process clause--which protects an interest in life, as well as an interest in refusing life-sustaining medical treatment--a state may legitimately seek to safeguard the personal element of the choice between life and death of an incompetent individual through the imposition of heightened evidentiary requirements, because a state is entitled (1) to guard against potential abuses in situations such as where family members either (a) are unavailable to serve as surrogate decisionmakers, or (b) will not act to protect a patient, (2) to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, and thus that such proceeding lacks the added guarantee of accurate factfinding that the adversarial process brings with it, and (3) to decline to make judgments about the quality of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual; under the due process clause, a state, by requiring proof by clear and convincing evidence, may place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment, since the interests at stake are more substantial, on both the individual and societal level, than those involved in a run-of-the-

mine civil dispute, and since an erroneous decision not to terminate results in a maintenance of the status quo--creating at least the potential that a wrong decision will eventually be corrected, or its impact mitigated, by subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment--while an erroneous decision to withdraw life-sustaining treatment is not susceptible of correction. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

EVIDENCE §918 > sufficiency -- intent of incompetent person -- withdrawal of nutrition and hydration --  
 > Headnote:

[LEdHN\[2A\]](#) [2A][LEdHN\[2B\]](#) [2B]

A state's highest court does not commit constitutional error in deciding that the desire of an incompetent patient--diagnosed to be in a persistent vegetative state--to have hydration and nutrition withdrawn was not proved at trial pursuant to a standard of clear and convincing evidence enunciated by that court in its decision, where the testimony adduced at trial consisted primarily of (1) the patient's statements to a housemate, about a year before an automobile accident in which the patient sustained severe injuries which rendered her incompetent, that the patient would not want to live should she face life as a "vegetable," and (2) other observations to the same effect, which observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

CONSTITUTIONAL LAW §528.5 > due process --

refusal of medical treatment -- > Headnote:

[LEdHN\[3\]](#) [3]

Pursuant to the due process clause of the [Federal Constitution's Fourteenth Amendment](#), a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.

CONSTITUTIONAL LAW §525 > due process -- liberty interest -- balancing test -- > Headnote:

[LEdHN\[4\]](#) [4]

The determination that a person has a liberty interest under the due process clause of the [Federal Constitution's Fourteenth Amendment](#) does not end the inquiry as to whether the person's constitutional rights have been violated; such liberty interest must then be balanced against the relevant state interests.

CONSTITUTIONAL LAW §101.3 > due process -- refusal of medical treatment -- right of privacy --

> Headnote:

[LEdHN\[5A\]](#) [5A][LEdHN\[5B\]](#) [5B]

The issue whether a person's right to refuse medical treatment is protected by the Federal Constitution is properly analyzed in terms of the person's liberty interest under the [due process clause of the Fourteenth Amendment](#), rather than in terms of a generalized constitutional right of privacy.

INCOMPETENT PERSONS §1 > right to refuse medical treatment -- necessity of surrogate --

> Headnote:

[LEdHN\[6\]](#) [6]

Because an incompetent person is not able to make an informed and voluntary choice to exercise a

hypothetical right to refuse treatment--or any other right--such right must be exercised for her, if at all, by some sort of surrogate.

CONSTITUTIONAL LAW §829 > EVIDENCE

§869 > Headnote:

[LEdHN\[7\]](#) [7]

The function of a standard of proof, as that concept is embodied in the due process clause of the [Federal Constitution's Fourteenth Amendment](#) and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

CONSTITUTIONAL LAW §829 > EVIDENCE

§869 > Headnote:

[LEdHN\[8A\]](#) [8A][LEdHN\[8B\]](#) [8B]

An intermediate standard of proof--that of "clear and convincing" evidence--may be mandated by the due process clause of the [Federal Constitution's Fourteenth Amendment](#) when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money; such standard not only reflects the importance of a particular adjudication, but also serves as a societal judgment about how the risk of error should be distributed between the litigants, given that the more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.

CONSTITUTIONAL LAW §514 > due process -- protection of individual interests -- > Headnote:

[LEdHN\[9A\]](#) [9A][LEdHN\[9B\]](#) [9B]

In determining whether an individual's important interests are protected by the due process clause of the [Federal Constitution's Fourteenth Amendment](#), there is no reason why such interests should be afforded less protection simply because the government finds itself in the position of defending them.

EVIDENCE §551 > parol evidence rule -- > Headnote:  
[LEdHN\[10\]](#) [10]

At common law and by statute in most states, the parol evidence rule prevents the variations of the terms of a written contract by oral testimony.

STATUTE OF FRAUDS §1 > oral contracts --  
> Headnote:  
[LEdHN\[11\]](#) [11]

The statute of frauds makes oral contracts to leave property by will unenforceable.

CONSTITUTIONAL LAW §8 > effect on general rules  
-- > Headnote:  
[LEdHN\[12\]](#) [12]

The Federal Constitution does not require general rules of law to work faultlessly.

CONSTITUTIONAL LAW §528.3 > due process --  
incompetent person -- family's right of "substituted judgment" -- > Headnote:  
[LEdHN\[13\]](#) [13]

The due process clause of the [Federal Constitution's Fourteenth Amendment](#) does not

require a state to repose the right to judge whether an incompetent patient wishes to have life-sustaining treatment withdrawn with anyone but the patient herself; thus, a state is not required to repose a right of "substituted judgment" as to such decision with close family members of a patient, and may choose to defer to only the patient's wishes, since there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent.

CONSTITUTIONAL LAW §347.5 > equal protection -  
- incompetent persons -- > Headnote:  
[LEdHN\[14A\]](#) [14A][LEdHN\[14B\]](#) [14B]

A state is warranted, under the [equal protection clause](#) of the [Federal Constitution's Fourteenth Amendment](#), in establishing rigorous procedures for the class of cases involving a choice made for an incompetent person by someone else to refuse medical treatment, which procedures do not apply to the class of cases involving a choice made by a competent person to refuse medical treatment, given the obvious differences between such choices.

## **Syllabus**

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Petitioner Nancy Cruzan is incompetent, having sustained severe injuries in an automobile accident, and now lies in a Missouri state hospital in what is referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. The State is bearing the cost of her care. Hospital employees refused, without court approval, to honor the request of Cruzan's parents, copetitioners here, to terminate her artificial nutrition and hydration, since that would result in death. A state trial court authorized

the termination, finding that a person in Cruzan's condition has a fundamental right under the State and Federal Constitutions to direct or refuse the withdrawal of death-prolonging procedures, and that Cruzan's expression to a former housemate that she would not wish to continue her life if sick or injured unless she could live at least halfway normally suggested that she would not wish [\*\*\*\*2] to continue on with her nutrition and hydration. The State Supreme Court reversed. While recognizing a right to refuse treatment embodied in the common-law doctrine of informed consent, the court questioned its applicability in this case. It also declined to read into the State Constitution a broad right to privacy that would support an unrestricted right to refuse treatment and expressed doubt that the Federal Constitution embodied such a right. The court then decided that the State Living Will statute embodied a state policy strongly favoring the preservation of life, and that Cruzan's statements to her housemate were unreliable for the purpose of determining her intent. It rejected the argument that her parents were entitled to order the termination of her medical treatment, concluding that no person can assume that choice for an incompetent in the absence of the formalities required by the Living Will statute or clear and convincing evidence of the patient's wishes.

*Held:*

1. The United States Constitution does not forbid Missouri to require that evidence of an incompetent's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence. [\*\*\*\*3] Pp. 269-285.

(a) Most state courts have based a right to refuse treatment on the common-law right to informed consent, see, e. g., *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, or on both that right and a constitutional privacy right, see, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417. In addition to relying on state constitutions and the

common law, state courts have also turned to state statutes for guidance, see, e.g., *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840. However, these sources are not available to this Court, where the question is simply whether the Federal Constitution prohibits Missouri from choosing the rule of law which it did. Pp. 269-278.

(b) A competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment. Cf., e. g., *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358. However, the question whether that constitutional right has been violated must be determined by balancing [\*\*\*\*4] the liberty interest against relevant state interests. For purposes of this case, it is assumed that a competent person would have a constitutionally protected right to refuse lifesaving hydration and nutrition. This does not mean that an incompetent person should possess the same right, since such a person is unable to make an informed and voluntary choice to exercise that hypothetical right or any other right. While Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to withdraw hydration and nutrition and thus cause death, it has established a procedural safeguard to assure that the surrogate's action conforms as best it may to the wishes expressed by the patient while competent. Pp. 278-280.

(c) It is permissible for Missouri, in its proceedings, to apply a clear and convincing evidence standard, which is an appropriate standard when the individual interests at stake are both particularly important and more substantial than mere loss of money, *Santosky v. Kramer*, 455 U.S. 745, 756, 71 L. Ed. 2d 599, 102 S. Ct. 1388. Here, Missouri has a general interest in the protection and preservation of human life, as well [\*\*\*\*5] as other, more particular interests, at stake. It may legitimately seek to safeguard the personal element of an individual's choice between life and death. The State is also entitled to guard against potential abuses by surrogates who may not act to protect the

patient. Similarly, it is entitled to consider that a judicial proceeding regarding an incompetent's wishes may not be adversarial, with the added guarantee of accurate factfinding that the adversary process brings with it. The State may also properly decline to make judgments about the "quality" of a particular individual's life and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual. It is self-evident that these interests are more substantial, both on an individual and societal level, than those involved in a common civil dispute. The clear and convincing evidence standard also serves as a societal judgment about how the risk of error should be distributed between the litigants. Missouri may permissibly place the increased risk of an erroneous decision on those seeking to terminate life-sustaining treatment. An erroneous [\*\*\*\*6] decision not to terminate results in a maintenance of the status quo, with at least the potential that a wrong decision will eventually be corrected or its impact mitigated by an event such as an advancement in medical science or the patient's unexpected death. However, an erroneous decision to withdraw such treatment is not susceptible of correction. Although Missouri's proof requirement may have frustrated the effectuation of Cruzan's not-fully-expressed desires, the Constitution does not require general rules to work flawlessly. Pp. 280-285.

2. The State Supreme Court did not commit constitutional error in concluding that the evidence adduced at trial did not amount to clear and convincing proof of Cruzan's desire to have hydration and nutrition withdrawn. The trial court had not adopted a clear and convincing evidence standard, and Cruzan's observations that she did not want to live life as a "vegetable" did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. P. 285.

3. The Due Process Clause does not require a State to accept the "substituted judgment" of close family members in the absence of substantial proof that

their views reflect [\*\*\*\*7] the patient's. This Court's decision upholding a State's favored treatment of traditional family relationships, *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333, may not be turned into a constitutional requirement that a State must recognize the primacy of these relationships in a situation like this. Nor may a decision upholding a State's right to permit family decisionmaking, *Parham v. J. R.*, 442 U.S. 584, 61 L. Ed. 2d 101, 99 S. Ct. 2493, be turned into a constitutional requirement that the State recognize such decisionmaking. Nancy Cruzan's parents would surely be qualified to exercise such a right of "substituted judgment" were it required by the Constitution. However, for the same reasons that Missouri may require clear and convincing evidence of a patient's wishes, it may also choose to defer only to those wishes rather than confide the decision to close family members. Pp. 285-287.

**Counsel:** William H. Colby argued the cause for petitioners. With him on the briefs were David J. Waxse, Walter E. Williams, Edward J. Kelly III, John A. Powell, and Steven R. Shapiro.

Robert L. Presson, Assistant Attorney General of Missouri, argued the cause for respondent [\*\*\*\*8] Director, Missouri Department of Health, et al. With him on the brief were William L. Webster, Attorney General, and Robert Northcutt.

Thad C. McCanse, pro se, and David B. Mouton filed a brief for respondent guardian ad litem.

Solicitor General Starr argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Acting Assistant Attorney General Schiffer, Deputy Solicitor General Merrill, and Brian J. Martin. \*

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\* Briefs of amici curiae urging reversal were filed for the AIDS Civil Rights Project by Walter R. Allan; for the American Academy of Neurology by John H. Pickering; for the American College of Physicians by Nancy J. Bregstein; for the American Geriatrics Society by Keith R. Anderson; for the American Hospital Association by Paul W. Armstrong; for the American Medical Association et al. by Rex E. Lee, Carter G. Phillips, Elizabeth H. Esty, Jack R. Bierig, Russell M. Pelton, Paul G. Gebhard, Laurie R.

**Judges:** [\*\*\*\*9] REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., post, p. 287, and SCALIA, J., post, p. 292, filed concurring opinions. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, post, p. 301. STEVENS, J., filed a dissenting opinion, post, p. 330.

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Rockett, and Henry Hart; for the Colorado Medical Society et al. by Garth C. Grissom; for Concern for Dying by Henry Putzel III and George J. Annas; for the Evangelical Lutheran Church in America by Susan D. Reece Martyn and Henry J. Bourgaignon; for the General Board of Church and Society of the United Methodist Church by Thomas S. Martin and Magda Lopez; for Missouri Hospitals et al. by Mark A. Thornhill, E. J. Holland, Jr., and John C. Shepherd; for the National Hospice Organization by Barbara F. Mishkin and Walter A. Smith, Jr.; for the National Academy of Elder Law Attorneys by Robert K. Huffman; for the Society of Critical Care Medicine et al. by Stephan E. Lawton; for the Society for the Right to Die, Inc., by Fenella Rouse; for Wisconsin Bioethicists et al. by Robyn S. Shapiro, Charles H. Barr, and Jay A. Gold; for Barbara Burgoon et al. by Vicki Gottlich, Leslie Blair Fried, and Stephanie M. Edelstein; and for John E. McConnell et al. by Stephen A. Wise.

Briefs of amici curiae urging affirmance were filed for Agudath Israel of America by David Zwiebel; for the American Academy of Medical Ethics by James Bopp, Jr.; for the Association of American Physicians and Surgeons et al. by Edward R. Grant and Kent Masterson Brown; for the Association for Retarded Citizens of the United States et al. by James Bopp, Jr., Thomas J. Marzen, and Stanley S. Herr; for the Catholic Lawyers Guild of the Archdiocese of Boston, Inc., by Calum B. Anderson and Leonard F. Zandrow, Jr.; for the District Attorney of Milwaukee County, Wisconsin, by E. Michael McCann, pro se, and John M. Stoiber; for Doctors for Life et al. by David O. Danis and Gerard F. Hempstead; for Families for Life et al. by Robert L. Mauro; for Focus on the Family et al. by Clarke D. Forsythe, Paul Benjamin Linton, and H. Robert Showers; for Free Speech Advocates et al. by Thomas Patrick Monaghan and Jay Alan Sekulow; for the International Anti-Euthanasia Task Force et al. by Jordan Lorence; for the Knights of Columbus by James H. Burnley IV, Robert J. Cynkar, and Carl A. Anderson; for the National Right to Life Committee, Inc., by James Bopp, Jr.; for the New Jersey Right to Life Committee, Inc., et al. by Donald D. Campbell and Anne M. Perone; for the Rutherford Institute et al. by John W. Whitehead, James J. Knicely, David E. Morris, William B. Hollberg, Amy Dougherty, Thomas W. Strahan, William Bonner, John F. Southworth, Jr., and W. Charles Bundren; for the United States Catholic Conference by Mark E. Chopko and Phillip H. Harris; for the Value of Life Committee, Inc., by Walter M. Weber; and for Elizabeth Sadowski et al. by Robert L. Mauro.

Briefs of amici curiae were filed for the American Nurses Association et al. by Diane Trace Warlick; and for the SSM Health Care System et al. by J. Jerome Mansmann and Melanie DiPietro.

**Opinion by:** REHNQUIST

## Opinion

[\*265] [\*\*\*234] [\*\*2844] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A] [LEdHN\[2A\]](#) [2A]Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Copetitioners Lester and Joyce Cruzan, Nancy's [\*\*2845] parents and coguardians, sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy's desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. We granted certiorari, 492 U.S. 917 (1989), and now affirm.

[\*266] On the night of January [\*\*\*\*10] 11, 1983, Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The vehicle overturned, and Cruzan was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed her as having sustained probable cerebral contusions compounded by significant anoxia (lack of oxygen). The Missouri trial court in this case found that permanent brain damage generally results after 6 minutes in an anoxic state; it was estimated that Cruzan was deprived of oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the recovery, surgeons implanted a gastrostomy

feeding and hydration tube in Cruzan with the consent of her then husband. Subsequent rehabilitative efforts proved unavailing. She now lies in a Missouri state hospital in what is commonly referred to as a persistent vegetative state: [\*\*\*\*11] generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function.<sup>1</sup> The

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<sup>1</sup>The State Supreme Court, adopting much of the trial court's findings, described Nancy Cruzan's medical condition as follows:

"... (1) Her respiration and circulation are not artificially maintained and are within the normal limits of a thirty-year-old female; (2) she is oblivious to her environment except for reflexive responses to sound and perhaps painful stimuli; (3) she suffered anoxia of the brain resulting in a massive enlargement of the ventricles filling with cerebrospinal fluid in the area where the brain has degenerated and [her] cerebral cortical atrophy is irreversible, permanent, progressive and ongoing; (4) her highest cognitive brain function is exhibited by her grimacing perhaps in recognition of ordinarily painful stimuli, indicating the experience of pain and apparent response to sound; (5) she is a spastic quadriplegic; (6) her four extremities are contracted with irreversible muscular and tendon damage to all extremities; (7) she has no cognitive or reflexive ability to swallow food or water to maintain her daily essential needs and . . . she will never recover her ability to swallow sufficient [sic] to satisfy her needs. In sum, Nancy is diagnosed as in a persistent vegetative state. She is not dead. She is not terminally ill. Medical experts testified that she could live another thirty years." [Cruzan v. Harmon, 760 S.W.2d 408, 411 \(Mo. 1989\)](#) (en banc) (quotations omitted; footnote omitted).

In observing that Cruzan was not dead, the court referred to the following Missouri statute:

"For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met:

"(1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or

"(2) When respiration and circulation are artificially maintained, and there is total and irreversible cessation of all brain function, including the brain stem and that such determination is made by a licensed physician." [Mo. Rev. Stat. § 194.005](#) (1986).

Since Cruzan's respiration and circulation were not being artificially maintained, she obviously fit within the first proviso of the statute.

Dr. Fred Plum, the creator of the term "persistent vegetative state" and a renowned expert on the subject, has described the "vegetative state" in the following terms:

"Vegetative state describes a body which is functioning entirely in

State of Missouri is bearing the cost of her care.

[\*267] [\*\*\*\*12] [\*\*\*235] [\*\*2846] After it had become apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked hospital employees to terminate the artificial nutrition and hydration procedures. All agree that such a [\*268] removal would cause her death. The employees refused to honor the request without court approval. The parents then sought and received authorization from the state trial court for termination. The court found that a person in Nancy's condition had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures." App. to Pet. for Cert. A99. The court also found that Nancy's "expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration." *Id.*, at A97-A98.

The Supreme Court of Missouri reversed by a divided vote. The court recognized a right to refuse treatment embodied in the common-law doctrine of informed consent, [\*\*\*\*13] but expressed skepticism about the application of that doctrine in the circumstances of this case. [Cruzan v. Harmon, 760 S.W.2d 408, 416-417 \(1988\)](#) (en banc). The court also declined to read a broad right of privacy into the State Constitution which would "support the right of a person to refuse medical treatment in every circumstance," and expressed doubt as to

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terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner." [In re Jobes, 108 N.J. 394, 403, 529 A.2d 434, 438 \(1987\)](#).

See also Brief for American Medical Association et al. as *Amici Curiae* 6 ("The persistent vegetative state can best be understood as one of the conditions in which patients have suffered a loss of consciousness").

whether such a right existed under the United States Constitution. *Id.*, at 417-418. It then decided that the Missouri Living Will statute, *Mo. Rev. Stat. § 459.010 et seq.* (1986), embodied a state policy strongly favoring the preservation of life. *760 S.W.2d at 419-420*. The court found that Cruzan's statements to her roommate regarding her desire to live or die under certain conditions were "unreliable for the purpose of determining her intent," *id.*, at 424, "and thus insufficient to support the co-guardians['] claim to exercise substituted [\*\*\*236] judgment on Nancy's behalf." *Id.*, at 426. It rejected the argument that Cruzan's parents were entitled to order the termination [\*\*\*\*14] of her medical treatment, [\*269] concluding that "no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here." *Id.*, at 425. The court also expressed its view that "broad policy questions bearing on life and death are more properly addressed by representative assemblies" than judicial bodies. *Id.*, at 426.

We granted certiorari to consider the question whether Cruzan has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances.

At common law, even the touching of one person by another without consent and without legal justification was a battery. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 9, pp. 39-42 (5th ed. 1984). Before the turn of the century, this Court observed that "no *HN1* right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free [\*\*\*\*15] from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally

required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: "Every human being [\*\*2847] of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914). The informed consent doctrine has become firmly entrenched in American tort law. See Keeton, Dobbs, Keeton, & Owen, *supra*, § 32, pp. 189-192; F. Rozovsky, *Consent to Treatment*, A Practical Guide 1-98 (2d ed. 1990).

[\*270] The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. Until [\*\*\*\*16] about 15 years ago and the seminal decision in *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied *sub nom. Garger v. New Jersey*, 429 U.S. 922, 50 L. Ed. 2d 289, 97 S. Ct. 319 (1976), the number of right-to-refuse-treatment decisions was relatively few.<sup>2</sup> Most of the earlier cases involved patients who refused medical treatment forbidden by their religious beliefs, thus implicating *First Amendment* rights as well as common-law rights of self-determination.<sup>3</sup> More recently, however, [\*\*\*237] with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned. See *760 S.W.2d at 412, n.4* (collecting 54 reported decisions from 1976 through 1988).

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<sup>2</sup>See generally Karnezis, *Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A. L. R. 3d 67 (1979) (collecting cases); Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 Rutgers L. Rev. 228, 229, and n.5 (1973) (noting paucity of cases).

<sup>3</sup>See Chapman, *The Uniform Rights of the Terminally Ill Act: Too Little, Too Late?*, 42 Ark. L. Rev. 319, 324, n.15 (1989); see also F. Rozovsky, *Consent to Treatment*, A Practical Guide 415-423 (1984).

[\*\*\*\*17] In the *Quinlan* case, young Karen Quinlan suffered severe brain damage as the result of anoxia and entered a persistent vegetative state. Karen's father sought judicial approval to disconnect his daughter's respirator. The New Jersey Supreme Court granted the relief, holding that [HN2](#) Karen had a right of privacy grounded in the Federal Constitution to terminate treatment. [In re Quinlan, 70 N.J. at 38-42, 355 A.2d at 662-664](#). Recognizing that this right was not absolute, however, the court balanced it against asserted state interests. Noting that the State's interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims," the court concluded that the state interests had to give way in that case. [Id., at \[\\*271\] 41, 355 A.2d at 664](#). [\*\*\*\*18] The court also concluded that the "only practical way" to prevent the loss of Karen's privacy right due to her incompetence was to allow her guardian and family to decide "whether she would exercise it in these circumstances." *Ibid*.

After *Quinlan*, however, most courts have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right. See L. Tribe, *American Constitutional Law* § 15-11, p. 1365 (2d ed. 1988). In [Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 \(1977\)](#), the Supreme Judicial Court of Massachusetts relied on both the right of privacy and the right of informed consent to permit the withholding of chemotherapy from a profoundly retarded 67-year-old man suffering from leukemia. [Id., at 737-738, 370 N.E.2d at 424](#). Reasoning that an incompetent person retains the same rights as a competent individual "because the value of human dignity extends to both," the court adopted a "substituted judgment" standard whereby courts were to determine [\*\*\*\*19] what an incompetent individual's decision would have been under the circumstances. [Id., at 745, 752-753, 757-758, 370 N.E.2d at 427, 431, 434](#). Distilling certain state interests from prior case law -- the preservation of life, the protection of the interests

[\*\*2848] of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession -- the court recognized the first interest as paramount and noted it was greatest when an affliction was curable, "as opposed to the State interest where, as here, the issue is not whether, but when, for how long, and at what cost to the individual [a] life may be briefly extended." [Id., at 742, 370 N.E.2d at 426](#).

In [In re Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266](#), cert. denied, 454 U.S. 858, 70 L. Ed. 2d 153, 102 S. Ct. 309 (1981), the New York Court of Appeals declined to base a right to refuse treatment on a constitutional privacy right. Instead, it found such a right "adequately [\*272] supported" by the informed consent doctrine. [Id., at 376-377, 420 N.E.2d at 70](#). [\*\*\*\*20] In *In re Eichner* (decided with [In re Storar, supra](#)), an 83-year-old man who had suffered brain damage from anoxia [\*\*\*238] entered a vegetative state and was thus incompetent to consent to the removal of his respirator. The court, however, found it unnecessary to reach the question whether his rights could be exercised by others since it found the evidence clear and convincing from statements made by the patient when competent that he "did not want to be maintained in a vegetative coma by use of a respirator." [Id., at 380, 420 N.E.2d at 72](#). In the companion *Storar* case, a 52-year-old man suffering from bladder cancer had been profoundly retarded during most of his life. Implicitly rejecting the approach taken in [Saikewicz, supra](#), the court reasoned that due to such life-long incompetency, "it is unrealistic to attempt to determine whether he would want to continue potentially life prolonging treatment if he were competent." [52 N.Y.2d at 380, 420 N.E.2d at 72](#). As the evidence showed that the patient's [\*\*\*\*21] required blood transfusions did not involve excessive pain and without them his mental and physical abilities would deteriorate, the court concluded that it should not "allow an incompetent patient to bleed to death because someone, even someone as close as a parent or sibling, feels that this is best for one with an incurable disease." [Id., at 382, 420 N.E.2d at 73](#).

Many of the later cases build on the principles established in *Quinlan*, *Saikewicz*, and *Storar/Eichner*. For instance, in *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985), the same court that decided *Quinlan* considered whether a nasogastric feeding tube could be removed from an 84-year-old incompetent nursing-home resident suffering irreversible mental and physical ailments. While recognizing that a federal right of privacy might apply in the case, the court, contrary to its approach in *Quinlan*, decided to base its decision on the common-law right to self-determination and informed consent. [\*273] 98 N.J. at 348, 486 A.2d at 1223. "On balance, the right to self-determination [\*\*\*\*22] ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death. Most of the cases that have held otherwise, unless they involved the interest in protecting innocent third parties, have concerned the patient's competency to make a rational and considered choice." *Id.*, at 353-354, 486 A.2d at 1225.

Reasoning that the right of self-determination should not be lost merely because an individual is unable to sense a violation of it, the court held that incompetent individuals retain a right to refuse treatment. It also held that such a right could be exercised by a surrogate decisionmaker using a "subjective" standard when there was clear evidence that the incompetent person would have exercised it. Where such evidence was lacking, the court held that an individual's right could still be invoked in certain circumstances under objective "best interest" standards. *Id.*, at 361-368, 486 A.2d at 1229-1233. Thus, if some trustworthy evidence existed that the individual would have wanted to terminate [\*\*\*\*23] treatment, but not enough to clearly establish a person's wishes for purposes of the [\*\*2849] subjective standard, and the burden of a prolonged life from the experience of pain and suffering markedly outweighed its satisfactions, treatment could be terminated under a "limited-objective" standard. Where no trustworthy evidence existed, [\*\*\*239] and a person's suffering would

make the administration of life-sustaining treatment inhumane, a "pure-objective" standard could be used to terminate treatment. If none of these conditions obtained, the court held it was best to err in favor of preserving life. *Id.*, at 364-368, 486 A.2d at 1231-1233.

The court also rejected certain categorical distinctions that had been drawn in prior refusal-of-treatment cases as lacking substance for decision purposes: the distinction between actively hastening death by terminating treatment and passively [\*274] allowing a person to die of a disease; between treating individuals as an initial matter versus withdrawing treatment afterwards; between ordinary versus extraordinary treatment; and between treatment by artificial feeding versus other forms of life-sustaining medical [\*\*\*\*24] procedures. *Id.*, at 369-374, 486 A.2d at 1233-1237. As to the last item, the court acknowledged the "emotional significance" of food, but noted that feeding by implanted tubes is a "medical procedure with inherent risks and possible side effects, instituted by skilled health-care providers to compensate for impaired physical functioning" which analytically was equivalent to artificial breathing using a respirator. *Id.*, at 373, 486 A.2d at 1236.<sup>4</sup>

[\*\*\*\*25] In contrast to *Conroy*, the Court of

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<sup>4</sup>In a later trilogy of cases, the New Jersey Supreme Court stressed that the analytic framework adopted in *Conroy* was limited to elderly, incompetent patients with shortened life expectancies, and established alternative approaches to deal with a different set of situations. See *In re Farrell*, 108 N.J. 335, 529 A.2d 404 (1987) (37-year-old competent mother with terminal illness had right to removal of respirator based on common law and constitutional principles which overrode competing state interests); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987) (65-year-old woman in persistent vegetative state had right to removal of nasogastric feeding tube -- under *Conroy* subjective test, power of attorney and hearsay testimony constituted clear and convincing proof of patient's intent to have treatment withdrawn); *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987) (31-year-old woman in persistent vegetative state entitled to removal of jejunostomy feeding tube -- even though hearsay testimony regarding patient's intent insufficient to meet clear and convincing standard of proof, under *Quinlan*, family or close friends entitled to make a substituted judgment for patient).

Appeals of New York recently refused to accept less than the clearly expressed wishes of a patient before permitting the exercise of her right to refuse treatment by a surrogate decisionmaker. *In re Westchester County Medical Center on behalf of O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988) (O'Connor). There, the court, over the objection of the patient's family members, granted an order to insert a feeding tube into a 77-year-old [\*275] woman rendered incompetent as a result of several strokes. While continuing to recognize a common-law right to refuse treatment, the court rejected the substituted judgment approach for asserting it "because it is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another. Consequently, we adhere to the view that, despite its pitfalls and inevitable uncertainties, the inquiry must always be narrowed to the patient's expressed intent, with every effort made to minimize the opportunity for error." *Id.*, at 530, 531 N.E.2d at 613 [\*\*\*\*26] (citation omitted). The court held that the record lacked the requisite clear and convincing evidence of the patient's expressed intent to [\*\*\*240] withhold life-sustaining treatment. *Id.*, at 531-534, 531 N.E.2d at 613-615.

Other courts have found state statutory law relevant to the resolution of these issues. In *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, cert. denied, 488 U.S. 958 (1988), the California Court of Appeal authorized [\*\*2850] the removal of a nasogastric feeding tube from a 44-year-old man who was in a persistent vegetative state as a result of an auto accident. Noting that the right to refuse treatment was grounded in both the common law and a constitutional right of privacy, the court held that a state probate statute authorized the patient's conservator to order the withdrawal of life-sustaining treatment when such a decision was made in good faith based on medical advice and the conservatee's best interests. While acknowledging that "to claim that [a patient's] 'right to choose' survives incompetence is a legal fiction at best,"

[\*\*\*\*27] the court reasoned that the respect society accords to persons as individuals is not lost upon incompetence and is best preserved by allowing others "to make a decision that reflects [a patient's] interests more closely than would a purely technological decision to do whatever is possible." <sup>5</sup> [\*\*276] *Id.*, at 208, 245 Cal. Rptr. at 854-855. See also *In re Conservatorship of Torres*, 357 N.W.2d 332 (Minn. 1984) (Minnesota court had constitutional and statutory authority to authorize a conservator to order the removal of an incompetent individual's respirator since in patient's best interests).

[\*\*\*\*28] In *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N.E.2d 292, 139 Ill. Dec. 780 (1989), the Supreme Court of Illinois considered whether a 76-year-old woman rendered incompetent from a series of strokes had a right to the discontinuance of artificial nutrition and hydration. Noting that the boundaries of a federal right of privacy were uncertain, the court found a right to refuse treatment in the doctrine of informed consent. *Id.*, at 43-45, 549 N.E.2d at 296-297. The court further held that the State Probate Act impliedly authorized a guardian to exercise a ward's right to refuse artificial sustenance in the event that the ward was terminally ill and irreversibly comatose. *Id.*, at 45-47, 549 N.E.2d at 298. Declining to adopt a best interests standard for deciding when it would be appropriate to exercise a ward's right because it "lets another make a determination of a patient's quality of life," the court opted instead for a substituted judgment standard. *Id.*, at 49, 549 N.E.2d at 299. Finding the "expressed [\*\*\*\*29]

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<sup>5</sup>The *Drabick* court drew support for its analysis from earlier, influential decisions rendered by California Courts of Appeal. See *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) (competent 28-year-old quadriplegic had right to removal of nasogastric feeding tube inserted against her will); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (competent 70-year-old, seriously ill man had right to the removal of respirator); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983) (physicians could not be prosecuted for homicide on account of removing respirator and intravenous feeding tubes of patient in persistent vegetative state).

intent" standard utilized in *O'Connor, supra*, too rigid, the court noted that other clear and convincing evidence of the patient's intent could be considered. *133 Ill. 2d at 50-51, 549 N.E.2d at 300*. The court also adopted the "consensus opinion [that] treats artificial nutrition and hydration as medical treatment." *Id., at 42, 549 N.E.2d at 296*. Cf. [\*\*\*241] *McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 705, [\*277] 553 A.2d 596, 603 (1989) (right to withdraw artificial nutrition and hydration found in the Connecticut Removal of Life Support Systems Act, which "provid[es] functional guidelines for the exercise of the common law and constitutional rights of self-determination"; attending physician authorized to remove treatment after finding that patient is in a terminal condition, obtaining consent of family, and considering expressed wishes of patient).<sup>6</sup>

[\*\*\*\*30] [\*\*2851] As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond that, these cases demonstrate both similarity and diversity in their approaches to decision of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources -- state constitutions, statutes, and common law -- which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did. This is the first case in which we have been

squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a "right to die." We follow the judicious counsel of our decision in *Twin City Bank v. Nebeker*, 167 U.S. 196, 202, 42 L. Ed. 134, 17 S. Ct. 766 (1897), where we said that in deciding "a question [\*278] of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase [\*\*\*\*31] of the subject."

*LEdHN[3]* [3]The *Fourteenth Amendment* provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358 (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. Decisions prior to the incorporation of the *Fourth Amendment* into the *Fourteenth Amendment* analyzed searches and seizures involving the body under the Due Process Clause and were thought to implicate substantial liberty interests. See, e.g., *Breithaupt v. Abram*, 352 U.S. 432, 439, 1 L. Ed. 2d 448, 77 S. Ct. 408 (1957) ("As against the right of an individual that his person be held inviolable . . . must be set the interests of society . . .").

[\*\*\*242] Just this Term, in the course of holding that a State's procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, [\*\*\*\*32] we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the *Due Process Clause of the Fourteenth Amendment*." *Washington v. Harper*, 494 U.S. 210, 221-222, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); see also *id., at 229* ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty").

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<sup>6</sup>Besides the Missouri Supreme Court in *Cruzan* and the courts in *McConnell*, *Longeway*, *Drabick*, *Bouvia*, *Barber*, *O'Connor*, *Conroy*, *Jobes*, and *Peter*, appellate courts of at least four other States and one Federal District Court have specifically considered and discussed the issue of withholding or withdrawing artificial nutrition and hydration from incompetent individuals. See *Gray v. Romeo*, 697 F. Supp. 580 (RI 1988); *In re Gardner*, 534 A.2d 947 (Me. 1987); *In re Grant*, 109 Wash. 2d 545, 747 P.2d 445 (1987); *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. App. 1986). All of these courts permitted or would permit the termination of such measures based on rights grounded in the common law, or in the State or Federal Constitution.

Still other cases support the recognition of a general liberty interest in refusing medical treatment. [\*Vitek v. Jones\*, 445 U.S. 480, 494, 63 L. Ed. 2d 552, 100 S. Ct. 1254 \(1980\)](#) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); [\*Parham v. J. R.\*, 442 U.S. 584, 600, 61 L. Ed. 2d 101, 99 S. Ct. 2493 \(1979\)](#) ("[A] child, in common with adults, has a substantial liberty [\*279] interest in not being confined unnecessarily for medical treatment").

[\*LEdHN\*\[4\]](#) [4][\*LEdHN\*\[5A\]](#) [5A]But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry;<sup>7</sup> "whether respondent's constitutional rights have been violated [\*\*2852] must be determined by balancing his [\*\*\*\*33] liberty interests against the relevant state interests." [\*Youngberg v. Romeo\*, 457 U.S. 307, 321, 73 L. Ed. 2d 28, 102 S. Ct. 2452 \(1982\)](#). See also [\*Mills v. Rogers\*, 457 U.S. 291, 299, 73 L. Ed. 2d 16, 102 S. Ct. 2442 \(1982\)](#).

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether [\*\*\*\*34] the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

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<sup>7</sup> [\*LEdHN\*\[5B\]](#) [5B]

Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a [\*Fourteenth Amendment\*](#) liberty interest. See [\*Bowers v. Hardwick\*, 478 U.S. 186, 194-195, 92 L. Ed. 2d 140, 106 S. Ct. 2841 \(1986\)](#).

Petitioners go on to assert that an incompetent person should possess the same right in this respect as is possessed by a competent person. They rely primarily on our decisions in [\*Parham v. J. R.\*, \*supra\*](#), and [\*Youngberg v. Romeo\*, \*supra\*](#). In *Parham*, we held that a mentally disturbed minor child had a liberty interest in "not being confined unnecessarily for medical treatment," [442 U.S. at 600](#), but we certainly did not intimate that such a minor child, after commitment, would have a liberty interest in refusing treatment. In *Youngberg*, we held that a seriously retarded adult had a liberty [\*280] interest in safety and freedom from [\*\*\*243] bodily restraint, [457 U.S. at 320](#). *Youngberg*, however, did not deal with decisions to administer or withhold medical treatment.

[\*LEdHN\*\[1B\]](#) [1B] [\*LEdHN\*\[6\]](#) [6]The difficulty with petitioners' claim [\*\*\*\*35] is that in a sense it begs the question: An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a "right" must be exercised for her, if at all, by some sort of surrogate. Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation [\*\*\*\*36] of human life, and there can be no gainsaying this interest. As

a general matter, the States -- indeed, all civilized nations -- demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.<sup>8</sup> We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

[\*281] [LEdHN\[1C\]](#) [1C] But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri [\*\*2853] may legitimately seek to safeguard the personal element of this choice through the imposition [\*\*\*\*37] of heightened evidentiary requirements. [HN3](#) It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "there will, of course, be some unfortunate situations in which family members will not act to protect a patient." [In re Jobes](#), 108 N.J. 394, 419, 529 A.2d 434, 447 (1987). A State is entitled to guard against potential abuses in such situations. Similarly, a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary [\*\*\*244] process brings with it.<sup>9</sup> See [Ohio v. Akron Center](#)

[for Reproductive \[\\*282\] Health](#), 497 U.S. 502, 515-516. Finally, we think [HN4](#) a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed [\*\*\*\*38] against the constitutionally protected interests of the individual.

[\*\*\*\*39] [LEdHN\[1D\]](#) [1D] [LEdHN\[7\]](#) [7] [LEdHN\[8A\]](#) [8A] [LEdHN\[9A\]](#) [9A] In our view, Missouri has permissibly sought to advance these interests through the adoption of a "clear and convincing" standard of proof to govern such proceedings. [HN5](#) "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" [Addington v. Texas](#), 441 U.S. 418, 423, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979) (quoting [In re Winship](#), 397 U.S. 358, 370, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (Harlan, J., concurring)). "This Court has mandated an intermediate standard of proof -- 'clear and convincing evidence' -- when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" [Santosky v. Kramer](#), 455 U.S. 745, 756, 71 L. Ed. 2d 599, 102 S. Ct. 1388 (1982) (quoting [Addington, supra](#), at 424). Thus, such a standard has been required in deportation

<sup>8</sup> See Smith, All's Well That Ends Well: Toward a Policy of Assisted Rational Suicide or Merely Enlightened Self-Determination?, 22 U. C. D. L. Rev. 275, 290-291, and n.106 (1989) (compiling statutes).

<sup>9</sup> Since Cruzan was a patient at a state hospital when this litigation commenced, the State has been involved as an adversary from the beginning. However, it can be expected that many disputes of this type will arise in private institutions, where a guardian ad litem or similar party will have been appointed as the sole representative of the incompetent individual in the litigation. In such cases, a guardian may act in entire good faith, and yet not maintain a position truly adversarial to that of the family. Indeed, as noted by the court below,

"the guardian *ad litem* [in this case] finds himself in the predicament of believing that it is in Nancy's 'best interest to have the tube feeding discontinued,' but 'feeling that an appeal should be made because our responsibility to her as attorneys and guardians *ad litem* was to pursue this matter to the highest court in the state in view of the fact that this is a case of first impression in the State of Missouri.'" [760 S.W.2d at 410, n.1](#). Cruzan's guardian ad litem has also filed a brief in this Court urging reversal of the Missouri Supreme Court's decision. None of this is intended to suggest that the guardian acted the least bit improperly in this proceeding. It is only meant to illustrate the limits which may obtain on the adversarial nature of this type of litigation.

proceedings, [Woodby v. INS](#), 385 U.S. 276, 17 L. Ed. 2d 362, 87 S. Ct. 483 (1966), in denaturalization proceedings, [\*\*\*\*40] [Schneiderman v. United States](#), 320 U.S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1943), in civil commitment proceedings, [Addington, supra](#), and in proceedings for the termination of parental rights, [Santosky, supra](#).<sup>10</sup> [\*\*\*245] Further, [\*283] this level of proof, "or an even higher one, has traditionally been imposed in cases involving [\*\*2854] allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as . . . lost wills, oral contracts to make bequests, and the like." [Woodby, supra, at 285, n.18](#).

[\*\*\*\*41] [LEdHN\[1E\]](#) [1E] [LEdHN\[8B\]](#) [8B] We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute. But [HN7](#) not only does the standard of proof reflect the importance of a particular adjudication, it also serves as "a societal judgment about how the risk of error should be distributed between the litigants." [Santosky, supra, at 755](#); [Addington, supra, at 423](#). The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. We believe that Missouri may

permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that [\*\*\*\*42] a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction. In *Santosky*, one of the factors which led the Court to require proof by clear and convincing evidence in a proceeding to terminate parental rights was that a decision in such a case was final and irrevocable. [Santosky, supra, at 759](#). The same must surely be said of the decision to discontinue hydration and nutrition of a patient such as Nancy Cruzan, which all agree will result in her death.

[\*284] [LEdHN\[10\]](#) [10] [LEdHN\[11\]](#) [11] [LEdHN\[12\]](#) [12] It is also worth noting that most, if not all, States simply forbid oral testimony entirely in determining the wishes of parties in transactions which, while important, simply do not have the consequences that a decision to terminate a person's life does. At common law and by statute in most States, the parol evidence rule prevents the variations of the terms of a written contract by oral testimony. The statute of frauds makes unenforceable oral contracts to leave property by will, and statutes regulating the making of wills universally require that those instruments be in [\*\*\*\*43] writing. See 2 A. Corbin, *Contracts* § 398, pp. 360-361 (1950); 2 W. Page, *Law of Wills* §§ 19.3-19.5, pp. 61-71 (1960). There is no doubt that statutes requiring wills to be in writing, and statutes of frauds which require that a contract to make a will be in writing, on occasion frustrate the effectuation of the intent of a particular decedent, just as Missouri's requirement of proof in this case may have frustrated the effectuation of the not-fully-expressed desires of Nancy Cruzan. But the

<sup>10</sup> [LEdHN\[9B\]](#) [9B]

We recognize that these cases involved instances where the government sought to take action against an individual. See [Price Waterhouse v. Hopkins](#), 490 U.S. 228, 253, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989) (plurality opinion). Here, by contrast, the government seeks to protect the interests of an individual, as well as its own institutional interests, in life. We do not see any [HN6](#) reason why important individual interests should be afforded less protection simply because the government finds itself in the position of defending them. "We find it significant that . . . the defendant rather than the plaintiff" seeks the clear and convincing standard of proof -- "suggesting that this standard ordinarily serves as a shield rather than . . . a sword." [Id., at 253](#). That it is the government that has picked up the shield should be of no moment.

Constitution does not require general rules to work faultlessly; no general rule can.

[LEdHN\[1F\]](#) [1F]In sum, we conclude that [HN8](#) a State may apply a clear and convincing [\[\\*\\*\\*246\]](#) evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. We note that many courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to the prior expressed wishes of the incompetent individual, or whether they allow more [\[\\*\\*2855\]](#) general proof of what the individual's decision would have been, require a clear and convincing standard of proof for such evidence. See, e. [\[\\*\\*\\*\\*44\]](#) *g.*, [Longeway](#), 133 Ill. 2d at 50-51, 549 N.E.2d at 300; [McConnell](#), 209 Conn. at 707-710, 553 A.2d at 604-605; [O'Connor](#), 72 N.Y.2d at 529-530, 531 N.E.2d at 613; *In re Gardner*, 534 A.2d 947, 952-953 (Me. 1987); *In re Jobs*, 108 N.J. at 412-413, 529 A. 2d, [\[\\*285\]](#) at 443; *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 11, 426 N.E.2d 809, 815 (1980).

[LEdHN\[2B\]](#) [2B]The Supreme Court of Missouri held that in this case the testimony adduced at trial did not amount to clear and convincing proof of the patient's desire to have hydration and nutrition withdrawn. In so doing, it reversed a decision of the Missouri trial court which had found that the evidence "suggested" Nancy Cruzan would not have desired to continue such measures, App. to Pet. for Cert. A98, but which had not adopted the standard of "clear and convincing evidence" enunciated by the Supreme Court. The testimony adduced at trial consisted primarily [\[\\*\\*\\*\\*45\]](#) of Nancy Cruzan's statements made to a housemate about a year before her accident that she would not want to live should she face life as a "vegetable," and other observations to the same effect. The observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. We cannot say that the Supreme Court of Missouri

committed constitutional error in reaching the conclusion that it did.<sup>11</sup>

[\[\\*\\*\\*\\*46\]](#) Petitioners alternatively contend that Missouri must accept the "substituted judgment" of close family members even in the absence of substantial proof that their views reflect [\[\\*286\]](#) the views of the patient. They rely primarily upon our decisions in [Michael H. v. Gerald D.](#), 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989), and [Parham v. J. R.](#), 442 U.S. 584, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979). But we do not think these cases support their claim. In *Michael H.*, we upheld the constitutionality of California's favored treatment of traditional family relationships; such a holding may not be turned around [\[\\*\\*\\*247\]](#) into a constitutional requirement that a State *must* recognize the primacy of those relationships in a situation like this. And in *Parham*, where the patient was a minor, we also upheld the constitutionality of a state scheme in which parents made certain decisions for mentally ill minors. Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way.

[LEdHN\[13\]](#) [13] [LEdHN\[14A\]](#) [14A]No doubt is engendered by [\[\\*\\*\\*\\*47\]](#) anything in this record

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<sup>11</sup> The clear and convincing standard of proof has been variously defined in this context as "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented," *In re Westchester County Medical Center on behalf of O'Connor*, 72 N.Y.2d 517, 531, 531 N.E.2d 607, 613, 534 N.Y.S.2d 886 (1988) (*O'Connor*), and as evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Jobs*, 108 N.J. at 407-408, 529 A.2d at 441 (quotation omitted). In both of these cases the evidence of the patient's intent to refuse medical treatment was arguably stronger than that presented here. The New York Court of Appeals and the Supreme Court of New Jersey, respectively, held that the proof failed to meet a clear and convincing threshold. See *O'Connor*, 72 N.Y.2d at 526-534, 531 N.E.2d at 610-615; *Jobs* 108 N.J. at 442-443.

but that Nancy Cruzan's mother and father are loving and caring parents. If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. But we do not think [HN9](#) the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling -- a feeling not at all ignoble or unworthy, but not entirely disinterested, [**\*\*2856**] either -- that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. All of the reasons previously discussed for allowing Missouri to require clear and convincing evidence of the patient's wishes lead us to conclude that the State may [**\*287**] choose to defer only to those wishes, rather than confide the decision to close family members.<sup>12</sup>

[**\*\*\*\*48**] The judgment of the Supreme Court of Missouri is

*Affirmed.*

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<sup>12</sup> We are not faced in this case with the question whether a State might be required to defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual.

[LEdHN\[14B\]](#) [14B]

Petitioners also adumbrate in their brief a claim based on the [Equal Protection Clause of the Fourteenth Amendment](#) to the effect that Missouri has impermissibly treated incompetent patients differently from competent ones, citing the statement in [Cleburne v. Cleburne Living Center, Inc.](#), 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985), that the Clause is "essentially a direction that all persons similarly situated should be treated alike." The differences between the choice made by a competent person to refuse medical treatment, and the choice made for an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class.

**Concur by:** O'CONNOR; SCALIA

**Concur**

JUSTICE O'CONNOR, concurring.

I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions, see 497 U.S. at 278-279, and that the refusal of artificially delivered food and water is encompassed within that liberty interest. See *ante*, at 279. I write separately to clarify why I believe this to be so.

As the Court notes, the liberty interest in refusing medical treatment flows from decisions involving the State's invasions into the body. [**\*\*\*248**] See *ante*, at 278-279. Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause. See, e.g., [Rochin v. California](#), 342 U.S. 165, 172, 96 L. Ed. 183, 72 S. Ct. 205 (1952) ("Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his [**\*288**] stomach's contents . . . is bound to offend even hardened sensibilities"); [Union Pacific R. Co. v. Botsford](#), 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891). [**\*\*\*\*49**] Our [Fourth Amendment](#) jurisprudence has echoed this same concern. See [Schmerber v. California](#), 384 U.S. 757, 772, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966) ("The integrity of an individual's person is a cherished value of our society"); [Winston v. Lee](#), 470 U.S. 753, 759, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985) ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime"). The State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. A seriously ill or dying patient whose

wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion. See, e.g., Washington v. Harper, 494 U.S. 210, 221, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); Parham v. J. R., 442 U.S. 584, 600, 61 L. Ed. 2d 101, 99 S. Ct. 2493 (1979) ("It is not disputed that a child, in common with adults, has a substantial [\*\*\*\*50] liberty interest in not being confined unnecessarily for medical treatment").

[\*\*2857] The State's artificial provision of nutrition and hydration implicates identical concerns. Artificial feeding cannot readily be distinguished from other forms of medical treatment. See, e.g., Council on Ethical and Judicial Affairs, American Medical Association, AMA Ethical Opinion 2.20, Withholding or Withdrawing Life-Prolonging Medical Treatment, Current Opinions 13 (1989); The Hastings Center, Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying 59 (1987). Whether or not the techniques used to pass food and water into the patient's alimentary tract are termed "medical treatment," it is clear they all involve some degree of intrusion and restraint. Feeding a patient by means of a nasogastric tube requires a physician to pass a long flexible tube through the patient's [\*289] nose, throat, and esophagus and into the stomach. Because of the discomfort such a tube causes, "many patients need to be restrained forcibly and their hands put into large mittens to prevent them from removing the tube." Major, The Medical Procedures for Providing Food and Water: Indications [\*\*\*\*51] and Effects, in *By No Extraordinary Means: The Choice to Forgo Life-Sustaining Food and Water* 25 (J. Lynn ed. 1986). A gastrostomy tube (as was used to provide food and water to Nancy Cruzan, see 497 U.S. at 266) or jejunostomy tube must be surgically implanted into the stomach or small intestine. Office of Technology Assessment [\*\*\*249] Task Force, Life-Sustaining Technologies and the Elderly 282 (1988).

Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.

I also write separately to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker. See *ante*, at 287, n.12. In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment. Few individuals provide explicit oral or written instructions regarding [\*\*\*\*52] their intent to refuse medical treatment should they become incompetent.<sup>1</sup> [\*290] States which decline to consider any evidence other than such instructions may frequently fail to honor a patient's intent. Such failures might be avoided if the State considered an equally probative source of evidence: the patient's appointment of a proxy to make health care decisions on her behalf. Delegating the authority to make medical decisions to a family member or friend is becoming a common method of planning for the future. See, e. g., Areen, The Legal Status of Consent Obtained from Families of Adult Patients to Withhold or Withdraw Treatment, 258 JAMA 229, 230 (1987). Several States have recognized the practical wisdom of such a procedure by enacting durable power of attorney statutes that specifically authorize an individual to appoint a surrogate to make medical treatment

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<sup>1</sup> See 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* 241-242 (1982) (36% of those surveyed gave instructions regarding how they would like to be treated if they ever became too sick to make decisions; 23% put those instructions in writing) (Lou Harris Poll, September 1982); American Medical Association Surveys of Physician and Public Opinion on Health Care Issues 29-30 (1988) (56% of those surveyed had told family members their wishes concerning the use of life-sustaining treatment if they entered an irreversible coma; 15% had filled out a living will specifying those wishes).

decisions.<sup>2</sup> Some state courts have suggested that an agent appointed pursuant **[\*\*2858]** to a general durable power of attorney statute would also be empowered to make health care decisions on behalf of the patient.<sup>3</sup> See, e.g., *In re Peter*, 108 N.J. 365,

<sup>2</sup> At least 13 States and the District of Columbia have durable power of attorney statutes expressly authorizing the appointment of proxies for making health care decisions. See Alaska Stat. Ann. §§ 13.26.335, 13.26.344(l) (Supp. 1989); *Cal. Civ. Code Ann. § 2500* (West Supp. 1990); *D. C. Code Ann. § 21-2205* (1989); *Idaho Code § 39-4505* (Supp. 1989); Ill. Rev. Stat., ch. 110 1/2, PP804-1 to 804-12 (Supp. 1988); *Kan. Stat. Ann. § 58-625* (Supp. 1989); *Me. Rev. Stat. Ann., Tit. 18-A, § 5-501* (Supp. 1989); *Nev. Rev. Stat. § 449.800* (Supp. 1989); *Ohio Rev. Code Ann. § 1337.11 et seq.* (Supp. 1989); *Ore. Rev. Stat. § 127.510* (1989); Pa. Stat. Ann., Tit. 20, § 5603(h) (Purdon Supp. 1989); *R. I. Gen. Laws § 23-4.10-1 et seq.* (1989); *Tex. Rev. Civ. Stat. Ann., Art. 4590h-1* (Vernon Supp. 1990); *Vt. Stat. Ann., Tit. 14, § 3451 et seq.* (1989).

<sup>3</sup> All 50 States and the District of Columbia have general durable power of attorney statutes. See *Ala. Code § 26-1-2* (1986); Alaska Stat. Ann. §§ 13-26-350 to 13-26-356 (Supp. 1989); *Ariz. Rev. Stat. Ann. § 14-5501* (1975); *Ark. Code Ann. §§ 28-68-201 to 28-68-203* (1987); *Cal. Civ. Code Ann. § 2400* (West Supp. 1990); *Colo. Rev. Stat. § 15-14-501 et seq.* (1987); Conn. Gen. Stat. § 45-69o (Supp. 1989); Del. Code Ann., Tit. 12, §§ 4901-4905 (1987); *D. C. Code Ann. § 21-2081 et seq.* (1989); *Fla. Stat. § 709.08* (1989); *Ga. Code Ann. § 10-6-36* (1989); *Haw. Rev. Stat. §§ 551D-1 to 551D-7* (Supp. 1989); *Idaho Code § 15-5-501 et seq.* (Supp. 1989); Ill. Rev. Stat., ch. 110 1/2, P802-6 (1987); *Ind. Code §§ 30-2-11-1 to 30-2-11-7* (1988); *Iowa Code § 633.705* (Supp. 1989); *Kan. Stat. Ann. § 58-610* (1983); *Ky. Rev. Stat. Ann. § 386.093* (Baldwin 1983); *La. Civ. Code Ann., Art. 3027* (West Supp. 1990); *Me. Rev. Stat. Ann., Tit. 18-A, § 5-501 et seq.* (Supp. 1989); *Md. Est. & Trusts Code Ann. §§ 13-601 to 13-602* (1974) (as interpreted by the Attorney General, see 73 Op. Md. Atty. Gen. No. 88-046 (Oct. 17, 1988)); Mass. Gen. Laws §§ 201B:1 to 201B:7 (1988); *Mich. Comp. Laws §§ 700.495, 700.497* (1979); *Minn. Stat. § 523.01 et seq.* (1988); *Miss. Code Ann. § 87-3-13* (Supp. 1989); *Mo. Rev. Stat. § 404.700* (Supp. 1990); *Mont. Code Ann. §§ 72-5-501 to 72-5-502* (1989); *Neb. Rev. Stat. §§ 30-2664 to 30-2672, 30-2667* (1985); *Nev. Rev. Stat. § 111.460 et seq.* (1986); *N. H. Rev. Stat. Ann. § 506:6 et seq.* (Supp. 1989); *N. J. Stat. Ann. § 46:2B-8* (West 1989); *N. M. Stat. Ann. § 45-5-501 et seq.* (1989); *N. Y. Gen. Oblig. Law § 5-1602* (McKinney 1989); *N. C. Gen. Stat. § 32A-1 et seq.* (1987); *N. D. Cent. Code §§ 30.1-30-01 to 30.1-30-05* (Supp. 1989); *Ohio Rev. Code Ann. § 1337.09* (Supp. 1989); Okla. Stat., Tit. 58, §§ 1071-1077 (Supp. 1989); *Ore. Rev. Stat. § 127.005* (1989); Pa. Stat. Ann., Tit. 20, §§ 5601 et seq., 5602(a)(9) (Purdon Supp. 1989); *R. I. Gen. Laws § 34-22-6.1* (1984); *S. C. Code Ann. §§ 62-5-501 to 62-5-502* (1987); *S. D. Codified Laws § 59-7-2.1* (1978); *Tenn. Code Ann. § 34-6-101 et seq.* (1984); *Tex. Prob. Code Ann. § 36A* (Supp. 1990); *Utah Code Ann. § 75-5-501 et seq.* (1978); *Vt. Stat. Ann., Tit. 14, § 3051 et seq.* (1989); *Va. Code Ann. § 11-9.1 et seq.* (1989); *Wash. Rev. Code § 11.94.020* (1989); *W. Va. Code § 39-*

*378-379, [\*291] [\*\*\*250] 529 A.2d 419, 426 (1987); [\*\*\*\*53]* see also 73 Op. Md. Atty. Gen. No. 88-046 (1988) (interpreting *Md. Est. & Trusts Code Ann. §§ 13-601 to 13-602* (1974), as authorizing a delegatee to make health care decisions). Other States allow an individual to designate a proxy to carry out the intent of a living will.<sup>4</sup> These procedures for surrogate decisionmaking, which appear to be rapidly gaining in acceptance, may be a **[\*292]** valuable additional safeguard of the patient's interest in directing his medical care. Moreover, as patients are likely to select a family member as a surrogate, see 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 240 (1982), giving effect to a proxy's decisions may also protect the "freedom of personal choice in matters of . . . family life." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639, 39 L. Ed. 2d 52, 94 S. Ct. 791 (1974).

**[\*\*\*\*54] [\*\*\*\*55]** Today's decision, holding only that the Constitution permits a State to require clear and convincing evidence of Nancy Cruzan's desire to have artificial hydration and nutrition withdrawn, does not preclude a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate. Nor does it prevent States from developing other **[\*\*2859]** approaches for protecting an incompetent individual's liberty **[\*\*\*\*56]** interest in refusing medical treatment.

*4-1 et seq.* (Supp. 1989); Wis. Stat. § 243.07 (1987-1988) (as interpreted by the Attorney General, see Wis. Op. Atty. Gen. 35-88 (1988)); *Wyo. Stat. § 3-5-101 et seq.* (1985).

<sup>4</sup> Thirteen States have living will statutes authorizing the appointment of health care proxies. See *Ark. Code Ann. § 20-17-202* (Supp. 1989); *Del. Code Ann., Tit. 16, § 2502* (1983); Fla. Stat. § 765.05(2) (1989); *Idaho Code § 39-4504* (Supp. 1989); Ind. Code § 16-8-11-14(g)(2) (1988); *Iowa Code § 144A.7(1)(a)* (1989); La. Rev. Stat. Ann. §§ 40:1299.58.1, 40:1299.58.3(C) (West Supp. 1990); *Minn. Stat. § 145B.01 et seq.* (Supp. 1989); *Tex. Health & Safety Code Ann. § 672.003(d)* (Supp. 1990); Utah Code Ann. §§ 75-2-1105, 75-2-1106 (Supp. 1989); *Va. Code Ann. § 54.1-2986(2)* (1988); 1987 Wash. Laws, ch. 162, § 1(1)(b); *Wyo. Stat. § 35-22-102* (1988).

As is evident from the Court's survey of state court decisions, see 497 U.S. at 271-277, no national consensus has yet emerged on the best solution for this difficult and sensitive problem. Today we decide only that one State's [\*\*\*251] practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the "laboratory" of the States, [\*New State Ice Co. v. Liebmann\*, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 \(1932\)](#) (Brandeis, J., dissenting), in the first instance.

JUSTICE SCALIA, concurring.

The various opinions in this case portray quite clearly the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it. The States have begun to grapple with these problems through legislation. I am concerned, from the tenor of today's opinions, that we are poised to confuse that [\*293] enterprise as successfully as we have confused the enterprise of legislating concerning abortion -- requiring it to be conducted [\*\*\*\*57] against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term. That would be a great misfortune.

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide -- including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence,

that even when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. [\*\*\*\*58] It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about "life and death" than they do) that they will decide upon a line less reasonable.

The text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty "without due process of law." To determine that such a deprivation would not occur if Nancy Cruzan were forced to take nourishment against her will, it is unnecessary to reopen the historically recurrent debate over whether "due process" includes substantive restrictions. Compare [\*Murray's Lessee v. Hoboken Land and Improvement Co.\*, 59 U.S. \(18 How.\) 272, 15 L. Ed. 372 \(1856\)](#), with [\*Scott \[\\*294\] v. Sandford\*, 60 U.S. \(19 How.\) 393, 450, 15 L. Ed. 691 \(1857\)](#); compare [\*Tyson & Brother v. Banton\*, 273 U.S. 418, 71 L. Ed. 718, 47 S. Ct. 426 \(1927\)](#), with [\*Olsen v. Nebraska ex rel. Western Reference & Bond Assn., Inc.\*, 313 U.S. 236, 246-247, 85 L. Ed. 1305, 61 S. Ct. 862 \[\\*\\*\\*252\] \(1941\)](#); [\*\*\*\*59] compare [\*Ferguson v. Skrupa\*, 372 U.S. 726, 730, 10 L. Ed. 2d 93, 83 S. Ct. 1028 \(1963\)](#), with [\*Moore v. East Cleveland\*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 \(1977\)](#) (plurality opinion); see Easterbrook, Substance and Due Process, 1982 S. Ct. Rev. 85; Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353 (1981). It is at least true that no "substantive due process" claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state [\*\*2860] interference. [\*Michael H. v. Gerald D.\*, 491 U.S. 110, 122, 105 L. Ed. 2d 91, 109 S. Ct. 2333 \(1989\)](#) (plurality opinion); [\*Bowers v. Hardwick\*, 478 U.S. 186, 192, 92 L. Ed. 2d 140, 106 S. Ct. 2841 \(1986\)](#); [\*Moore\*,](#)

[431 U.S. at 502-503](#) (plurality opinion). That cannot possibly be established here.

At common law in England, a suicide -- defined as one who "deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death," 4 W. Blackstone, Commentaries \*189 -- was criminally liable. *Ibid.* Although the States abolished [\*\*\*\*60] the penalties imposed by the common law (*i. e.*, forfeiture and ignominious burial), they did so to spare the innocent family and not to legitimize the act. Case law at the time of the adoption of the [Fourteenth Amendment](#) generally held that assisting suicide was a criminal offense. See Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 76 (1985) ("In short, twenty-one of the thirty-seven states, and eighteen of the thirty ratifying states prohibited assisting suicide. Only eight of the states, and seven of the ratifying states, definitely did not"); see also 1 F. Wharton, Criminal Law § 122 (6th rev. ed. 1868). The System of Penal Law presented to the House of Representatives by Representative Livingston in 1828 would have criminalized assisted suicide. E. Livingston, A System of Penal Law, Penal Code 122 (1828). The Field Penal Code, [\*295] adopted by the Dakota Territory in 1877, proscribed attempted suicide and assisted suicide. Marzen, O'Dowd, Crone, & Balch, *supra*, at 76-77. And most States that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years [\*\*\*\*61] following the [Fourteenth Amendment's](#) ratification, that assisted and (in some cases) attempted suicide were unlawful. *Id.*, at 77-100; [id.](#), at 148-242 (surveying development of States' laws). Thus, "there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.*, at 100 (quoting [Palko v. Connecticut](#), 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149 (1937)).

Petitioners rely on three distinctions to separate Nancy Cruzan's case from ordinary suicide: (1) that

she is permanently incapacitated and in pain; (2) that she would bring on her death not by any affirmative act but by merely declining treatment that provides nourishment; and (3) that preventing her from effectuating her presumed wish to die requires violation of her bodily integrity. None of these suffices. Suicide was not excused even when committed "to avoid those ills which [persons] had not the fortitude to endure." 4 Blackstone, *supra*, at \*189. "The life of those to whom life has become a burden -- of those who are [\*\*\*253] hopelessly diseased or fatally wounded -- [\*\*\*\*62] nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live." [Blackburn v. State](#), 23 Ohio St. 146, 163 (1873). Thus, a man who prepared a poison, and placed it within reach of his wife, "to put an end to her suffering" from a terminal illness was convicted of murder, [People v. Roberts](#), 211 Mich. 187, 198, 178 N.W. 690, 693 (1920); the "incurable suffering of the suicide, as a legal question, could hardly affect the degree of criminality . . . ." Note, 30 Yale L. J. 408, 412 (1921) (discussing *Roberts*). Nor would the imminence of the patient's death have [\*296] affected liability. "The lives of all are equally under the protection of the law, and under that protection to their last moment. . . . [Assisted suicide] is declared by the law to be murder, irrespective of the wishes or the condition of the party to whom the poison is administered . . . ." [Blackburn, supra](#), at 163; see also [Commonwealth v. Bowen](#), 13 Mass. 356, 360 (1816).

[\*\*\*\*63] [\*\*2861] The second asserted distinction -- suggested by the recent cases canvassed by the Court concerning the right to refuse treatment, 497 U.S. at 270-277 -- relies on the dichotomy between action and inaction. Suicide, it is said, consists of an affirmative act to end one's life; refusing treatment is not an affirmative act "causing" death, but merely a passive acceptance of the natural process of dying. I readily acknowledge that the distinction between action and inaction has some bearing upon the

legislative judgment of what ought to be prevented as suicide -- though even there it would seem to me unreasonable to draw the line precisely between action and inaction, rather than between various forms of inaction. It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing. Even as a legislative matter, in other words, the intelligent line does not fall between action and inaction but between those forms of inaction that consist of abstaining [\*\*\*\*64] from "ordinary" care and those that consist of abstaining from "excessive" or "heroic" measures. Unlike action versus inaction, that is not a line to be discerned by logic or legal analysis, and we should not pretend that it is.

But to return to the principal point for present purposes: the irrelevance of the action-inaction distinction. Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide's conscious [\*297] decision to "put an end to his own existence." 4 Blackstone, *supra*, at \*189. See *In re Caulk*, 125 N.H. 226, 232, 480 A.2d 93, 97 (1984); *State ex rel. White v. Narick*, 170 W. Va. 195, 292 S.E.2d 54 (1982); *Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623 (1982). Of course the common law rejected the action-inaction distinction in other contexts involving the taking of human life as well. In the prosecution of a parent for the starvation death of her infant, it was no defense [\*\*\*\*65] that the infant's [\*\*\*254] death was "caused" by no action of the parent but by the natural process of starvation, or by the infant's natural inability to provide for itself. See *Lewis v. State*, 72 Ga. 164 (1883); *People v. McDonald*, 49 Hun 67, 1 N.Y.S. 703 (5th Dept., App. Div. 1888); *Commonwealth v. Hall*, 322 Mass. 523, 528, 78 N.E.2d 644, 647 (1948) (collecting cases); F. Wharton, *Law of Homicide* §§ 134-135, 304 (2d ed. 1875); 2 J. Bishop,

*Commentaries on Criminal Law* § 686 (5th ed. 1872); J. Hawley & M. McGregor, *Criminal Law* 152 (3d ed. 1899). A physician, moreover, could be criminally liable for failure to provide care that could have extended the patient's life, even if death was immediately caused by the underlying disease that the physician failed to treat. *Barrow v. State*, 17 Okla. Crim. 340, 188 P. 351 (1920); *People v. Phillips*, 64 Cal. 2d 574, 414 P.2d 353, 51 Cal. Rptr. 225 (1966).

It is not surprising, therefore, that the early cases considering the claimed [\*\*\*\*66] right to refuse medical treatment dismissed as specious the nice distinction between "passively submitting to death and actively seeking it. The distinction may be merely verbal, as it would be if an adult sought death by starvation instead of a drug. If the State may interrupt one mode of self-destruction, it may with equal authority interfere with the other." *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 581-582, 279 A.2d 670, 672-673 (1971); see also *Application of President & Directors of Georgetown College, Inc.*, 118 U.S. App. D.C. 80, 88-89, 331 F.2d 1000, [\*298] 1008-1009 (Wright, J., in chambers), cert. denied, 377 U.S. 978, 12 L. Ed. 2d 746, 84 S. Ct. 1883 (1964).

The third asserted basis of distinction -- that frustrating Nancy Cruzan's wish to die in the present case requires interference with her bodily integrity -- is likewise inadequate, because such interference is impermissible only if one begs the question whether her refusal to undergo the treatment on her own is suicide. It has always been lawful not [\*\*2862] only for the State, but even for private citizens, to interfere [\*\*\*\*67] with bodily integrity to prevent a felony. See *Phillips v. Trull*, 11 Johns. 486 (N. Y. 1814); *City Council v. Payne*, 11 S.C. L. 475, 2 Nott & McC. 475 (S. C. 1821); *Vandever v. Mattocks*, 3 Ind. 479 (1852); T. Cooley, *Law of Torts* 174-175 (1879); Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 673 (1924); *Restatement of Torts* § 119 (1934). That general rule has of course been applied to suicide. At common law, even a private person's use of

force to prevent suicide was privileged. Colby v. Jackson, 12 N.H. 526, 530-531 (1842); Look v. Choate, 108 Mass. 116, 120 (1871); Commonwealth v. Mink, 123 Mass. 422, 429 (1877); In re Doyle, 16 R.I. 537, 539, 18 A. 159, 159-160 (1889); Porter v. Ritch, 70 Conn. 235, 255, 39 A. 169, 175 (1898); Emmerich v. Thorley, 35 A.D. 452, 456, 54 N.Y.S. 791, 793-794 (1898); State v. Hembd, 305 Minn. 120, 130, 232 N.W.2d 872, 878 (1975); [\*\*\*\*68] 2 C. Addison, Law of Torts § 819 (1876); Cooley, *supra*, at 179-180. It is not even reasonable, much less required by the Constitution, to maintain that although the State has the right to prevent a person from slashing his wrists, it does not have the power to apply physical force to prevent him from doing so, nor the power, should he succeed, to apply, coercively if necessary, medical measures to stop the flow of blood. The state-run hospital, I am certain, is not liable under 42 U. S. C. § 1983 [\*\*\*255] for violation of constitutional rights, nor the private hospital liable under general tort law, if, in a State where suicide is unlawful, it pumps out the stomach of a person who has intentionally [\*299] taken an overdose of barbiturates, despite that person's wishes to the contrary.

The dissents of JUSTICES BRENNAN and STEVENS make a plausible case for our intervention here only by embracing -- the latter explicitly and the former by implication -- a political principle that the States are free to adopt, but that is demonstrably not imposed by the Constitution. "The State," says JUSTICE BRENNAN, "has no legitimate general interest in someone's [\*\*\*\*69] life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment." 497 U.S. at 313 (emphasis added). The italicized phrase sounds moderate enough and is all that is needed to cover the present case -- but the proposition cannot *logically* be so limited. One who accepts it must also accept, I think, that the State has no such legitimate interest that could outweigh "the person's choice to put an end to her life." Similarly, if one agrees with

JUSTICE BRENNAN that "the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment," *post*, at 314 (emphasis added), he must also believe that the State must accede to her "particularized and intense interest in self-determination in her choice whether to continue living or to die." For insofar as balancing the relative interests of the State and the individual is concerned, there is nothing distinctive about accepting death through the refusal of "medical treatment," as opposed to accepting it through the refusal of food, or through the failure to shut [\*\*\*\*70] off the engine and get out of the car after parking in one's garage after work. Suppose that Nancy Cruzan were in precisely the condition she is in today, except that she could be fed and digest food and water *without* artificial assistance. How is the State's "interest" in keeping her alive thereby increased, or her interest in deciding whether she wants to continue living reduced? It seems to me, in other words, that JUSTICE BRENNAN's position ultimately rests upon the proposition that it is none of the State's [\*300] business if a person wants to commit suicide. JUSTICE STEVENS is explicit on the point: "Choices about death touch the core of liberty . . . . Not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience." *Post*, at 343. This is a view that some societies have held, and that our States are free to adopt if they wish. But it is not a view imposed by our constitutional traditions, [\*\*2863] in which the power of the State to prohibit suicide is unquestionable.

What I have said above is not meant to suggest that I would think it desirable, [\*\*\*\*71] if we were sure that Nancy Cruzan wanted to die, to keep her alive by the means at issue here. I assert only that the Constitution has nothing to say about the subject. To raise up a constitutional right here we would have to create out of nothing (for it exists neither in text nor tradition) some constitutional principle whereby, although the [\*\*\*256] State

may insist that an individual come in out of the cold and eat food, it may not insist that he take medicine; and although it may pump his stomach empty of poison he has ingested, it may not fill his stomach with food he has failed to ingest. Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of most of our protection -- what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day, none of which horrors are categorically [\*\*\*\*72] prohibited by the Constitution. Our salvation is the [Equal Protection Clause](#), which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me. This Court need not, and has no authority to, inject itself into every field of human activity [\*301] where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.

**Dissent by:** BRENNAN; STEVENS

## **Dissent**

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

"Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity." <sup>1</sup>

Nancy Cruzan has dwelt in [\*\*\*\*73] that twilight zone for six years. She is oblivious to her surroundings and will remain so. [Cruzan v. Harmon, 760 S.W.2d 408, 411 \(Mo. 1988\)](#). Her body twitches only reflexively, without consciousness. *Ibid.* The areas of her brain that once thought, felt, and experienced sensations have degenerated badly and are continuing to do so. The cavities remaining are filling with cerebrospinal fluid. The "cerebral cortical atrophy is irreversible, permanent, progressive and ongoing." *Ibid.* "Nancy will never interact meaningfully with her environment again. She will remain in a persistent vegetative state until her death." [Id., at 422](#).<sup>2</sup> Because she cannot swallow, her nutrition and hydration are delivered through a tube surgically implanted in her stomach.

[\*\*\*\*74] A grown woman at the time of the accident, Nancy had previously expressed her wish to forgo continuing medical care under circumstances such as these. Her family and her [\*302] friends are convinced that this is what she would want. See n.20, *infra*. A guardian ad litem appointed by the trial court is also convinced that this is what Nancy would want. See [760 S.W.2d at 444](#) (Higgins, J., [\*\*\*257] dissenting from denial of rehearing). Yet the Missouri Supreme Court, alone among state courts deciding such a question, has determined that an irreversibly vegetative [\*\*2864] patient will remain a passive prisoner of medical technology -- for Nancy, perhaps for the next 30 years. See [id., at 424, 427](#).

Today the Court, while tentatively accepting that there is some degree of constitutionally protected liberty interest in avoiding unwanted medical treatment, including life-sustaining medical treatment such as artificial nutrition and hydration,

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(1987) (en banc).

<sup>2</sup> Vegetative state patients may *react reflexively* to sounds, movements, and normally painful stimuli, but they do not *feel* any pain or *sense* anybody or anything. Vegetative state patients may appear awake but are completely unaware. See Cranford, *The Persistent Vegetative State: The Medical Reality*, 18 *Hastings Ctr. Rep.* 27, 28, 31 (1988).

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<sup>1</sup> [Rasmussen v. Fleming, 154 Ariz. 207, 211, 741 P.2d 674, 678](#)

affirms the decision of the Missouri Supreme Court. The majority opinion, as I read it, would affirm that decision on the ground that a State may require "clear and convincing" evidence of Nancy [\*\*\*\*75] Cruzan's prior decision to forgo life-sustaining treatment under circumstances such as hers in order to ensure that her actual wishes are honored. See 497 U.S. at 282-283, 286-287. Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with dignity.

I

A

"The timing of death -- once a matter of fate -- is now a matter of human choice." Office of Technology Assessment Task Force, *Life Sustaining Technologies and the Elderly* 41 (1988). Of the approximately 2 million people who die each year, 80% die in hospitals and long-term care institutions,<sup>3</sup> [\*303] and perhaps 70% of those after a decision to forgo life-sustaining treatment has been made.<sup>4</sup> Nearly every death involves a decision whether to undertake some medical procedure that could prolong the process of dying. Such decisions are difficult and personal. They must be made on the basis of individual [\*\*\*\*76] values, informed by medical realities, yet within a framework governed by law. The role of the courts is confined to defining that framework, delineating the ways in which government may and may not

participate in such decisions.

The question before this Court is a relatively narrow one: whether the Due Process Clause allows Missouri to require a now-incompetent patient in an irreversible persistent vegetative state to remain on life support absent rigorously clear and convincing evidence that avoiding the treatment represents the patient's prior, express choice. See 497 U.S. at 277-278. If a fundamental right is at issue, Missouri's [\*\*\*\*77] rule of decision must be scrutinized under the standards this Court has always applied in such circumstances. As we said in [Zablocki v. Redhail](#), 434 U.S. 374, 388, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978), if a [\*\*\*258] requirement imposed by a State "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." The Constitution imposes on this Court the obligation to "examine carefully . . . the extent to which [the legitimate government interests advanced] are served by the challenged regulation." [Moore v. East Cleveland](#), 431 U.S. 494, 499, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977). See also [Carey v. Population Services International](#), 431 U.S. 678, 690, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977) (invalidating a requirement that bore "no relation to the State's interest"). An evidentiary rule, just as a substantive prohibition, must meet these standards if it significantly burdens a fundamental liberty interest. Fundamental [\*304] rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle [\*\*\*\*78] governmental [\*\*2865] interference." [Bates v. Little Rock](#), 361 U.S. 516, 523, 4 L. Ed. 2d 480, 80 S. Ct. 412 (1960).

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The starting point for our legal analysis must be whether a competent person has a constitutional right to avoid unwanted medical care. Earlier this Term, this Court held that the [Due Process Clause of the Fourteenth Amendment](#) confers a significant liberty interest in avoiding unwanted medical

<sup>3</sup> See President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life Sustaining Treatment* 15, n.1, and 17-18 (1983) (hereafter President's Commission).

<sup>4</sup> See Lipton, *Do-Not-Resuscitate Decisions in a Community Hospital: Incidence, Implications and Outcomes*, 256 JAMA 1164, 1168 (1986).

treatment. [\*Washington v. Harper\*, 494 U.S. 210, 221-222, 108 L. Ed. 2d 178, 110 S. Ct. 1028 \(1990\)](#). Today, the Court concedes that our prior decisions "support the recognition of a general liberty interest in refusing medical treatment." See 497 U.S. at 278. The Court, however, avoids discussing either the measure of that liberty interest or its application by assuming, for purposes of this case only, that a competent person has a constitutionally protected liberty interest in being free of unwanted artificial nutrition and hydration. See *ante*, at 279. JUSTICE O'CONNOR'S opinion is less parsimonious. She openly affirms that "the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause," that there is a liberty [\*\*\*\*79] interest in avoiding unwanted medical treatment, and that it encompasses the right to be free of "artificially delivered food and water." See *ante*, at 287.

But if a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and JUSTICE O'CONNOR concede, it must be fundamental. "We are dealing here with [a decision] which involves one of the basic civil rights of man." [\*Skinner v. Oklahoma ex rel. Williamson\*, 316 U.S. 535, 541, 86 L. Ed. 1655, 62 S. Ct. 1110 \(1942\)](#) (invalidating a statute authorizing sterilization of certain felons). Whatever other liberties protected by the Due Process Clause are fundamental, "those liberties that are 'deeply rooted in this Nation's history and tradition'" are among them. [\*Bowers v. Hardwick\*, \[\\*305\] 478 U.S. 186, 192, 106 S. Ct. 2841, 92 L. Ed. 2d 140 \(1986\)](#) (quoting [\*Moore v. East Cleveland\*, \*supra\*, at 503](#) (plurality opinion)). "Such a tradition commands respect in part because the Constitution carries the gloss of history." [\*Richmond Newspapers, Inc. v. Virginia\*, 448 U.S. 555, 589, 65 L. Ed. 2d 973, 100 S. Ct. 2814 \[\\*\\*\\*259\] \(1980\)](#) (BRENNAN, J., concurring in judgment).

[\*\*\*\*80] The right to be free from medical attention without consent, to determine what shall be done with one's own body, is deeply rooted in

this Nation's traditions, as the majority acknowledges. See 497 U.S. at 270. This right has long been "firmly entrenched in American tort law" and is securely grounded in the earliest common law. *Ante*, at 269. See also [\*Mills v. Rogers\*, 457 U.S. 291, 294, n.4, 73 L. Ed. 2d 16, 102 S. Ct. 2442 \(1982\)](#) ("The right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician"). "Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of lifesaving surgery, or other medical treatment." [\*Natanson v. Kline\*, 186 Kan. 393, 406-407, 350 P.2d 1093, 1104 \(1960\)](#). "The inviolability of the person" has been held as "sacred" and "carefully guarded" as any common-law right. [\*Union Pacific R. Co. v. Botsford\*, 141 U.S. 250, 251-252, 35 L. Ed. 734, 11 S. Ct. 1000 \(1891\)](#). [\*\*\*\*81] Thus, freedom from unwanted medical attention is unquestionably among those principles "so rooted in the traditions and conscience of our people as to be ranked as fundamental." [\*Snyder v. Massachusetts\*, 291 U.S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330 \(1934\)](#).<sup>5</sup>

[\*306] [\*\*\*\*82] [\*\*2866] That there may be serious consequences involved in refusal of the medical treatment at issue here does not vitiate the right under our common-law tradition of medical self-determination. It is "a well-established rule of general law . . . that it is the patient, not the physician, who ultimately decides if treatment --

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<sup>5</sup> See, e. g., [\*Canterbury v. Spence\*, 150 U.S. App. D.C. 263, 271, 464 F.2d 772, 780](#), cert. denied, [\*409 U.S. 1064, 34 L. Ed. 2d 518, 93 S. Ct. 560 \(1972\)\*](#) ("The root premise" of informed consent "is the concept, fundamental in American jurisprudence, that 'every human being of adult years and sound mind has a right to determine what shall be done with his own body'" (quoting [\*Schloendorff v. Society of New York Hospital\*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 \(1914\)](#) (Cardozo, J.)). See generally [\*Washington v. Harper\*, 494 U.S. 210, 241, 108 L. Ed. 2d 178, 110 S. Ct. 1028 \(1990\)](#) (STEVENS, J., dissenting) ("There is no doubt . . . that a competent individual's right to refuse [psychotropic] medication is a fundamental liberty interest deserving the highest order of protection").

any treatment -- is to be given at all. . . . The rule has never been qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it." [\*Tune v. Walter Reed Army Medical Hospital\*, 602 F. Supp. 1452, 1455 \(DC 1985\)](#). See also [\*Downer v. Veilleux\*, 322 A.2d 82, 91 \(Me. 1974\)](#) ("The rationale of this rule lies in the fact that every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others").<sup>6</sup>

**[\*307] [\*\*\*\*83] [\*\*\*260]** No material distinction can be drawn between the treatment to which Nancy Cruzan continues to be subject -- artificial nutrition and hydration -- and any other medical treatment. See 497 U.S. at 288-289 (O'CONNOR, J., concurring). The artificial delivery of nutrition and hydration is undoubtedly medical treatment. The technique to which Nancy Cruzan is subject -- artificial feeding through a gastrostomy tube -- involves a tube implanted surgically into her stomach through incisions in her abdominal wall. It may obstruct the intestinal tract, erode and pierce the stomach wall, or cause leakage

of the stomach's contents into the abdominal cavity. See Page, Andrassy, & Sandler, *Techniques in Delivery of Liquid Diets*, in *Nutrition in Clinical Surgery* 66-67 (M. Deitel 2d ed. 1985). The tube can cause pneumonia from reflux of the stomach's contents into the lung. See Bernard & Forlaw, *Complications and Their Prevention*, in *Enteral and Tube Feeding* 553 (J. Rombeau & M. Caldwell eds. 1984). Typically, and in this case (see Tr. 377), commercially prepared formulas are used, rather than fresh food. See Matarese, *Enteral Alimentation*, in *Surgical Nutrition* 726 (J. Fischer [\*\*\*\*84] ed. 1983). The type of formula and method of administration must be experimented with to avoid gastrointestinal problems. *Id.*, at 748. The patient must be monitored daily by medical personnel as to weight, fluid intake, and fluid output; blood tests must be done weekly. *Id.*, at [749, 751](#).

Artificial delivery of food and water is regarded as medical treatment by the medical **[\*\*2867]** profession and the Federal Government.<sup>7</sup> According to the American Academy of Neurology: **[\*308]** "The artificial provision of nutrition and hydration is a form of medical treatment . . . analogous to other forms of life-sustaining treatment, such as the use of the respirator. When a patient is unconscious, both a respirator and an artificial feeding device serve to support or replace normal bodily functions that are compromised as a result of the patient's illness." *Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient*, 39 *Neurology* 125 **[\*\*\*261]** (Jan. 1989). See also

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<sup>6</sup>Under traditional tort law, exceptions have been found only to protect dependent children. See [\*Cruzan v. Harmon\*, 760 S.W.2d 408, 422, n.17 \(Mo. 1988\)](#) (citing cases where Missouri courts have ordered blood transfusions for children over the religious objection of parents); see also [\*Winthrop University Hospital v. Hess\*, 128 Misc. 2d 804, 490 N.Y.S.2d 996 \(Sup. Ct. Nassau Cty. 1985\)](#) (court ordered blood transfusion for religious objector because she was the mother of an infant and had explained that her objection was to the signing of the consent, not the transfusion itself); [\*Application of President & Directors of Georgetown College, Inc.\*, 118 U.S. App. D.C. 80, 88, 331 F.2d 1000, 1008](#) (blood transfusion ordered for mother of infant), cert. denied, 377 U.S. 978, 12 L. Ed. 2d 746, 84 S. Ct. 1883 (1964). Cf. [\*In re Estate of Brooks\*, 32 Ill. 2d 361, 373, 205 N.E.2d 435, 441-442 \(1965\)](#) (finding that lower court erred in ordering a blood transfusion for a woman -- whose children were grown -- and concluding: "Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith in the form of a conservatorship established in the waning hours of her life for the sole purpose of compelling her to accept medical treatment forbidden by her religious principles, and previously refused by her with full knowledge of the probable consequences").

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<sup>7</sup>The Missouri court appears to be alone among state courts to suggest otherwise, [760 S.W.2d at 419](#) and 423, although the court did not rely on a distinction between artificial feeding and other forms of medical treatment. *Id.*, at 423. See, e. g., [\*Delio v. Westchester County Medical Center\*, 129 A.D.2d 1, 19, 516 N.Y.S.2d 677, 689 \(1987\)](#) ("Review of the decisions in other jurisdictions . . . failed to uncover a single case in which a court confronted with an application to discontinue feeding by artificial means has evaluated medical procedures to provide nutrition and hydration differently from other types of life-sustaining procedures").

Council on Ethical and Judicial Affairs of the American Medical Association, Current Opinions, Opinion 2.20 (1989) ("Life-prolonging medical treatment includes [\*\*\*\*85] medication and artificially or technologically supplied respiration, nutrition or hydration"); President's Commission 88 (life-sustaining treatment includes respirators, kidney dialysis machines, and special feeding procedures). The Federal Government permits the cost of the medical devices and formulas used in enteral feeding to be reimbursed under Medicare. See Pub. L. 99-509, § 9340, note following [42 U.S.C. § 1395u](#), p. 592 (1982 ed., Supp. V). The formulas are regulated by the federal Food and Drug Administration as "medical foods," see [21 U.S.C. § 360ee](#), and the feeding tubes are regulated as medical devices, [21 CFR § 876.5980 \(1989\)](#).

[\*\*\*\*86] Nor does the fact that Nancy Cruzan is now incompetent deprive her of her fundamental rights. See [Youngberg v. Romeo, 457 U.S. 307, 315-316, 319, 73 L. Ed. 2d 28, 102 S. Ct. 2452 \(1982\)](#) (holding that severely retarded man's liberty interests in safety, freedom from bodily restraint, and reasonable training survive involuntary commitment); [Parham v. J. R., 442 U.S. 584, 600, 61 L. Ed. 2d 101, 99 S. Ct. 2493 \(1979\)](#) (recognizing a child's substantial liberty interest in not being confined unnecessarily for medical treatment); [Jackson v. Indiana, 406 U.S. 715, 730, 738, 32 L. Ed. 2d 435, 92 S. Ct. 1845 \(1972\)](#) (holding that Indiana could not violate the due process and equal protection rights of a mentally retarded deaf mute by committing him for an indefinite amount of time simply because he was incompetent to stand trial on the criminal charges filed against [\*309] him). As the majority recognizes, 497 U.S. at 280, the question is not whether an incompetent has constitutional rights, but how such rights may be exercised. As we explained in [Thompson v. Oklahoma, 487 U.S. 815, 101 L. Ed. 2d 702, 108 S. Ct. 2687 \(1988\)](#): "The law must often adjust the manner in which it affords [\*\*\*\*87] rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and *those who are*

*irreversibly ill with loss of brain function, for instance, all retain 'rights,' to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind." [Id., at 825, n.23](#) (emphasis added). "To deny [its] exercise because the patient is unconscious or incompetent would be to deny the right." [Foody v. Manchester Memorial Hospital, 40 Conn. Supp. 127, 133, 482 A.2d 713, 718 \(1984\)](#).*

## II

### A

The right to be free from unwanted medical attention is a right to evaluate the potential benefit of treatment and its possible consequences according to one's own values and to make a personal decision whether to subject [\*\*2868] oneself to the intrusion. For a patient like Nancy Cruzan, the sole benefit of medical treatment is being kept metabolically alive. Neither artificial nutrition nor any other form of medical treatment available today can cure or in any way ameliorate her condition.<sup>8</sup> [\*\*\*262] Irreversibly vegetative [\*\*\*\*88] patients are devoid of thought, [\*310] emotion, and sensation; they are permanently and completely unconscious. See n.2, *supra*.<sup>9</sup> As the

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<sup>8</sup>While brain stem cells can survive 15 to 20 minutes without oxygen, cells in the cerebral hemispheres are destroyed if they are deprived of oxygen for as few as 4 to 6 minutes. See Cranford & Smith, Some Critical Distinctions Between Brain Death and the Persistent Vegetative State, 6 Ethics Sci. & Med. 199, 203 (1979). It is estimated that Nancy's brain was deprived of oxygen from 12 to 14 minutes. See 497 U.S. at 266. Out of the 100,000 patients who, like Nancy, have fallen into persistent vegetative states in the past 20 years due to loss of oxygen to the brain, there have been only three even partial recoveries documented in the medical literature. Brief for American Medical Association et al. as *Amici Curiae* 11-12. The longest any person has ever been in a persistent vegetative state and recovered was 22 months. See Snyder, Cranford, Rubens, Bundlie, & Rockswold, Delayed Recovery from Postanoxic Persistent Vegetative State, 14 Annals Neurol. 156 (1983). Nancy has been in this state for seven years.

<sup>9</sup>The American Academy of Neurology offers three independent bases on which the medical profession rests these neurological conclusions:

President's Commission concluded in approving the withdrawal of life support equipment from irreversibly vegetative patients:

"Treatment ordinarily aims to benefit a patient through preserving life, relieving pain and suffering, protecting against disability, and returning maximally effective functioning. If a prognosis of permanent unconsciousness is correct, however, continued treatment cannot confer such benefits. Pain and suffering are absent, as are joy, satisfaction, and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible." President's Commission 181-182.

[\*\*\*\*89] There are also affirmative reasons why someone like Nancy might choose to forgo artificial nutrition and hydration under these circumstances. Dying is personal. And it is profound. For many, the thought of an ignoble [\*\*\*\*90] end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity [\*311] intact, is a matter of extreme consequence. "In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve." *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 434, 497 N.E.2d 626, 635-636 (1986) (finding the subject of the proceeding "in a condition which [he] has indicated he would consider to be degrading and without human dignity" and holding that "the duty of the State to preserve life must encompass a

recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity"). Another court, hearing a similar case, noted:

"It is apparent from the testimony [\*\*\*\*263] that what was on [the patient's] mind was not only the invasiveness of life-sustaining systems, such as the [nasogastric] tube, upon the integrity of his body. It was also the utter helplessness of the permanently comatose person, the wasting of a once strong body, and the submission of the most private [\*\*\*\*91] bodily functions to the [\*\*2869] attention of others." *In re Gardner*, 534 A.2d 947, 953 (Me. 1987).

Such conditions are, for many, humiliating to contemplate,<sup>10</sup> as is visiting a prolonged and anguished vigil on one's parents, spouse, and children. A long, drawn-out death can have a debilitating effect on family members. See Carnwath & Johnson, *Psychiatric Morbidity Among Spouses of Patients With Stroke*, 294 Brit. Med. J. 409 (1987); Livingston, *Families Who Care*, 291 Brit. Med. J. 919 (1985). For some, the idea of being remembered in their persistent vegetative [\*312] states rather than as they were before their illness or accident may be very disturbing.<sup>11</sup>

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"First, direct clinical experience with these patients demonstrates that there is no behavioral indication of any awareness of pain or suffering.

"Second, in all persistent vegetative state patients studied to date, postmortem examination reveals overwhelming bilateral damage to the cerebral hemispheres to a degree incompatible with consciousness . . . .

"Third, recent data utilizing positron emission tomography indicates that the metabolic rate for glucose in the cerebral cortex is greatly reduced in persistent vegetative state patients, to a degree incompatible with consciousness." Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient, 39 Neurology 125 (Jan. 1989).

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<sup>10</sup> Nancy Cruzan, for instance, is totally and permanently disabled. All four of her limbs are severely contracted; her fingernails cut into her wrists. App. to Pet. for Cert. A93. She is incontinent of bowel and bladder. The most intimate aspects of her existence are exposed to and controlled by strangers. Brief for Respondent Guardian Ad Litem 2. Her family is convinced that Nancy would find this state degrading. See n.20, *infra*.

<sup>11</sup> What general information exists about what most people would choose or would prefer to have chosen for them under these circumstances also indicates the importance of ensuring a means for now-incompetent patients to exercise their right to avoid unwanted medical treatment. A 1988 poll conducted by the American Medical Association found that 80% of those surveyed favored withdrawal of life-support systems from hopelessly ill or irreversibly comatose patients if they or their families requested it. New York Times, June 5, 1988, p. 14, col. 4 (citing American Medical News, June 3, 1988,

[\*\*\*92] [\*\*\*93] B

Although the right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute,<sup>12</sup> no state interest could outweigh the rights of an individual in Nancy Cruzan's position. Whatever a State's possible interests in mandating life-support treatment under other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so. Missouri does not claim, nor could it, that society as a whole will be benefited by Nancy's receiving medical treatment. [\*313] No third party's situation will be improved and no harm to [\*\*\*264] others will be averted. Cf. nn. 6 and 8, *supra*.<sup>13</sup>

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p. 9, col. 1). Another 1988 poll conducted by the Colorado University Graduate School of Public Affairs showed that 85% of those questioned would not want to have their own lives maintained with artificial nutrition and hydration if they became permanently unconscious. The Coloradoan, Sept. 29, 1988, p. 1.

Such attitudes have been translated into considerable political action. Since 1976, 40 States and the District of Columbia have enacted natural death Acts, expressly providing for self-determination under some or all of these situations. See Brief for Society for the Right to Die, Inc., as *Amicus Curiae* 8; Weiner, Privacy, Family, and Medical Decision Making for Persistent Vegetative Patients, 11 Cardozo L. Rev. 713, 720 (1990). Thirteen States and the District of Columbia have enacted statutes authorizing the appointment of proxies for making health care decisions. See 497 U.S. at 290, n.2 (O'CONNOR, J., concurring).

<sup>12</sup> See *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27, 49 L. Ed. 643, 25 S. Ct. 358 (1905) (upholding a Massachusetts law imposing fines or imprisonment on those refusing to be vaccinated as "of paramount necessity" to that State's fight against a smallpox epidemic).

<sup>13</sup> Were such interests at stake, however, I would find that the Due Process Clause places limits on what invasive medical procedures could be forced on an unwilling comatose patient in pursuit of the interests of a third party. If Missouri were correct that its interests outweigh Nancy's interest in avoiding medical procedures as long as she is free of pain and physical discomfort, see 760 S.W.2d at 424, it is not apparent why a State could not choose to remove one of her kidneys without consent on the ground that society would be better off if the recipient of that kidney were saved from renal poisoning. Nancy cannot feel surgical pain. See n.2, *supra*. Nor would removal of one kidney be expected to shorten her life expectancy. See The American Medical Association Family Medical Guide 506 (J. Kunz ed. 1982). Patches of her skin could also be removed to provide

[\*\*\*94] [\*\*2870] The only state interest asserted here is a general interest in the preservation of life.<sup>14</sup> But the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment. "The regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns *other than* disagreement with the choice the individual has made. . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity." *Hodgson v. Minnesota*, 497 U.S. 417, 435, 111 L. Ed. 2d 344, 110 S. Ct. 2926 [\*314] (opinion of STEVENS, J.) (emphasis added). Thus, the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment. There is simply nothing legitimately within the State's purview to be gained by superseding her decision.

[\*\*\*95] Moreover, there may be considerable danger that Missouri's rule of decision would impair rather than serve any interest the State does have in sustaining life. Current medical practice recommends use of heroic measures if there is a scintilla of a chance that the patient will recover, on the assumption that the measures will be discontinued should the patient improve. When the President's Commission in 1982 approved the

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grafts for burn victims and scrapings of bone marrow to provide grafts for someone with leukemia. Perhaps the State could lawfully remove more vital organs for transplanting into others who would then be cured of their ailments, provided the State placed Nancy on some other life-support equipment to replace the lost function. Indeed, why could the State not perform medical experiments on her body, experiments that might save countless lives, and would cause her no greater burden than she already bears by being fed through the gastrostomy tube? This would be too brave a new world for me and, I submit, for our Constitution.

<sup>14</sup> The Missouri Supreme Court reviewed the state interests that had been identified by other courts as potentially relevant -- prevention of homicide and suicide, protection of interests of innocent third parties, maintenance of the ethical integrity of the medical profession, and preservation of life -- and concluded that: "In this case, only the state's interest in the preservation of life is implicated." 760 S.W.2d at 419.

withdrawal of life-support equipment from irreversibly vegetative patients, it explained that "an even more troubling wrong occurs when a treatment that might save life or improve health is not started because the health care personnel are afraid that they will find it very difficult to stop the treatment if, as is fairly likely, it proves to be of little benefit and greatly burdens the patient." President's Commission 75. A New Jersey court recognized that families as well as doctors [\*\*\*265] might be discouraged by an inability to stop life-support measures from "even attempting certain types of care [which] could thereby force them into hasty and premature decisions to allow a patient to die." *In re Conroy*, 98 N.J. 321, 370, 486 A.2d 1209, 1234 (1985). [\*\*\*\*96] See also Brief for American Academy of Neurology as *Amicus Curiae* 9 (expressing same concern).<sup>15</sup>

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<sup>15</sup>In any event, the state interest identified by the Missouri Supreme Court -- a comprehensive and "unqualified" interest in preserving life, 760 S.W.2d at 420, 424 -- is not even well supported by that State's own enactments. In the first place, Missouri has no law requiring every person to procure any needed medical care nor a state health insurance program to underwrite such care. *Id.*, at 429 (Blackmar, J., dissenting). Second, as the state court admitted, Missouri has a living will statute which specifically "allows and encourages the pre-planned termination of life." *Ibid.*; see *Mo. Rev. Stat. § 459.015(1)* (1986). The fact that Missouri actively provides for its citizens to choose a natural death under certain circumstances suggests that the State's interest in life is not so unqualified as the court below suggests. It is true that this particular statute does not apply to nonterminal patients and does not include artificial nutrition and hydration as one of the measures that may be declined. Nonetheless, Missouri has also not chosen to require court review of every decision to withhold or withdraw life support made on behalf of an incompetent patient. Such decisions are made every day, without state participation. See 760 S.W.2d at 428 (Blackmar, J., dissenting).

In addition, precisely what implication can be drawn from the statute's limitations is unclear given the inclusion of a series of "interpretive" provisions in the Act. The first such provision explains that the Act is to be interpreted consistently with the following: "Each person has the primary right to request or refuse medical treatment subject to the state's interest in protecting innocent third parties, preventing homicide and suicide and preserving good ethical standards in the medical profession." *Mo. Rev. Stat. § 459.055(1)* (1986). The second of these subsections explains that the Act's provisions are cumulative and not intended to increase or decrease the right of a patient to make decisions or lawfully effect the

[\*315] [\*\*\*\*97] [\*\*2871] III

This is not to say that the State has no legitimate interests to assert here. As the majority recognizes, 497 U.S. at 281-282, Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But *until* Nancy's wishes have been determined, [\*316] the only state interest that may be asserted is an interest in safeguarding the accuracy of that determination.

Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination. The Missouri "safeguard" that the Court upholds today does not meet that standard. The determination needed in this context [\*\*\*266] is whether the incompetent person would choose to live in a persistent vegetative state on life support or to avoid this medical treatment. [\*\*\*\*98] Missouri's rule of decision imposes a markedly asymmetrical evidentiary burden. Only evidence of specific statements of treatment choice made by the patient when competent is admissible to support a finding that the patient, now in a persistent vegetative state, would wish to avoid further medical treatment. Moreover, this evidence must be

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withholding or withdrawal of medical care. § 459.055(2). The third subsection provides that "no presumption concerning the intention of an individual who has not executed a declaration to consent to the use or withholding of medical procedures" shall be created. § 459.055(3).

Thus, even if it were conceivable that a State could assert an interest sufficiently compelling to overcome Nancy Cruzan's constitutional right, Missouri law demonstrates a more modest interest at best. See generally *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715, 81 L. Ed. 2d 580, 104 S. Ct. 2694 (1984) (finding that state regulations narrow in scope indicated that State had only a moderate interest in its professed goal).

clear and convincing. No proof is required to support a finding that the incompetent person would wish to continue treatment.

A

The majority offers several justifications for Missouri's heightened evidentiary standard. First, the majority explains that the State may constitutionally adopt this rule to govern determinations of an incompetent's wishes in order to advance the State's substantive interests, including its unqualified interest in the preservation of human life. See 497 U.S. at 282-283, and n.10. Missouri's evidentiary standard, however, cannot rest on the State's own interest in a particular substantive result. To be sure, courts have long erected clear and convincing evidence standards to place the greater risk of erroneous decisions on those bringing disfavored claims.<sup>16</sup> In such cases, however, the choice to discourage [\*317] [\*\*\*\*99] certain claims was a legitimate, constitutional policy choice. In contrast, Missouri has no such power to disfavor a choice by Nancy Cruzan to avoid medical treatment, because Missouri has no legitimate [\*\*2872] interest in providing Nancy with treatment until it is established that this represents her choice. See *supra*, at 312-314. Just as a State may not override Nancy's choice directly, it may not do so indirectly

through the imposition of a procedural rule.

[\*\*\*\*100] Second, the majority offers two explanations for why Missouri's clear and convincing evidence standard is a means of enhancing accuracy, but neither is persuasive. The majority initially argues that a clear and convincing evidence standard is necessary to compensate for the possibility that such proceedings will lack the "guarantee of accurate factfinding that the adversary process brings with it," citing *Ohio v. Akron Center for Reproductive Health*, 497 U.S. at 515-516 (upholding a clear and convincing evidence standard for an *ex parte* proceeding). 497 U.S. at 281-282. [\*\*\*267] Without supporting the Court's decision in that case, I note that the proceeding to determine an incompetent's wishes is quite different from a proceeding to determine whether a minor may bypass notifying her parents before undergoing an abortion on the ground that she is mature enough to make the decision or that the abortion is in her best interests.

[\*318] An adversarial proceeding is of particular importance when one side has a strong personal interest which needs to be counterbalanced to assure the court that the questions will be fully explored. A minor who has a strong interest in obtaining [\*\*\*\*101] permission for an abortion without notifying her parents may come forward whether or not society would be satisfied that she has made the decision with the seasoned judgment of an adult. The proceeding here is of a different nature. Barring venal motives, which a trial court has the means of ferreting out, the decision to come forward to request a judicial order to stop treatment represents a slowly and carefully considered resolution by at least one adult and more frequently several adults that discontinuation of treatment is the patient's wish.

In addition, the bypass procedure at issue in *Akron*, *supra*, is *ex parte* and secret. The court may not notify the minor's parents, siblings, or friends. No one may be present to submit evidence unless brought forward by the minor herself. In contrast,

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<sup>16</sup> See *Colorado v. New Mexico*, 467 U.S. 310, 81 L. Ed. 2d 247, 104 S. Ct. 2433 (1984) (requiring clear and convincing evidence before one State is permitted to divert water from another to accommodate society's interests in stable property rights and efficient use of resources); *New York v. New Jersey*, 256 U.S. 296, 65 L. Ed. 937, 41 S. Ct. 492 (1921) (promoting federalism by requiring clear and convincing evidence before using Court's power to control the conduct of one State at the behest of another); *Maxwell Land-Grant Case*, 121 U.S. 325, 30 L. Ed. 949, 7 S. Ct. 1015 (1887) (requiring clear, unequivocal, and convincing evidence to set aside, annul, or correct a patent or other title to property issued by the Government in order to secure settled expectations concerning property rights); *Marcum v. Zaring*, 406 P.2d 970 (Okla. 1965) (promoting stability of marriage by requiring clear and convincing evidence to prove its invalidity); *Stevenson v. Stein*, 412 Pa. 478, 195 A.2d 268 (1963) (promoting settled expectations concerning property rights by requiring clear and convincing evidence to prove adverse possession).

the proceeding to determine Nancy Cruzan's wishes was neither *ex parte* nor secret. In a hearing to determine the treatment preferences of an incompetent person, a court is not limited to adjusting burdens of proof as its only means of protecting against a possible imbalance. Indeed, any concern that those who come forward will present [\*\*\*\*102] a one-sided view would be better addressed by appointing a guardian ad litem, who could use the State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of interest and ensure that each party likely to have relevant evidence is consulted and brought forward -- for example, other members of the family, friends, clergy, and doctors. See, e. g., [\*In re Colyer\*, 99 Wash. 2d 114, 133, 660 P.2d 738, 748-749 \(1983\)](#). Missouri's heightened evidentiary standard attempts to achieve balance by discounting evidence; the guardian ad litem technique achieves balance by probing for additional evidence. Where, as here, the family members, [\*319] friends, doctors, and guardian ad litem agree, it is not because the process has failed, as the majority suggests. See 497 U.S. at 281, n.9. It is because there is no genuine dispute as to Nancy's preference.

The majority next argues that where, as here, important individual rights are at stake, a clear and convincing evidence standard has long been held to be an appropriate means of enhancing accuracy, citing decisions [\*\*\*\*103] concerning what process an individual is due before he can be deprived of a liberty interest. See 497 U.S. at 283. In those cases, however, this Court imposed a clear and convincing standard as a constitutional minimum on the basis of its evaluation that one [\*\*2873] side's interests clearly outweighed the second side's interests and therefore the second side should bear the risk of error. See [\*Santosky v. Kramer\*, 455 U.S. 745, 753, 766-767, 71 L. Ed. 2d 599, 102 S. Ct. 1388 \[\\*\\*\\*268\] \(1982\)](#) (requiring a clear and convincing evidence standard for termination of parental rights because the parent's interest is fundamental but the State has no

legitimate interest in termination unless the parent is unfit, and finding that the State's interest in finding the best home for the child does not arise until the parent has been found unfit); [\*Addington v. Texas\*, 441 U.S. 418, 426-427, 60 L. Ed. 2d 323, 99 S. Ct. 1804 \(1979\)](#) (requiring clear and convincing evidence in an involuntary commitment hearing because the interest of the individual far outweighs that of a State, which has no legitimate interest in confining individuals who are not mentally ill and do not pose a danger to themselves or others). Moreover, [\*\*\*\*104] we have always recognized that shifting the risk of error reduces the likelihood of errors in one direction at the cost of increasing the likelihood of errors in the other. See [\*Addington\*, supra, at 423](#) (contrasting heightened standards of proof to a preponderance standard in which the two sides "share the risk of error in roughly equal fashion" because society does not favor one outcome over the other). In the cases cited by the majority, the imbalance imposed by a heightened evidentiary standard was not only acceptable but required because the standard was deployed to protect an individual's [\*320] exercise of a fundamental right, as the majority admits, 497 U.S. at 282-283, n.10. In contrast, the Missouri court imposed a clear and convincing evidence standard as an obstacle to the exercise of a fundamental right.

The majority claims that the allocation of the risk of error is justified because it is more important not to terminate life support for someone who would wish it continued than to honor the wishes of someone who would not. An erroneous decision to terminate life support is irrevocable, says the majority, while an erroneous decision not to [\*\*\*\*105] terminate "results in a maintenance of the status quo." See *ante*, at 283. <sup>17</sup> But, from the

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<sup>17</sup> The majority's definition of the "status quo," of course, begs the question. Artificial delivery of nutrition and hydration represents the "status quo" only if the State has chosen to permit doctors and hospitals to keep a patient on life-support systems over the protests of his family or guardian. The "status quo" absent that state interference would be the natural result of his accident or illness (and the family's decision). The majority's definition of status quo,

point of view of the patient, an erroneous decision in either direction is irrevocable. An erroneous decision to terminate artificial nutrition and hydration, to be sure, will lead to failure of that last remnant of physiological life, the brain stem, and result in complete brain death. An erroneous decision not to terminate life support, however, robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted.

[\*\*\*\*106] [\*\*\*269] Even a later decision to grant him his wish cannot undo the intervening harm. But a later decision is unlikely in any event. "The discovery of new evidence," to which the majority [\*321] refers, *ibid.*, is more hypothetical than plausible. The majority also misconceives the relevance of the possibility of "advancements in medical science," *ibid.*, by treating it as a reason to force someone to continue medical treatment against his will. The possibility of a medical miracle is indeed part of the calculus, but it is a part of the *patient's* calculus. If current research suggests [\*\*\*2874] that some hope for cure or even moderate improvement is possible within the lifespan projected, this is a factor that should be and would be accorded significant weight in assessing what the patient himself would choose.<sup>18</sup>

[\*\*\*\*107] B

Even more than its heightened evidentiary standard,

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however, is "to a large extent a predictable, yet accidental confluence of technology, psyche, and inertia. The general citizenry . . . never said that it favored the creation of coma wards where permanently unconscious patients would be tended for years and years. Nor did the populace as a whole authorize the preeminence of doctors over families in making treatment decisions for incompetent patients." Rhoden, *Litigating Life and Death*, [102 Harv. L. Rev. 375, 433-434 \(1988\)](#).

<sup>18</sup>For Nancy Cruzan, no such cure or improvement is in view. So much of her brain has deteriorated and been replaced by fluid, see App. to Pet. for Cert. A94, that apparently the only medical advance that could restore consciousness to her body would be a brain transplant. Cf. n.22, *infra*.

the Missouri court's categorical exclusion of relevant evidence dispenses with any semblance of accurate factfinding. The court adverted to no evidence supporting its decision, but held that no clear and convincing, inherently reliable evidence had been presented to show that Nancy would want to avoid further treatment. In doing so, the court failed to consider statements Nancy had made to family members and a close friend.<sup>19</sup> The

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<sup>19</sup>The trial court had relied on the testimony of Athena Comer, a longtime friend, co-worker, and housemate for several months, as sufficient to show that Nancy Cruzan would wish to be free of medical treatment under her present circumstances. App. to Pet. for Cert. A94. Ms. Comer described a conversation she and Nancy had while living together, concerning Ms. Comer's sister who had become ill suddenly and died during the night. The Comer family had been told that if she had lived through the night, she would have been in a vegetative state. Nancy had lost a grandmother a few months before. Ms. Comer testified: "Nancy said she would never want to live [in a vegetative state] because if she couldn't be normal or even, you know, like half way, and do things for yourself, because Nancy always did, that she didn't want to live . . . and we talked about it a lot." Tr. 388-389. She said "several times" that "she wouldn't want to live that way because if she was going to live, she wanted to be able to live, not to just lay in a bed and not be able to move because you can't do anything for yourself." *Id.*, at 390, 396. "She said that she hoped that [all the] people in her family knew that she wouldn't want to live [in a vegetative state] because she knew it was usually up to the family whether you lived that way or not." *Id.*, at 399.

The conversation took place approximately a year before Nancy's accident and was described by Ms. Comer as a "very serious" conversation that continued for approximately half an hour without interruption. *Id.*, at 390. The Missouri Supreme Court dismissed Nancy's statement as "unreliable" on the ground that it was an informally expressed reaction to other people's medical conditions. [760 S.W.2d at 424](#).

The Missouri Supreme Court did not refer to other evidence of Nancy's wishes or explain why it was rejected. Nancy's sister Christy, to whom she was very close, testified that she and Nancy had had two very serious conversations about a year and a half before the accident. A day or two after their niece was stillborn (but would have been badly damaged if she had lived), Nancy had said that maybe it was part of a "greater plan" that the baby had been stillborn and did not have to face "the possible life of mere existence." Tr. 537. A month later, after their grandmother had died after a long battle with heart problems, Nancy said that "it was better for my grandmother not to be kind of brought back and forth [by] medical [treatment], brought back from a critical near point of death . . . ." *Id.*, at 541.

[\*\*\*270] court also failed to consider testimony [\*322] from Nancy's mother and sister that they were certain that Nancy would want to discontinue artificial nutrition and hydration,<sup>20</sup> even after the court found that Nancy's family was loving and without malignant motive. See [760 S.W.2d at 412](#). The court also failed to consider the conclusions of the guardian ad litem, appointed by the trial court, that there was clear and convincing evidence that Nancy would want to [\*323] discontinue medical treatment and that this was in her best interests. [Id., at 444](#) (Higgins, J., dissenting from denial of rehearing); Brief for Respondent Guardian [\*\*\*\*108] Ad Litem 2-3. The court did not specifically define what kind of evidence it would consider [\*\*2875] clear and convincing, but its general discussion suggests that only a living will or equivalently formal directive from the patient when competent would meet this standard. See [760 S.W.2d at 424-425](#).

[\*\*\*\*109] Too few people execute living wills or equivalently formal directives for such an evidentiary rule to ensure adequately that the wishes of incompetent persons will be honored.<sup>21</sup> While it might be a wise social policy to encourage

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<sup>20</sup> Nancy's sister Christy, Nancy's mother, and another of Nancy's friends testified that Nancy would want to discontinue the hydration and nutrition. Christy said that "Nancy would be horrified at the state she is in." [Id., at 535](#). She would also "want to take that burden away from [her family]." [Id., at 544](#). Based on "a lifetime of experience [I know Nancy's wishes] are to discontinue the hydration and the nutrition." [Id., at 542](#). Nancy's mother testified: "Nancy would not want to be like she is now. If it were me up there or Christy or any of us, she would be doing for us what we are trying to do for her. I know she would, . . . as her mother." [Id., at 526](#).

<sup>21</sup> Surveys show that the overwhelming majority of Americans have not executed such written instructions. See Emmanuel & Emmanuel, The Medical Directive: A New Comprehensive Advance Care Document, 261 JAMA 3288 (1989) (only 9% of Americans execute advance directives about how they would wish treatment decisions to be handled if they became incompetent); American Medical Association Surveys of Physician and Public Opinion on Health Care Issues 29-30 (1988) (only 15% of those surveyed had executed living wills); 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 241-242 (1982) (23% of those surveyed said that they had put treatment instructions in writing).

people to furnish such instructions, no general conclusion about a patient's choice can be drawn from the absence of formalities. The probability of becoming irreversibly vegetative is [\*\*\*\*110] so low that many people may not feel an urgency to marshal formal evidence of their preferences. Some may not wish to dwell on their own physical deterioration and mortality. Even someone with a resolute determination to avoid life support under circumstances such as Nancy's would still need to know that such things as living wills exist and how to execute one. Often legal help would be necessary, especially given the majority's apparent willingness to permit States to insist that a person's wishes are not truly known unless the particular medical treatment is specified. See 497 U.S. at 285.

[\*324] [\*\*\*\*111] As a California appellate court observed: "The lack of generalized public awareness of the statutory scheme and the typically human characteristics of procrastination and reluctance to contemplate the need for such arrangements however makes this a tool which will all too often go unused by those who might desire it." [Barber v. Superior Court, 147 Cal. App. 3d 1006, 1015, 195 Cal. \[\\*\\*\\*271\] Rptr. 484, 489 \(1983\)](#). When a person tells family or close friends that she does not want her life sustained artificially, she is "expressing her wishes in the only terms familiar to her, and . . . as clearly as a lay person should be asked to express them. To require more is unrealistic, and for all practical purposes, it precludes the right of patients to forego life-sustaining treatment." [In re O'Connor, 72 N.Y.2d 517, 551, 531 N.E.2d 607, 626, 534 N.Y.S.2d 886 \(1988\)](#) (Simons, J., dissenting).<sup>22</sup> When Missouri

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<sup>22</sup> New York is the only State besides Missouri to deny a request to terminate life support on the ground that clear and convincing evidence of prior, expressed intent was absent, although New York did so in the context of very different situations. Mrs. O'Connor, the subject of *In re O'Connor*, had several times expressed her desire not to be placed on life support if she were not going to be able to care for herself. However, both of her daughters testified that they did not know whether their mother would want to decline artificial nutrition and hydration under her present circumstances. Cf. n.13, *supra*. Moreover, despite damage from several strokes, Mrs. O'Connor was

enacted a living will statute, it specifically provided that the absence of a living will does not warrant a presumption that a patient wishes continued medical treatment. See n.15, *supra*. [\*325] [\*\*\*\*112] Thus, apparently not even Missouri's own legislature believes that a person who does not execute a living will fails [\*\*2876] to do so because he wishes continuous medical treatment under all circumstances.

[\*\*\*\*113] The testimony of close friends and family members, on the other hand, may often be the best evidence available of what the patient's choice would be. It is they with whom the patient most likely will have discussed such questions and they who know the patient best. "Family members have a unique knowledge of the patient which is vital to any decision on his or her behalf." Newman, Treatment Refusals for the Critically and Terminally Ill: Proposed Rules for the Family, the Physician, and the State, 3 N. Y. L. S. Human Rights Annual 35, 46 (1985). The Missouri court's decision to ignore this whole category of testimony is also at odds with the practices of other States. See, e. g., *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987); *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986); *In re Severns*, 425 A.2d 156 (Del. Ch. 1980).

The Missouri court's disdain for Nancy's statements in serious conversations not long before her accident, for the opinions of Nancy's family and friends as to her values, beliefs and certain choice, [\*\*\*\*114] and even for the opinion of an outside objective factfinder appointed by the State evinces a disdain for Nancy Cruzan's own right to choose.

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conscious and capable of responding to simple questions and requests and the medical testimony suggested she might improve to some extent. Cf. 497 U.S. at 301. The New York Court of Appeals also denied permission to terminate blood transfusions for a severely retarded man with terminal cancer because there was no evidence of a treatment choice made by the man when competent, as he had never been competent. See *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, cert. denied, 454 U.S. 858, 70 L. Ed. 2d 153, 102 S. Ct. 309 (1981). Again, the court relied on evidence that the man was conscious, functioning in the way he always had, and that the transfusions did not cause him substantial pain (although it was clear he did not like them).

The rules by which an incompetent person's wishes are determined must represent every effort to determine those wishes. The rule that the Missouri court adopted and that this Court upholds, however, skews the result away from a determination [\*\*\*272] that as accurately as possible reflects the individual's own preferences and beliefs. It is a rule that transforms human beings into passive subjects of medical technology.

"Medical care decisions must be guided by the individual patient's interests and values. Allowing persons to determine their own medical treatment is an important way in which society respects persons as individuals. [\*326] Moreover, the respect due to persons as individuals does not diminish simply because they have become incapable of participating in treatment decisions. . . . It is still possible for others to make a decision that reflects [the patient's] interests more closely than would a purely technological decision to do whatever is possible. Lacking the ability to decide, [a patient] has a right to a decision [\*\*\*\*115] that takes his interests into account." *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 208, 245 Cal. Rptr. 840, 854-855, cert. denied, 488 U.S. 958 (1988).

C

I do not suggest that States must sit by helplessly if the choices of incompetent patients are in danger of being ignored. See 497 U.S. at 281. Even if the Court had ruled that Missouri's rule of decision is unconstitutional, as I believe it should have, States would nevertheless remain free to fashion procedural protections to safeguard the interests of incompetents under these circumstances. The Constitution provides merely a framework here: Protections must be genuinely aimed at ensuring decisions commensurate with the will of the patient, and must be reliable as instruments to that end. Of the many States which have instituted such protections, Missouri is virtually the only one to have fashioned a rule that lessens the likelihood of

accurate determinations. In contrast, nothing in the Constitution prevents States from reviewing the advisability of a family decision, by requiring a court proceeding or by appointing an impartial guardian ad litem.

There are various [\*\*\*\*116] approaches to determining an incompetent patient's treatment choice in use by the several States today, and there may be advantages and disadvantages to each and other approaches not yet envisioned. The choice, in largest part, is and should be left to the States, so long as each State is seeking, in a reliable manner, to discover what the patient would want. But with such momentous interests in the balance, States must avoid procedures that will prejudice [\*327] the decision. "To err either [\*\*2877] way -- to keep a person alive under circumstances under which he would rather have been allowed to die, or to allow that person to die when he would have chosen to cling to life -- would be deeply unfortunate." *In re Conroy*, 98 N.J. at 343, 486 A.2d at 1220.

D

Finally, I cannot agree with the majority that where it is not possible to determine what choice an incompetent patient would make, a State's role as *parens patriae* permits the State automatically to make that choice itself. See 497 U.S. at 286 (explaining that the Due Process Clause does not require a State to confide the decision to "anyone but the patient herself"). Under [\*\*\*\*117] fair rules of evidence, it is improbable that a court could [\*\*\*273] not determine what the patient's choice would be. Under the rule of decision adopted by Missouri and upheld today by this Court, such occasions might be numerous. But in neither case does it follow that it is constitutionally acceptable for the State invariably to assume the role of deciding for the patient. A State's legitimate interest in safeguarding a patient's choice cannot be furthered by simply appropriating it.

The majority justifies its position by arguing that, while close family members may have a strong

feeling about the question, "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent." *Ibid.* I cannot quarrel with this observation. But it leads only to another question: Is there any reason to suppose that a State is *more* likely to make the choice that the patient would have made than someone who knew the patient intimately? To ask this is to answer it. As the New Jersey Supreme Court observed: "Family members are best qualified to make substituted [\*\*\*\*118] judgments for incompetent patients not only because of their peculiar grasp of the patient's approach to life, but also [\*328] because of their special bonds with him or her . . . . It is . . . they who treat the patient as a person, rather than a symbol of a cause." *In re Jobes*, 108 N.J. 394, 416, 529 A.2d 434, 445 (1987). The State, in contrast, is a stranger to the patient.

A State's inability to discern an incompetent patient's choice still need not mean that a State is rendered powerless to protect that choice. But I would find that the Due Process Clause prohibits a State from doing more than that. A State may ensure that the person who makes the decision on the patient's behalf is the one whom the patient himself would have selected to make that choice for him. And a State may exclude from consideration anyone having improper motives. But a State generally must either repose the choice with the person whom the patient himself would most likely have chosen as proxy or leave the decision to the patient's family.<sup>23</sup>

#### [\*\*\*\*119] IV

As many as 10,000 patients are being maintained in persistent vegetative states in the United States, and the number is expected to increase significantly in

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<sup>23</sup> Only in the exceedingly rare case where the State cannot find any family member or friend who can be trusted to endeavor genuinely to make the treatment choice the patient would have made does the State become the legitimate surrogate decisionmaker.

the near future. See Cranford, *supra* n.2, at 27, 31. Medical technology, developed over the past 20 or so years, is often capable of resuscitating people after they have stopped breathing or their hearts have stopped beating. Some of those people are brought fully back to life. Two decades ago, those who were not and could not swallow and digest food, died. Intravenous solutions could not provide sufficient calories to maintain people for more than a short time. Today, various forms of artificial feeding have been developed that are able to keep people metabolically alive for years, even decades. See Spencer & Palmisano, Specialized Nutritional Support of [\*329] [\*\*2878] Patients -- A Hospital's Legal Duty?, 11 Quality Rev. Bull. 160, 160-161 [\*\*\*274] (1985). In addition, in this century, chronic or degenerative ailments have replaced communicable diseases as the primary causes of death. See R. Weir, Abating Treatment with Critically Ill Patients 12-13 (1989); President's Commission 15-16. The 80% of Americans who die in [\*\*\*\*120] hospitals are "likely to meet their end . . . 'in a sedated or comatose state; betubed nasally, abdominally and intravenously; and far more like manipulated objects than like moral subjects.'" <sup>24</sup> A fifth of all adults surviving to age 80 will suffer a progressive dementing disorder prior to death. See Cohen & Eisdorfer, Dementing Disorders, in *The Practice of Geriatrics* 194 (E. Calkins, P. Davis, & A. Ford eds. 1986).

"Law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of." *In re Quinlan*, 70 N.J. 10, 44, 355 A.2d 647, 665, cert. denied, 429 U.S. 922 (1976). The new medical technology can reclaim those who would have been irretrievably lost a few decades ago and restore them to active lives. For Nancy Cruzan, it failed, [\*\*\*\*121] and for others with wasting incurable disease, it may be doomed to failure. In these unfortunate situations, the bodies and preferences and memories of the victims do not

escheat to the State; nor does our Constitution permit the State or any other government to commandeer them. No singularity of feeling exists upon which such a government might confidently rely as *parens patriae*. The President's Commission, after years of research, concluded:

"In few areas of health care are people's evaluations of their experiences so varied and uniquely personal as in their assessments of the nature and value of the processes associated with dying. For some, every moment of life is of inestimable value; for others, life without [\*330] some desired level of mental or physical ability is worthless or burdensome. A moderate degree of suffering may be an important means of personal growth and religious experience to one person, but only frightening or despicable to another." President's Commission 276.

Yet Missouri and this Court have displaced Nancy's own assessment of the processes associated with dying. They have discarded evidence of her will, ignored her values, and deprived [\*\*\*\*122] her of the right to a decision as closely approximating her own choice as humanly possible. They have done so disingenuously in her name and openly in Missouri's own. That Missouri and this Court may truly be motivated only by concern for incompetent patients makes no matter. As one of our most prominent jurists warned us decades ago: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting).

I respectfully dissent.

[\*\*\*275] JUSTICE STEVENS, dissenting.

Our Constitution is born of the proposition that all legitimate governments must secure the equal right

<sup>24</sup>Fadiman, The Liberation of Lolly and Gronky, *Life Magazine*, Dec. 1986, p. 72 (quoting medical ethicist Joseph Fletcher).

of every person to "Life, Liberty, and the pursuit of Happiness." <sup>1</sup> In the ordinary case we quite naturally assume [**\*\*2879**] that these three [**\*331**] ends are compatible, mutually enhancing, and perhaps even coincident.

[**\*\*\*\*123**] The Court would make an exception here. It permits the State's abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan, interests which would, according to an undisputed finding, be served by allowing her guardians to exercise her constitutional right to discontinue medical treatment. Ironically, the Court reaches this conclusion despite endorsing three significant propositions which should save it from any such dilemma. First, a competent individual's decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the [Due Process Clause of the Fourteenth Amendment](#). See 497 U.S. at 278-279. Second, upon a proper evidentiary showing, a qualified guardian may make that decision on behalf of an incompetent ward. See, e. g., *ante*, at 284-285. Third, in answering the important question presented by this tragic case, it is wise "not to attempt, by any general statement, to cover every possible phase of the subject." See *ante*, at 278 (citation omitted). Together, these considerations suggest that Nancy Cruzan's liberty to be free from medical treatment must be understood in light of [**\*\*\*\*124**] the facts and circumstances particular to her.

I would so hold: In my view, the Constitution requires the State to care for Nancy Cruzan's life in a way that gives appropriate respect to her own best

interests.

I

This case is the first in which we consider whether, and how, the Constitution protects the liberty of seriously ill patients to be free from life-sustaining medical treatment. So put, the question is both general and profound. We need not, however, resolve the question in the abstract. Our responsibility as judges both enables and compels us to treat the problem as it is illuminated by the facts of the controversy before us.

[**\*332**] The most important of those facts are these: "Clear and convincing evidence" established that Nancy Cruzan is "oblivious to her environment except for reflexive responses to sound and perhaps to painful stimuli"; that "she has no cognitive or reflexive ability to swallow food or water"; that "she will never recover" these abilities; and that her "cerebral cortical atrophy is irreversible, permanent, progressive and [**\*\*\*276**] ongoing." App. to Pet. for Cert. A94-A95. Recovery and consciousness are impossible; the highest cognitive brain function [**\*\*\*\*125**] that can be hoped for is a grimace in "recognition of ordinarily painful stimuli" or an "apparent response to sound." *Id.*, at A95. <sup>2</sup>

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<sup>2</sup>The trial court found as follows on the basis of "clear and convincing evidence":

"1. That her respiration and circulation are not artificially maintained and within essentially normal limits for a 30 year old female with vital signs recently reported as BP 130/80; pulse 78 and regular; respiration spontaneous at 16 to 18 per minute.

"2. That she is oblivious to her environment except for reflexive responses to sound and perhaps to painful stimuli.

"3. That she has suffered anoxia of the brain resulting in massive enlargement of the ventricles filling with cerebrospinal fluid in the area where the brain has degenerated. This cerebral cortical atrophy is irreversible, permanent, progressive and ongoing.

"4. That her highest cognitive brain function is exhibited by her grimacing perhaps in recognition of ordinarily painful stimuli, indicating the experience of pain and her apparent response to sound.

"5. That she is spastic quadriplegic.

"6. That she has contractures of her four extremities which are

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<sup>1</sup> It is stated in the Declaration of Independence that:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

**[\*\*\*\*126] [\*\*2880]** After thus evaluating Nancy Cruzan's medical condition, the trial judge next examined how the interests of third parties would be affected if Nancy's parents were allowed to withdraw the gastrostomy tube that had been implanted in **[\*333]** their daughter. His findings make it clear that the parents' request had no economic motivation,<sup>3</sup> and that granting their request would neither adversely affect any innocent third parties nor breach the ethical standards of the medical profession.<sup>4</sup> He then considered, and rejected, a religious objection to his decision,<sup>5</sup> and explained why he concluded that the ward's constitutional "right to liberty" outweighed the general public policy on which the State relied:

"There is a fundamental natural right expressed in our Constitution as the 'right to liberty,' which permits an individual to refuse or direct the withholding or withdrawal of artificial death prolonging procedures when the person has no more cognitive brain function than our Ward and all the physicians agree there is no

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slowly progressive with irreversible muscular and tendon damage to all extremities.

"7. That she has no cognitive or reflexive ability to swallow food or water to maintain her daily essential needs. That she will never recover her ability to swallow sufficient to satisfy her needs." App. to Pet. for Cert. A94-A95.

<sup>3</sup>"The only economic considerations in this case rest with Respondent's employer, the State of Missouri, which is bearing the entire cost of care. Our ward is an adult without financial resources other than Social Security whose not inconsiderable medical insurance has been exhausted since January 1986." *Id.*, at A96.

<sup>4</sup>"In this case there are no innocent third parties requiring state protection, neither homicide nor suicide will be committed and the consensus of the medical witnesses indicated concerns personal to themselves or the legal consequences of such actions rather than any objections that good ethical standards of the profession would be breached if the nutrition and hydration were withdrawn the same as any other artificial death prolonging procedures the statute specifically authorizes." *Id.*, at A98.

<sup>5</sup>"Nancy's present unresponsive and hopeless existence is not the will of the Supreme Ruler but of man's will to forcefully feed her when she herself cannot swallow thus fueling respiratory and circulatory pumps to no cognitive purpose for her except sound and perhaps pain." *Id.*, at A97.

hope of further recovery while the deterioration of the brain continues with further overall worsening physical contractures. To the extent that the statute **[\*\*\*\*127]** or public policy prohibits withholding or withdrawal of nutrition and hydration **[\*\*\*\*277]** or euthanasia or mercy killing, if such be the definition, under all circumstances, arbitrarily and with no exceptions, it is in violation of our ward's constitutional rights by depriving her of liberty without due process of **[\*334]** law. To decide otherwise that medical treatment once undertaken must be continued irrespective of its lack of success or benefit to the patient in effect gives one's body to medical science without their *[sic]* consent.

....

"The Co-guardians are required only to exercise their legal authority to act in the best interests of their Ward as they discharge their duty and are free to act or not with this authority as they may determine." *Id.*, at A98-A99 (footnotes omitted).

## **[\*\*\*\*128] II**

Because he believed he had a duty to do so, the independent guardian ad litem appealed the trial court's order to the Missouri Supreme Court. In that appeal, however, the guardian advised the court that he did not disagree with the trial court's decision. Specifically, he endorsed the critical finding **[\*\*\*\*129]** that "it was in Nancy Cruzan's best interests to have the tube feeding discontinued." <sup>6</sup>

That important conclusion thus was not disputed by the litigants. One might reasonably suppose that it

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<sup>6</sup>"Appellant guardian ad litem advises this court:

"we informed the [trial] court that we felt it was in Nancy Cruzan's best interests to have the tube feeding discontinued. We now find ourselves in the position of appealing from a judgment we basically agree with." [\*Cruzan v. Harmon\*, 760 S.W.2d 408, 435 \(Mo. 1988\)](#) (Higgins, J., dissenting).

would be dispositive: If Nancy Cruzan has no interest in continued treatment, and if she has a liberty interest in being free from unwanted treatment, and if the cessation of treatment would have no **[\*\*2881]** adverse impact on third parties, and if no reason exists to doubt the good faith of Nancy's parents, then what possible basis could the State have for insisting upon continued medical treatment? Yet, instead of questioning or endorsing the trial court's **[\*\*\*\*130]** conclusions about Nancy Cruzan's interests, the State Supreme Court largely ignored them.

**[\*335]** The opinion of that court referred to four different state interests that have been identified in other somewhat similar cases, but acknowledged that only the State's general interest in "the preservation of life" was implicated by this case.<sup>7</sup> It defined that interest as follows:

"The state's interest in life embraces two separate concerns: an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself."  
[\*Cruzan v. Harmon\*, 760 S.W.2d 408, 419 \(1988\)](#).

Although the court did not characterize this interest as absolute, it repeatedly indicated that it outweighs any countervailing interest that is based on the "quality of life" **[\*\*\*278]** of any individual patient.<sup>8</sup> In the view of the state-court majority,

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<sup>7</sup> "Four state interests have been identified: preservation of life, prevention of homicide and suicide, the protection of interests of innocent third parties and the maintenance of the ethical integrity of the medical profession. See [Section 459.055\(1\), RSMo 1986](#); [Brophy](#), 497 N.E.2d at 634. In this case, only the state's interest in the preservation of life is implicated." [Id.](#), at 419.

<sup>8</sup> "The state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality." *Ibid*.

"It is tempting to equate the state's interest in the preservation of life with some measure of quality of life. As the discussion which follows shows, some courts find quality of life a convenient focus when justifying the termination of treatment. But the state's interest is not in quality of life. The broad policy statements of the legislature

**[\*336]** that general interest is strong enough to foreclose any decision to refuse treatment for an incompetent person unless that person had previously evidenced, in a clear and convincing terms, such a decision for herself. The best interests of the incompetent individual who had never confronted **[\*\*\*\*131]** the issue -- or perhaps had been incompetent since birth -- are entirely irrelevant and unprotected under the reasoning of the State Supreme Court's four-judge majority.

**[\*\*\*\*132]** The three dissenting judges found Nancy Cruzan's interests compelling. They agreed with the trial court's evaluation of state policy. In his persuasive dissent, Judge Blackmar explained that decisions about the care of chronically ill patients were traditionally private:

"My disagreement with the principal opinion lies fundamentally in its emphasis on the interest of and the role of the state, represented by the Attorney General. Decisions about prolongation of life are of recent origin. For most of the world's history, and presently in most parts of the world, such decisions would never arise because the technology would not be available. Decisions about medical treatment have customarily been made by the patient, or by those closest to the patient if the patient, because of youth or infirmity, is unable to make the decisions. This is nothing new in

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make no such distinction; nor shall we. Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives. Instead, the state's interest is in life; that interest is unqualified." [760 S.W.2d at 420](#).

"As we previously stated, however, the state's interest is not in quality of life. The state's interest is an unqualified interest in life." [Id.](#), at 422. "The argument made here, that Nancy will not recover, is but a thinly veiled statement that her life in its present form is not worth living. Yet a diminished quality of life does not support a decision to cause death." *Ibid*.

"Given the fact that Nancy is alive and that the burdens of her treatment are not excessive for her, we do not believe her right to refuse treatment, whether that right proceeds from a constitutional right of privacy or a common law right to refuse treatment, outweighs the immense, clear fact of life in which the state maintains a vital interest." [Id.](#), at 424.

substituted decisionmaking. The state is seldom called upon to be the decisionmaker.

"I would not accept the assumption, inherent in the principal opinion, that, with **[\*\*2882]** our advanced technology, the state must necessarily become involved in a decision about using extraordinary measures to prolong life. Decisions of this kind **[\*\*\*\*133]** are made daily by the patient or relatives, on the basis of medical advice and their conclusion as to what is best. Very few cases reach court, and **[\*337]** I doubt whether this case would be before us but for the fact that Nancy lies in a state hospital. I do not place primary emphasis on the patient's expressions, except possibly in the very unusual case, of which I find no example in the books, in which the patient expresses a view that all available life supports should **[\*\*\*279]** be made use of. Those closest to the patient are best positioned to make judgments about the patient's best interest." [Id., at 428.](#)

Judge Blackmar then argued that Missouri's policy imposed upon dying individuals and their families a controversial and objectionable view of life's meaning:

"It is unrealistic to say that the preservation of life is an absolute, without regard to the quality of life. I make this statement only in the context of a case in which the trial judge has found that there is no chance for amelioration of Nancy's condition. The principal opinion accepts this conclusion. It is appropriate to consider the quality of life in making decisions **[\*\*\*\*134]** about the extraordinary medical treatment. Those who have made decisions about such matters without resort to the courts certainly consider the quality of life, and balance this against the unpleasant consequences to the patient. There is evidence that Nancy may react to pain stimuli. If she has any awareness of her surroundings, her life must be a living hell. She is unable to express herself or to do anything at all to alter her situation. Her parents, who are

her closest relatives, are best able to feel for her and to decide what is best for her. The state should not substitute its decisions for theirs. Nor am I impressed with the crypto-philosophers cited in the principal opinion, who declaim about the sanctity of any life without regard to its quality. They dwell in ivory towers." [Id., at 429.](#)

**[\*338]** Finally, Judge Blackmar concluded that the Missouri policy was illegitimate because it treats life as a theoretical abstraction, severed from, and indeed opposed to, the person of Nancy Cruzan.

"The Cruzan family appropriately came before the court seeking relief. The circuit judge properly found the facts and applied **[\*\*\*\*135]** the law. His factual findings are supported by the record and his legal conclusions by overwhelming weight of authority. The principal opinion attempts to establish absolutes, but does so at the expense of human factors. In so doing it unnecessarily subjects Nancy and those close to her to continuous torture which no family should be forced to endure." [Id., at 429-430.](#)

Although Judge Blackmar did not frame his argument as such, it propounds a sound constitutional objection to the Missouri majority's reasoning: Missouri's regulation is an unreasonable intrusion upon traditionally private matters encompassed within the liberty protected by the Due Process Clause.

The portion of this Court's opinion that considers the merits of this case is similarly unsatisfactory. It, too, fails to respect the best interests of the patient.<sup>9</sup> It, too, relies on what is tantamount to a waiver rationale: The dying patient's best interests are put

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<sup>9</sup> See especially 497 U.S. at 282 ("We think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual"); *ante*, at 282, n.10 (stating that the government is seeking to protect "its own institutional interests" in life).

to one side, and the entire inquiry is focused on her prior expressions [\*\*\*280] of intent.<sup>10</sup> An innocent person's constitutional right to be free from unwanted medical treatment is thereby categorically limited [\*\*\*\*136] to those patients who had the foresight to make an unambiguous [\*\*2883] statement [\*339] of their wishes while competent. The Court's decision affords no protection to children, to young people who are victims of unexpected accidents or illnesses, or to the countless thousands of elderly persons who either fail to decide, or fail to explain, how they want to be treated if they should experience a similar fate. Because Nancy Beth Cruzan did not have the foresight to preserve her constitutional right in a living will, or some comparable "clear and convincing" alternative, her right is gone forever and her fate is in the hands of the state legislature instead of in those of her family, her independent neutral guardian ad litem, and an impartial judge -- all of whom agree on the course of action that is in her best interests. The Court's willingness to find a waiver of this constitutional right reveals a distressing misunderstanding of the importance of individual liberty.

### [\*\*\*\*137] III

It is perhaps predictable that courts might undervalue the liberty at stake here. Because death is so profoundly personal, public reflection upon it is unusual. As this sad case shows, however, such reflection must become more common if we are to deal responsibly with the modern circumstances of death. Medical advances have altered the physiological conditions of death in ways that may be alarming: Highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than as its continuation. But those same advances, and the reorganization of medical care accompanying the new science and technology, have also transformed the political and social conditions of death: People

are less likely to die at home, and more likely to die in relatively public places, such as hospitals or nursing homes.<sup>11</sup>

[\*340] [\*\*\*\*138] [\*\*\*281] Ultimate questions that might once have been dealt with in intimacy by a family and its physician<sup>12</sup> have now become the

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<sup>11</sup> "Until the latter part of this century, medicine had relatively little treatment to offer the dying and the vast majority of persons died at home rather than in the hospital." Brief for American Medical Association et al. as *Amici Curiae* 6. "In 1985, 83% of deaths [of] Americans age 65 or over occurred in a hospital or nursing home. Sager, Easterling, et. al., *Changes in the Location of Death After Passage of Medicare's Prospective Payment System: A National Study*, 320 New Eng. J. Med. 433, 435 (1989)." *Id.*, at 6, n.2.

According to the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

"Just as recent years have seen alterations in the underlying causes of death, the places where people die have also changed. For most of recorded history, deaths (of natural causes) usually occurred in the home.

"'Everyone knew about death at first hand; there was nothing unfamiliar or even queer about the phenomenon. People seem to have known a lot more about the process itself than is the case today. The "deathbed" was a real place, and the dying person usually knew where he was and when it was time to assemble the family and call for the priest.'

"Even when people did get admitted to a medical care institution, those whose conditions proved incurable were discharged to the care of their families. This was not only because the health care system could no longer be helpful, but also because alcohol and opiates (the only drugs available to ease pain and suffering) were available without a prescription. Institutional care was reserved for the poor or those without family support; hospitals often aimed more at saving patients' souls than at providing medical care.

"As medicine has been able to do more for dying patients, their care has increasingly been delivered in institutional settings. By 1949, institutions were the sites of 50% of all deaths; by 1958, the figure was 61%; and by 1977, over 70%. Perhaps 80% of all deaths in the United States now occur in hospitals and long-term care institutions, such as nursing homes. The change in where very ill patients are treated permits health care professionals to marshal the instruments of scientific medicine more effectively. But people who are dying may well find such a setting alienating and unsupportive." Deciding to Forego Life-Sustaining Treatment 17-18 (1983) (footnotes omitted), quoting Thomas, *Dying as Failure*, 447 *Annals Am. Acad. Pol. & Soc. Sci.* 1, 3 (1980).

<sup>12</sup> We have recognized that the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause. See, e. g., [Grisswold](#)

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<sup>10</sup> See, e. g., *ante*, 497 U.S. at 284.

concern of institutions. When the institution is a state hospital, [\*341] as it is in this case, the [\*\*2884] government itself becomes involved.<sup>13</sup> Dying nonetheless remains a part of "the life which characteristically has its place in the home," *Poe v. Ullman*, 367 U.S. 497, 551, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961) (Harlan, J., dissenting). The "integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right," *id.*, at 551-552, and our decisions have demarcated a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166-167, 88 L. Ed. 645, 64 S. Ct. 438 (1944). The physical boundaries of the home, of course, remain crucial guarantors of the life within it. See, e. g., *Payton v. New York*, 445 U.S. 573, 589, 63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980); *Stanley v. Georgia*, 394 U.S. 557, 565, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). Nevertheless, this Court has long [\*\*\*\*139] recognized that the liberty to make the decisions

*v. Connecticut*, 381 U.S. 479, 481, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); *Roe v. Wade*, 410 U.S. 113, 152-153, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986).

<sup>13</sup>The Court recognizes that "the State has been involved as an adversary from the beginning" in this case only because Nancy Cruzan "was a patient at a state hospital when this litigation commenced," 760 S.W.2d at 281, n.9. It seems to me, however, that the Court draws precisely the wrong conclusion from this insight. The Court apparently believes that the absence of the State from the litigation would have created a problem, because agreement among the family and the independent guardian ad litem as to Nancy Cruzan's best interests might have prevented her treatment from becoming the focus of a "truly adversarial" proceeding. *Ibid.* It may reasonably be debated whether some judicial process should be required before life-sustaining treatment is discontinued; this issue has divided the state courts. Compare *In re Estate of Longeway*, 133 Ill. 2d 33, 51, 549 N.E.2d 292, 300, 139 Ill. Dec. 780 (1989) (requiring judicial approval of guardian's decision), with *In re Hamlin*, 102 Wash. 2d 810, 818-819, 689 P.2d 1372, 1377-1378 (1984) (discussing circumstances in which judicial approval is unnecessary). Cf. *In re Conservatorship of Torres*, 357 N.W.2d 332, 341, n.4 (Minn. 1984) ("At oral argument it was disclosed that on an average about 10 life support systems are disconnected weekly in Minnesota"). I tend, however, to agree with Judge Blackmar that the intervention of the State in these proceedings as an adversary is not so much a cure as it is part of the disease.

and choices constitutive of private life is so fundamental to our "concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149 (1937), that those choices must occasionally be afforded more direct protection. [\*342] See, e. g., *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923); *Griswold v. Connecticut*, [\*\*\*\*282] 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772-782, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (STEVENS, J., concurring).

[\*\*\*\*140] [\*\*\*\*141] Respect for these choices has guided our recognition of rights pertaining to bodily integrity. The constitutional decisions identifying those rights, like the common-law tradition upon which they built,<sup>14</sup> are mindful that the "makers of our Constitution . . . recognized the significance of man's spiritual nature." *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting). It may truly be said that "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." 760 S.W.2d at 287 (O'CONNOR, J., concurring). Thus we have construed the Due Process Clause to preclude physically invasive recoveries of evidence not only because such procedures are "brutal" but also because they are "offensive to human dignity." *Rochin v. California*, 342 U.S. 165, 174, 96 L. Ed. 183, 72 S. Ct. 205 [\*\*2885] (1952). We have interpreted the Constitution to interpose barriers to a State's efforts to sterilize some criminals not only because the proposed punishment would do "irreparable injury" to bodily integrity, but because "marriage and procreation" concern "the basic civil

<sup>14</sup>See 497 U.S. at 269, 278. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891).

rights of man." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942). [\*\*\*\*142] The sanctity, and individual privacy, of the human body is obviously fundamental to liberty. "Every violation of a person's bodily integrity is an invasion of his or her liberty." *Washington v. Harper*, 494 U.S. 210, 237, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) (STEVENS, J., concurring in part and dissenting in part). Yet, just as the constitutional protection for the "physical curtilage of the home . . . is surely [\*\*343] . . . a result of solicitude to protect the privacies of the life within," *Poe v. Ullman*, 367 U.S. at 551 (Harlan, J., dissenting), so too the constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein.

[\*\*\*\*143] It is against this background of decisional law, and the constitutional tradition which it illuminates, that the right to be free from unwanted life-sustaining medical treatment must be understood. That right presupposes no abandonment of the desire for life. Nor is it reducible to a protection against batteries undertaken in the name of treatment, or to a guarantee against the infliction of bodily discomfort. Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330 [\*\*\*283] (1934), and indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator. See *Meachum v. Fano*, 427 U.S. 215, 230, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976) (STEVENS, J., dissenting).

The more precise constitutional significance of death is difficult to describe; not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices [\*\*\*\*144] about death to individual conscience. We may also,

however, justly assume that death is not life's simple opposite, or its necessary terminus,<sup>15</sup> but rather its completion. Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance. It may, in fact, be impossible to live for anything without being prepared to die for something. Certainly there was no disdain for life in Nathan Hale's most famous declaration or in Patrick Henry's; [\*\*344] their words instead bespeak a passion for life that forever preserves their own lives in the memories of their countrymen.<sup>16</sup> From such "honored dead we take increased devotion to that cause for which they gave the last full measure of devotion."<sup>17</sup>

[\*\*\*\*145] These considerations cast into stark relief the injustice, and unconstitutionality, of Missouri's treatment of Nancy Beth Cruzan. Nancy Cruzan's death, when it comes, cannot be an historic act of heroism; it will inevitably be the consequence of her tragic accident. But Nancy Cruzan's interest in life, no less than that of any other person, includes an interest in how she will be thought of after her death by those whose opinions mattered [\*\*2886] to her. There can be no doubt that her life made her dear to her family and to others. How she dies will affect how that life is remembered. The trial court's order authorizing Nancy's parents to cease their daughter's treatment would have permitted the family that cares for Nancy to bring to a close her tragedy and her death. Missouri's objection to that order subordinates Nancy's body, her family, and the lasting significance of her life to the State's own interests. The decision we review thereby interferes with

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<sup>15</sup> Many philosophies and religions have, for example, long venerated the idea that there is a "life after death," and that the human soul endures even after the human body has perished. Surely Missouri would not wish to define its interest in life in a way antithetical to this tradition.

<sup>16</sup> See, e. g., H. Johnston, Nathan Hale 1776: Biography and Memorials 128-129 (1914); J. Axelrad, Patrick Henry: The Voice of Freedom 110-111 (1947).

<sup>17</sup> A. Lincoln, Gettysburg Address, 1 Documents of American History 429 (H. Commager ed.) (9th ed. 1973).

constitutional interests of the highest [\*\*\*\*146] order.

To be constitutionally permissible, Missouri's intrusion upon these fundamental liberties must, at a minimum, bear a reasonable relationship to a legitimate state end. See, e. g., [Meyer v. Nebraska](#), 262 U.S. at 400; [Doe v. Bolton](#), 410 U.S. 179, 194-195, 199, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973). Missouri asserts that its policy is related to a state interest in the protection of life. In my view, however, it is an effort to define life, rather than to protect it, that is the heart of Missouri's policy. Missouri insists, without regard to Nancy Cruzan's own interests, upon [\*345] equating [\*\*\*284] her life with the biological persistence of her bodily functions. Nancy Cruzan, it must be remembered, is not now simply incompetent. She is in a persistent vegetative state and has been so for seven years. The trial court found, and no party contested, that Nancy has no possibility of recovery and no consciousness.

It seems to me that the Court errs insofar as it characterizes this case as involving "judgments about the 'quality' of life that a particular individual may enjoy," 497 U.S. at 282. Nancy Cruzan is obviously "alive" in a [\*\*\*\*147] physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is "life" as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.

<sup>18</sup> The State's unflagging determination to

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<sup>18</sup>The Supreme Judicial Court of Massachusetts observed in this connection: "When we balance the State's interest in prolonging a patient's life against the rights of the patient to reject such prolongation, we must recognize that the State's interest in life encompasses a broader interest than mere corporeal existence. In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve." [Brophy v. New England Sinai Hospital, Inc.](#), 398 Mass. 417, 433-434, 497 N.E.2d 626, 635 (1986). The *Brophy* court then stressed that this reflection upon the nature of the State's interest in life was distinguishable from any considerations related to the quality of a particular patient's life, considerations which the court

perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity.

[\*\*\*\*148] This much should be clear from the oddity of Missouri's definition alone. Life, particularly human life, is not commonly thought of as a merely physiological condition or function.<sup>19</sup> [\*\*\*\*149] [\*346] Its sanctity is often thought to [\*\*2887] derive from the impossibility of any such reduction. When people speak of life, they often mean to describe the experiences that comprise a person's history, as when it [\*\*\*285] is said that somebody "led a good life."<sup>20</sup> They may also mean to refer to the practical manifestation of

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regarded as irrelevant to its inquiry. See also [In re Eichner](#), 73 A.D.2d 431, 465, 426 N.Y.S.2d 517, 543 (1980) (A patient in a persistent vegetative state "has no health, and, in the true sense, no life, for the State to protect"), modified in [In re Storar](#), 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

<sup>19</sup>One learned observer suggests, in the course of discussing persistent vegetative states, that "few of us would accept the preservation of such a reduced level of function as a proper *goal* for medicine, even though we sadly accept it as an unfortunate and unforeseen *result* of treatment that had higher aspirations, and even if we refuse actively to cause such vegetative life to cease." L. Kass, *Toward a More Natural Science* 203 (1985). This assessment may be controversial. Nevertheless, I again tend to agree with Judge Blackmar, who in his dissent from the Missouri Supreme Court's decision contended that it would be unreasonable for the State to assume that most people *did* in fact hold a view contrary to the one described by Dr. Kass.

My view is further buttressed by the comments of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

"The primary basis for medical treatment of patients is the prospect that each individual's interests (specifically, the interest in well-being) will be promoted. Thus, treatment ordinarily aims to benefit a patient through preserving life, relieving pain and suffering, protecting against disability, and returning maximally effective functioning. If a prognosis of permanent unconsciousness is correct, however, continued treatment cannot confer such benefits. Pain and suffering are absent, as are joy, satisfaction, and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible." *Deciding to Forego Life-Sustaining Treatment* 181-182 (1983).

<sup>20</sup>It is this sense of the word that explains its use to describe a biography: for example, Boswell's *Life of Johnson* or Beveridge's *The Life of John Marshall*. The reader of a book so titled would be surprised to find that it contained a compilation of biological data.

the human spirit, a meaning captured by the familiar observation that somebody "added life" to an assembly. If there is a shared thread among the various opinions on this subject, it may be that life is an activity which is at once the matrix for, and an integration of, a person's interests. In [\*347] any event, absent some theological abstraction, the idea of life is not conceived separately from the idea of a living person. Yet, it is by precisely such a separation that Missouri asserts an interest in Nancy Cruzan's life in opposition to Nancy Cruzan's own interests. The resulting definition is uncommon indeed.

The laws punishing homicide, upon which the Court relies, 497 U.S. at 280, do not support a contrary inference. Obviously, such laws protect both the life *and* interests of those who would otherwise be victims. Even laws against suicide presuppose that those inclined to take their own lives have *some* interest in living, and, indeed, that the depressed people whose lives are preserved may later be thankful for the State's intervention. Likewise, decisions that address the "quality of life" of incompetent, but conscious, patients rest upon the recognition that these patients have *some* interest in continuing their lives, even if that interest pales in some eyes when measured against interests in dignity or comfort. Not so here. Contrary to the Court's suggestion, Missouri's protection of life in a form abstracted [\*\*\*\*150] from the living is not commonplace; it is aberrant.

Nor does Missouri's treatment of Nancy Cruzan find precedent in the various state-law cases surveyed by the majority. Despite the Court's assertion that state courts have demonstrated "both similarity and diversity in their approaches" to the issue before us, *none* of the decisions surveyed by the Court interposed an absolute bar to the termination of treatment for a patient in a persistent vegetative state. For example, *In re Westchester County Medical Center on behalf of O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988), pertained to an incompetent patient who "was not in a coma or vegetative state. She was

conscious, and capable of responding to simple questions or requests sometimes by squeezing the questioner's hand and sometimes verbally." [\*348] *Id.*, at 524-525, 531 N.E.2d at 609-610. Likewise, *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981), involved a conscious patient who was incompetent because "profoundly retarded with a mental age of about 18 months." *Id.*, at 373, 420 N.E.2d at 68. [\*\*\*\*151] When it decided *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985), the New Jersey Supreme Court noted that "Ms. Conroy was not brain dead, comatose, or in a chronic vegetative state," 98 N.J. at 337, 486 A.2d at 1217, and then distinguished *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), on the ground that Karen Quinlan had been in a "persistent vegetative or comatose state." 98 N.J. at 358-359, 486 A.2d at 1228. By contrast, an unbroken stream of cases has authorized procedures for the cessation of treatment of patients in [\*\*2888] persistent [\*\*\*\*286] vegetative states.<sup>21</sup> Considered [\*349] against the

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<sup>21</sup> See, e. g., *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N.E.2d 292, 139 Ill. Dec. 780 (1989) (authorizing removal of a gastrostomy tube from a permanently unconscious patient after judicial approval is obtained); *McConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 705, 553 A.2d 596, 603 (1989) (authorizing, pursuant to statute, removal of a gastrostomy tube from patient in a persistent vegetative state, where patient had previously expressed a wish not to have treatment sustained); *Gray v. Romeo*, 697 F. Supp. 580 (RI 1988) (authorizing removal of a feeding tube from a patient in a persistent vegetative state); *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987) (en banc) (authorizing procedures for the removal of a feeding tube from a patient in a persistent vegetative state); *In re Gardner*, 534 A.2d 947 (Me. 1987) (allowing discontinuation of life-sustaining procedures for a patient in a persistent vegetative state); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987) (authorizing procedures for cessation of treatment to elderly nursing home patient in a persistent vegetative state); *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987) (authorizing procedures for cessation of treatment to nonelderly patient determined by "clear and convincing" evidence to be in a persistent vegetative state); *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986) (permitting removal of a feeding tube from a patient in a persistent vegetative state); *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984) (holding that court approval was not needed to authorize cessation of life-support for patient in a persistent vegetative state who had executed a living will); *In re Conservatorship of Torres*, 357 N.W.2d 332 (Minn. 1984) (authorizing removal of a permanently unconscious patient from life-support systems); *In re L. H. R.*, 253 Ga. 439, 321 S.E.2d

background of other cases involving patients in persistent vegetative states, instead of against the broader -- and inapt -- category of cases involving chronically ill incompetent patients, Missouri's decision is anomalous.

[\*350] [\*\*\*\*152] In short, there is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the [\*\*\*287] State has decided is her life. As I

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[716 \(1984\)](#) (allowing parents to terminate life support for infant in a chronic vegetative state); [In re Hamlin, 102 Wash. 2d 810, 689 P.2d 1372 \(1984\)](#) (allowing termination, without judicial intervention, of life support for patient in a vegetative state if doctors and guardian concur; conflicts among doctors and the guardian with respect to cessation of treatment are to be resolved by a trial court); [In re Colyer, 99 Wash. 2d 114, 660 P.2d 738 \(1983\)](#), modified on other grounds, [In re Hamlin, 102 Wash. 2d 810, 689 P.2d 1372 \(1984\)](#) (allowing court-appointed guardian to authorize cessation of treatment of patient in persistent vegetative state); [In re Eichner](#) (decided with [In re Storar](#)), [52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266](#) (authorizing the removal of a patient in a persistent vegetative state from a respirator), cert. denied, [454 U.S. 858 \(1981\)](#); [In re Quinlan, 70 N.J. 10, 355 A.2d 647](#) (authorizing, on constitutional grounds, the removal of a patient in a persistent vegetative state from a respirator), cert. denied, [429 U.S. 922 \(1976\)](#); [Corbett v. D'Alessandro, 487 So. 2d 368 \(Fla. App. 1986\)](#) (authorizing removal of nasogastric feeding tube from patient in persistent vegetative state); [In re Conservatorship of Drabick, 200 Cal. App. 3d 185, 218, 245 Cal. Rptr. 840, 861 \(1988\)](#) ("Life sustaining treatment is not 'necessary' under Probate Code section 2355 if it offers no reasonable possibility of returning the conservatee to cognitive life and if it is not otherwise in the conservatee's best interests, as determined by the conservator in good faith") (footnote omitted); [Delio v. Westchester County Medical Center, 129 A.D.2d 1, 516 N.Y.S.2d 677 \(1987\)](#) (authorizing discontinuation of artificial feeding for a 33-year-old patient in a persistent vegetative state); [Leach v. Akron General Medical Center, 68 Ohio Misc. 1, 426 N.E.2d 809 \(1980\)](#) (authorizing removal of a patient in a persistent vegetative state from a respirator); [In re Severns, 425 A.2d 156 \(Del. Ch. 1980\)](#) (authorizing discontinuation of all medical support measures for a patient in a "virtual vegetative state").

These cases are not the only ones which have allowed the cessation of life-sustaining treatment to incompetent patients. See, e. g., [Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 \(1977\)](#) (holding that treatment could have been withheld from a profoundly mentally retarded patient); [Bouvia v. Superior Court of Los Angeles County, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 \(1986\)](#) (allowing removal of lifesaving nasogastric tube from competent, highly intelligent patient who was in extreme pain).

have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life. See [Webster v. Reproductive Health Services, 492 U.S. 490, 566-572, 106 L. Ed. 2d 410, 109 S. Ct. 3040 \[\\*\\*\\*2889\] \(1989\)](#) (STEVENS, J., dissenting).

My disagreement with the Court is thus unrelated to its endorsement of the clear and convincing standard of proof for cases of this kind. Indeed, I agree that the controlling facts must be established with unmistakable clarity. The critical question, however, is not how to prove the controlling facts but rather what proven facts should be controlling. In my view, the constitutional answer is clear: The best interests of the individual, especially when buttressed by the [\*\*\*\*153] interests of all related third parties, must prevail over any general state policy that simply ignores those interests.<sup>22</sup> Indeed, the only apparent *secular* basis for the State's interest in life is the policy's persuasive impact upon people other than Nancy and her family. Yet, "although the State may properly perform a teaching function," and although that teaching may foster respect for the sanctity of life, the State may not pursue its project by infringing constitutionally protected interests [\*351] for "symbolic effect." [Carey v. Population Services International, 431 U.S. 678, 715, 52 L. Ed. 2d 675, 97 S. Ct. 2010 \(1977\)](#) (STEVENS, J., concurring in part and concurring in judgment). The failure of Missouri's policy to heed the interests of a dying individual with respect to matters so private is ample evidence

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<sup>22</sup> Although my reasoning entails the conclusion that the best interests of the incompetent patient must be respected even when the patient is conscious, rather than in a vegetative state, considerations pertaining to the "quality of life," in addition to considerations about the definition of life, might then be relevant. The State's interest in protecting the life, and thereby the interests, of the incompetent patient would accordingly be more forceful, and the constitutional questions would be correspondingly complicated.

of the policy's illegitimacy.

**[\*\*\*\*154]** Only because Missouri has arrogated to itself the power to define life, and only because the Court permits this usurpation, are Nancy Cruzan's life and liberty put into disquieting conflict. If Nancy Cruzan's life were defined by reference to her own interests, so that her life expired when her biological existence ceased serving *any* of her own interests, then her constitutionally protected interest in freedom from unwanted treatment would not come into conflict with her constitutionally protected interest in life. Conversely, if there were *any* evidence that Nancy Cruzan herself defined life to encompass every form of biological persistence by a human being, so that the continuation of treatment would serve Nancy's own liberty, then once again there would be no conflict between life and liberty. The opposition of life and liberty in this case are thus not the result of Nancy Cruzan's tragic accident, but are instead the artificial consequence of Missouri's effort, and this Court's willingness, to abstract Nancy Cruzan's life from Nancy Cruzan's person.

#### **[\*\*\*288]** IV

Both this Court's majority and the state court's majority express great deference to the policy choice made by the **[\*\*\*\*155]** state legislature.<sup>23</sup> That deference is, in my view, based **[\*352]** upon a severe error in the Court's constitutional logic. The Court believes that the liberty interest claimed here on behalf of Nancy Cruzan is peculiarly

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<sup>23</sup> Thus, the state court wrote:

"This State has expressed a strong policy favoring life. We believe that policy dictates that we err on the side of preserving life. If there is to be a change in that policy, it must come from the people through their elected representatives. Broad policy questions bearing on life and death issues are more properly addressed by representative assemblies. These have vast fact and opinion gathering and synthesizing powers unavailable to courts; the exercise of these powers is particularly appropriate where issues invoke the concerns of medicine, ethics, morality, philosophy, theology and law. Assuming change is appropriate, this issue demands a comprehensive resolution which courts cannot provide." [760 S.W.2d at 426](#).

problematic because "an incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment **[\*\*2890]** or any other right." 497 U.S. at 280. The impossibility of such an exercise affords the State, according to the Court, some discretion to interpose "a procedural requirement" that effectively compels the continuation of Nancy Cruzan's treatment.

**[\*\*\*\*156]** There is, however, nothing "hypothetical" about Nancy Cruzan's constitutionally protected interest in freedom from unwanted treatment, and the difficulties involved in ascertaining what her interests are do not in any way justify the State's decision to oppose her interests with its own. As this case comes to us, the crucial question -- and the question addressed by the Court -- is not what Nancy Cruzan's interests are, but whether the State must give effect to them. There is certainly nothing novel about the practice of permitting a next friend to assert constitutional rights on behalf of an incompetent patient who is unable to do so. See, e. g., [Youngberg v. Romeo](#), 457 U.S. 307, 310, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982); [Whitmore v. Arkansas](#), 495 U.S. 149, 161-164, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990). Thus, if Nancy Cruzan's incapacity to "exercise" her rights is to alter the balance between her interests and the State's, there must be some further explanation of how it does so. The Court offers two possibilities, neither of them satisfactory.

The first possibility is that the State's policy favoring life is by its nature less intrusive upon the patient's interest **[\*\*\*\*157]** than any alternative. The Court suggests that Missouri's policy "results in a maintenance of the status quo," and is subject to reversal, while a decision to terminate treatment "is not susceptible **[\*353]** of correction" because death is irreversible. 497 U.S. at 283. Yet, this explanation begs the question, for it assumes either that the State's policy is consistent with Nancy Cruzan's own interests, or that no damage is done by ignoring her interests. The first assumption is without basis in the record of this case, and would obviate any need for the State to rely, as it does,

upon its own interests rather than upon the patient's. The second assumption is unconscionable. Insofar as Nancy Cruzan has an interest in being remembered for how she lived rather than how she died, the damage done to those memories by the [\*\*\*289] prolongation of her death is irreversible. Insofar as Nancy Cruzan has an interest in the cessation of any pain, the continuation of her pain is irreversible. Insofar as Nancy Cruzan has an interest in a closure to her life consistent with her own beliefs rather than those of the Missouri Legislature, the State's imposition of its contrary view is irreversible. [\*\*\*\*158] To deny the importance of these consequences is in effect to deny that Nancy Cruzan has interests at all, and thereby to deny her personhood in the name of preserving the sanctity of her life.

The second possibility is that the State must be allowed to define the interests of incompetent patients with respect to life-sustaining treatment because there is no procedure capable of determining what those interests are in any particular case. The Court points out various possible "abuses" and inaccuracies that may affect procedures authorizing the termination of treatment. See *ante*, at 281-282. The Court correctly notes that in some cases there may be a conflict between the interests of an incompetent patient and the interests of members of his or her family. A State's procedures must guard against the risk that the survivors' interests are not mistaken for the patient's. Yet, the appointment of the neutral guardian ad litem, coupled with the searching inquiry conducted by the trial judge and the imposition of the clear and convincing standard of proof, all effectively avoided that risk in this case. Why such procedural safeguards should not [\*354] be adequate to avoid a [\*\*\*\*159] similar risk in other cases is a question the Court simply ignores.

Indeed, to argue that the mere possibility of error in *any* case suffices to allow the State's interests to override the particular interests of incompetent individuals in *every* case, or to argue that the

interests of such individuals are unknowable and therefore [\*\*2891] may be subordinated to the State's concerns, is once again to deny Nancy Cruzan's personhood. The meaning of respect for her personhood, and for that of others who are gravely ill and incapacitated, is, admittedly, not easily defined: Choices about life and death are profound ones, not susceptible of resolution by recourse to medical or legal rules. It may be that the best we can do is to ensure that these choices are made by those who will care enough about the patient to investigate his or her interests with particularity and caution. The Court seems to recognize as much when it cautions against formulating any general or inflexible rule to govern all the cases that might arise in this area of the law. *Ante*, 497 U.S. at 277-278. The Court's deference to the legislature is, however, itself an inflexible rule, one that the Court is willing to apply [\*\*\*\*160] in this case even though the Court's principal grounds for deferring to Missouri's Legislature are hypothetical circumstances not relevant to Nancy Cruzan's interests.

On either explanation, then, the Court's deference seems ultimately to derive from the premise that chronically incompetent persons have no constitutionally cognizable interests at all, and so are not persons within the meaning of the Constitution. Deference of this sort is patently unconstitutional. It is also dangerous in ways that may not be immediately apparent. Today the State of Missouri has announced its intent to spend several hundred [\*\*\*290] thousand dollars in preserving the life of Nancy Beth Cruzan in order to vindicate its general policy favoring the preservation of human life. Tomorrow, another State equally eager to champion an interest in the "quality of life" might favor a policy designed to ensure quick [\*355] and comfortable deaths by denying treatment to categories of marginally hopeless cases. If the State in fact has an interest in defining life, and if the State's policy with respect to the termination of life-sustaining treatment commands deference from the judiciary, it is unclear how any resulting [\*\*\*\*161] conflict

between the best interests of the individual and the general policy of the State would be resolved.<sup>24</sup> I believe the Constitution requires that the individual's vital interest in liberty should prevail over the general policy in that case, just as in this.

That a contrary result is readily imaginable under the majority's theory makes manifest that [\*\*\*\*162] this Court cannot defer to any state policy that drives a theoretical wedge between a person's life, on the one hand, and that person's liberty or happiness, on the other.<sup>25</sup> The consequence of such a theory [\*356] is to deny the personhood of those whose lives are defined by the State's interests [\*\*2892] rather than their own. This consequence may be acceptable in theology or in speculative philosophy, see *Meyer*, 262 U.S. at 401-402, but it is radically inconsistent with the foundation of all legitimate government. Our Constitution presupposes a respect for the

personhood of every individual, and nowhere is strict adherence to that principle more essential than in the judicial branch. See, e. g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 781-782 (STEVENS, J., concurring).

[\*\*\*\*163] V

In this case, as is no doubt true in many others, the predicament confronted by the healthy members of the Cruzan family merely adds emphasis to the best interests finding [\*\*\*291] made by the trial judge. Each of us has an interest in the kind of memories that will survive after death. To that end, individual decisions are often motivated by their impact on others. A member of the kind of family identified in the trial court's findings in this case would likely have not only a normal interest in minimizing the burden that her own illness imposes on others, but also an interest in having their memories of her filled predominantly with thoughts about her past vitality rather than her current condition. The meaning and completion of her life should be controlled by persons who have her best interests at heart -- not by a state legislature concerned only with the "preservation of human life."

The Cruzan family's continuing concern provides a concrete reminder that Nancy Cruzan's interests did not disappear with her vitality or her consciousness. However commendable may be the State's interest in human life, it cannot pursue that interest by appropriating Nancy Cruzan's life as a symbol [\*\*\*\*164] for its own purposes. Lives do not exist in abstraction [\*357] from persons, and to pretend otherwise is not to honor but to desecrate the State's responsibility for protecting life. A State that seeks to demonstrate its commitment to life may do so by aiding those who are actively struggling for life and health. In this endeavor, unfortunately, no State can lack for opportunities: There can be no need to make an example of tragic cases like that of Nancy Cruzan.

I respectfully dissent.

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<sup>24</sup>The Supreme Judicial Court of Massachusetts anticipated this possibility in its *Brophy* decision, where it observed that the "duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity," because otherwise the State's defense of life would be tantamount to an effort by "the State to make decisions regarding the individual's quality of life." 398 Mass. at 434, 497 N.E.2d at 635. Accord, *Gray v. Romeo*, 697 F. Supp. at 588.

<sup>25</sup>Judge Campbell said on behalf of the Florida District Court of Appeal for the Second District:

"We want to acknowledge that we began our deliberations in this matter, as did those who drafted our Declaration of Independence, with the solemnity and the gratefulness of the knowledge 'that all men are . . . endowed by their Creator with . . . Life.' It was not without considerable searching of our hearts, souls, and minds, as well as the jurisprudence of this great Land that we have reached our conclusions. We forcefully affirm that Life having been endowed by our Creator should not be lightly taken nor relinquished. We recognize, however, that we are also endowed with a certain amount of dignity and the right to the 'Pursuit of Happiness.' When, therefore, it may be determined by reason of the advanced scientific and medical technologies of this day that Life has, through causes beyond our control, reached the unconscious and vegetative state where all that remains is the forced function of the body's vital functions, including the artificial sustenance of the body itself, then we recognize the right to allow the natural consequence of the removal of those artificial life sustaining measures." *Corbett v. D'Alessandro*, 487 So. 2d at 371.

## References

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22A Am Jur 2d, Death 632, 633, 635, 636, 650, 655; 30 Am Jur 2d, Evidence 1167

USCS, [Constitution, Amendment 14](#)

US L Ed Digest, Constitutional Law 830.7; Evidence 918

Index to Annotations, Euthanasia and Right to Die; Incompetent and Insane Persons; Medical Care and Treatment; Presumptions and Burden of Proof; States

### Annotation References:

Supreme Court's views as to concept of "liberty" under [due process clauses of Fifth](#) and [Fourteenth Amendments](#). 47 L Ed 2d 975.

Tortious maintenance or removal of life supports. [58 ALR4th 222](#).

Judicial power to order [\*\*\*\*165] discontinuance of life-sustaining treatment. [48 ALR4th 67](#).

Homicide: physician's withdrawal of life supports from comatose patient. [47 ALR4th 18](#).

Patient's right to refuse treatment allegedly necessary to sustain life. [93 ALR3d 67](#).

Power of courts or other public agencies, in the absence of statutory authority, to order compulsory medical care for adult. [9 ALR3d 1391](#).



Caution

As of: October 18, 2026 6:38 AM Z

## *Dep't of State v. Muñoz*

Supreme Court of the United States

April 23, 2024, Argued; June 21, 2024, Decided

No. 23-334.

### Reporter

602 U.S. 899 \*; 144 S. Ct. 1812 \*\*; 219 L. Ed. 2d 507 \*\*\*; 2024 U.S. LEXIS 2716 \*\*\*\*; 2024 LX 189242; 2024 WL 3074425

DEPARTMENT OF STATE, ET AL.,  
PETITIONERS v. SANDRA MUÑOZ, ET AL.

**Notice:** The pagination of this document is subject to change pending release of the final published version.

**Subsequent History:** As Revised June 21, 2024.

**Prior History:** [\*\*\*\*1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[\*Muñoz v. United States Dep't of State\*, 50 F.4th 906, 2022 U.S. App. LEXIS 27801, 2022 WL 5089771 \(9th Cir. Cal., Oct. 5, 2022\)](#)

**Disposition:** [50 F. 4th 906](#), reversed and remanded.

### Core Terms

noncitizen, visa, spouse, marriage, immigrate, consular, constitutional right, marry, consular officer, alien, fundamental rights, inadmissibility, the, due process right, due process, husband's, liberty interest, facially, couple, citizen's, bona fide, consulate, inspect, interview, gang, factual basis, longstanding, plurality, trigger, officer's

### Case Summary

### Overview

**HOLDINGS:** [1]-Per the [Due Process Clause of the Fifth Amendment](#), a U.S. citizen did not have a fundamental liberty interest in her noncitizen spouse being admitted to the country as the right to bring a noncitizen spouse to the United States was not deeply rooted in the Nation's history and tradition. On the contrary, the through line of history was recognition of the Government's sovereign authority to set the terms governing the admission and exclusion of noncitizens, and the citizen asserting the right pointed to no subsidiary tradition that curbed that authority in the case of noncitizen spouses; [2]-Whatever else it may have stood for, Mandel did not hold that a citizen's independent constitutional right grace that citizen a procedural due process right to a facially legitimate and bona fide reason for why someone else's visa was denied.

### Outcome

Judgment reversed and remanded. 6-3 decision; 1 concurrence, 1 dissent.

### LexisNexis® Headnotes

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Evidence > Burdens of Proof > Allocation

[HN1](#) Privacy, Personal Decisions

To establish the premise that a right is an unenumerated constitutional right, the proponent must show that the asserted right is deeply rooted in the Nation's history and tradition.

Immigration Law > Admission of Immigrants & Nonimmigrants > Numerical Limitations on Immigration > Administrative Proceedings

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility & Issuance > Consular Processing

## **HN2 Numerical Limitations on Immigration, Administrative Proceedings**

For more than a century, the U.S. Supreme Court has recognized that the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the government's political departments largely immune from judicial control. Congress may delegate to executive officials the discretionary authority to admit noncitizens immune from judicial inquiry or interference. When it does so, the action of an executive officer to admit or to exclude an alien is final and conclusive. The Judicial Branch has no role to play unless expressly authorized by law. The Immigration and Nationality Act does not authorize judicial review of a consular officer's denial of a visa; thus, as a rule, the federal courts cannot review those decisions. This principle is known as the doctrine of consular nonreviewability.

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility & Issuance > Consular Processing

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility & Issuance > Judicial Review

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility &

Issuance > Visa Application Denials

## **HN3 Visa Eligibility & Issuance, Consular Processing**

The U.S. Supreme Court has assumed that a narrow exception to the doctrine of consular nonreviewability bar exists when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen. In that event, the Court has considered whether the Executive gave a facially legitimate and bona fide reason for denying the visa. If so, the inquiry is at an end; the Court has disclaimed the authority to look behind the exercise of that discretion, much less to balance the reason given against the asserted constitutional right.

Constitutional Law > Substantive Due Process > Scope

Immigration Law > Admission of Immigrants & Nonimmigrants > Numerical Limitations on Immigration > Preferences & Priorities

## **HN4 Constitutional Law, Substantive Due Process**

A citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

## **HN5 Constitutional Law, Substantive Due Process**

The [Due Process Clause of the Fifth Amendment](#) requires the Government to provide due process of law before it deprives someone of life, liberty, or property. Under judicial precedent, the Clause

promises more than fair process: It also provides heightened protection against government interference with certain fundamental rights and liberty interests. When a fundamental right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest. Identifying unenumerated rights carries a serious risk of judicial overreach, so the U.S. Supreme Court exercises the utmost care whenever it is asked to break new ground in this field. To that end, Glucksberg's two-step inquiry disciplines the substantive due process analysis. First, it insists on a careful description of the asserted fundamental liberty interest. Second, it stresses that the Due Process Clause specially protects only those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition.

Immigration Law > Constitutional  
Foundations > Power to Exclude

Immigration Law > Admission of Immigrants  
& Nonimmigrants > Numerical Limitations on  
Immigration > Preferences & Priorities

#### **HN6 Constitutional Foundations, Power to Exclude**

The Knauff decision reaffirmed the longstanding principle that the United States can, as a matter of public policy forbid aliens or classes of aliens from coming within their borders, and no limits can be put by the courts upon that power. Congress's authority to formulate policies concerning the entry of noncitizens has become about as firmly imbedded in the legislative and judicial tissues of the body politic as any aspect of the government, representing not merely a page of history, but a whole volume. The U.S. Supreme Court's general reaffirmations of this principle have been legion. While families of putative immigrants certainly have an interest in their admission, it is a fallacy to leap from that premise to the conclusion that United States citizens have a fundamental right that can

limit how Congress exercises the Nation's sovereign power to admit or exclude foreigners.

Constitutional Law > Substantive Due  
Process > Scope

Immigration Law > Constitutional  
Foundations > Power to Exclude

Immigration Law > Admission of Immigrants  
& Nonimmigrants > Numerical Limitations on  
Immigration > Preferences & Priorities

#### **HN7 Constitutional Law, Substantive Due Process**

While Congress may show special solicitude to noncitizen spouses, such solicitude is a matter of legislative grace rather than fundamental right.

Constitutional Law > Substantive Due  
Process > Scope

Immigration Law > Constitutional  
Foundations > Due Process

Constitutional Law > ... > Fundamental  
Rights > Procedural Due Process > Scope of  
Protection

Immigration Law > Admission of Immigrants  
& Nonimmigrants > Visa Eligibility &  
Issuance > Judicial Review

#### **HN8 Constitutional Law, Substantive Due Process**

Mandel does not hold that citizens have procedural due process rights in the visa proceedings of others.

Constitutional Law > Substantive Due  
Process > Scope

Immigration Law > Constitutional

Foundations > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility & Issuance > Issuance of Visas

## **HN9 Constitutional Law, Substantive Due Process**

Whatever else it may stand for, *Mandel* does not hold that a citizen's independent constitutional right (say, a free speech claim) gives that citizen a procedural due process right to a facially legitimate and bona fide reason for why someone else's visa was denied.

## **Syllabus**

[\*899] [\*\*1814] Respondent Sandra Muñoz is an American citizen. In 2010, she married [\*\*1815] Luis Asencio-Cordero, a citizen of El Salvador. The couple eventually sought to obtain an immigrant visa for Asencio-Cordero so that they could live together in the United States. Muñoz filed a petition with U. S. Citizenship and Immigration Services to have Asencio-Cordero classified as an immediate relative. See [8 U. S. C. §§1151\(b\)\(2\)\(A\)\(i\), 1154\(a\)\(1\)\(A\)](#). USCIS granted Muñoz's petition, and Asencio-Cordero traveled to the consulate in San Salvador to apply for a visa. See [§§1154\(b\), 1202](#). After conducting several interviews with Asencio-Cordero, a consular officer denied his application, citing [§1182\(a\)\(3\)\(A\)\(ii\)](#), a provision that renders inadmissible a noncitizen whom the officer "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in" certain specified offenses or "any other unlawful activity."

Asencio-Cordero guessed that he was denied a visa

based on a finding that he was a member of MS-13, a transnational criminal gang. So he disavowed any gang membership, and he and Muñoz pressed the consulate to reconsider [\*\*\*\*2] the officer's finding. When the consulate refused, they appealed to the Department of State, which agreed with the consulate's determination. Asencio-Cordero and Muñoz then sued the Department of State and others (collectively, State Department), claiming that it had abridged Muñoz's constitutional liberty interest in her husband's visa application by failing to give a sufficient reason why Asencio-Cordero is inadmissible under the "unlawful activity" bar. The District Court granted summary judgment to the State Department, but the Ninth Circuit vacated the judgment, holding that Muñoz had a constitutionally protected liberty interest in her husband's visa application. Because of that interest, the court said, the [Due Process Clause](#) required the State Department to give Muñoz a reason for denying her husband's visa. The court further held that by declining to give Muñoz more information earlier in the process, the State Department had forfeited its entitlement to insulate its decision from judicial review under the doctrine of consular nonreviewability.

*Held:* A citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country. Pp. 907-919.

[\*900] (a) Under the doctrine [\*\*\*\*3] of consular nonreviewability, an executive officer's decision "to admit or to exclude an alien" "is final and conclusive," [United States ex rel. Knauff v. Shaughnessy](#), 338 U. S. 537, 547, 70 S. Ct. 309, 94 L. Ed. 317, and not subject to judicial review in federal court. This Court has assumed a narrow exception in cases "when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen." [Trump v. Hawaii](#), 585 U. S. 667, 703, 138 S. Ct. 2392, 201 L. Ed. 2d 775. In that event, the Court has considered whether the executive official gave a "facially legitimate and bona fide reason" for denying the visa. [Kerry v. Din](#), 576 U. S. 86, 103-104, 135 S. Ct. 2128, 192 L. Ed. 2d 183.

Asencio-Cordero cannot invoke the exception himself, thus Muñoz must assert that the denial of her husband's visa violated *her* constitutional rights, thereby enabling judicial review. She argues that the State Department abridged her fundamental right to live with her spouse in her country of citizenship without affording her due process. Pp. 907-908.

(b) Among other things, the *Due Process Clause* “provides heightened protection [**\*\*1816**] against government interference with certain fundamental rights and liberty interests.” *Washington v. Glucksberg*, 521 U. S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772. When a fundamental right is at stake, the government can act only by narrowly tailored means that serve a compelling state interest. To identify an unenumerated right, the Court follows the two-step inquiry in *Glucksberg*. That inquiry [**\*\*\*\*4**] first insists on a “careful description of the asserted fundamental liberty interest.” *Id.*, at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (internal quotation marks omitted). Second, the inquiry stresses that “the *Due Process Clause* specially protects” only “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.” *Id.*, at 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (same).

Here, Muñoz invokes the “fundamental right to marriage,” but she actually claims something more distinct: the right to *reside with her noncitizen spouse in the United States*. That involves more than marriage and more than spousal cohabitation—it includes the right to have her noncitizen husband enter (and remain in) the United States. As Muñoz asserts it, she claims “a marital right . . . sufficiently important that it cannot be unduly burdened without procedural due process as to an inadmissibility finding that would block her from residing with her spouse in her country of citizenship.” Brief for Respondent 19, n. 10. So described, the asserted right is fundamental enough to be implicit in “liberty;” but, unlike other

implied fundamental rights, its deprivation does not trigger strict scrutiny.

Because Muñoz cannot clear the second step of *Glucksberg*, the Court need not [**\*\*\*\*5**] decide whether such a category of implied rights protected by the *Due Process Clause* exists. *Glucksberg* requires a demonstration that the asserted right be “deeply rooted in this Nation’s history and [**\*901**] tradition.” 521 U. S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772. This Nation’s history and tradition recognizes the Government’s sovereign authority to set the terms governing the admission and exclusion of noncitizens, and Muñoz points to no subsidiary tradition that curbs this authority in the case of noncitizen spouses.

From this Nation’s beginnings, the admission of noncitizens into the country was characterized as “of favor [and] not of right.” J. Madison, Report of 1800. And when Congress began to restrict immigration in the late 19th century, the laws it enacted provided no exceptions for citizens’ spouses. See, e.g., *Page Act of 1875*, 18 Stat. 477-478; *Immigration Act of 1882*, 22 Stat. 214; *Immigration Act of 1891*, 26 Stat. 1084. And while Congress has, on occasion, extended special immigration treatment to marriage, see, e.g., *War Brides Act of 1945*, 59 Stat. 659, it has never made spousal immigration a matter of right.

This Court has not interfered with such policy choices, despite their interference with the spousal relationship. Thus in *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537, 70 S. Ct. 309, 94 L. Ed. 317, the Court reaffirmed, in the case of a noncitizen spouse who was denied admission for confidential security reasons, the longstanding principle “that [**\*\*\*\*6**] the United States can, as a matter of public policy . . . forbid aliens or classes of aliens from coming within [its] borders,” and “[n]o limits can be put by the courts upon” that power. *Wong Wing v. United States*, 163 U. S. 228, 237, 16 S. Ct. 977, 41 L. Ed. 140. Pp. 909-916.

(c) Muñoz’s claim to a procedural due process right

in *someone else's* legal proceeding would have unsettling collateral consequences. Her position would usher in a new strain of constitutional law—one **[\*\*1817]** that prevents the government from taking actions that “indirectly or incidentally” burden a citizen’s legal rights. [\*Castle Rock v. Gonzales\*, 545 U. S. 748, 767, 125 S. Ct. 2796, 162 L. Ed. 2d 658](#). See, e.g., [\*O’Bannon v. Town Court Nursing Ctr.\*, 447 U. S. 773, 788, 100 S. Ct. 2467, 65 L. Ed. 2d 506](#). To be sure, Muñoz has suffered harm from the denial of Asencio-Cordero’s visa application, but that harm does not give her a constitutional right to participate in his consular proceeding. Pp. 916-919.

[50 F. 4th 906](#), reversed and remanded.

**Counsel: Curtis E. Gannon** argued the cause for petitioners.

**Eric T. Lee** argued the cause for respondents.

**Judges:** Barrett, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Alito, and Kavanaugh, JJ., joined. Gorsuch, J., filed an opinion concurring in the judgment. Sotomayor, J., filed a dissenting opinion, in which Kagan and Jackson, JJ., joined.

**Opinion by: BARRETT**

## **Opinion**

**[\*902] [\*\*\*513]** JUSTICE BARRETT delivered the opinion of the Court.

Luis Asencio-Cordero seeks to enter the United States to live with Sandra Muñoz, his wife. To obtain the necessary visa, he submitted an **[\*\*\*\*7]** application at the United States consulate in San Salvador. A consular officer denied his application, however, after finding that Asencio-Cordero is affiliated with MS-13, a transnational criminal gang. Because of national security concerns, the consular officer did not disclose the basis for his

decision. And because Asencio-Cordero, as a noncitizen, has no constitutional right to enter the United States, he cannot elicit that information or challenge the denial of his visa.

**[\*903]** Muñoz, on the other hand, is a citizen, and she filed her own challenge to the consular officer’s decision. She reasons as follows: The right to live with her noncitizen spouse in the United States is implicit in the “liberty” protected by the [Fifth Amendment](#); the denial of her husband’s visa deprived her of this interest, thereby triggering her right to due process; the consular officer violated her right to due process by declining to disclose the basis for finding Asencio-Cordero inadmissible; and this, in turn, enables judicial review, even though visa denials are ordinarily unreviewable by courts.

Muñoz’s argument fails at the threshold. Her argument is built on the premise that **[\*\*1818]** the right to bring her noncitizen spouse to **[\*\*\*\*8]** the United States is an unenumerated constitutional right. [HN1](#) To establish this premise, she must show that the asserted right is “‘deeply rooted in this Nation’s history and tradition.’” [Washington v. Glucksberg](#), 521 U. S. 702, 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). She cannot make that showing. In fact, Congress’s longstanding regulation of spousal immigration—including through bars on admissibility—cuts the other way.

I

A

To be admitted to the United States, a noncitizen typically needs a visa. [66 Stat. 181, 8 U. S. C. §1181\(a\)](#). Visa decisions are made by the political branches. [Trump v. Hawaii](#), 585 U. S. 667, 702-703, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (2018); see also [Oceanic Steam Nav. Co. v. Stranahan](#), 214 U. S. 320, 339, 29 S. Ct. 671, 53 L. Ed. 1013 (1909) (explaining that “over no conceivable subject is the legislative power of Congress more complete”). As a general matter, Congress sets the terms for entry,

and the Department of State implements those requirements at United States Embassies and consulates in foreign countries.<sup>1</sup>

**[\*904]** Congress has streamlined the visa process for noncitizens with immediate **[\*\*\*514]** relatives in the United States. The citizen-relative must first file a petition with U. S. Citizenship and Immigration Services (USCIS), an agency housed within the Department of Homeland Security, to have the noncitizen classified as an immediate relative. See *Scialabba v. Cuellar de Osorio*, 573 U. S. 41, 46-47, 134 S. Ct. 2191, 189 L. Ed. 2d 98 (2014) (plurality opinion); [§§1151\(b\)\(2\)\(A\)\(i\)](#), [1154\(a\)\(1\)\(A\)](#). If USCIS approves the petition, then the noncitizen may apply for a visa. [§§1201\(a\)](#), **[\*\*\*\*9]** [1202\(a\)](#). As part of this process, the noncitizen submits written materials and interviews with a consular officer abroad. [§§1201\(a\)\(1\)](#), [1202](#).

Ordinarily, a consular officer who denies a visa application “because the officer determines the alien to be inadmissible” must “provide the alien with a timely written notice that . . . (A) states the determination, and (B) lists the specific provision or provisions of law under which the alien is inadmissible.” [§1182\(b\)\(1\)](#). The statute requires no explanation, however, “to any alien inadmissible” on certain grounds related to crime and national security. [§1182\(b\)\(3\)](#). This case involves a noncitizen to whom this statutory exception applies.

B

Sandra Muñoz, an American citizen, married Luis Asencio-Cordero, a Salvadoran citizen, in 2010. Several years later, the couple began taking steps to obtain an immigrant visa for Asencio-Cordero.

Muñoz filed a petition to classify her husband as an immediate relative, which USCIS granted. [§§1151\(b\)\(2\)\(A\)\(i\)](#), [1154\(a\)\(1\)\(A\)](#). Because Asencio-Cordero had entered the United States unlawfully, he was required to return to El Salvador and submit his visa application at a consulate there. See [§§1154\(b\)](#), [1202](#); 22 CFR §42. He met **[\*905]** with a consular officer in San Salvador and underwent several interviews.

**[\*\*1819]** In December **[\*\*\*\*10]** 2015, the officer denied Asencio-Cordero’s application, citing [8 U. S. C. §1182\(a\)\(3\)\(A\)\(ii\)](#). That provision renders inadmissible a noncitizen whom the officer “knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in” certain specified offenses or “any other unlawful activity.” *Ibid*. The officer provided no additional details—but, given the reason for the visa denial, even the statutory citation was more information than Asencio-Cordero was entitled to receive. [§1182\(b\)\(3\)](#).

Asencio-Cordero guessed (as it turns out, accurately) that he was denied a visa based on a finding that he was a member of MS-13, a transnational criminal gang. He also guessed (again, accurately) that this finding was based at least in part on the conclusion that his tattoos signified gang membership. Asencio-Cordero and Muñoz denied that Asencio-Cordero was affiliated with MS-13 or any other gang, and they pressed the consulate to reconsider the officer’s finding. When the consulate held firm, they appealed to the Department of State, submitting evidence that the tattoos were innocent. A Department official informed Asencio-Cordero and Muñoz that the **[\*\*\*515]** Department agreed with the consulate’s **[\*\*\*\*11]** determination. The next day, the consul in San Salvador notified them that Asencio-Cordero’s application had gone through multiple rounds of review—including by the consular officer, consular supervisors, the consul himself, the Bureau of Consular Affairs, and the State Department’s Immigration Visa Unit—and none of these reviews had “‘revealed any grounds

<sup>1</sup> We describe the process for noncitizens who, like Asencio-Cordero, have not yet been lawfully admitted to the United States and must therefore apply from abroad. Compare [8 U. S. C. §1255\(a\)](#) (adjustment of status to lawful permanent resident for noncitizens already admitted into the United States) with [22 CFR §§42.61, 42.62 \(2023\)](#) (noncitizens applying for immigrant visa must appear in person before consular officer in consular district of residence).

to change the finding of inadmissibility.” App. 7.

Asencio-Cordero and Muñoz sued the Department of State, the Secretary of State, and the United States consul in San Salvador. (For simplicity’s sake, we will refer to the [\*906] defendants collectively as the State Department.) They alleged, among other things, that the State Department had abridged Muñoz’s constitutional liberty interest in her husband’s visa application by failing to give a sufficient reason why Asencio-Cordero is inadmissible under the “unlawful activity” bar.

The District Court agreed and ordered discovery. In a sworn declaration, an attorney adviser from the State Department explained that Asencio-Cordero was deemed inadmissible because he belonged to MS-13. The finding was “based on the in-person interview, a criminal review of . . . Asencio[-]Cordero, and a review [\*\*\*\*12] of [his] tattoos.” App. to Pet. for Cert. 124a. In addition to the affidavit, the State Department provided the District Court with confidential law enforcement information, which it reviewed *in camera*, identifying Asencio-Cordero as a member of MS-13. Satisfied, the District Court granted summary judgment to the State Department.

The Ninth Circuit vacated the judgment and remanded the case. Consistent with circuit precedent, it held that Muñoz, as a citizen, had a constitutionally protected liberty interest in her husband’s visa application. Because of that interest, the Ninth Circuit said, the Due Process Clause required the State Department to give Muñoz a “‘facially legitimate and bona fide reason’” for denying her husband’s visa. 50 F.4th 906, 916 (2022) (quoting Kleindienst v. Mandel, 408 U. S. 753, 766-770, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972)). The initial statutory citation did not qualify, 50 F.4th, at 917-918, and the later affidavit was untimely, id., at 921-922. Delay carried a serious consequence for the State Department. Visa denials are insulated from judicial review by the doctrine of consular nonreviewability. But the Ninth Circuit held that by declining to give Muñoz

more information earlier in the process, [\*\*1820] the State Department had forfeited its entitlement “to shield its visa decision from judicial review.” Id., at 924. The panel [\*\*\*\*13] remanded for the District Court to consider the merits of Muñoz’s suit, which include [\*907] a request for a declaration invalidating the finding that Asencio-Cordero is inadmissible and an order demanding that the State Department readjudicate Asencio-Cordero’s application.<sup>2</sup>

[\*\*\*516] The Ninth Circuit denied en banc review over the dissent of 10 judges, and we granted the State Department’s petition for certiorari. 601 U. S. \_\_\_, 144 S. Ct. 679, 217 L. Ed. 2d 342 (2024).<sup>3</sup>

## II

HN2 “For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a ‘fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’” Trump, 585 U. S., at 702, 138 S. Ct. 2392, 201 L. Ed. 2d 775 (quoting Fiallo v. Bell, 430

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<sup>2</sup>At oral argument in this Court, Muñoz suggested that she is asserting a constitutional entitlement only to information—a “facially legitimate and bona fide reason” why the consular officer deemed her husband inadmissible under the “unlawful activity” bar. Tr. of Oral Arg. 59-64. Elsewhere, though, she suggests that the Due Process Clause entitles her to both the information and “a meaningful opportunity to respond.” Brief for Respondents 11. If appeal is no longer available under State Department regulations (and the Ninth Circuit said it was not), Muñoz presumably seeks what she sought below: judicial review of the inadmissibility finding and a court order requiring the State Department to reconsider Asencio-Cordero’s visa application. 50 F.4th, at 912, n. 14. This level of judicial involvement in the visa process would be a significant extension of our precedent. The dissent, however, would remand to the Ninth Circuit for consideration of this relief. Post, at 10, n. 2 (opinion of SOTOMAYOR, J.).

<sup>3</sup>Inexplicably, the dissent claims that the Court is reaching out improperly to settle this issue. Post, at 2. We granted certiorari on this very question to resolve a longstanding circuit split. 601 U. S. \_\_\_, 144 S. Ct. 679, 217 L. Ed. 2d 342 (2024). And we did so at the request of the Solicitor General, who emphasized both the Government’s need for uniformity in the administration of immigration law and the importance of this issue to national security. Pet. for Cert. 27-28, 31-33.

[U. S. 787, 792, 97 S. Ct. 1473, 52 L. Ed. 2d 50 \(1977\)](#)). Congress may delegate to executive officials the discretionary authority to admit noncitizens “immune from judicial inquiry or interference.” [Harisiades v. \[\\*\\*908\] Shaughnessy, 342 U. S. 580, 588-591, 72 S. Ct. 512, 96 L. Ed. 586 \(1952\)](#). When it does so, the action of an executive officer “to admit or to exclude an alien” “is final and conclusive.” [United States ex rel. Knauff v. Shaughnessy, 338 U. S. 537, 543, 70 S. Ct. 309, 94 L. Ed. 317 \(1950\)](#); see also [Dept. of Homeland Security v. Thuraissigiam, 591 U.S. 103, 138-139, 140 S. Ct. 1959, 207 L. Ed. 2d 427 \(2020\)](#); [Mandel, 408 U. S., at 765-766, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#); [Nishimura Ekiu v. United States, 142 U. S. 651, 659-660, 12 S. Ct. 336, 35 L. Ed. 1146 \(1892\)](#). The Judicial Branch has no role to play “unless expressly authorized by law.” [Knauff, 338 U. S., at 543, 70 S. Ct. 309, 94 L. Ed. 317](#). The [Immigration and Nationality Act \(INA\)](#) does not authorize judicial review of a consular officer’s denial of a visa; thus, as a rule, the federal courts cannot review those decisions.<sup>4</sup> This principle is known [\*\*\*\*14] as the doctrine of consular nonreviewability.

[\*\*1821] [HN3](#) We have assumed that a narrow exception to this bar exists “when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen.” [Trump, 585 U. S., at 703, 138 S. Ct. 2392, 201 L. Ed. 2d 775](#). In that event, the Court has considered whether the Executive gave a “‘facially legitimate and bona fide reason’” for denying the visa. [Kerry v. Din, 576 U. S. 86, 103-104, 135 S. Ct. 2128, 192 L. Ed. 2d 183 \(2015\)](#) (Kennedy, J., concurring in judgment) (quoting [Mandel, 408 U. S., at 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#)). If so, the inquiry is at an end—the Court

[\*\*\*517] has disclaimed the authority to “‘look behind the exercise of that discretion,’” much less to balance the reason given against the asserted constitutional right. [Din, 576 U. S., at 104, 135 S. Ct. 2128, 192 L. Ed. 2d 183](#).

Asencio-Cordero cannot invoke the exception himself, because he has no “constitutional right of entry to this country as a nonimmigrant or otherwise.” [Mandel, 408 U. S., at 762, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#). Thus, so far as Asencio-Cordero is concerned, the doctrine of consular nonreviewability applies. Muñoz, however, is an [\*\*909] American citizen, and she asserts that the denial of her husband’s visa violated *her* constitutional rights, thereby enabling judicial review. Specifically, she argues that the State Department abridged her fundamental right to live with her spouse in her country of citizenship—and that it did so without affording her the fair [\*\*\*\*15] procedure guaranteed by the [Fifth Amendment](#).

The Ninth Circuit is the only Court of Appeals to have embraced this asserted right—every other Circuit to consider the issue has rejected it.<sup>5</sup> See [Colindres v. U. S. Dept. of State, 71 F. 4th 1018, 1021, 461 U.S. App. D.C. 293 \(CADDC 2023\)](#); [Baaghil v. Miller, 1 F. 4th 427, 433 \(CA6 2021\)](#); [Bakran v. Secretary, U. S. Dept. of Homeland Security, 894 F. 3d 557, 564 \(CA3 2018\)](#); [Bright v. Parra, 919 F. 2d 31, 34 \(CA5 1990\)](#) (*per curiam*); [Burrafato v. U. S. Dept. of State, 523 F. 2d 554, 554-557 \(CA2 1975\)](#); [Silverman v. Rogers, 437 F. 2d 102, 107 \(CA1 1970\)](#). In *Din*, this Court considered but did not resolve the question. A plurality concluded that a citizen does not have a fundamental right to bring her noncitizen spouse to the United States. [576 U. S., at 96, 135 S. Ct. 2128, 192 L. Ed. 2d 183](#). Two Justices chose not to reach

<sup>4</sup>In *Trump v. Hawaii*, the plaintiffs argued that a proclamation excluding certain classes of noncitizens from entering the United States exceeded the President’s authority under the Immigration and Nationality Act. [585 U. S. 667, 681-682, 138 S. Ct. 2392, 201 L. Ed. 2d 775 \(2018\)](#). The Court explained that the doctrine of consular nonreviewability is not jurisdictional and “assume[d] without deciding that [the] plaintiffs’ statutory claims [were] reviewable.” [Id., at 682-683, 138 S. Ct. 2392, 201 L. Ed. 2d 775](#).

<sup>5</sup>The dissent characterizes our decision today as extreme, [post, at 14](#), but it is the dissent who embraces the outlier position: Our opinion is in line with the vast majority of Circuits that have decided this question. The dissent aligns itself with the lone Circuit going the other way.

the issue, explaining that even if the right existed, the statutory citation provided by the Executive qualified as a facially legitimate and bona fide reason. *Id.*, at 105, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (opinion of Kennedy, J.). Since *Din*, the existence of the right has continued to divide the Circuits.

Today, we resolve the open question. [HN4](#) Like the *Din* plurality, we hold that a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.

### III

[HN5](#) The [Due Process Clause of the Fifth Amendment](#) requires the Government to provide due process of law before it deprives [\[\\*910\]](#) someone of “life, liberty, or property.” Under our precedent, the Clause promises more than fair process: It also “provides heightened protection against government interference with certain fundamental rights and liberty interests.” [Glucksberg](#), 521 U. S., at 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772. When a fundamental [\[\\*\\*\\*\\*16\]](#) right is at stake, the Government can act only by narrowly tailored means that serve a compelling state interest. *Id.*, at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772. Identifying unenumerated rights carries [\[\\*\\*1822\]](#) a serious risk of judicial overreach, so this Court “exercise[s] the utmost care whenever [\[\\*\\*\\*518\]](#) we are asked to break new ground in this field.” *Id.*, at 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (internal quotation marks omitted). To that end, *Glucksberg*’s two-step inquiry disciplines the substantive due process analysis. First, it insists on a “careful description of the asserted fundamental liberty interest.” *Id.*, at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (internal quotation marks omitted). Second, it stresses that “the [Due Process Clause](#) specially protects” only “those fundamental rights and liberties which are, objectively, deeply rooted in this Nation’s history and tradition.” *Id.*, at 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (internal quotation marks omitted).

We start with a “careful description of the asserted fundamental liberty interest.” *Id.*, at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (internal quotation marks omitted). Muñoz invokes the “fundamental right of marriage,” but the State Department does not deny that Muñoz (who is already married) has a fundamental right to marriage. Muñoz claims something distinct: the right to *reside with her noncitizen spouse in the United States*. That involves more than marriage and more than spousal [\[\\*\\*\\*\\*17\]](#) cohabitation—it includes the right to have her noncitizen husband enter (and remain in) the United States.

It is difficult to pin down the nature of the right Muñoz claims. The logic of her position suggests an entitlement to bring Asencio-Cordero to the United States—how else could Muñoz enjoy the asserted right to live with her noncitizen husband in her country of citizenship? See also Brief for Petitioners 23, n. 8 (characterizing Muñoz’s claim as an “entitle[ment] to the visa itself”). Yet Muñoz disclaims that [\[\\*911\]](#) characterization, insisting that “[she] does not advance a substantive right to immigrate one’s spouse.” Brief for Respondents 19, n. 10. This concession is wise, because such a claim would ordinarily trigger strict scrutiny—and it would be remarkable to put the Government to the most demanding test in constitutional law in the field of immigration, an area unsuited to rigorous judicial oversight. [Fiallo](#), 430 U. S., at 792, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (“Our cases ‘have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control’”).

Though understandable, Muñoz’s concession makes characterizing the asserted right [\[\\*\\*\\*\\*18\]](#) a conceptually harder task. Here is her formulation: a “marital right . . . sufficiently important that it cannot be unduly burdened without procedural due process as to an inadmissibility finding that would block her from residing with her spouse in her country of citizenship.” Brief for Respondents 19, n. 10. So described, the asserted right is neither fish

nor fowl. It is fundamental enough to be implicit in “liberty;” but, unlike other implied fundamental rights, its deprivation does not trigger strict scrutiny. See [Din, 576 U. S., at 99, 135 S. Ct. 2128, 192 L. Ed. 2d 183](#) (plurality opinion) (observing that this argument posits “two categories of implied rights protected by the [Due Process Clause](#): really fundamental rights, which cannot be taken away at all absent a compelling state interest; and not-so-fundamental rights, which can be taken away so long as procedural due process is observed”). [\*\*\*519] This right would be in a category of one: a substantive due process right that gets only procedural due process protection. *Ibid.*

We need not decide whether such a category exists, because Muñoz cannot clear the second step of *Glucksberg*’s test: demonstrating that the right to bring a noncitizen spouse to the United States is “deeply rooted in this Nation’s history [\*\*\*\*19] [\*\*1823] and tradition.” [521 U. S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772](#). On the contrary, the through line of history is recognition of the [\*912] Government’s sovereign authority to set the terms governing the admission and exclusion of noncitizens. And Muñoz points to no subsidiary tradition that curbs this authority in the case of noncitizen spouses.

From the beginning, the admission of noncitizens into the country was characterized as “of favor [and] *not of right*.” J. Madison, Report of 1800 (Jan. 7, 1800), in 17 Papers of James Madison 319 (D. Mattern, J. Stagg, J. Cross, & S. Perdue eds. 1991) (emphasis added); see also 2 Records of the Federal Convention of 1787, p. 238 (M. Farrand ed. 1911) (recounting Gouverneur Morris’s observation that “every Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be admitted”); Debate on Virginia Resolutions, in *The Virginia Report of 1799-1800*, p. 31 (1850) (“[B]y the law of nations, it is left in the power of all states to take such measures about the admission of strangers as they think convenient”). Consistent with this view, the 1798 Act Concerning Aliens gave the President

complete discretion to remove “all such aliens as he shall judge [\*\*\*\*20] dangerous to the peace and safety of the United States.” 1 Stat. 571 (emphasis deleted). The Act made no exception for spouses—or, for that matter, other family members.

The United States had relatively open borders until the late 19th century. But once Congress began to restrict immigration, “it enacted a complicated web of regulations that erected serious impediments to a person’s ability to bring a spouse into the United States.” [Din, 576 U. S., at 96, 135 S. Ct. 2128, 192 L. Ed. 2d 183](#) (plurality opinion). One of the first federal immigration statutes, the Immigration Act of 1882, required executive officials to “examine” noncitizens and deny “perm[iss]ion to land” to “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.” [22 Stat. 214](#). The Act provided no exception for citizens’ spouses. And when Congress drafted a successor statute that expanded the grounds of inadmissibility, it again gave [\*913] no special treatment to the marital relationship. *Immigration Act of 1891, ch. 551, 26 Stat. 1084*.

There are other examples. The Page Act of 1875, which functioned as a restriction on Chinese female immigration, contained no exception for wives. [18 Stat. 477-478](#); see [Colindres, 71 F. 4th, at 1023](#). Or consider the Emergency Quota Act of 1921, which capped the number of immigrants permitted to enter the country each year. [42 Stat. 5-6](#). Although the Act gave preferential [\*\*\*\*21] treatment to citizens’ wives, “once all the quota spots were filled for the year, the spouse was barred without exception.” [Din, 576 U. S., at 97, 135 S. Ct. 2128, 192 L. Ed. 2d 183](#) (plurality [\*\*\*520] opinion).<sup>6</sup>

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<sup>6</sup> Given the then-existing law of coverture, the Act was only relevant to noncitizen wives—a citizen wife with a noncitizen husband was forced to assume her husband’s nationality. K. Abrams, What Makes the Family Special? [80 U. Chi. L. Rev. 7, 11 \(2013\)](#) (Abrams). (“Giving wives the opportunity to sponsor their husbands would have been nonsensical; under the Expatriation Act of 1907, a wife automatically *lost* her US citizenship upon marrying a foreigner, so there could be no such thing as a US citizen wife with an immigrant

See also C. Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 115 (1998) (“[C]itizens’ wives were still quota immigrants, and immigration officials could regulate their entry closely if economic or other circumstances prompted a general tightening of admission”). In 1924, **[\*\*1824]** Congress, showing favor to men rather than marriage, lifted the quotas for male citizens with noncitizen wives, but did not similarly clear the way for female citizens with noncitizen husbands. *Abrams* 12. This gender disparity did not change until 1952. *Id.*, at 13-14.

That is not to say that Congress has not extended special treatment to marriage—it has. For instance, the War Brides Act of 1945 provided that the noncitizen spouses of World War II veterans would be exempt from certain admissibility bars and documentary requirements. *Ch. 591, 59 Stat. 659*. Closer to home, Asencio-Cordero’s visa application **[\*914]** rested on his marriage to Muñoz, which made him eligible for immigrant status. [§1154](#). But while Congress has made it easier for spouses to immigrate, it has never made spousal immigration a matter of right. On the contrary, qualifications and restrictions have long been the norm. See, **[\*\*\*\*22]** *e.g.*, *Act of Aug. 9, 1946, ch. 945, 60 Stat. 975* (granting nonquota status to Chinese wives of American citizens, but only for those with longstanding marriages).

Of particular relevance to Muñoz, Congress has not exempted spouses from inadmissibility restrictions like the INA’s unlawful-activity bar. Precursors to that bar have existed since the early 20th century. For example, the Immigration Act of 1917 provided for the exclusion of “persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude.” *Ch. 29, 39 Stat. 875*. Consular officers applied this bar to spouses, and courts refused to review those visa denials, citing the doctrine of

consular nonreviewability. See, *e.g.*, [United States ex rel. Ulrich v. Kellogg, 30 F. 2d 984, 985-986 \(CA DC 1929\)](#).

*United States ex rel. Knauff v. Shaughnessy* is a striking example from this Court. In *Knauff*, a United States citizen (and World War II veteran) found himself similarly situated to Muñoz: His noncitizen wife was denied admission for security reasons, based on “information of a confidential nature, the disclosure of which would be prejudicial to the public interest.” [338 U. S., at 541, 544, 70 S. Ct. 309, 94 L. Ed. 317](#). We held that the War Brides Act did not supersede the statute on which the Attorney General had relied. *Id.*, at 546-547, [70 S. Ct. 309, 94 L. Ed. 317](#) (“There is nothing in the War Brides Act . . . to indicate that **[\*\*\*\*23]** it was the purpose of Congress, by partially suspending compliance with certain requirements and quota provisions **[\*\*\*521]** of the immigration laws, to relax the security provisions of the immigration laws”). So, “[a]s all other aliens, petitioner had to stand the test of security.” *Id.*, at 547, [70 S. Ct. 309, 94 L. Ed. 317](#). Nor was she entitled to a hearing, because “[w]hatever the procedure authorized by Congress **[\*915]** is, it is due process as far as an alien denied entry is concerned.” *Id.*, at 544, [70 S. Ct. 309, 94 L. Ed. 317](#). The Attorney General’s decision was “final and conclusive,” and he did not have to divulge the reason for it. *Id.*, at 543, [70 S. Ct. 309, 94 L. Ed. 317](#).<sup>7</sup>

[HN6](#) *Knauff* thus reaffirmed the longstanding principle “that the United States can, as a matter of public policy . . . forbid aliens or classes of aliens from coming within their borders,” and “[n]o limits

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husband” (footnotes omitted)). This changed in 1922, when the [Cable Act](#) “largely undid derivative citizenship for married women.” *Ibid.*

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<sup>7</sup>The dissent criticizes *Knauff* because the Attorney General, under pressure from Congress, ultimately revisited his decision and admitted *Knauff* as a lawful permanent resident. *Post*, at 19. But the history of the case does not establish that the Court was wrong to decline to review the Attorney General’s decision. It reflects a decision that was made by the political branches and reversed through the political process. Moreover, *Knauff* remains good law that we have repeatedly reaffirmed. [Dept. of Homeland Security v. Thuraissigiam, 591 U.S. 103, 138-139, 140 S. Ct. 1959, 207 L. Ed. 2d 427 \(2020\)](#).

can be put by the courts upon” that power. [Wong Wing v. United States](#), 163 U. S. 228, 237, 16 S. Ct. 977, 41 L. Ed. 140 (1896). [**\*\*1825**] Congress’s authority to “formulat[e] . . . policies” concerning the entry of noncitizens “has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government,” representing “not merely ‘a page of history,’ but a whole volume.” [Galvan v. Press](#), 347 U. S. 522, 531, 74 S. Ct. 737, 98 L. Ed. 911 (1954) (citation omitted). “[T]he Court’s general reaffirmations of this principle have been legion.” [Mandel](#), 408 U. S., at 765-766, 92 S. Ct. 2576, 33 L. Ed. 2d 683; see [**\*\*\*\*24**] also [id.](#), at 765 (“[T]he power to exclude aliens is ‘inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government’”).<sup>8</sup> While “families of putative immigrants [**\*916**] certainly have an interest in their admission,” it is a “fallacy” to leap from that premise to the conclusion that United States citizens have a “‘fundamental right’” that can limit how Congress exercises “the Nation’s sovereign power to admit or exclude foreigners.” [Fiallo](#), 430 U. S., at 795, n. 6, 97 S. Ct. 1473, 52 L. Ed. 2d 50.

To be sure, Congress can use its authority over immigration to prioritize the unity of the immigrant family. [Din](#), 576 U. S., at 97, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (plurality opinion). See, e.g., [§1151\(b\)\(2\)\(A\)\(i\)](#) (exempting “immediate relatives” from certain numerical quotas). It has frequently done just that. But the Constitution does not *require* this result; moreover, Congress’s

generosity with respect to [**\*\*\*522**] spousal immigration has always been subject to restrictions, including bars on admissibility. This is an area in which more than family unity is at play: Other issues, including national security and foreign policy, matter too. [HN7](#) Thus, while Congress may show special solicitude [**\*\*\*\*25**] to noncitizen spouses, such solicitude is “a matter of legislative grace rather than fundamental right.” [Din](#), 576 U. S., at 97, 135 S. Ct. 2128, 192 L. Ed. 2d 183 (plurality opinion). Muñoz has pointed to no evidence suggesting otherwise.<sup>9</sup>

#### IV

As the State Department observes, Muñoz’s claim to a procedural due process right in *someone else’s* legal proceeding would have unsettling collateral consequences. Consider [**\*917**] where her logic leads: Could a wife challenge her husband’s “assignment to a remote prison or to an overseas military deployment, even though prisoners and service members themselves cannot bring such challenges”? Reply Brief 13. Could a citizen assert procedural rights in the removal proceeding of [**\*\*1826**] her spouse? Brief for Petitioners 30. Muñoz’s position would usher in a new strain of constitutional law, for the Constitution does not ordinarily prevent the government from taking actions that “indirectly or incidentally” burden a citizen’s legal rights. [Castle Rock v. Gonzales](#), 545 U. S. 748, 767, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005) (quoting [O’Bannon v. Town Court Nursing Ctr.](#), 447 U. S. 773, 788, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980)).

<sup>8</sup>The dissent barely acknowledges that any of this precedent exists. In fact, rather than recognizing the prerogatives of the political branches in this area, the dissent criticizes the United States’ immigration policy, [post](#), at 4-5, as well as the competence of the Executive Branch officials who make difficult, high-stakes decisions about which noncitizens seeking entry to the United States pose a threat to national security, [post](#), at 6-7. Perhaps our dissenting colleagues are well-equipped to set immigration policy and manage border security, but the Constitution entrusts those tasks to the political branches.

<sup>9</sup>The dissent never addresses the actual issue in this case, which is whether the Judiciary has any authority to review visa determinations made by the State Department. Instead, the dissent chooses the rhetorically easier path of charging the Court with endangering the fundamental right to marriage. See [post](#), at 11-14. To be clear: Today’s decision does not remotely call into question any precedent of this Court, including those protecting marriage as a fundamental right. By contrast, the dissent would upend more than a century’s worth of this Court’s precedent regarding the doctrine of consular nonreviewability, not to mention equally longstanding congressional and Executive Branch practice. *Ibid.*

Our decision in *O'Bannon* is illustrative. There, a group of nursing-home residents alleged that the government had violated their liberty interests when it decertified their nursing home without providing them a hearing. [447 U. S., at 777-781, 784, 100 S. Ct. 2467, 65 L. Ed. 2d 506](#). We acknowledged that the residents would suffer [\*\*\*\*26] harm from the government's decision. [Id., at 784, and n. 16, 100 S. Ct. 2467, 65 L. Ed. 2d 506](#). But we held that absent a "direct restraint on [their liberty]," the decision did not implicate their due process rights. [Id., at 788, 100 S. Ct. 2467, 65 L. Ed. 2d 506](#). The decertification decision imposed only an *indirect* harm. We explained that the residents were akin to "members of a family who have been dependent on an errant father." *Ibid.* Although "they may suffer serious trauma if he is deprived of his liberty or property as a consequence of criminal proceedings," such family members "surely . . . have no constitutional right to participate in his trial or sentencing procedures." *Ibid.* The same principle governs here. Muñoz has suffered harm from the denial of Asencio-Cordero's visa application, but that harm does not give her a constitutional right to participate in his consular process.

Lest there be any doubt, [HN8 \*Mandel\*](#) does *not* hold that citizens have procedural [\*\*\*523] due process rights in the visa proceedings of others. The Ninth Circuit seems to have read *Mandel* that way, but that is a misreading.

[\*918] In *Mandel*, the Attorney General refused to waive inadmissibility and grant Ernest Mandel, a self-described "revolutionary Marxist," a temporary visa to attend academic conferences [\*\*\*\*27] in the United States. [408 U. S., at 756, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#). A group of professors sued on the ground that the Executive's discretion to grant a waiver was limited by their [First Amendment](#) right to hear Mandel speak; they insisted that "the [First Amendment](#) claim should prevail, at least where no justification is advanced for denial of a waiver." [Id., at 769, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#). In response, the

Attorney General asserted that "Congress has delegated the waiver decision to the Executive in its sole and unfettered discretion, and any reason or no reason may be given." *Ibid.*

But because "the Attorney General *did* inform Mandel's counsel of the reason for refusing him a waiver," the Court chose not to resolve this statutory argument. *Ibid.* (emphasis added). Instead, it said that so long as the Executive gives a "facially legitimate and bona fide reason" for denying a waiver under [§212\(a\)\(28\) of the INA](#)—the statutory provision at issue—"the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [First Amendment](#) interests of those who seek personal communication with the applicant." [Id., at 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#). The Court expressly declined to address whether a constitutional challenge would "be available for attacking [an] exercise of discretion for which no justification whatsoever is [\*\*\*\*28] advanced." *Ibid.*

Thus, the "facially legitimate and bona fide reason" in *Mandel* was the justification for avoiding a difficult question of statutory interpretation; it had nothing to do with procedural due process. Indeed, a procedural due process claim was not even before the Court. The professors argued [\*\*1827] that the denial of Mandel's visa directly deprived them of their [First Amendment](#) rights, *not* that their [First Amendment](#) rights entitled them to procedural protections in Mandel's visa application process. [Id., at 754, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#). To make an argument [\*919] logically analogous to that of the professors, Muñoz would have to claim that the denial of Asencio-Cordero's visa violated her substantive due process right to bring her noncitizen spouse to the United States—thereby triggering the State Department's obligation to demonstrate why denying him the visa is the least restrictive means of serving the Government's interest in national security. But, as we have explained, Muñoz has disavowed that argument, which cannot succeed in any event because the

asserted right is not a longstanding and “‘deeply rooted’” tradition in this country. [Glucksberg, 521 U. S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.](#)

The bottom line is that procedural due process is an odd vehicle for Muñoz’s argument, and *Mandel* does not support [\*\*\*\*29] it. [HN9](#) Whatever else it may stand for, *Mandel* does not hold that a citizen’s independent constitutional right (say, a free speech claim) gives that citizen a procedural due process right to a “facially legitimate and bona fide reason” for why someone [\*\*\*524] else’s visa was denied. And Muñoz is not constitutionally entitled to one here.

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The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

**Concur by:** GORSUCH

## **Concur**

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JUSTICE GORSUCH, concurring in the judgment.

A consular officer denied Sandra Muñoz’s husband a visa to come to and live lawfully in the United States. [526 F. Supp. 3d 709, 713-714 \(CD Cal. 2021\)](#). In doing so, the officer simply cited [8 U. S. C. §1182\(a\)\(3\)\(A\)\(ii\)](#), a provision of the Immigration and Nationality Act that makes inadmissible any person a consular officer “has reasonable ground to believe . . . seeks to enter the United States to engage . . . in . . . any other unlawful activity.” Eventually, Ms. Muñoz sued for further explanation of that decision. See App. 2, [\*\*920] 8-9. The government, she claimed, needed to identify for her not just the statute on which it based its decision, but also the “‘discrete factual predicates’” on which it relied. *Id.*, at 8, ¶36.

Over the course of this [\*\*\*\*30] litigation, the United States has given Ms. Muñoz what she requested. As the Ninth Circuit recognized, the United States has now revealed the factual basis for its decision to deny her husband a visa. [50 F. 4th 906, 919-920 \(2022\)](#); see App. to Pet. for Cert. 124a; App. 76. In this Court, too, the government has assured Ms. Muñoz that she has a chance to use and respond to that information. She can again seek her husband’s admission to this country, the government says—and this time she will be armed with an understanding of why the government denied the last application. Tr. of Oral Arg. 45, 104.

Those developments should end this case. With no more information to uncover and no bar to trying for admission again, nothing is left for a court to address through this litigation. In particular, the constitutional questions presented by the government no longer have any practical relevance here. Whether or not Ms. Muñoz had a constitutional right to the information she wanted, the government gave it to her. I therefore would reverse the Ninth Circuit’s decision without reaching the government’s constitutional arguments. See [City of Mesquite v. Aladdin’s Castle, Inc., 455 U.S. 283, 294-295, 102 S. Ct. 1070, 71 L. Ed. 2d 152 \(1982\)](#). [\*\*1828] At the same time, I do not cast aspersions on the motives of my colleagues who do reach the [\*\*\*\*31] government’s arguments. They may see the case differently than I do, but their decision and rationales are essentially those the Solicitor General and the Department of State urged this Court to adopt.

**Dissent by:** SOTOMAYOR

## **Dissent**

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JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

“The right to marry is fundamental as a matter of history and tradition.” [Obergefell v. Hodges, 576 U.](#)

[S. 644, 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609 \(2015\)](#). After U. S. citizen Sandra Muñoz and her Salvadoran [\*921] husband spent five years of married life in the [\*\*\*525] United States, the Government told her that he could no longer reenter the country. If she wanted to live together with him and their child again, she would have to move to El Salvador. The reason? A consular officer's bare assertion that her husband, who has no criminal record in the United States or El Salvador, planned to engage in "unlawful activity." [8 U. S. C. §1182\(a\)\(3\)\(A\)\(ii\)](#). Muñoz argues that the Government, having burdened her fundamental right to marriage, owes her one thing: the factual basis for excluding her husband.

The majority could have resolved this case on narrow grounds under longstanding precedent. This Court has already recognized that excluding a noncitizen from the country can burden the constitutional rights of citizens who seek [\*\*\*\*32] his presence. See [Kleindienst v. Mandel, 408 U. S. 753, 765-770, 92 S. Ct. 2576, 33 L. Ed. 2d 683 \(1972\)](#). Acknowledging the Government's power over admission and exclusion, the *Mandel* Court held that "a facially legitimate and bona fide reason" for the exclusion sufficed to justify that burden. *Id.*, at 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683. In this case, after protracted litigation, the Government finally explained that it denied Muñoz's husband a visa because of its belief that he had connections to the gang MS-13. Regardless of the validity of that belief, it is a "facially legitimate and bona fide reason." *Ibid.*; see also [ante, at 919-920](#) (GORSUCH, J., concurring in judgment). Under this Court's precedent, that is enough.

Instead, the majority today chooses a broad holding on marriage over a narrow one on procedure.<sup>1</sup> It

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<sup>1</sup> The Government asked this Court to review three questions:

"1. Whether a consular officer's refusal of a visa to a U. S. citizen's noncitizen spouse impinges upon a constitutionally protected interest of the citizen.

holds that [\*922] Muñoz's right to marry, live with, and raise children alongside her husband entitles her to nothing when the Government excludes him from the country. Despite the majority's assurance two Terms ago that its eradication of the right to abortion "does not undermine . . . in any way" other entrenched substantive due process rights such as "the right to marry," "the right to reside with relatives," and "the right to [\*\*1829] make decisions about the education of one's children," the Court fails at the [\*\*\*\*33] first pass. [Dobbs v. Jackson Women's Health Organization, 597 U.S. 215, 256-257, 142 S. Ct. 2228, 213 L. Ed. 2d 545 \(2022\)](#). Because, to me, there is no question that excluding a citizen's spouse burdens her right to marriage, and that burden requires the Government to provide at least a factual basis for its decision, I respectfully dissent.

[\*\*\*526] I

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Marriage is not an automatic ticket to a green card. A married citizen-noncitizen couple must jump through a series of administrative hoops to apply for the lawful permanent residency that marriage can confer. Noncitizen spouses coming from abroad must apply for a visa to enter the United

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"2. Whether, assuming that such a constitutional interest exists, notifying a visa applicant that he was deemed inadmissible under [8 U. S. C. 1182\(a\)\(3\)\(A\)\(ii\)](#) suffices to provide any process that is due.

"3. Whether, assuming that such a constitutional interest exists and that citing [Section 1182\(a\)\(3\)\(A\)\(ii\)](#) is insufficient standing alone, due process requires the government to provide a further factual basis for the visa denial 'within a reasonable time,' or else forfeit the ability to invoke consular nonreviewability in court." Pet. for Cert. I.

This Court granted certiorari limited to the first and second questions. [601 U. S. \\_\\_\\_, 144 S. Ct. 679, 217 L. Ed. 2d 342 \(2024\)](#). The majority chooses to decide this case on the first question presented rather than "assuming that such a constitutional interest exists" and determining what "process . . . is due" (the second question presented). Pet. for Cert. I.

States. In certain [\*\*\*\*34] cases, however, the law requires even couples who meet and marry in the United States to send the noncitizen spouse back to his country of origin to do the same thing. In doing so, the couple must take an enormous risk to pursue the stability of lawful immigration status: the risk that when the noncitizen spouse tries to reenter the United States, he will face unexpected exile.

[\*923] In technical immigration terms, a noncitizen spouse applying for a green card seeks to “[a]djust[t]” his immigration “status” from “nonimmigrant to that of [a] person admitted for permanent residence.” [8 U. S. C. §1255](#). To do so, the citizen spouse must petition the Government on the noncitizen’s behalf. The citizen spouse first sends United States Citizenship and Immigration Services (USCIS) a petition to classify the noncitizen spouse as an “immediate relative.” [§§1151\(b\)\(2\)\(A\)\(i\)](#), [1154\(a\)\(1\)\(A\)](#). Once USCIS approves the petition, a noncitizen spouse who is already in the United States can then apply to adjust his status to lawful permanent resident without leaving the country. See [§1255\(a\)](#). For a noncitizen spouse living outside of the United States, however, USCIS first approves the immediate-relative petition, but then sends it to the consulate of the country [\*\*\*\*35] where the noncitizen spouse lives for processing. See [§1154\(b\)](#); [22 CFR §§42.42, 42.61 \(2023\)](#). A consular officer interviews the noncitizen spouse and makes the final admission decision. See [8 U. S. C. §§1201, 1202\(f\)](#).

Because of idiosyncrasies in our immigration system, not all noncitizen spouses living in the United States can adjust their status with USCIS. Even when a couple meets, marries, and lives in the United States, the noncitizen spouse may instead have to travel back to his country of origin for consular processing if he was never formally “inspected and admitted or paroled” at the Border. [§1255\(a\)](#). A noncitizen who entered without “inspect[ion]” in this way typically cannot adjust his status from within the United States based on an immediate-relative petition. See *ibid.* Once the

citizen spouse submits the petition to USCIS, the noncitizen spouse must return to his country of origin and meet with a consular officer, who will then adjudicate his application. See [22 CFR §§42.42, 42.61, 42.62](#).

Living in the United States after initially having entered without inspection is not unusual. In fact, the Government endorses the presence of many of these members of our national [\*924] community. Recipients under the Deferred Action for Childhood Arrivals (DACA) program, for instance, [\*\*\*\*36] may have been brought across the border by their parents without inspection. Even though DACA status entitles them to work and live in the country without the immediate threat of removal, see [8 CFR §236.21\(c\)](#), it does not change their initial entry designation. As of the end of 2023, there were [\*\*1830] roughly 530,000 active DACA recipients in the United States. [\*\*\*527] See Dept. of Homeland Security (DHS), USCIS, Count of Active DACA Recipients by Month of Current DACA Expiration (as of Dec. 31, 2023). The same is true of the approximately 680,000 holders of Temporary Protected Status (TPS), who have been designated temporarily unable to return to their home countries because of war, natural disasters, or other extraordinary circumstances. See DHS, Citizenship and Immigration Services Ombudsman, Ann. Rep. 45 (June 30, 2023); [Sanchez v. Mayorkas](#), [593 U. S. 409, 419, 141 S. Ct. 1809, 210 L. Ed. 2d 52 \(2021\)](#) (holding that TPS status did not change an entry without inspection into a lawful admission that would allow adjustment to lawful permanent residency from within the United States). Even when married to a U. S. citizen, DACA recipients and TPS holders are barred from adjusting status within the United States if they entered without inspection. See [8 U. S. C. §1255\(a\)](#).

Ironically, the longer the noncitizen spouse [\*\*\*\*37] has lived in the United States, the more difficult and uncertain the process to adjust to lawful status can become. A noncitizen who initially entered without inspection will accrue

“unlawful presence,” which can bar him from reentering the country if he leaves. [§1182\(a\)\(9\)\(B\)](#). If a noncitizen who has lived in the United States between six months and one year leaves and tries to reenter, he will be subject to a 3-year reentry bar. [§1182\(a\)\(9\)\(B\)\(i\)\(I\)](#). If he has lived in the United States for more than a year and tries to reenter, he faces a 10-year ban. [§1182\(a\)\(9\)\(B\)\(i\)\(II\)](#).

[\*925] This scheme places couples who meet and marry in the United States in a difficult position if the noncitizen spouse entered without inspection. The couple can continue to live with one spouse in a precarious immigration status; or, they can seek the stability of permanent residency for the noncitizen spouse but face a potential multiyear exile when he leaves and applies for reentry.

Recognizing this difficult choice, USCIS allows a noncitizen spouse to apply for a waiver of inadmissibility for any accrued unlawful presence before departing the United States for his consular interview. To obtain such a waiver, the noncitizen spouse must show that the citizen spouse [\*\*\*\*38] will suffer “extreme hardship” if her noncitizen spouse is not admitted. [§1182\(a\)\(9\)\(B\)\(v\)](#). Then, once the noncitizen spouse returns to his country of origin, if a consular officer approves his visa application, he can reenter free from the inadmissibility bar.

Consular officers fall under the State Department, see [§1104\(a\)](#), not DHS, which oversees USCIS, see [6 U. S. C. §271\(a\)](#). Even though DHS officers and consular officers make admission determinations under the same substantive laws, see [§1182](#), in reality, a noncitizen seeking admission via consular processing faces a far higher risk of arbitrary denial with far less opportunity for review than a noncitizen seeking admission from DHS.

DHS officers are constrained by a framework of required process that does not apply to consular processing. A noncitizen denied adjustment of status in the United States must receive notice and the reasons for a denial. See [8 CFR §245.2\(a\)\(5\)\(i\)](#);

DHS, USCIS, Policy Manual, vol. 7, pt. A, ch. 11—Decision Procedures (June 14, 2024) (requiring that a denial [\*\*\*\*528] notice either “[e]xplain what eligibility requirements are not met and why they are not met” or “[e]xplain the positive and negative factors considered, the relative weight given to each factor individually and collectively, [\*\*\*\*39] and why the negative [\*926] factors outweigh the positive factors”). He can renew his application in removal proceedings [\*\*1831] before an immigration court, see [8 U. S. C. §1229b\(b\)\(1\)](#), where DHS must present any evidence against him in adversarial proceedings, see [§§1229\(a\)](#), [1229a\(b\)\(4\)\(B\)](#), [1229a\(c\)\(3\)](#). From those removal proceedings, a noncitizen can petition for review to the Board of Immigration Appeals (BIA), see [8 CFR §1003.1\(b\)](#), and, ultimately, a federal court of appeals, see [8 U. S. C. §1252\(a\)](#).

In contrast, a noncitizen denied admission via consular processing is entitled to nothing more than a cite to the statute under which the consular officer decided to exclude him. [§1182\(b\)\(1\)](#).<sup>2</sup> He has no opportunity for administrative or judicial review, and can only submit more evidence and request reconsideration. [22 CFR §42.81\(e\)](#). Former consular officers tell this Court that this lack of accountability, coupled with deficient information and inconsistent training, means decisions often “rely on stereotypes or tropes,” even “bias or bad faith.” Brief for Former Consular Officers as *Amici Curiae* 8. Visa applicants may “experience disparate outcomes based on nothing more than the luck or misfortune of which diplomatic post and consular officer . . . they happen to be assigned.” *Id.*, at 8-9. The State Department’s [\*\*\*\*40] Office of the Inspector General has documented numerous deficiencies in consular processing across several continents. See, e.g., ISP-I-19-14, Inspection of Embassy Bogota, Colombia, p. 16

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<sup>2</sup> As the majority notes, if the consular officer denies admission based on “certain grounds related to crime and national security,” a noncitizen is entitled to “no explanation” at all. [Ante, at 904](#) (citing [8 U. S. C. §1182\(b\)\(3\)](#)).

(Apr. 2019) (finding consular managers in Bogota required visa adjudicators to maintain an average of 30 in-person interviews per hour). Supervisors are required by the State Department to review a certain percentage of visa denials but often fail to do so. See, e.g., Office of Inspector General, ISP-I-19-17, Inspection of Embassy Santo Domingo, Dominican Republic, p. 12 (July 2019) (finding “managers [**\*927**] did not review 284 (23 percent) of the refusals that should have been reviewed between April 1 and June 30, 2018”); Office of Inspector General, ISP-I-16-24A, Inspection of Embassy Ankara, Turkey, p. 20 (Sept. 2016) (finding visa adjudicator failed to review the required 10% of visa issuances and 20% of visa denials).

When the Government requires one spouse to leave the country to apply for immigration status based on his marriage, it therefore asks him to give up the process he would receive in the United States and subject himself to the black box of consular processing.

B

Muñoz, a celebrated workers’ [**\*\*\*\*41**] rights lawyer from Los Angeles, California, met Luis Asencio-Cordero in 2008, three years after he had arrived in the United States. They have been married since 2010 and have a child together. In 2013, Muñoz filed an immediate-relative petition for her [**\*\*\*529**] husband, which USCIS approved. Because Asencio-Cordero had originally entered the United States without inspection, the Government required him to return to El Salvador, his country of origin, for consular processing to obtain his immigrant visa. Yet he also faced a bar to reentry if he left the country. DHS granted him a waiver of this bar upon his anticipated return to the United States because of the “extreme hardship” Muñoz would suffer if he were excluded. [8 U. S. C. §1182\(a\)\(9\)\(B\)\(v\)](#). In April 2015, Asencio-Cordero traveled from California to El Salvador. That was the last time he stood on American soil.

Asencio-Cordero attended the initial consular

interview in San Salvador on May [**\*\*1832**] 28, 2015. In December 2015, a consular officer denied his visa application. As justification, the denial cited only to [§1182\(a\)\(3\)\(A\)\(ii\)](#). That statute provides that any noncitizen “who a consular officer . . . knows, or has reasonable ground to believe, seeks to enter the United States to engage [**\*\*\*\*42**] solely, principally, or incidentally in . . . any other unlawful activity . . . is inadmissible.” In other words, [**\*928**] the consular officer excluded Asencio-Cordero based on a belief that he planned to engage in some unspecified unlawful conduct upon return to the United States. “[U]nlawful activity” could mean anything from jaywalking to murder.

Asencio-Cordero has no criminal history in the United States or El Salvador. See [50 F. 4th 906, 911 \(CA9 2022\)](#); Brief for Respondents 8, n. 5 (“It is uncontested that Asencio-Cordero has never been charged with any crime”). With no obvious justification for the consular officer’s belief, Muñoz and Asencio-Cordero asked for reconsideration. Muñoz sought the help of Congresswoman Judy Chu, who sent a letter to the State Department on Muñoz’s behalf. The following day, the consulate responded to the letter again with only a citation to [§1182\(a\)\(3\)\(A\)\(ii\)](#). In January and April 2016, Muñoz asked the State Department for the factual basis for her husband’s inadmissibility. She and her husband provided evidence of her accolades at work and attestations of Asencio-Cordero’s good moral character. A few days later, the consulate notified Muñoz that the State Department had reviewed the denial and concurred [**\*\*\*\*43**] with the consular officer’s decision. It denied reconsideration.

After the consulate denied reconsideration, Muñoz and her husband wrote to the State Department again requesting a factual basis for the inadmissibility decision. Asencio-Cordero has no criminal record, but he does have several tattoos from his teenage years. App. 22. They depict a range of subjects, including “Our Lady of Guadalupe, Sigmund Freud, a ‘tribal’ pattern with a

paw print, and theatrical masks with dice and cards.” Brief for Respondents 2, n. 2. Some of these images have deep significance in Latin American culture. See, e.g., Brief for Professors and Scholars as *Amici Curiae* 8-10 (“Many Latin Americans view La Virgen de Guadalupe as a special protector, and as a symbol of pan-Latinx identity that transcends attachment to any one geography”). Some also happen to appear on gang members. [\*929] See *ibid.* (noting that “law enforcement agencies and officials often use tattoos of common Catholic imagery . . . as indicia of gang membership”). Speculating about potential bases for a visa denial, [\*\*\*530] Muñoz and her husband included additional evidence from a court-approved gang expert in their letter to the State Department. The [\*\*\*\*44] expert reviewed Asencio-Cordero’s tattoos and concluded that none were “related to any gang or criminal organization in the United States or elsewhere.” [50 F. 4th, at 911](#). The State Department responded that it lacked authority to overturn consular decisions and “concluded in the finding of ineligibility.” *Ibid.* The consulate followed up in May 2016, a year after Asencio-Cordero’s initial interview, by listing all the entities that had reviewed the visa application and noting that “there is no appeal.” *Ibid.*

It was only after Muñoz and her husband sued the Government in Federal District Court that they finally received the factual basis for the denial. After almost two years of litigation, the Government submitted a declaration from a State Department attorney-adviser. [Id., at 912](#). That declaration stated that the consular officer denied Asencio-Cordero’s visa application under [§1182\(a\)\(3\)\(A\)\(ii\)](#) because “based on the in-person interview, a criminal review of Mr. Asencio Cordero and a [\*\*1833] review of . . . Mr. Asencio Cordero’s tattoos, the consular officer determined that Mr. Asencio Cordero was a member of a known criminal organization . . . specifically MS-13.” *Ibid.* (alterations omitted).

The Court of Appeals ruled in Muñoz’s [\*\*\*\*45] favor. It held that the Government’s reason was too

little, too late. The denial of her husband’s visa burdened Muñoz’s right to marriage, and the Government had provided inadequate process. Even though the Government provided a “facially legitimate and bona fide” reason, that reason was not “timely” enough to satisfy constitutional due process requirements. [Id., at 919-921](#). This Court granted the Government’s petition for a writ of certiorari. 601 U. S. \_\_\_, 144 S. Ct. 679, 217 L. Ed. 2d 342 (2024).

## [\*930] II

There was a simple way to resolve this case. I agree with JUSTICE GORSUCH that “the United States has now revealed the factual basis for its decision to deny [Muñoz’s] husband a visa,” and she has thus received whatever process she was due. [Ante, at 920](#) (opinion concurring in judgment).<sup>3</sup> That could and should have been the end of it. Instead, the majority swings for the fences. It seizes on the Government’s invitation to abrogate the right to marriage in the immigration context [\*\*\*531] and sharply limit this Court’s longstanding precedent.

Muñoz has a constitutionally protected interest in her husband’s visa application because its denial burdened her right to marriage. She petitioned USCIS to recognize their marriage so that her husband could remain [\*\*\*\*46] lawfully beside her and their child in the United States. It was the extreme hardship Muñoz faced from her husband’s

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<sup>3</sup>Unlike JUSTICE GORSUCH, I would vacate and remand the opinion below. The Court of Appeals and District Court correctly resolved the two questions on which this Court granted certiorari. The Ninth Circuit nevertheless vacated the District Court’s judgment and remanded based on the answer to a third question, which is not before this Court. See n. 1, *supra*; [50 F. 4th 906, 923-924 \(2022\)](#) (“Because no ‘fact in the record’ justifying the denial of Asencio-Cordero’s visa was made available to [Muñoz and her husband] until nearly three years had elapsed after the denial, and until after litigation had begun, we conclude that the government did not meet the notice requirements of due process when it denied Asencio-Cordero’s visa”). I would let the Ninth Circuit decide in the first instance the effect of a Court holding that Muñoz received all the process she was constitutionally due.

exclusion that formed the basis for USCIS's waiver of his inadmissibility. For the majority, however, once Muñoz's husband left the country in reliance on those approvals, their marriage ceased to matter. Suddenly, the Government owed her no explanation at all.

The constitutional right to marriage is not so flimsy. The Government cannot banish a U. S. citizen's spouse and give [\*931] only a bare statutory citation as an excuse. By denying Muñoz the right to a factual basis for her husband's exclusion, the majority departs from longstanding precedent and gravely undervalues the right to marriage in the immigration context.

A

The constitutional right to marriage has deep roots. “[M]arriage,” this Court said over a century ago, “is something more than a mere contract.” *Maynard v. Hill*, 125 U. S. 190, 210-211, 8 S. Ct. 723, 31 L. Ed. 654 (1888). It is “the most important relation in life,” *id.*, at 205, 8 S. Ct. 723, 31 L. Ed. 654, and “the foundation of the family,” *id.*, at 211, 8 S. Ct. 723, 31 L. Ed. 654. This Court has described it in one breath as the right “to marry, establish a home and bring up children,” a right “long recognized at common law as essential [\*\*1834] to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U. S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). In upholding the right [\*\*\*\*47] of Mildred and Richard Loving to have their marriage license from the District of Columbia recognized by Virginia, this Court emphasized that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U. S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942)). Indeed, the right to marriage was one of the first building blocks of substantive due process. The right was so “‘fundamental’” and “‘implicit in the concept of ordered liberty’” that the *Roe* Court invoked it as part of the foundation underlying the right to abortion. *Roe v. Wade*, 410 U. S. 113, 152-153, 93

*S. Ct. 705, 35 L. Ed. 2d 147 (1973)* (cataloguing existing substantive due process rights as extending to “marriage, procreation, contraception, family relationships, and child rearing and education” (citations omitted)), overruled, *Dobbs*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545.

Almost 10 years ago, this Court vindicated the expansiveness of the right to marriage. It upheld the right of James Obergefell and his terminally ill husband, John Arthur, to have their marriage from Maryland recognized in Ohio. Rejecting the idea that “Ohio can erase [Obergefell’s] marriage [\*\*932] to John Arthur for all time” by declining to place Obergefell as the surviving spouse on Arthur’s death certificate, this Court reasoned that “marriage is a right ‘older than the *Bill of Rights*.’” [\*\*\*\*48] *Obergefell*, 576 U. S., at 666, 678, 135 S. Ct. 2584, 192 L. Ed. 2d 609. Marriage “‘fulfils yearnings for security, safe haven, and connection that express our common humanity.’” *Id.*, at 666, 135 S. Ct. 2584, 192 L. Ed. 2d 609. [\*\*\*532] “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.” *Id.*, at 667, 135 S. Ct. 2584, 192 L. Ed. 2d 609.

The majority, ignoring these precedents, makes the same fatal error it made in *Dobbs*: requiring too “‘careful [a] description of the asserted fundamental liberty interest.’” *Ante*, at 910 (quoting *Washington v. Glucksberg*, 521 U. S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)); cf. *Dobbs*, 597 U. S., at 374-375, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (Breyer, SOTOMAYOR, and KAGAN, JJ., dissenting). The majority faults Muñoz’s invocation of the “‘fundamental right to marriage’” as “‘difficult to pin down.’” *Ante*, at 910. Instead, it tries to characterize her asserted right as “an entitlement to bring [her husband] to the United States,” even though it acknowledges that Muñoz “disclaims that characterization.” *Ibid*.

Obergefell rejected what the majority does today as “inconsistent with the approach this Court has used in discussing [the] fundamental rights” of “marriage and intimacy.” 576 U. S., at 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609. Cataloguing a half century of precedent on the right to marriage, the Court stressed that “Loving did not ask about a ‘right [\*\*\*\*49] to interracial marriage’; Turner did not ask about a ‘right of inmates to marry’; and Zablocki did not ask about a ‘right of fathers with unpaid child support duties to marry.’” *Ibid.* Instead, “each case inquired about the right to marry in its comprehensive sense” of “marriage and intimacy.” *Ibid.* Similarly, Muñoz does not argue that her marriage gives her the right to immigrate her husband. She instead advances the reasonable position that blocking her from living with her husband in the United [\*933] States burdens her right “to marry, establish a home and bring up children” with him. Meyer, 262 U.S., at 399, 43 S. Ct. 625, 67 L. Ed. 1042.

[\*\*1835] This Court has never required that plaintiffs be fully prevented from exercising their right to marriage before invoking it. Instead, the question is whether a challenged government action burdens the right. For example, the Court in Zablocki v. Redhail, 434 U. S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978), examined the “burden” placed on fathers by a statute that required a hearing to “counsel” them “as to the necessity of fulfilling” any outstanding child support obligations before being granted permission to marry. *Id., at 387-388, 98 S. Ct. 673, 54 L. Ed. 2d 618*. The Court in Turner v. Safley, 482 U. S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), applied Zablocki to incarcerated people to hold that the particular prison marriage restriction at issue “impermissibly burden[ed] the right to marry.” [\*\*\*\*50] 482 U. S., at 97, 107 S. Ct. 2254, 96 L. Ed. 2d 64. There can be no real question that excluding a citizen’s spouse from the country “burdens” the citizen’s right to marriage as this Court has repeatedly defined it. This Court has never held that a married couple’s ability to move their home elsewhere removes the burden on their constitutional rights. [\*\*\*533] It

did not tell Richard and Mildred Loving to stay in the District of Columbia or James Obergefell and John Arthur to stay in Maryland. It upheld their ability to exercise their right to marriage wherever they sought to make their home.

Muñoz may be able to live in El Salvador alongside her husband or at least visit him there, but not everyone is so lucky. The majority’s holding will also extend to those couples who, like the Lovings and the Obergefells, depend on American law for their marriages’ validity. Same-sex couples may be forced to relocate to countries that do not recognize same-sex marriage, or even those that criminalize homosexuality. American husbands may be unable to follow their wives abroad if their wives’ countries of origin do not recognize derivative immigration status from women (as was the case in this country for many years, see *ante*, at 913 (noting visa “quotas [\*\*\*\*51] . . . for female citizens with noncitizen husbands” [\*934] until 1952)). The majority’s failure to respect the right to marriage in this country consigns U. S. citizens to rely on the fickle grace of other countries’ immigration laws to vindicate one of the “‘basic civil rights of man’” and live alongside their spouses. Loving, 388 U. S., at 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010.

B

Given that the Government has burdened Muñoz’s right to marriage by excluding her husband from the country, the question is the remedy for that burden. Muñoz argues that this burden triggers procedural due process protections in her husband’s visa denial. Emphasizing that substantive due process rights like the right to marriage usually trigger strict scrutiny, the majority faults Muñoz for creating a right “in a category of one: a substantive due process right that gets only procedural due process protection.” *Ante, at 911*. Muñoz, however, did not create that category of rights. This Court did. See Mandel, 408 U. S., at 768-770, 92 S. Ct. 2576, 33 L. Ed. 2d 683. This Court already set the ground rules for when the Government’s exercise of its extensive power over the exclusion of

noncitizens burdens a U. S. citizen's constitutional rights. See [id.](#), at 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683. In short, a fundamental right may trigger procedural due process protections over a noncitizen's [\*\*\*\*52] exclusion, but such protections are limited. See *ibid.*

Noncitizens who apply for visas from outside the United States have no constitutional entitlement to enter the country, and therefore typically have no constitutional process protections in the visa application themselves. See [Landon v. Plasencia](#), 459 U. S. 21, 32, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982). In contrast, noncitizens [\*\*1836] who already live in the United States whom the Government seeks to remove have procedural due process protections during that removal. See [Yick Wo v. Hopkins](#), 118 U. S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220 (1886); [Zadvydas v. Davis](#), 533 U. S. 678, 693, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Had the Government sought to remove Muñoz's husband when they were living together in the United States, he would have had his own constitutional protections in those [\*935] proceedings. Instead, because the Government forced him to leave [\*\*\*534] the country and reenter in order to adjust his immigration status, he lost them.

Not only do noncitizens seeking to enter the United States lack constitutional process rights in their visa applications. This Court has further insulated the Government's visa determinations from review by declining to evaluate them at all. See [ante](#), at 907-908. This judge-made "doctrine of consular nonreviewability" reflects the Judicial Branch's recognition that the "admission and exclusion of foreign nationals" is an area of unusually [\*\*\*\*53] heightened congressional and executive power. [Ante](#), at 6-7.<sup>4</sup> When the denial of

a noncitizen's visa burdens a U. S. citizen's constitutional rights, however, this Court has had to reconcile the importance of those rights with its recognition of Government authority over visa determinations. In *Mandel*, it set the remedy. The *Mandel* Court held that when a visa denial "implicate[s]" a citizen's rights, a court will not look behind a "facially legitimate [\*936] and bona fide" reason for the denial. 408 U. S., at 765, 769, 92 S. Ct. 2576, 33 L. Ed. 2d 683.

In *Mandel*, a group of U. S. professors sued the Government over the visa denial of Dr. Ernest E. Mandel, a famous Belgian Marxist. See [id.](#), at 756, 759-760, 92 S. Ct. 2576, 33 L. Ed. 2d 683. The professors argued that excluding Mandel burdened their *First Amendment* right to hear and meet with him in person. See [id.](#), at 760, 92 S. Ct. 2576, 33 L. Ed. 2d 683. The Court agreed that the professors had a *First Amendment* "right to receive information" from Mandel. [Id.](#), at 762, 764, 92 S. Ct. 2576, 33 L. Ed. 2d 683. It also emphasized, as the majority does today, Congress's power over the admission and exclusion of noncitizens. See [id.](#), at 766-767, 92 S. Ct. 2576, 33 L. Ed. 2d 683; [ante](#), at 907-908. To avoid the need to balance "the strength of the audience's interest against that of the Government in refusing a waiver to the particular [noncitizen] applicant, according to some as yet undetermined standard," [\*\*\*\*54] [Mandel](#), 408 U.

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Government to ask this Court for less judicial review over its immigration decisions. See, e.g., [Wilkinson v. Garland](#), 601 U. S. 209, 144 S. Ct. 780, 218 L. Ed. 2d 140 (2024) (arguing that eligibility for cancellation of removal is unreviewable); [Santos-Zacaria v. Garland](#), 598 U. S. 411, 143 S. Ct. 1103, 215 L. Ed. 2d 375 (2023) (arguing that noncitizens must request discretionary forms of administrative review before challenging a final order of removal in federal court); [Patel v. Garland](#), 596 U. S. 328, 142 S. Ct. 1614, 212 L. Ed. 2d 685 (2022) (arguing that federal courts lack jurisdiction to review facts found as part of eligibility determination for discretionary relief); [Garland v. Aleman Gonzalez](#), 596 U. S. 543, 142 S. Ct. 2057, 213 L. Ed. 2d 102 (2022) (arguing that district courts lack jurisdiction to entertain noncitizens' requests for class-wide injunctive relief). Unusually, in this case, the Government's argument against review is not based on any statutes passed by Congress but on a doctrine that this Court created itself. Rather than exercise the restraint counseled by *Mandel*, the majority instead chooses to exclude a fundamental right from *Mandel*'s prudent exception. See *infra*, at 936-939.

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<sup>4</sup>Judges created this doctrine because of the otherwise "strong presumption that Congress intends judicial review of administrative action." [Bowen v. Michigan Academy of Family Physicians](#), 476 U. S. 667, 670, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986). The majority emphasizes that the Government asked the Court for the holding it reaches today. See [ante](#), at 907, n. 3. It is hardly unusual for the

[S.](#), [at 768-769](#), [92 S. Ct. 2576](#), [33 L. Ed. 2d 683](#), the Court [\[\\*\\*\\*535\]](#) instead noted that “the Attorney General did inform [\[\\*\\*1837\]](#) Mandel’s counsel of the reason for refusing him a waiver. And that reason was *facially legitimate and bona fide*.” [Id.](#), [at 769](#), [92 S. Ct. 2576](#), [33 L. Ed. 2d 683](#) (emphasis added). Therefore, “when the Executive exercises [conditional power to exclude] negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the [First Amendment](#) interests of those who seek personal communication with the applicant.” [Id.](#), [at 770](#), [92 S. Ct. 2576](#), [33 L. Ed. 2d 683](#). In other words, when a visa denial burdens a noncitizen’s constitutional rights, rather than attempt to balance the competing interests under strict scrutiny, a court should accept the Government’s “facially legitimate and bona fide reason.” *Ibid*. That minimal requirement ensures that courts do not unduly intrude on “the Government’s sovereign authority to set the terms governing the admission and exclusion of noncitizens,” [ante](#), [at 911-912](#), while also ensuring that the Government does not arbitrarily burden citizens’ constitutional rights.

This Court has repeatedly relied on *Mandel*’s test in the immigration context. See, e.g., [Trump v. Hawaii](#), [585 U. S. 667](#), [703](#), [138 S. Ct. 2392](#), [201 L. Ed. 2d 775](#) [\[\\*937\]](#) (2018) (noting that “this Court has engaged [\[\\*\\*\\*\\*55\]](#) in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen”); [Fiallo v. Bell](#), [430 U. S. 787](#), [794](#), [799](#), [97 S. Ct. 1473](#), [52 L. Ed. 2d 50](#) (1977) (relying on *Mandel* in declining to “probe and test the justifications for [a] legislative” distinction between mothers and fathers because this Court has applied limited scrutiny to “resolv[e] similar challenges to immigration legislation based on other constitutional rights of citizens”).<sup>5</sup> Indeed, less than a decade ago, six

Justices ruling on the exact legal question the Court confronts today would have held that *Mandel* controlled or extended its protections even further in the marriage context. See [Kerry v. Din](#), [576 U. S. 86](#), [103-104](#), [\[\\*\\*\\*536\]](#) [135 S. Ct. 2128](#), [192 L. Ed. 2d 183](#) (2015) (Kennedy, J., [\[\\*938\]](#) concurring in judgment) (“The reasoning and the holding in *Mandel* control here. . . . Like the professors who sought an audience with Dr. Mandel, [respondent] claims her [\[\\*\\*1838\]](#) constitutional rights were burdened by the denial of a visa to a noncitizen, namely her husband”); [id.](#), [at 107](#), [135 S. Ct. 2128](#), [192 L. Ed. 2d 183](#) (Breyer, J., dissenting) (reasoning that respondent’s “liberty interest [in] her freedom to live together with her husband in the United States” is the kind “to which the [Due Process Clause](#) grants procedural protection”).

Outside the immigration context, this [\[\\*\\*\\*\\*56\]](#) Court has endorsed similar tests in circumstances where there is a heightened underlying governmental power. For instance, in [Turner](#), the Court evaluated the right to marriage in the prison

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because they have relied on *Mandel* to hold that the Government has in any case provided a “‘facially legitimate and bona fide’” reason. See, e.g., [Sesay v. United States](#), [984 F. 3d 312](#), [315-316](#), and n. 2 (CA4 2021); [Del Valle v. U. S. Dept. of State](#), [16 F. 4th 832](#), [838-842](#) (CA11 2021); [Yafai v. Pompeo](#), [912 F. 3d 1018](#), [1020-1021](#) (CA7 2019). One of the cases the majority cites pre-dates *Mandel*, [Silverman v. Rogers](#), [437 F. 2d 102](#) (CA1 1970), and two others reached the majority’s holding based only on conclusory assertions, see [Burrafato v. U. S. Dept. of State](#), [523 F. 2d 554](#), [555-557](#) (CA2 1975); [Bright v. Parra](#), [919 F. 2d 31](#), [34](#) (CA5 1990) (*per curiam*). Only two Circuits have used the majority’s reasoning to hold that a U. S. citizen’s right to marriage does not trigger the *Mandel* remedy. In one, the court had an alternative holding that “even if we take [the right to marriage] as a given, the argument fails because the consulate provided a facially legitimate reason for the visa denials.” [Baaghil v. Miller](#), [1 F. 4th 427](#), [434](#) (CA6 2021). In the other, a concurring judge urged his colleagues to resolve this challenge on the same narrow holding that the majority could have followed today. See, e.g., [Colindres v. United States Dep’t of States](#), [71 F. 4th 1018](#), [1027](#), [461 U.S. App. D.C. 293](#) (CADC 2023) (opinion of Srinivasan, J.) (“There is no need for us to take up the merits of [the] constitutional question . . . and I would refrain from doing so. Rather, we can rest our decision solely on the ground . . . that even assuming [appellant’s] fundamental right to marriage includes a protected interest in living in the country with her husband, such that at least some form of due process scrutiny applies, the government’s denial of a visa to him afforded her adequate process”).

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<sup>5</sup>Despite the majority’s claim that its decision is the majority rule in the Courts of Appeals, [ante](#), [at 909](#), and n. 5, lower courts have rarely reached the question the majority reaches today. That is

context. Even though an incarcerated person “retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system,” the Court emphasized that “[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration.” [482 U. S., at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64](#) (quoting [Pell v. Procunier, 417 U. S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495 \(1974\)](#)). Only because the challenged prison regulation there was not “reasonably related” to the government’s articulated penological interests, or “legitimate security and rehabilitation concerns,” did this Court hold it unconstitutional. [Turner, 482 U. S., at 95, 107 S. Ct. 2254, 96 L. Ed. 2d 64](#); see [id., at 99, 107 S. Ct. 2254, 96 L. Ed. 2d 64](#).

Just as [Turner](#) looked at burdens on the right to marriage through the narrow lens of “penological interests” to defer to the government’s control over prisons, *Mandel* used a “facially legitimate and bona fide reason” to defer to the Government’s power over the exclusion of noncitizens. Neither case erased the constitutional right at issue. The Court simply recognized that the right can be substantially [\*\*\*\*57] limited in areas where the government exercises unusually heightened control.

Applying *Mandel* and [Turner](#) here, the remedy is clear. The Government’s exclusion of Muñoz’s husband entitles her [\*939] at least to the remedy required in *Mandel*: a “facially legitimate and bona fide reason” for the exclusion. [408 U. S., at 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#).

C

The majority resists this conclusion by worrying about its “unsettling collateral consequences.” [Ante, at 916](#). The majority poses a series of hypotheticals that it fears will result from recognizing the limited right Muñoz proposes. These fears are groundless.

First, the majority’s concern that applying *Mandel* to Muñoz’s right to marriage in this case will result in a slippery slope of constitutional challenges is

unfounded. Muñoz’s right triggers limited process protections in part because her husband lost his own procedural protections when the Government required him to leave the country. Muñoz’s right to marriage raises that floor from zero process to some by requiring the Government to provide a “facially legitimate and bona fide reason” when her husband receives no process. In contrast, a [\*\*\*\*537] citizen’s liberty interest “in the removal proceeding of her spouse” in the United States, [ante, at 917, \[\\*\\*\\*\\*58\]](#) would presumably be limited by the noncitizen’s own due process rights in that same proceeding. Similarly, any challenge from a wife to her husband’s “assignment to a remote prison,” *ibid.*, would presumably be limited by the criminal procedural protections her husband already received.

Second, the majority’s reliance on [O’Bannon v. Town Court Nursing Ctr., 447 U. S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 \(1980\)](#), is misplaced and highlights the speculative nature of its concerns. *O’Bannon* rejected a freestanding constitutional interest in avoiding “serious trauma.” [Id., at 788, 100 S. Ct. 2467, 65 L. Ed. 2d 506](#). [\*\*1839] The residents of a government-funded nursing home sought relief from transfer to alternative housing because of the emotional harm they would suffer from the move. [Id., at 777-781, 784, 100 S. Ct. 2467, 65 L. Ed. 2d 506](#). Muñoz, however, does not rely on a free-floating emotional harm that separation from her husband will cause. She invokes her [\*940] fundamental right to marry, live, and raise a family with her husband, the right recognized by this Court for centuries. See *supra*, at 931-934. Denying her husband entry to the country directly burdens that right.

In sum, the majority’s concerns are unwarranted. There are few circumstances where the limited relief sought by Muñoz would be available.

III

A “facially legitimate and bona fide” reason may seem like a meager remedy for [\*\*\*\*59] burdening a fundamental right. Yet even the barest

explanation requirement can be powerful. The majority relies heavily on [\*United States ex rel. Knauff v. Shaughnessy\*, 338 U. S. 537, 70 S. Ct. 309, 94 L. Ed. 317 \(1950\)](#). See [ante](#), at 908, 914-915. A closer look at the story of Ellen Knauff, however, illustrates the importance of putting the Government to a minimal evidence requirement when a visa denial burdens a constitutional right.

Knauff’s U. S. citizen husband sought to bring her to the United States after they married during his deployment to Germany. After this Court upheld her exclusion on undisclosed national security grounds, there was a public outcry. See [C. Weisselberg, \*The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei\*, 143 U. Pa. L. Rev. 933, 958-964 \(1995\)](#). Both Houses of Congress introduced private bills for her relief and, after the Attorney General rushed to remove Knauff from Ellis Island before Congress could act, Justice Jackson (who had vigorously dissented in the case) issued a stay from this Court. See *id.*, at 958, n. 127. After extensive advocacy, the Attorney General ordered immigration officials to reopen the case. See *id.*, at 961-962. Eventually, Knauff won her case before the BIA when the Government failed to prove up its national security concerns. *Id.*, at 963-964. She was finally admitted as a lawful permanent resident. *Id.*, at 964.

The majority relies heavily on “[t]he rule of *Knauff*”: that “the Attorney General [\*\*\*\*60] has the unchallengeable power to [\*941] exclude” a noncitizen. *Ibid.*; [ante](#), at 915 [\*\*\*538] (emphasizing that “[n]o limits can be put by the courts upon” the exercise of the Government’s power to “forbid aliens or classes of aliens from coming within their borders”). Yet, “the full story of Ellen Knauff shows a populace and a Congress unwilling to accept the exercise of this sort of raw power.” [Weisselberg, 143 U. Pa. L. Rev., at 964](#). “Once the government was required to justify its exclusion decision with substantial and reliable evidence, in an open proceeding, Knauff gained admission into the United States.” *Ibid.*

Knauff brought her own petition to challenge her exclusion. [Knauff, 338 U. S., at 539-540, 70 S. Ct. 309, 94 L. Ed. 317](#). Her husband did not argue that her exclusion burdened his right to marriage. Twenty-two years after *Knauff*, however, when faced with such a challenge, this Court limited the justification that the Government must provide in these circumstances to a “facially legitimate and bona fide reason.” [Mandel, 408 U. S., at 770, 92 S. Ct. 2576, 33 L. Ed. 2d 683](#). The majority, not content to resolve this case on even those narrow grounds, instead relieves the Government of any need to justify itself at all. Knauff’s story illustrates why the right to marriage deserves more. By leaving U. S. citizens without even a factual [\*\*\*\*61] basis for their spouses’ exclusion, the majority [\*\*1840] paves the way for arbitrary denials of a right this Court has repeatedly held among the most important to our Nation.

\*\*\*

A traveler to the United States two centuries ago reported that “[t]here is certainly no country in the world where the tie of marriage is so much respected as in America.” [Obergefell, 576 U. S., at 669, 135 S. Ct. 2584, 192 L. Ed. 2d 609](#) (quoting 1 A. de Tocqueville, *Democracy in America* 309 (H. Reeve transl., rev. ed. 1900)). Today, the majority fails to live up to that centuries-old promise. Muñoz may be able to live with her husband in El Salvador, but it will mean raising her U. S.-citizen child outside the United States. Others will be less fortunate. The burden will fall most heavily on same-sex couples and others [\*942] who lack the ability, for legal or financial reasons, to make a home in the noncitizen spouse’s country of origin. For those couples, this Court’s vision of marriage as the “assurance that while both still live there will be someone to care for the other” rings hollow. [Obergefell, 576 U. S., at 667, 135 S. Ct. 2584, 192 L. Ed. 2d 609](#). I respectfully dissent.



Caution

As of: October 18, 2026 6:38 AM Z

## ***Dobbs v. Jackson Women's Health Org.***

Supreme Court of the United States

December 1, 2021, Argued; June 24, 2022, Decided

No. 19-1392.

### **Reporter**

597 U.S. 215 \*; 142 S. Ct. 2228 \*\*; 213 L. Ed. 2d 545 \*\*\*; 2022 U.S. LEXIS 3057 \*\*\*\*; 29 Fla. L. Weekly Fed. S 486; 2022 WL 2276808

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, ET AL., PETITIONERS v. JACKSON WOMEN'S HEALTH ORGANIZATION, ET AL.

**Notice:** The pagination of this document is subject to change pending release of the final published version.

**Prior History:** [\*\*\*\*1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 2019 U.S. App. LEXIS 36957, 2019 WL 6799650 (5th Cir. Miss., Dec. 13, 2019)

**Disposition:** 945 F. 3d 265, reversed and remanded.

### **Core Terms**

abortion, woman, pregnancy, viability, stare decisis, imprisonment, procure, the, miscarriage, medicine, woman's, fine, due process, contraception, dollar, doctrine, today's, fetus, necessary to preserve, pregnant, abortion rights, constitutional right, destroy, ban, plurality, fetal, majority's, pregnant woman, slip opinion, reaffirm

### **Case Summary**

### **Overview**

Holdings: [1]-*Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), were overruled as Constitution did not reference abortion, and right was neither implicitly protected by a constitutional provision, deeply rooted in Nation's history and tradition, implicit in ordered liberty concept, nor justified as component of broader entrenched right; [2]-Stare decisis did not compel continued acceptance where, inter alia, Roe usurped power to address a profound, important moral and social question unequivocally left to the people, the reasoning was exceptionally weak, precise lines as to permissible restrictions were impossible, and courts could not evaluate the social and economic beliefs; [3]-Constitutional challenge to *Miss. Code Ann. 41-41-191* (2018) failed given the State's legitimate interest in protecting the life of the unborn.

### **Outcome**

Judgment reversed; 6-3 decision; 3 concurrences; 1 dissent.

### **LexisNexis® Headnotes**

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical

Treatment > Abortion > Right to Privacy

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > Substantive Due Process > Scope

### **HN1 Privacy, Personal Decisions**

[\*Roe v. Wade\*, 410 U.S. 113 \(1973\)](#), and [\*Planned Parenthood v. Casey\*, 505 U.S. 833 \(1992\)](#), must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including 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 the Nation's history and tradition and implicit in the concept of ordered liberty.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

### **HN2 Privacy, Personal Decisions**

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.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

### **HN3 Privacy, Personal Decisions**

Constitutional analysis must begin with the

language of the instrument, which offers a fixed standard for ascertaining what the 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.

Constitutional Law > Equal Protection > Gender & Sex

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

### **HN4 Equal Protection, Gender & Sex**

Judicial precedent establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications. The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other. And the goal of preventing abortion does not constitute invidiously discriminatory animus against women. Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.

Constitutional Law > Substantive Due Process > Scope

### **HN5 Constitutional Law, Substantive Due Process**

In deciding whether a right falls into either the rights guaranteed by the first eight Amendments or the fundamental rights not listed in the

Constitution, judicial precedent has long asked whether the right is deeply rooted in the Nation's history and tradition and whether it is essential to the Nation's scheme of ordered liberty.

Constitutional Law > Substantive Due  
Process > Scope

Constitutional Law > ... > Fundamental  
Rights > Procedural Due Process > Scope of  
Protection

### **HN6 Constitutional Law, Substantive Due Process**

In interpreting what is meant by the Fourteenth Amendment's reference to liberty, courts must guard against the natural human tendency to confuse what that Amendment protects with their own ardent views about the liberty that Americans should enjoy. That is why the Supreme Court has long been reluctant to recognize rights that are not mentioned in the Constitution.

Constitutional Law > Substantive Due  
Process > Scope

### **HN7 Constitutional Law, Substantive Due Process**

The Supreme Court must exercise the utmost care whenever it is asked to break new ground in the substantive due process is field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of the Court.

Constitutional Law > Substantive Due  
Process > Scope

### **HN8 Constitutional Law, Substantive Due Process**

The established method of substantive-due-process

analysis requires that an unenumerated right be deeply rooted in the Nation's history and tradition before it can be recognized as a component of the liberty protected in the Due Process Clause.

Governments > Courts > Judicial Precedent

### **HN9 Courts, Judicial Precedent**

As reiterated time and time again, adherence to judicial precedent is not an inexorable command. There are occasions when past decisions should be overruled.

Governments > Courts > Judicial Precedent

### **HN10 Courts, Judicial Precedent**

Stare decisis plays an important role in case law, and it 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 courts 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.

Governments > Courts > Judicial Precedent

### **HN11 Courts, Judicial Precedent**

It is long recognized that stare decisis is not an inexorable command, and it is at its weakest when courts interpret 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 liberties, which was meant to endure through a long lapse of ages, a high value is placed on having the matter settled right. In addition, when one of the Supreme Court's constitutional decisions goes astray, the country is usually stuck with the bad decision unless it corrects its own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but the Constitution is notoriously hard to amend. [U.S. Const. art. V](#). Therefore, in appropriate circumstances the Supreme Court must be willing to reconsider and, if necessary, overrule constitutional decisions.

Constitutional Law > Amendment Process

### [HN12](#) Constitutional Law, Amendment Process

An erroneous constitutional decision can be fixed by amending the Constitution, but the United States Constitution is notoriously hard to amend. [U.S. Const. art. V](#).

Governments > Courts > Authority to Adjudicate

Governments > Courts > Judicial Precedent

### [HN13](#) Courts, Authority to Adjudicate

It is essential that the Supreme Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.

Governments > Courts > Judicial Precedent

### [HN14](#) Courts, Judicial Precedent

Under judicial precedents, the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered.

Governments > Courts > Judicial Precedent

### [HN15](#) Courts, Judicial Precedent

Judicial 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.

Governments > Courts > Judicial Precedent

### [HN16](#) Courts, Judicial Precedent

In the context of stare decisis, traditional reliance interests arise where advance planning of great precision is most obviously a necessity.

Governments > Courts > Judicial Precedent

### [HN17](#) Courts, Judicial Precedent

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.

Governments > Courts > Judicial Precedent

### [HN18](#) Courts, Judicial Precedent

The Supreme Court's sole authority is to exercise judgment, which is to say, the authority to judge what the law means and how it should apply to the case at hand. The Court has no authority to decree that an erroneous precedent is permanently exempt from evaluation under traditional stare decisis principles. A precedent of the Supreme Court is

subject to the usual principles of stare decisis under which adherence to precedent is the norm but not an inexorable command.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical  
Treatment > Abortion > Right to Privacy

Constitutional Law > Bill of Rights > Fundamental Rights > Unenumerated Rights

### **HN19 Privacy, Personal Decisions**

The United States Constitution does not confer a right to abortion.

Governments > Courts > Judicial Precedent

### **HN20 Courts, Judicial Precedent**

The Supreme Court cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical  
Treatment > Abortion > Right to Privacy

### **HN21 Privacy, Personal Decisions**

Under judicial precedents, rational-basis review is the appropriate standard for constitutional challenges to state abortion regulations.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical

Treatment > Abortion > Right to Privacy

### **HN22 Privacy, Personal Decisions**

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.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Healthcare Law > Medical  
Treatment > Abortion > Right to Privacy

### **HN23 Privacy, Personal Decisions**

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.

Healthcare Law > Medical  
Treatment > Abortion > Right to Privacy

### **HN24 Abortion, Right to Privacy**

Except in a medical emergency or in the case of a severe fetal abnormality, [\*Miss. Code Ann. § 41-41-191\(4\)\(b\)\*](#) prohibits abortion if the probable gestational age of the unborn human being has been determined to be greater than 15 weeks.

Constitutional Law > Substantive Due  
Process > Privacy > Personal Decisions

Healthcare Law > Medical  
Treatment > Abortion > Right to Privacy

## **HN25 Privacy, Personal Decisions**

The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833 (1992), arrogated that authority.

## **Syllabus**

[\*215] [\*\*2234] Mississippi’s Gestational Age Act provides that “[e]xcept 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.” Miss. Code Ann. §41-41-191(4)(b). Respondents—Jackson Women’s Health Organization, an abortion clinic, and one of its doctors—challenged the Act in Federal District Court, alleging that it violated this Court’s precedents establishing a constitutional right to abortion, in particular Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, and Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674. The District Court granted summary judgment in favor of respondents and permanently enjoined enforcement of the Act, reasoning that Mississippi’s 15-week restriction on abortion violates this Court’s cases forbidding States to ban abortion pre-viability. The Fifth Circuit affirmed. Before this Court, petitioners defend the Act on the grounds that Roe and Casey were wrongly decided and that the Act is constitutional because it satisfies rational-basis review.

*Held*: The Constitution does not [\*\*\*\*2] confer a right to abortion; Roe and Casey are overruled; and the authority to regulate abortion is returned to the people and their elected representatives. Pp. 8-79.

(a) The critical question is whether the Constitution, properly understood, confers a right to obtain an abortion. Casey’s controlling opinion skipped over that question and reaffirmed Roe solely on the basis of *stare decisis*. A proper application of *stare decisis*, however, requires an assessment of the strength of the grounds on which Roe was based. The Court therefore turns to the question that the Casey plurality did not consider. Pp. 8-32.

(1) First, the Court reviews the standard that the Court’s cases have used to determine whether the Fourteenth Amendment’s reference to “liberty” protects [\*\*2235] a particular right. The Constitution makes no express reference to a right to obtain an abortion, but several constitutional provisions have been offered as potential homes for an implicit constitutional right. Roe held that the abortion right is part of a right [\*216] to privacy that springs from the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. See 410 U.S., at 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147. The Casey Court 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. Others have suggested that support [\*\*\*\*3] can be found in the Fourteenth Amendment’s Equal Protection Clause, but that theory is squarely foreclosed by the Court’s precedents, which establish that a State’s regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications. See Geduldig v. Aiello, 417 U.S. 484, 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256; Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 273-274, 113 S. Ct. 753, 122 L. Ed. 2d 34. Rather, regulations and prohibitions of abortion are governed by the same standard of review as other health and safety measures. Pp. 9-11.

(2) Next, the Court examines whether the right to obtain an abortion is rooted in the Nation's history and tradition and whether it is an essential component of "ordered liberty." The Court finds that the right to abortion is not deeply rooted in the Nation's history and tradition. The underlying theory on which [Casey](#) rested—that the [Fourteenth Amendment's Due Process Clause](#) provides substantive, as well as procedural, protection for "liberty"—has long been controversial. The Court's decisions have held that the [Due Process Clause](#) protects two categories of substantive rights—those rights guaranteed by the first eight Amendments to the Constitution and those rights deemed fundamental that are not mentioned anywhere in the Constitution. In deciding whether a right falls into either of these categories, the question is whether the right is "deeply rooted in [our] history and tradition" [\*\*\*\*4] and whether it is essential to this Nation's "scheme of ordered liberty." [Timbs v. Indiana](#), 586 U.S. \_\_\_, \_\_\_, 139 S. Ct. 682, 203 L. Ed. 2d 11 (internal quotation marks omitted). The term "liberty" alone provides little guidance. Thus, historical inquiries are essential whenever the Court is asked to recognize a new component of the "liberty" interest protected by the [Due Process Clause](#). In interpreting what is meant by "liberty," the Court must guard against the natural human tendency to confuse what the [Fourteenth Amendment](#) protects with the Court's own ardent views about the liberty that Americans should enjoy. For this reason, the Court has been "reluctant" to recognize rights that are not mentioned in the Constitution. [Collins v. Harker Heights](#), 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261.

Guided by the history and tradition that map the essential components of the Nation's concept of ordered liberty, the Court finds the [Fourteenth Amendment](#) clearly does not protect the right to an abortion. 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 [\*217] constitutional provision had recognized such a right. Until a few years before [Roe](#), no

federal or state court had recognized such a right. Nor had any scholarly treatise. Indeed, abortion had long been a *crime* in every single State. At common law, abortion [\*\*\*\*5] 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 [\*\*2236] expanded criminal liability for abortions. By the time the Fourteenth Amendment was adopted, three-quarters of the States had made abortion a crime at any stage of pregnancy. This consensus endured until the day [Roe](#) was decided. [Roe](#) either ignored or misstated this history, and [Casey](#) declined to reconsider [Roe](#)'s faulty historical analysis.

Respondents' argument that this history does not matter flies in the face of the standard the Court has applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the [Fourteenth Amendment](#). The Solicitor General repeats [Roe](#)'s claim that it is "doubtful . . . abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus," 410 U.S., at 136, 93 S. Ct. 705, 35 L. Ed. 2d 147, but the great common-law authorities—Bracton, Coke, Hale, and Blackstone—all wrote that a post-quickening abortion was a crime. Moreover, many authorities asserted that even a pre-quickening abortion was "unlawful" and that, as a result, an abortionist [\*\*\*\*6] was guilty of murder if the woman died from the attempt. The Solicitor General suggests that history supports an abortion right because of the common law's failure to criminalize abortion before quickening, but the insistence on quickening was not universal, see [Mills v. Commonwealth](#), 13 Pa. 631, 633; [State v. Slagle](#), 83 N. C. 630, 632, and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.

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, [410 U. S., at 154, 93 S. Ct. 705, 35 L. Ed. 2d 147](#), and [Casey](#) described it as the freedom to make “intimate and personal choices” that are “central to personal dignity and autonomy,” [505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Ordered liberty sets limits and defines the boundary between competing interests. [Roe](#) and [Casey](#) each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life.” [Roe, 410 U.S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147](#); [Casey, 505 U.S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). But the people of the various States may evaluate those interests differently. The Nation’s historical understanding of ordered liberty [\*\*\*\*7] does not prevent [\*218] the people’s elected representatives from deciding how abortion should be regulated. Pp. 11-30.

(3) Finally, the Court considers whether a right to obtain an abortion is part of a broader entrenched right that is supported by other precedents. The Court concludes the right to obtain an abortion cannot be justified as a component of such a right. Attempts to justify abortion through appeals to a broader right to autonomy and to define one’s “concept of existence” prove too much. [Casey, 505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Those criteria, at a high level of generality, could license fundamental rights to illicit drug use, prostitution, and the like. What sharply distinguishes the abortion right from the rights recognized in the cases on which [Roe](#) and [Casey](#) rely is something that both those decisions acknowledged: Abortion is different because it destroys what [Roe](#) termed “potential life” and what the law challenged in this case calls an “unborn human being.” None of the other decisions cited by [Roe](#) and [Casey](#) involved the critical moral question posed by abortion. Accordingly, those cases do not support the right to obtain an abortion, and the Court’s conclusion that the Constitution does not

confer [\*\*2237] such a right does not undermine [\*\*\*\*8] them in any way. Pp. 30-32.

(b) The doctrine of *stare decisis* does not counsel continued acceptance of [Roe](#) and [Casey](#). *Stare decisis* plays an important role and 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.” [Kimble v. Marvel Entertainment, LLC, 576 U. S. 446, 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463](#). It “contributes to the actual and perceived integrity of the judicial process.” [Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720](#). And it restrains judicial hubris by respecting the judgment of those who grappled with important questions in the past. But *stare decisis* is not an inexorable command, [Pearson v. Callahan, 555 U. S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565](#), and “is at its weakest when [the Court] interpret[s] the Constitution,” [Agostini v. Felton, 521 U. S. 203, 235, 117 S. Ct. 1997, 138 L. Ed. 2d 391](#). Some of the Court’s most important constitutional decisions have overruled prior precedents. See, e.g., [Brown v. Board of Education, 347 U. S. 483, 491, 74 S. Ct. 686, 98 L. Ed. 873](#) (overruling the infamous decision in [Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256](#), and its progeny).

The Court’s cases have identified factors that should be considered in deciding when a precedent should be overruled. *Janus v. State, County, and Municipal Employees*, 585 U. S. \_\_\_, \_\_\_-\_\_\_. Five factors discussed below weigh strongly in favor of overruling [Roe](#) and [Casey](#). Pp. 39-66.

(1) *The nature of the Court’s error.* Like the infamous decision in *Plessy v. Ferguson*, [Roe](#) was also egregiously wrong and on a collision course with the [\*\*\*\*9] Constitution from the day it was decided. *Casey* perpetuated [\*219] its errors, 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 disagreed with *Roe*. Pp. 43-45.

(2) *The quality of the reasoning.* Without any grounding in the constitutional text, history, or precedent, *Roe* imposed on the entire country a detailed set of rules for pregnancy divided into trimesters much like those that one might expect to find in a statute or regulation. See [410 U.S., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). *Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Then, after surveying history, the opinion spent many paragraphs conducting the sort of fact-finding that might be undertaken by a legislative committee, and did not explain why the sources on which it relied shed light on the meaning of the [\*\*\*\*10] Constitution. As to precedent, citing a broad array of cases, the Court found support for a constitutional "right of personal privacy." *Id.*, at [152, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). But *Roe* conflated the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See [Whalen v. Roe, 429 U. S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64](#). None of these decisions involved what is distinctive about abortion: its effect on what *Roe* termed "potential life." When the Court summarized the basis for the scheme it imposed on the country, it asserted that its rules were "consistent with," among other things, "the relative [\*\*2238] weights of the respective interests involved" and "the demands of the profound problems of the present day." *Roe*, [410 U. S., at 165, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). These are precisely the sort of considerations that legislative bodies often take into account when they draw lines that accommodate competing interests. The scheme *Roe* produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body. An even

more glaring deficiency was *Roe*'s failure to justify the critical distinction it drew between pre- and post-viability abortions. See *id.*, at [163, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). The arbitrary viability line, which *Casey* termed *Roe*'s central rule, has not found [\*\*\*\*11] much support among philosophers and ethicists who have attempted to justify a right to abortion. The most obvious problem with any such argument is that viability has changed over time and is heavily dependent on factors—such as medical advances and the availability of quality medical care—that have nothing to do with the characteristics of a fetus.

When *Casey* revisited *Roe* almost 20 years later, it reaffirmed *Roe*'s central holding, but pointedly refrained from endorsing most of its reasoning. [\*\*220] The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the [Fourteenth Amendment's Due Process Clause, 505 U.S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). The controlling opinion criticized and rejected *Roe*'s trimester scheme, [505 U. S., at 872, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#), and substituted a new and obscure "undue burden" test. *Casey*, in short, either refused to reaffirm or rejected important aspects of *Roe*'s analysis, failed to remedy glaring deficiencies in *Roe*'s reasoning, endorsed what it termed *Roe*'s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than *Roe*'s status as precedent, and imposed a new test with no firm grounding in constitutional text, history, or precedent. Pp. 45-56.

(3) *Workability.* Deciding [\*\*\*\*12] whether a precedent should be overruled depends in part on 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. The *Casey* plurality tried to put meaning into the "undue burden" test by setting out three subsidiary rules, but these rules created their own problems. And the difficulty of applying *Casey*'s

new rules surfaced in that very case. Compare [505 U. S., at 881-887, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#), with [id., at 920-922, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (Stevens, J., concurring in part and dissenting in part). 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*, 585 U. S., at \_\_\_\_\_. *Casey* has generated a long list of Circuit conflicts. Continued adherence to [Casey](#)’s unworkable “undue burden” test would undermine, not advance, the “evenhanded, predictable, and consistent development of legal principles.” [Payne, 501 U.S., at 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720](#). Pp. 56-62.

(4) *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. See [Ramos v. Louisiana, 590 U. S. \\_\\_\\_\\_\\_, 140 S. Ct. 1390, 206 L. Ed. 2d 583](#) (Kavanaugh, J., concurring in [\*\*\*\*13] part). Pp. 62-63.

(5) *Reliance interests.* Overruling [Roe](#) and [Casey](#) will not upend concrete reliance interests like those that develop in “cases involving property and contract rights.” [Payne, 501 U. S., at 828, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720](#). In [Casey](#), the controlling opinion conceded [\*\*2239] that traditional reliance interests were not implicated because getting an abortion is generally “unplanned activity,” and “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.” [505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Instead, the opinion perceived a more intangible form of reliance, namely, that “people [had] organized intimate relationships and [\*221] made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail” and that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their

ability to control their reproductive lives.” [Ibid.](#) The contending sides in this case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women as well as the status of the fetus. The *Casey* plurality’s speculative attempt to weigh the relative importance [\*\*\*\*14] of the interests of the fetus and the mother represent a departure from the “original constitutional proposition” that “courts do not substitute their social and economic beliefs for the judgment of legislative bodies.” [Ferguson v. Skrupa, 372 U.S. 726, 729-730, 83 S. Ct. 1028, 10 L. Ed. 2d 93](#).

The Solicitor General suggests that overruling [Roe](#) and [Casey](#) would threaten the protection of other rights under the [Due Process Clause](#). The Court emphasizes that this decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion. Pp. 63-66.

(c) *Casey* identified another concern, namely, the danger that the public will perceive a decision overruling a controversial “watershed” decision, such as [Roe](#), as influenced by political considerations or public opinion. [505 U.S., at 866-867, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). But the Court cannot allow its decisions to be affected by such extraneous concerns. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like [Plessy](#) would still be the law. The Court’s job is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly. [\*\*\*\*15] Pp. 66-69.

(d) Under the Court’s precedents, rational-basis review is the appropriate standard to apply when state abortion regulations undergo constitutional challenge. Given that procuring an abortion is not a fundamental constitutional right, 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.” [\*Ferguson\*, 372 U.S., at 729-730, 83 S. Ct. 1028, 10 L. Ed. 2d 93](#). That 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.” [\*Heller v. Doe\*, 509 U. S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257](#). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. [\*Id.\*, at 320, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257](#).

[\*222] Mississippi’s Gestational Age Act is supported by the Mississippi Legislature’s specific findings, which include the State’s asserted interest in “protecting the life of the unborn.” §2(b)(i)(7). These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents’ constitutional challenge must fail. Pp. 76-78.

[\*\*2240] (e) [\*\*\*\*16] 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. The Court overrules those decisions and returns that authority to the people and their elected representatives. Pp. 78-79.

945 F. 3d 265, reversed and remanded.

**Counsel: Scott G. Stewart** argued the cause for petitioners.

**Julie Rikelman** argued the cause for respondents.

**Elizabeth B. Prelogar** argued the cause for respondents.

**Judges:** Alito, J., delivered the opinion of the Court, in which Thomas, Gorsuch, Kavanaugh, and

Barrett, JJ., joined. Thomas, J., and Kavanaugh, J., filed concurring opinions. Roberts, C. J., filed an opinion concurring in the judgment. Breyer, Sotomayor, and Kagan, JJ., filed a dissenting opinion.

**Opinion by: ALITO**

## Opinion

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[\*223] [\*\*\*557] JUSTICE ALITO delivered the opinion of the Court.

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 [\*224] 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 [\*225] should be allowed under some but not all circumstances, and those within this group hold a variety of views about [\*\*\*\*17] 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\*, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). 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 [\*226] 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 [\*227] was probably never a crime under the common law). After cataloging a wealth of other information having [\*\*\*558] no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be

found in a statute enacted by a legislature.

[\*228] [\*\*2241] 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. [\*\*\*\*18] Although the Court acknowledged that States had a legitimate interest in protecting “potential life,”<sup>1</sup> 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 end[ed] 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.”<sup>2</sup>

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.<sup>3</sup> As Justice Byron White aptly put it in his dissent, the decision represented the “exercise of raw judicial power,” *410 U.S.*, [\*229] at 222, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147, and it sparked a national controversy that has embittered our political culture for a half century.<sup>4</sup>

Eventually, in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), the [\*\*\*\*19] Court revisited *Roe*, but the Members of the Court split three ways. Two Justices expressed no desire to change *Roe* in any way.<sup>5</sup> Four others wanted to overrule the decision in its entirety.<sup>6</sup> And the three remaining Justices, who jointly signed the controlling opinion, took a third position.<sup>7</sup> Their opinion did not endorse *Roe*’s reasoning, and it even hinted that one or more of its authors might [\*\*\*559] have “reservations” about whether the Constitution protects a right to abortion.<sup>8</sup> 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.<sup>9</sup> Anything less, the opinion claimed, would undermine respect for this Court and the rule of law.

[\*\*2242] Paradoxically, the judgment in *Casey* did a fair amount of overruling. Several important abortion decisions were overruled *in toto*, and *Roe* itself was overruled in part.<sup>10</sup> [\*230] *Casey* threw

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moving in a reform direction and thereby, I believed, prolonged divisiveness and deferred stable settlement of the issue”).

<sup>5</sup> See *505 U.S.*, at 911, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Stevens, J., concurring in part and dissenting in part); *id.*, at 922, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

<sup>6</sup> See *id.*, at 944, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Rehnquist, C. J., concurring in judgment in part and dissenting in part); *id.*, at 979, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Scalia, J., concurring in judgment in part and dissenting in part).

<sup>7</sup> See *id.*, at 843, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (joint opinion of O’Connor, Kennedy, and Souter, JJ.).

<sup>8</sup> *Id.*, at 853, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

<sup>9</sup> *Id.*, at 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

<sup>10</sup> *Id.*, at 861, 870, 873, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (overruling *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), and *Thornburgh v. American College of Obstetricians and*

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<sup>1</sup> *Roe v. Wade*, 410 U.S. 113, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

<sup>2</sup> J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 926, 947 (1973) (Ely) (emphasis deleted).

<sup>3</sup> L. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 2 (1973) (Tribe).

<sup>4</sup> See R. Ginsburg, *Speaking in a Judicial Voice*, 67 N. Y. U. L. Rev. 1185, 1208 (1992) (“*Roe*. . . halted a political process that was

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. [\*\*\*\*20]<sup>11</sup> 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 “call[ed] 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.<sup>12</sup>

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 [\*\*\*\*21] 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.” Brief for Respondents 43. They contend that “no [\*231] half-measures” are available and that we must either reaffirm or overrule [Roe](#) and [Casey](#). Brief for Respondents 50.

[\*\*\*560] [HN1](#) 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.” [Washington v. Glucksberg](#), 521 U. S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (internal quotation marks omitted).

The right to abortion does not fall within this category. Until the latter part of the 20th century, such [\*\*\*\*22] a right was entirely unknown in American law. Indeed, when the [Fourteenth Amendment](#) was adopted, three quarters of the States made abortion [\*\*2243] 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.”<sup>13</sup>

*Stare decisis*, the doctrine on which [Casey](#)’s controlling opinion was based, does not compel unending adherence to [Roe](#)’s abuse of judicial

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[Gynecologists](#), 476 U. S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986)).

<sup>11</sup> 505 U. S., at 874, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

<sup>12</sup> *Id.*, at 867, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

<sup>13</sup> [Miss. Code Ann. §41-41-191\(4\)\(b\)](#) (2018).

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 [\*232] abortion issue, [Roe](#) and [Casey](#) have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "[HN2](#) The permissibility of abortion, [\*\*\*\*23] 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." [Casey](#), 505 U.S., at 979, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Scalia, J., concurring in judgment in part and dissenting in part). That is what the Constitution and the rule of law demand.

I

The law at issue in this case, Mississippi's Gestational Age Act, see [Miss. Code Ann. §41-41-191](#) (2018), 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." [§4\(b\)](#).<sup>14</sup>

To support this Act, the legislature made a series of factual findings. It [\*\*\*561] began by noting that, at the time of enactment, only six countries besides the United States "permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation."<sup>15</sup> [§2\(a\)](#). The legislature [\*233]

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 [\*\*\*\*24] present"; at 10 weeks "vital organs begin to function," and "[h]air, fingernails, and toenails . . . begin [\*\*2244] 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." [§2\(b\)\(i\)](#) (quoting [Gonzales v. Carhart](#), 550 U. S. 124, 160, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007)). 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." [§2\(b\)\(i\)\(8\)](#).

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 [\*\*\*\*25] 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." [Jackson \[\\*\\*\\*234\] Women's Health Org. v. Currier](#), 349 F.

<sup>14</sup>The Act defines "gestational age" to be "the age of an unborn human being as calculated from the first day of the last menstrual period of the pregnant woman." [§3\(f\)](#).

<sup>15</sup>Those other six countries were Canada, China, the Netherlands, North Korea, Singapore, and Vietnam. See A. Baglini, Charlotte Lozier Institute, Gestational Limits on Abortion in the United States Compared to International Norms 6-7 (2014); M. Lee, Is the United States One of Seven Countries That "Allow Elective Abortions After 20 Weeks of Pregnancy?" Wash. Post (Oct. 8, 2017), [www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-](http://www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy)

[united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy](http://www.washingtonpost.com/news/fact-checker/wp/2017/10/09/is-the-united-states-one-of-seven-countries-that-allow-elective-abortions-after-20-weeks-of-pregnancy) (stating that the claim made by the Mississippi Legislature and the Charlotte Lozier Institute was "backed by data"). A more recent compilation from the Center for Reproductive Rights indicates that Iceland and Guinea-Bissau are now also similarly permissive. See The World's Abortion Laws, Center for Reproductive Rights (Feb. 23, 2021), <https://reproductiverights.org/maps/worlds-abortion-laws/>.

*Supp. 3d* 536, 539-540 (SD Miss. 2019) (internal quotation marks omitted). The Fifth Circuit affirmed. 945 F. 3d 265 (2019).

We granted certiorari, [593 U.S. \\_\\_\\_\\_\\_, 141 S. Ct. 2619, 209 L. Ed. 2d 748, 2021 U.S. LEXIS 2556, 89 U.S.L.W. 3388 \(2021\)](#), to resolve the question whether “all pre-viability prohibitions on elective abortions are unconstitutional,” Pet. for Cert. i. Petitioners’ primary defense of the Mississippi Gestational Age Act is that [Roe](#) and [Casey](#) were wrongly decided and that “the Act is constitutional because it satisfies rational-basis review.” Brief for Petitioners 49. Respondents answer that allowing Mississippi to ban pre-viability abortions “would be no different than overruling [Casey](#) and [Roe](#) entirely.” Brief for Respondents 43. They tell us that “no half-measures” [\[\\*\\*\\*562\]](#) are available: We must either reaffirm or overrule [Roe](#) and [Casey](#). Brief for Respondents 50.

## 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 [\[\\*\\*\\*\\*26\]](#) explain, proper application of *stare decisis* required an assessment of the strength of the grounds on which [Roe](#) was based. See [infra, at 45-56](#).

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.

[\[\\*235\]](#) A

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[HN3](#) Constitutional analysis must begin with “the language of the instrument,” [Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 186-189, 6 \[\\*\\*2245\] L. Ed. 23 \(1824\)](#), which offers a “fixed standard” for ascertaining what our founding document means, 1 J. Story, *Commentaries on the Constitution of the United States* §399, p. 383 (1833). 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 [\[\\*\\*\\*\\*27\]](#) 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. See [410 \[\\*\\*\\*563\] U.S., at 152-153, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). 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](#). *Id.*, at 152, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147.

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.” *Id.*, at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147. 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. *Ibid*; see also [McDonald v. Chicago, 561 U. S. 742, 763-766, 130 S. Ct. 3020, 177 L. Ed. 2d 894 \(2010\)](#) (majority opinion) (discussing incorporation). 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](#), 410 U.S., at 153, 163, 93 S. Ct. 705, 35 L. Ed. 2d 147. [Roe](#) expressed the “feel[ing]” [\*236] 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 [\*\*\*\*28] paramount importance.<sup>16</sup> 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](#).

We discuss this theory in depth below, but before doing so, we briefly address one additional constitutional provision that some of respondents’ *amici* have now offered as yet another potential home for the abortion right: the [Fourteenth Amendment's Equal Protection Clause](#). See Brief for United States as *Amicus Curiae* 24 (Brief for United States); see also Brief for Equal Protection Constitutional Law Scholars as *Amici Curiae*. [HN4](#) Neither [Roe](#) nor [Casey](#) saw fit to invoke this theory, and it is squarely foreclosed by our precedents, which establish that a State’s regulation of abortion is not a sex-based classification and is thus not subject to the “heightened scrutiny” that applies to such classifications.<sup>17</sup> The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional [\*\*2246] scrutiny unless the regulation is a “mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.” [Geduldig v. Aiello](#), 417 U. S. 484, 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974). And as the Court has

stated, the “goal of preventing abortion” does not constitute [\*\*\*\*29] “invidiously discriminatory animus” against women. [Bray v. Alexandria \[\\*\\*237\] Women's Health Clinic](#), 506 U.S. 263, 273-274, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993) (internal quotation marks omitted). Accordingly, laws regulating or prohibiting abortion are not subject to heightened scrutiny. Rather, they are governed by the same standard of review as other health and safety measures.<sup>18</sup>

With this new theory addressed, we 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](#). 505 U.S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674; Brief for Respondents 17; Brief for United States 21-22.

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.

[\*\*\*564] The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government, [Barron ex rel. Tiernan v. Mayor of Baltimore](#), 32 U.S. 243, 7 Pet. 243, 247-251, 8 L. Ed. 672 (1833) (opinion for the Court by Marshall, C. J.), 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. See [McDonald](#), 561 U.S., at 763-767, 130 S. Ct. 3020, 177 L. Ed. 2d 894, and nn. 12-13. 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.

[HN5](#) In deciding [\*\*\*\*30] whether a right falls

<sup>16</sup>The Court’s words were as follows: “This right of privacy, whether it be founded in the [Fourteenth Amendment's](#) concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the [Ninth Amendment's](#) reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” 410 U.S., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147.

<sup>17</sup> See, e.g., [Sessions v. Morales-Santana](#), 582 U.S. 47, —, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017) (slip op., at 8).

<sup>18</sup> We discuss this standard in Part VI of this opinion.

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.” *Timbs v. [\*\*\*238] Indiana*, 586 U. S. \_\_\_, \_\_\_, 139 S. Ct. 682, 203 L. Ed. 2d 11, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2019) (slip op., at 3) (internal quotation marks omitted); *McDonald*, 561 U.S., at 764, 767, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (internal quotation marks omitted); *Glucksberg*, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (internal quotation marks omitted).<sup>19</sup> 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,” 586 U.S., at \_\_\_, 139 S. Ct. 682, 685, 203 L. Ed. 2d 11 (internal quotation marks omitted), her opinion traced the right back to Magna Carta, Blackstone’s Commentaries, and 35 of the 37 state constitutions in effect at the [\*\*\*2247] ratification of the *Fourteenth Amendment*. 586 U. S., at - , 139 S. Ct. 682, 697, 203 L. Ed. 2d 11.

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 [\*\*\*\*31] to

keep and bear arms), federal laws enacted during the same period, and other relevant historical evidence. 561 U.S., at 767-777, 130 S. Ct. 3020, 177 L. Ed. 2d 894. 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.” *Id.*, at 778, 130 S. Ct. 3020, 177 L. Ed. 2d 894; see also *id.*, at 822-850, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (THOMAS, J., concurring in part and concurring in judgment) (surveying history and reaching the [\*\*\*565] same [\*239] result under the *Fourteenth Amendment’s Privileges or Immunities Clause*).

*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,” 521 U.S., at 711, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772, and made clear that a fundamental right must be “objectively, deeply rooted in this Nation’s history and tradition,” *id.*, at 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772.

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 [\*\*\*\*32] all declare for Liberty; but in using the same word we do not all mean the same thing.”<sup>20</sup> In a well-known essay, Isaiah Berlin reported that “[h]istorians of ideas” had cataloged more than 200 different senses

<sup>19</sup> See also, e.g., *Duncan v. Louisiana*, 391 U. S. 145, 148, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (asking whether “a right is among those ‘fundamental principles of liberty and justice which lie at the base of our civil and political institutions’”); *Palko v. Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937) (requiring “a ‘principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental’” (quoting *Snyder v. Massachusetts*, 291 U. S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934))).

<sup>20</sup> Address at Sanitary Fair at Baltimore, Md. (Apr. 18, 1864), reprinted in 7 The Collected Works of Abraham Lincoln 301 (R. Basler ed. 1953).

in which the term had been used.<sup>21</sup>

**HN6** 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 should enjoy. That is why the Court has long been “reluctant” to recognize rights that are not mentioned in the Constitution. [Collins v. Harker Heights](#), 503 U. S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). “Substantive due process has at times been a treacherous field for this Court,” [Moore v. East Cleveland](#), 431 U. S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion), and it has sometimes led the Court to usurp authority that the Constitution **[\*240]** entrusts to the people’s elected representatives. See [Regents of Univ. of Mich. v. Ewing](#), 474 U. S. 214, 225-226, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985). **HN7** As the Court cautioned in [Glucksberg](#), “[w]e 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 **[\*\*2248]** of the Members of this Court.” [521 U. S.](#), at 720 (internal quotation marks and citation omitted).

On occasion, when the Court has ignored the “[a]ppropriate limits” imposed by “‘respect for the **[\*\*\*\*33]** teachings of history,’” [Moore](#), 431 U. S., at 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (plurality opinion), it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as [Lochner v. New York](#), 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). 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, **[\*\*\*566]** 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.<sup>22</sup>

## **[\*241] 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. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before [Roe](#).<sup>23</sup>

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<sup>22</sup> That is true regardless of whether we look to the [Amendment's Due Process Clause](#) or its [Privileges or Immunities Clause](#). Some scholars and Justices have maintained that the [Privileges or Immunities Clause](#) is the provision of the [Fourteenth Amendment](#) that guarantees substantive rights. See, e.g., [McDonald v. Chicago](#), 561 U. S. 742, 813-850, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment); [Duncan](#), 391 U.S., at 165-166, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (Black, J., concurring); A. Amar, Bill of Rights: Creation and Reconstruction 163-180 (1998) (Amar); J. Ely, Democracy and Distrust 22-30 (1980); 2 W. Crosskey, Politics and the Constitution in the History of the United States 1089-1095 (1953). But even on that view, such a right would need to be rooted in the Nation’s history and tradition. See [Corfield v. Coryell](#), 6 F. Cas. 546, 551-552, F. Cas. No. 3230 (No. 3,230) (CC ED Pa. 1823) (describing unenumerated rights under the [Privileges and Immunities Clause, Art. IV, §2](#), as those “fundamental” rights “which have, at all times, been enjoyed by the citizens of the several states”); Amar 176 (relying on [Corfield](#) to interpret the Privileges or Immunities Clause); cf. [McDonald](#), 561 U.S., at 819-820, 832, 854, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (opinion of THOMAS, J.) (reserving the question whether the Privileges or Immunities Clause protects “any rights besides those enumerated in the Constitution”).

<sup>23</sup> See R. Lucas, Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes, 46 N. C. L. Rev. 730 (1968) (Lucas); see also D. Garrow, Liberty and Sexuality 334-335 (1994) (Garrow) (stating that Lucas was “undeniably the first person to fully articulate on paper” the argument that “a woman’s right to choose abortion was a fundamental individual freedom protected by the U. S. Constitution’s guarantee of personal liberty”).

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<sup>21</sup> Four Essays on Liberty 121 (1969).

Not only was there no support for such a constitutional right until shortly before [Roe](#), but abortion [\*\*\*\*34] 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, [\*\*2249] 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.

## [\*242] 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 [\*\*\*567] womb, which usually occurs between the 16th and 18th week of pregnancy.<sup>24</sup>

The “eminent common-law authorities (Blackstone, Coke, Hale, and the like),” [Kahler v. Kansas](#), 589 U. S. \_\_\_, \_\_\_, 140 S. Ct. 1021, 206 L. Ed. 2d 312

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<sup>24</sup>The exact meaning of “quickening” is subject to some debate. Compare Brief for Scholars of Jurisprudence as *Amici Curiae* 12-14, and n. 32 (emphasis deleted) (“a quick child” meant simply a “live” child, and under the era’s outdated knowledge of embryology, a fetus was thought to become “quick” at around the sixth week of pregnancy), with Brief for American Historical Association et al. as *Amici Curiae* 6, n. 2 (“quick” and “quickening” consistently meant “the woman’s perception of fetal movement”). We need not wade into this debate. First, it suffices for present purposes to show that abortion was criminal by *at least* the 16th or 18th week of pregnancy. Second, as we will show, during the relevant period—*i.e.*, the period surrounding the enactment of the [Fourteenth Amendment](#)—the quickening distinction was abandoned as States criminalized abortion at all stages of pregnancy. See *infra*, at 21-25.

(2020) (slip op., at 7), *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 [\*\*\*\*35] abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide.” 2 *De Legibus et Consuetudinibus Angliae* 279 (T. Twiss ed. 1879); see also 1 Fleta, c. 23, reprinted in 72 *Selden Soc.* 60-61 (H. Richardson & G. Sayles eds. 1955) (13th-century treatise).<sup>25</sup>

Sir Edward Coke’s 17th-century treatise likewise asserted that abortion of a quick child was “murder” if the “childe be born alive” and a “great misprision” if the “childe dieth in her body.” 3 *Institutes of the Laws of England* 50-51 (1644). [\*243] (“Misprision” referred to “some heynous offence under the degree of felony.” *Id.*, at 139.) Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a “great crime” and a “great misprision.” *Pleas of the Crown* 53 (P. Glazebrook ed. 1972); 1 *History of the Pleas of the Crown* 433 (1736) (Hale). And 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). 1 *Commentaries on the Laws of England* 129-130 (7th ed. 1775) (Blackstone). [\*\*\*\*36]

English cases dating all the way back to the 13th century corroborate the treatises’ statements that abortion was a crime. See generally J. Dellapenna, *Dispelling the Myths of Abortion History* 126, and n. 16, 134-142, 188-194, and nn. 84-86 (2006) (Dellapenna); J. Keown, *Abortion, Doctors and the Law* 3-12 (1988) (Keown). In 1732, for example, Eleanor Beare was convicted of “destroying the Foetus in the Womb” of another woman and

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<sup>25</sup> Even before Bracton’s time, English law imposed punishment for the killing of a fetus. See *Leges Henrici Primi* 222-223 (L. Downer ed. 1972) (imposing penalty for any abortion and treating a woman who aborted a “quick” child “as if she were a murderess”).

“thereby causing her [**\*\*2250**] to miscarry.”<sup>26</sup> For that crime and another “misdemeanor,” Beare was sentenced to two days in the pillory and three years’ imprisonment.<sup>27</sup>

Although a pre-quickening abortion was not itself considered homicide, it [**\*\*\*568**] does not follow that abortion was *permissible* at common law—much less that abortion was a legal *right*. Cf. [\*Glucksberg\*, 521 U.S., at 713, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772](#) (removal of “common law’s harsh sanctions did not represent an acceptance of suicide”). Quite to the contrary, in the 1732 case mentioned above, the judge said of the charge of abortion (with no mention of quickening) that he had “never met with a case so barbarous and unnatural.”<sup>28</sup> Similarly, an indictment from 1602, which did not distinguish between a pre-quickening and post-quickening abortion, described abortion as “pernicious” [**\*\*\*\*37**] [**\*244**] and “against the peace of our Lady the Queen, her crown and dignity.” Keown 7 (discussing *R. v. Webb*, Calendar of Assize Records, Surrey Indictments 512 (1980)).

That the common law did not condone even pre-quickening abortions is confirmed by what one might call a proto-felony-murder rule. Hale and Blackstone explained a way in which a pre-quickening abortion could rise to the level of a homicide. Hale wrote that if a physician gave a woman “with child” a “potion” to cause an abortion, and the woman died, it was “murder” because the potion was given “*unlawfully* to destroy her child within her.” 1 Hale 429-430 (emphasis added). As Blackstone explained, to be “murder” a killing had to be done with “malice aforethought, . . . either express or implied.” 4 Blackstone 198 (emphasis deleted). In the case of an abortionist, Blackstone wrote, “the law will

imply [malice]” for the same reason that it would imply malice if a person who intended to kill one person accidentally killed a different person:

“[I]f one shoots at A and misses *him*, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one [**\*\*\*\*38**] lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. *So also*, if one gives *a woman with child* a medicine to procure abortion, and it operates so violently as to kill the woman, *this is murder* in the person who gave it.” *Id.*, at 200-201 (emphasis added; footnote omitted).<sup>29</sup>

Notably, Blackstone, like Hale, did not state that this proto-felony-murder rule required that the woman be “with [**\*245**] quick child”—only that she be “with child.” *Id.*, at 201. And it is revealing that Hale and Blackstone treated abortionists differently from *other* physicians or surgeons who caused the death of a patient “without any intent of doing [the patient] any bodily hurt.” Hale 429; see 4 Blackstone 197. These other physicians—even if “unlicensed”—would not be “guilty of murder or manslaughter.” Hale 429. But a physician performing an abortion would, precisely because his aim was an “unlawful” one.

[**\*\*2251**] In sum, although common-law authorities differed on the severity of [**\*\*\*569**] 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 [**\*\*\*\*39**] suggests a positive *right* to procure an abortion at any stage of pregnancy.

<sup>26</sup> 2 Gentleman’s Magazine 931 (Aug. 1732).

<sup>27</sup> *Id.*, at 932.

<sup>28</sup> *Ibid.*

<sup>29</sup> Other treatises restated the same rule. See 1 W. Russell & C. Greaves, *Crimes and Misdemeanors* 540 (5th ed. 1845) (“So where a person gave medicine to a woman to procure an abortion, and where a person put skewers into the womb of a woman for the same purpose, by which in both cases the women were killed, these acts were clearly held to be murder” (footnotes omitted)); 1 E. East, *Pleas of the Crown* 230 (1803) (similar).

b

In this country, the historical record is similar. The “most important early American edition of Blackstone’s Commentaries,” [\*District of Columbia v. Heller\*, 554 U. S. 570, 594, 128 S. Ct. 2783, 171 L. Ed. 2d 637 \(2008\)](#), reported Blackstone’s statement that abortion of a quick child was at least “a heinous misdemeanor,” 2 St. George Tucker, Blackstone’s Commentaries 129-130 (1803), and that edition also included Blackstone’s discussion of the proto-felony-murder rule, 5 *id.*, at 200-201. Manuals for justices of the peace printed in the Colonies in the 18th century typically restated the common-law rule on abortion, and some manuals repeated Hale’s and Blackstone’s statements that anyone who prescribed medication “unlawfully to destroy the child” would be guilty of murder if the woman died. See, e.g., J. Parker, Conductor Generalis 220 (1788); 2 R. Burn, Justice of the Peace, and Parish Officer 221-222 (7th ed. 1762) (English manual stating the same).<sup>30</sup>

**[\*246]** The few cases available from the early colonial period corroborate that abortion was a crime. See generally Dellapenna 215-228 (collecting cases). In Maryland in 1652, for example, an indictment charged that a man “Murtherously endeavoured to destroy [**\*\*\*\*40**] or Murther the Child by him begotten in the Womb.”

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<sup>30</sup> For manuals restating one or both rules, see J. Davis, Criminal Law 96, 102-103, 339 (1838); Conductor Generalis 194-195 (1801) (printed in Philadelphia); Conductor Generalis 194-195 (1794) (printed in Albany); Conductor Generalis 220 (1788) (printed in New York); Conductor Generalis 198 (1749) (printed in New York); G. Webb, Office and Authority of a Justice of Peace 232 (1736) (printed in Williamsburg); Conductor Generalis 161 (1722) (printed in Philadelphia); see also J. Conley, Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America, 6 J. Legal Hist. 257, 265, 267 (1985) (noting that these manuals were the justices’ “primary source of legal reference” and of “practical value for a wider audience than the justices”).

For cases stating the proto-felony-murder rule, see, e.g., [\*Commonwealth v. Parker\*, 50 Mass. 263, 265, 9 Metc. 263 \(1845\)](#); [\*People v. Sessions\*, 58 Mich. 594, 595-596, 26 N. W. 291, 292-293 \(1886\)](#); [\*State v. Moore\*, 25 Iowa 128, 131-132 \(1868\)](#); [\*Smith v. State\*, 33 Me. 48, 54-55 \(1851\)](#).

*Proprietary v. Mitchell*, 10 Md. Archives 80, 183 (1652) (W. Browne ed. 1891). And by the 19th century, courts frequently explained that the common law made abortion of a quick child a crime. See, e.g., [\*Smith v. Gaffard\*, 31 Ala. 45, 51 \(1857\)](#); [\*Smith v. State\*, 33 Me. 48, 55 \(1851\)](#); [\*State v. Cooper\*, 22 N. J. L. 52, 52-55 \(1849\)](#); [\*Commonwealth v. Parker\*, 50 Mass. 263, 264-268, 9 Metc. 263 \(1845\)](#).

c

The original ground for drawing a distinction between pre- and post-quickening abortions is not entirely clear, but some have attributed the rule to the difficulty of proving that a pre-quickening fetus was alive. At that time, there were no scientific methods for detecting pregnancy in its early stages,<sup>31</sup> and thus, as one court put it in 1872: “[U]ntil the period of quickening [**\*\*2252**] there is no evidence [**\*\*\*570**] of life; and whatever may be said of the feotus, the law has fixed upon this [**\*247**] period of gestation as the time when the child is endowed with life” because “foetal movements are the first clearly marked and well defined evidences of life.” [\*Evans v. People\*, 49 N. Y. 86, 90, 1 Cow. Cr. 494](#) (emphasis added); [\*Cooper\*, 22 N. J. L., at 56](#) (“In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives *the first physical proof of life*, no matter when it first received it” (emphasis added)).

The Solicitor General offers a different explanation of the basis for the quickening [**\*\*\*\*41**] rule, namely, that before quickening the common law did not regard a fetus “as having a ‘separate and independent existence.’” Brief for United States 26 (quoting [\*Parker\*, 50 Mass., at 266, 9 Metc. 263](#)). But the case on which the Solicitor General relies

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<sup>31</sup> See E. Rigby, A System of Midwifery 73 (1841) (“Under all circumstances, the diagnosis of pregnancy must ever be difficult and obscure during the early months”); see also *id.*, at 74-80 (discussing rudimentary techniques for detecting early pregnancy); A. Taylor, A Manual of Medical Jurisprudence 418-421 (6th Am. ed. 1866) (same).

for this proposition also suggested that the criminal law's quickening rule was out of step with the treatment of prenatal life in other areas of law, noting that "to many purposes, in reference to civil rights, an infant *in ventre sa mere* is regarded as a person in being." *Ibid.* (citing 1 Blackstone 129); see also [Evans, 49 N. Y., at 89, 90, 1 Cow. Cr. 494](#); [Mills v. Commonwealth, 13 Pa. 631, 633 \(1850\)](#); [Morrow v. Scott, 7 Ga. 535, 537 \(1849\)](#); [Hall v. Hancock, 32 Mass. 255, 258, 15 Pick. 255 \(1834\)](#); *Thellusson v. Woodford*, 4 Ves. 227, 321-322, 31 Eng. Rep. 117, 163 (1789).

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as "neither in accordance with the result of medical experience, nor with the principles of the common law." F. Wharton, *Criminal Law* §1220, p. 606 (rev. 4th ed. 1857) (footnotes omitted); see also J. Beck, *Researches in Medicine and Medical Jurisprudence* 26-28 (2d ed. 1835) (describing the quickening distinction as "absurd" and "injurious").<sup>32</sup> In [\*248] 1803, the British Parliament made abortion a crime at all stages [\*\*\*\*42] of pregnancy and authorized the imposition of severe punishment. See Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803). One scholar has suggested that Parliament's decision

"may partly have been attributable to the medical man's concern that fetal life should be protected by the law at all stages of gestation." Keown 22.

In this country during the 19th century, the vast majority of the States enacted statutes criminalizing abortion [\*\*\*571] at all stages of pregnancy. See Appendix A, *infra* (listing state statutory provisions in chronological order).<sup>33</sup> By 1868, the year when the [\*\*2253] [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.<sup>34</sup> See *ibid.* Of the nine States that had not yet [\*249] criminalized abortion at all stages, all but one did so by 1910. See *ibid.*

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). See Appendix B, *infra*; see also [Casey, 505 U.S., at 952, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (Rehnquist, C. J., concurring in judgment in part and dissenting in part); Dellapenna 317-319. By the end of the 1950s, according to the [Roe](#) Court's own count, statutes [\*\*\*\*43] in all but four States and the District of Columbia prohibited abortion "however and whenever performed, unless done to save or

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<sup>32</sup> See [Mitchell v. Commonwealth, 78 Ky. 204, 209-210 \(1879\)](#) (acknowledging the common-law rule but arguing that "the law should punish abortions and miscarriages, willfully produced, at any time during the period of gestation"); [Mills v. Commonwealth, 13 Pa., 631, 633 \(1850\)](#) (the quickening rule "never ought to have been the law anywhere"); J. Bishop, *Commentaries on the Law of Statutory Crimes* §744, p. 471 (1873) ("If we look at the reason of the law, we shall prefer" a rule that "discard[s] this doctrine of the necessity of a quickening"); I. Dana, *Report of the Committee on the Production of Abortion*, in 5 *Transactions of the Maine Medical Association* 37-39 (1866); *Report on Criminal Abortion*, in 12 *Transactions of the American Medical Association* 75-77 (1859); W. Guy, *Principles of Forensic Medicine* 133-134 (1845); J. Chitty, *Practical Treatise on Medical Jurisprudence* 438 (2d Am. ed. 1836); 1 T. Beck & J. Beck, *Elements of Medical Jurisprudence* 293 (5th ed. 1823); 2 T. Percival, *The Works, Literary, Moral and Medical* 430 (1807); see also Keown 38-39 (collecting English authorities).

<sup>33</sup> See generally Dellapenna 315-319 (cataloging the development of the law in the States); E. Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 *Geo. L. J.* 395, 435-437, 447-520 (1961) (Quay) (same); J. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and The Fourteenth Amendment*, 17 *St. Mary's L. J.* 29, 34-36 (1985) (Witherspoon) (same).

<sup>34</sup> Some scholars assert that only 27 States prohibited abortion at all stages. See, e.g., Dellapenna 315; Witherspoon 34-35, and n. 15. Those scholars appear to have overlooked Rhode Island, which criminalized abortion at all stages in 1861. See *Acts and Resolves R. I.* 1861, ch. 371, §1, p. 133 (criminalizing the attempt to "procure the miscarriage" of "any pregnant woman" or "any woman supposed by such person to be pregnant," without mention of quickening). The *amicus* brief for the American Historical Association asserts that only 26 States prohibited abortion at all stages, but that brief incorrectly excludes West Virginia and Nebraska from its count. Compare *Brief for American Historical Association* 27-28 (citing Quay), with Appendix A, *infra*.

preserve the life of the mother.” [410 U.S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147](#).<sup>35</sup>

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. **[\*250]** See [id., at 118, 93 S. Ct. 705, 35 L. Ed. 2d 147, and n. 2](#) (listing States). 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. [Id., at 140, 93 S. Ct. 705, 35 L. Ed. 2d 147, and n. 37](#); Tribe 2. 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.” [Thornburgh v. American College of Obstetricians and Gynecologists](#), 476 U. S. 747, 793, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986) (White, J., dissenting).

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 **[\*\*2254]** 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 **[\*\*\*\*44]** toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice].” [521 U.S., at 719, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772](#).

3

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

Neither respondents nor the Solicitor General disputes the fact that by 1868 the vast majority of States criminalized abortion at all stages of pregnancy. See Brief for Petitioners 12-13; see also Brief for American Historical Association et al. as *Amici Curiae* 27-28, and nn. 14-15 (conceding that 26 out of 37 States prohibited abortion before quickening); Tr. of Oral Arg. 74-75 (respondents’ counsel conceding the same). Instead, respondents are forced to argue that it “does [not] matter that some States prohibited abortion at the time [Roe](#) was decided or when the [Fourteenth Amendment](#) **[\*251]** was adopted.” Brief for Respondents 21. But that argument flies in the face of the standard we have applied in determining whether an asserted right that is nowhere mentioned in the Constitution is nevertheless protected by the [Fourteenth Amendment](#).

Not only are respondents and their *amici* unable to show that a constitutional right to abortion was established when the [Fourteenth Amendment](#) was adopted, but they have found no support for the existence of **[\*\*\*\*45]** an abortion right that predates the latter part of the 20th century—no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before [Roe](#) and a small number of law review articles from the

<sup>35</sup>The statutes of three States (Massachusetts, New Jersey, and Pennsylvania) prohibited abortions performed “unlawfully” or “without lawful justification.” [Roe, 410 U.S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147](#) (internal quotation marks omitted). In Massachusetts, case law held that abortion was allowed when, according to the judgment of physicians in the relevant community, the procedure was necessary to preserve the woman’s life or her physical or emotional health. [Commonwealth v. Wheeler](#), 315 Mass. 394, 395, 53 N. E. 2d 4, 5 (1944). In the other two States, however, there is no clear support in case law for the proposition that abortion was lawful where the mother’s life was not at risk. See [State v. Brandenburg](#), 137 N. J. L. 124, 58 A. 2d 709 (1948); [Commonwealth v. Trombetta](#), 131 Pa. Super. 487, 200 A. 107 (1938).

Statutes in the two remaining jurisdictions (the District of Columbia and Alabama) permitted “abortion to preserve the mother’s health.” [Roe, 410 U. S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). Case law in those jurisdictions does not clarify the breadth of these exceptions.

same time period.<sup>36</sup>

A few of respondents' *amici* muster historical arguments, but they are very weak. The Solicitor General repeats *Roe*'s claim that it is "'doubtful' . . . 'abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.'" Brief for United States 26 (quoting *Roe*, 410 U. S., at 136, 93 S. Ct. 705, 35 L. Ed. 2d 147). But as we have seen, great common-law authorities like Bracton, Coke, Hale, and Blackstone all wrote that a post-quickening abortion was a crime—and a serious one at that. Moreover, [\*\*\*573] Hale and Blackstone (and many other authorities following them) asserted that even a pre-quickening abortion was "unlawful" and that, as a result, an abortionist was guilty of murder if the woman died from the attempt.

[\*252] Instead of following these authorities, *Roe* relied largely on two articles by a pro-abortion advocate who claimed that Coke had intentionally misstated [\*\*\*\*46] the common law because of his strong anti-abortion views.<sup>37</sup> These articles have been discredited,<sup>38</sup> and it has come to light that even [\*\*2255] members of Jane Roe's legal team did not regard them as serious scholarship. An internal memorandum characterized this author's

work as donning "the guise of impartial scholarship while advancing the proper ideological goals."<sup>39</sup> Continued reliance on such scholarship is unsupportable.

The Solicitor General next suggests that history supports an abortion right because the common law's failure to criminalize abortion before quickening means that "at the Founding and for decades thereafter, women generally could terminate a pregnancy, at least in its early stages."<sup>40</sup> Brief for [\*253] United States 26-27; see also Brief for Respondents 21. But the insistence on quickening was not universal, see *Mills*, 13 Pa., at 633; *State v. Slagle*, 83 N. C. 630, 632 (1880), and regardless, the fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so. When legislatures began to exercise that authority as the century wore on, no one, as far as we are aware, argued that the laws they enacted violated a fundamental right. [\*\*\*\*47] That is not surprising since common-law authorities had repeatedly condemned abortion and described it as an "unlawful" act without regard to whether it

<sup>36</sup> See 410 U.S., at 154-155, 93 S. Ct. 705, 35 L. Ed. 2d 147 (collecting cases decided between 1970 and 1973); C. Means, The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About To Arise From the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty? 17 N. Y. L. Forum 335, 337-339 (1971) (Means II); C. Means, The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N. Y. L. Forum 411 (1968) (Means I); Lucas 730.

<sup>37</sup> See 410 U. S., at 136, n. 26, 93 S. Ct. 705, 35 L. Ed. 2d 147 (citing Means II); 410 U. S., at 132-133, n. 21, 93 S. Ct. 705, 35 L. Ed. 2d 147 (citing Means I).

<sup>38</sup> For critiques of Means's work, see, e.g., Dellapenna 143-152, 325-331; Keown 3-12; J. Finnis, "Shameless Acts" in Colorado: Abuse of Scholarship in Constitutional Cases, 7 Academic Questions 10, 11-12 (1994); R. Destro, Abortion and the Constitution: The Need for a Life-Protective Amendment, 63 Cal. L. Rev. 1250, 1267-1282 (1975); R. Byrn, An American Tragedy: The Supreme Court on Abortion, 41 Ford. L. Rev. 807, 814-829 (1973).

<sup>39</sup> Garrow 500-501, and n. 41 (internal quotation marks omitted).

<sup>40</sup> In any event, *Roe*, *Casey*, and other related abortion decisions imposed substantial restrictions on a State's capacity to regulate abortions performed after quickening. See, e.g., *June Medical Services L. L. C. v. Russo*, 591 U. S. \_\_\_, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (2020) (holding a law requiring doctors performing abortions to secure admitting privileges to be unconstitutional); *Whole Woman's Health v. Hellerstedt*, 579 U. S. 582, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) (similar); *Casey*, 505 U.S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (declaring that prohibitions on "abortion before viability" are unconstitutional); *id.*, at 887-898, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (holding that a spousal notification provision was unconstitutional). In addition, *Doe v. Bolton*, 410 U. S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), has been interpreted by some to protect a broad right to obtain an abortion at any stage of pregnancy provided that a physician is willing to certify that it is needed due to a woman's "emotional" needs or "familial" concerns. *Id.*, at 192, 93 S. Ct. 739, 35 L. Ed. 2d 201. See, e.g., *Women's Medical Professional Corp. v. Voinovich*, 130 F. 3d 187, 209 (CA6 1997), cert. denied, 523 U.S. 1036, 118 S. Ct. 1347, 140 L. Ed. 2d 496 (1998); but see *id.*, at 1039 (THOMAS, J., dissenting from denial of certiorari).

occurred before or after quickening. See *supra*, at 16-21.

[\*\*\*574] Another *amicus* brief relied upon by respondents (see Brief for Respondents 21) tries to dismiss the significance of the state criminal statutes that were in effect when the [Fourteenth Amendment](#) was adopted by suggesting that they were enacted for illegitimate reasons. According to this account, which is based almost entirely on statements made by one prominent proponent of the statutes, important motives for the laws were the fear that Catholic immigrants were having more babies than Protestants and that the availability of abortion was leading White Protestant women to “shir[k their] maternal duties.” Brief for American Historical Association et al. as *Amici Curiae* 20.

Resort to this argument is a testament to the lack of any real historical support for the right that *Roe* and *Casey* recognized. This Court has long disfavored arguments based on alleged legislative motives. See, e.g., [City of Erie v. Pap’s A.M.](#), 529 U. S. 277, 292, 120 S. Ct. 1382, 146 L. Ed. 2d [\*\*2256] 265 (2000) (plurality opinion); [Turner Broadcasting System, Inc. v. FCC](#), 512 U. S. 622, 652, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); [United States v. O’Brien](#), 391 U. S. 367, 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); [Arizona v. California](#), 283 U. S. 423, 455, 51 S. Ct. 522, 75 L. Ed. 1154 (1931) (collecting cases). The Court has recognized that inquiries into legislative motives [\*\*\*\*48] “are a hazardous matter.” *O’Brien*, 391 U. S., at 383, 88 S. Ct. 1673, 20 L. Ed. 2d 672. Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we [\*254] have been reluctant to attribute those motives to the legislative body as a whole. “What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.” *Id.*, at 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672.

Here, the argument about legislative motive is not even based on statements by legislators, but on statements made by a few supporters of the new

19th-century abortion laws, and it is quite a leap to attribute these motives to all the legislators whose votes were responsible for the enactment of those laws. Recall that at the time of the adoption of the [Fourteenth Amendment](#), over three-quarters of the States had adopted statutes criminalizing abortion (usually at all stages of pregnancy), and that from the early 20th century until the day *Roe* was handed down, every single State had such a law on its books. Are we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?

There is ample evidence that the passage of these laws was instead spurred by a sincere belief that abortion [\*\*\*\*49] kills a human being. Many judicial decisions from the late 19th and early 20th centuries made that point. See, e.g., [Nash v. Meyer](#), 54 Idaho 283, 301, 31 P. 2d 273, 280 (1934); [State v. Ausplund](#), 86 Ore. 121, 131-132, 167 P. 1019, 1022-1023 (1917); [Trent v. State](#), 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); [State v. Miller](#), 90 Kan. 230, 233, 133 P. 878, 879 (1913); [State v. Tippie](#), 89 Ohio St. 35, 39-40, 105 N. E. 75, 77 (1913); [State v. Gedicke](#), 43 N. J. L. 86, 90 (1881); [Dougherty v. People](#), 1 Colo. 514, 522-523 (1873); [State v. Moore](#), 25 Iowa 128, 131-132 (1868); [Smith](#), 33 Me., at 57; see also [Memphis Center for Reproductive Health v. Slatery](#), 14 F. 4th 409, 446, and n. 11 (CA6 2021) [\*\*\*575] (Thapar, J., concurring in judgment in part and dissenting in part) (citing cases).

One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests), but even *Roe* and *Casey* did not question the good faith of abortion [\*255] opponents. See, e.g., [Casey](#), 505 U. S., at 850 (“Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage”). And we see no reason to discount the significance of the state laws in question based on these *amici*’s suggestions about legislative

motive.<sup>41</sup>

[\*\*2257] C

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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, [410 U.S., at 154, 93 S. Ct. 705, 35 L. Ed. 2d 147](#), and [Casey](#) described it as the freedom to make “intimate and personal choices” that are “central to personal dignity and autonomy,” [505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). [\*\*\*\*50] [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.” [Ibid.](#)

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 [\*256] 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.”

Ordered liberty sets limits and defines the boundary

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<sup>41</sup>Other *amicus* briefs present arguments about the motives of proponents of liberal access to abortion. They note that some such supporters have been motivated by a desire to suppress the size of the African-American population. See Brief for African-American Organization et al. as *Amici Curiae* 14-21; see also [Box v. Planned Parenthood of Ind. and Ky., Inc.](#), [587 U. S. \\_\\_\\_, \\_\\_\\_-\\_\\_\\_, 141 S. Ct. 184, 207 L. Ed. 2d 1112 \(2019\)](#) (THOMAS, J., concurring) (slip op., at 1-4). And it is beyond dispute that [Roe](#) has had that demographic effect. A highly disproportionate percentage of aborted fetuses are Black. See, e.g., Dept. of Health and Human Servs., Centers for Disease Control and Prevention (CDC), K. Kortsmit et al., *Abortion Surveillance—United States, 2019*, 70 *Morbidity and Mortality Report, Surveillance Summaries*, p. 20 (Nov. 26, 2021) (Table 6). For our part, we do not question the motives of either those who have supported or those who have opposed laws restricting abortions.

between competing interests. [Roe](#) and [Casey](#) each struck a particular balance between the interests of a woman who wants an abortion and the interests of what they termed “potential life.” [Roe, 410 U. S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147](#) (emphasis deleted); [Casey, 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). But the people of the various States may evaluate those interests differently. In some States, voters may believe that the abortion right should be even more extensive than the right that [Roe](#) and [Casey](#) recognized. Voters in other States [\*\*\*576] may wish to impose tight restrictions based on their belief that abortion destroys [\*\*\*\*51] an “unborn human being.” [Miss. Code Ann. §41-41-191\(4\)\(b\)](#). Our Nation’s historical understanding of ordered liberty does not prevent the people’s elected representatives from deciding how abortion should be regulated.

Nor does the right to obtain an abortion have a sound basis in precedent. [Casey](#) relied on cases involving the right to marry a person of a different race, [Loving v. Virginia](#), [388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 \(1967\)](#); the right to marry while in prison, [Turner v. Safley](#), [482 U. S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 \(1987\)](#); the right to obtain contraceptives, [Griswold v. Connecticut](#), [381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 \(1965\)](#), [Eisenstadt v. Baird](#), [405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 \(1972\)](#), [Carey v. Population Services Int’l](#), [431 U. S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 \(1977\)](#); the right to reside with relatives, [Moore v. East Cleveland](#), [431 U. S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 \(1977\)](#); the right to make decisions about the education of one’s children, [Pierce v. Society of Sisters](#), [268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 \(1925\)](#), [Meyer v. Nebraska](#), [262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 \(1923\)](#); the right not to be sterilized without consent, [Skinner v. Oklahoma ex rel. Williamson](#), [316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 \(1942\)](#); and the right in certain circumstances not to undergo involuntary surgery, forced administration of drugs, or other substantially similar procedures, [Winston v. Lee](#), [470 U. S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 \(1985\)](#), [Washington v. Harper](#), [494 U. S. 210,](#)

[110 S. Ct. 1028, 108 L. Ed. 2d 178 \(1990\)](#), [\*257] [Rochin v. California, 342 U. S. 165, \[\\*\\*2258\] 72 S. Ct. 205, 96 L. Ed. 183 \(1952\)](#). Respondents and the Solicitor General also rely on post-[Casey](#) decisions like [Lawrence v. Texas, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 \(2003\)](#) (right to engage in private, consensual sexual acts), and [Obergefell v. Hodges, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 \(2015\)](#) (right to marry a person of the same sex). See Brief for Respondents 18; Brief for United States 23-24.

These attempts to justify abortion through appeals to a broader right to autonomy and to define one’s “concept of existence” prove too much. [Casey, 505 U.S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Those criteria, at a high level of generality, could license fundamental rights to illicit [\*\*\*\*52] drug use, prostitution, and the like. See [Compassion in Dying v. Washington, 85 F. 3d 1440, 1444 \(CA9 1996\)](#) (O’Scannlain, J., dissenting from denial of rehearing en banc). None of these rights has any claim to being deeply rooted in history. [Id., at 1440, 1445](#).

What sharply distinguishes the abortion right from the rights recognized in the cases on which [Roe](#) and [Casey](#) rely is something that both those decisions acknowledged: Abortion destroys what those decisions call “potential life” and what the law at issue in this case regards as the life of an “unborn human being.” See [Roe, 410 U.S., at 159, 93 S. Ct. 705, 35 L. Ed. 2d 147](#) (abortion is “inherently different”); [Casey, 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (abortion is “a unique act”). None of the other decisions cited by [Roe](#) and [Casey](#) involved the critical moral question posed by abortion. They are therefore inapposite. They do not support the right to obtain an abortion, [\*\*\*577] and by the same token, our conclusion that the Constitution does not confer such a right does not undermine them in any way.

2

In drawing this critical distinction between the abortion right and other rights, it is not necessary to

dispute [Casey](#)’s claim (which we accept for the sake of argument) that “the specific practices of States at the time of the adoption of the [Fourteenth Amendment](#)” do not “mar[k] the outer limits of the substantive sphere of liberty which the [\*\*\*\*53] [Fourteenth Amendment](#) [\*258] protects.” [505 U. S., at 848, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless.

Defenders of [Roe](#) and [Casey](#) do not claim that any new scientific learning calls for a different answer to the underlying moral question, but they do contend that changes in society require the recognition of a constitutional right to obtain an abortion. Without the availability of abortion, they maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.

Americans who believe that abortion should be restricted press countervailing arguments about modern developments. They note that attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy;<sup>42</sup> that leave for pregnancy and childbirth are [\*\*2259] now guaranteed by law in many cases;<sup>43</sup> that the costs of medical care associated with pregnancy are

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<sup>42</sup> See, e.g., [Pregnancy Discrimination Act, 92 Stat. 2076, 42 U. S. C. §2000e\(k\)](#) (federal law prohibiting pregnancy discrimination in employment); Dept. of Labor, Women’s Bureau, Employment Protections for Workers Who Are Pregnant or Nursing, <https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections> (showing that 46 States and the District of Columbia have employment protections against pregnancy discrimination).

<sup>43</sup> See, e.g., Family and Medical Leave Act of 1993, 107 Stat. 9, [29 U. S. C. §2612](#) (federal law guaranteeing employment leave for pregnancy and birth); Bureau of Labor Statistics, Access to Paid and Unpaid Family Leave in 2018, <https://www.bls.gov/opub/ted/2019/access-to-paid-and-unpaid-family-leave-in-2018.htm> (showing that 89 percent of civilian workers had access to unpaid family leave in 2018).

covered by insurance or government assistance;<sup>44</sup> that States have increasingly adopted “safe haven” laws, [\*259] which generally allow [\*\*\*578] women to drop off [\*\*\*\*54] babies anonymously;<sup>45</sup> and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.<sup>46</sup> They also claim that many people now have a new appreciation of fetal life and that when prospective parents who want to have a child view a sonogram, they typically have no doubt that what they see is their daughter or son.

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

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<sup>44</sup> The *Affordable Care Act (ACA)* requires non-grandfathered health plans in the individual and small group markets to cover certain essential health benefits, which include maternity and newborn care. See 124 Stat. 163, 42 U. S. C. §18022(b)(1)(D). The ACA also prohibits annual limits, see §300gg-11, and limits annual cost-sharing obligations on such benefits, §18022(c). State Medicaid plans must provide coverage for pregnancy-related services—including, but not limited to, prenatal care, delivery, and postpartum care—as well as services for other conditions that might complicate the pregnancy. 42 CFR §§440.210(a)(2)(i)-(ii) (2020). State Medicaid plans are also prohibited from imposing deductions, cost-sharing, or similar charges for pregnancy-related services for pregnant women. 42 U. S. C. §§1396o(a)(2)(B), (b)(2)(B).

<sup>45</sup> Since *Casey*, all 50 States and the District of Columbia have enacted such laws. Dept. of Health and Human Servs., Children’s Bureau, Infant Safe Haven Laws 1-2 (2016), <https://www.childwelfare.gov/pubPDFs/safehaven.pdf> (noting that safe haven laws began in Texas in 1999).

<sup>46</sup> See, e.g., CDC, Adoption Experiences of Women and Men and Demand for Children To Adopt by Women 18-44 Years of Age in the United States 16 (Aug. 2008) (“[N]early 1 million women were seeking to adopt children in 2002 (i.e., they were in demand for a child), whereas the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent”); CDC, National Center for Health Statistics, Adoption and Nonbiological Parenting, [https://www.cdc.gov/nchs/nsfg/key\\_statistics/a-keystat.htm#adoption](https://www.cdc.gov/nchs/nsfg/key_statistics/a-keystat.htm#adoption) (showing that approximately 3.1 million women between the ages of 18-49 had ever “[t]aken steps to adopt a child” based on data collected from 2015-2019).

to the people and their elected representatives.

[\*260] D

1

The dissent is very candid that it cannot show that a constitutional right to abortion has any foundation, let alone a “‘deeply rooted’” one, “‘in this Nation’s history and tradition.’” *Glucksberg*, 521 U.S., at 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772; see *post*, at 12-14 (joint opinion of BREYER, SOTOMAYOR, and KAGAN, JJ.). The dissent does not identify *any* pre-*Roe* authority that supports such a right—no state constitutional provision or statute, no federal or state judicial precedent, not even a scholarly treatise. Compare [\*\*\*\*55] *post*, at 12-14, n. 2, with *supra*, at 15-16, and n. 23. Nor does the dissent dispute the fact that abortion was illegal at common law at least after quickening; that the 19th century saw a [\*\*\*2260] trend toward criminalization of pre-quickening abortions; that by 1868, a supermajority of States (at least 26 of 37) had enacted statutes criminalizing abortion at all stages of pregnancy; that by the late 1950s at least 46 States prohibited abortion “however and whenever performed” except if necessary to save “the life of the mother,” *Roe*, 410 U.S., at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147; and that when *Roe* was decided in 1973 similar statutes were still in effect in 30 States. Compare *post*, at 12-14, nn. 2-3, with *supra*, at 23-25, and nn. 33-34.<sup>47</sup>

[\*\*\*579] The dissent’s failure to engage with this long tradition is devastating to its position. *HN8* 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”

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<sup>47</sup> By way of contrast, at the time *Griswold v. Connecticut*, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), was decided, the Connecticut statute at issue was an extreme outlier. See Brief for Planned Parenthood Federation of America, Inc. as *Amicus Curiae* in *Griswold v. Connecticut*, O. T. 1964, No. 496, p. 27.

protected in the [Due Process Clause](#). [Glucksberg](#), 521 U. S., at 721; cf. [Timbs](#), 586 U.S., at 139 S. Ct. 682, 203 L. Ed. 2d 11 (slip op., at 7). But despite the dissent’s professed fidelity to *stare decisis*, it fails to seriously engage with that important precedent—which [\*\*\*\*56] it cannot possibly satisfy.

The dissent attempts to obscure this failure by misrepresenting our application of [Glucksberg](#). The dissent suggests that we have focused only on “the legal status of abortion in the 19th century,” [post](#), at 26, but our review of this Nation’s tradition extends well past that period. As explained, for more than a century after 1868—including “another half-century” after women gained the constitutional right to vote in 1920, see [post](#), at 15; Amdt. 19—it was firmly established that laws prohibiting abortion like the Texas law at issue in [Roe](#) were permissible exercises of state regulatory authority. And today, another half century later, more than half of the States have asked us to overrule [Roe](#) and [Casey](#). The dissent cannot establish that a right to abortion has ever been part of this Nation’s tradition.

2

Because the dissent cannot argue that the abortion right is rooted in this Nation’s history and tradition, it contends that the “constitutional tradition” is “not captured whole at a single moment,” and that its “meaning gains content from the long sweep of our history and from successive judicial precedents.” [Post](#), at 18 (internal quotation marks omitted). This vague formulation [\*\*\*\*57] imposes no clear restraints on what Justice White called the “exercise of raw judicial power,” [Doe](#), 410 U.S., at 222, 93 S. Ct. 705, 35 L. Ed. 2d 201 (dissenting opinion), and while the dissent claims that its standard “does not mean anything goes,” [post](#), at 17, any real restraints are hard to discern.

The largely limitless reach of the dissenters’ standard is illustrated by the way they apply it here. First, if the “long sweep of history” imposes any restraint on the recognition of unenumerated rights,

then [Roe](#) was surely wrong, since abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years before that decision was handed down. Second, it is impossible to [\*262] 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.” See [supra](#), at 32.

[\*\*2261] 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 [\*\*\*\*58] the doctrine of *stare decisis*, those precedents are entitled to [\*\*\*580] careful and respectful consideration, and we engage in that analysis below. [HN9](#) But as the Court has reiterated time and time again, adherence to precedent is not “an inexorable command.” [Kimble v. Marvel Entertainment, LLC](#), 576 U. S. 446, 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (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](#) [\*\*\*\*59] 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.

[\*263] 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,” [post](#), at 2, 6, 8, 10, 12, 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, see [infra](#), at 50-54, 55-56, and given in the opinion of THE CHIEF JUSTICE, [post](#), at 2-5 (opinion concurring in judgment), 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, [\*\*\*\*60] 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.’” [Post](#), at 8.

### III

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of [Roe](#) and [Casey](#). [HN10](#) *Stare decisis* plays an important role [\*\*\*581] in our case law, and we have explained

that it serves many valuable ends. It protects the interests of [\*\*2262] those who have taken action in reliance on a past decision. See [Casey](#), 505 U.S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (joint opinion); see also [Payne v. Tennessee](#), 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). It “reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.” [\*264] [Kimble](#), 576 U.S., at 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463. It fosters “evenhanded” decisionmaking by requiring that like cases be decided in a like manner. [Payne](#), 501 U.S., at 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. It “contributes to the actual and perceived integrity of the judicial process.” [Ibid](#). And it restrains judicial hubris and reminds us to respect the judgment of those who have grappled with important questions in the past. “Precedent [\*\*\*\*61] 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.” N. Gorsuch, *A Republic, If You Can Keep It* 217 (2019).

[HN11](#) We have long recognized, however, that *stare decisis* is “not an inexorable command,” [Pearson v. Callahan](#), 555 U.S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (internal quotation marks omitted), and it “is at its weakest when we interpret the Constitution,” [Agostini v. Felton](#), 521 U.S. 203, 235, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). It has been said that it is sometimes more important that an issue “‘be settled than that it be settled right.’” [Kimble](#), 576 U.S., at 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (quoting [Burnet v. Coronado Oil & Gas Co.](#), 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932) (Brandeis, J., dissenting)). 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,” [Martin v. Hunter’s Lessee](#), 14 U.S. 304, 1 *Wheat.* 304, 326, 4 L. Ed. 97 (1816) (opinion for the Court by Story, J.)—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. [HN12](#) An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. See Art. V; [Kimble](#), 576 U.S., at 456, 135 S. Ct. 2401, 192 L. Ed. 2d 463. Therefore, in appropriate circumstances we must be willing to reconsider and, [\*\*\*\*62] if necessary, overrule constitutional decisions.

Some of our most important constitutional decisions have overruled prior precedents. We mention three. In [Brown v. Board of Education](#), 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Court repudiated [\*265] the “separate but equal” doctrine, which had allowed States to maintain racially segregated schools and other facilities. *Id.*, at 488, 74 S. Ct. 686, 98 L. Ed. 873 (internal quotation marks omitted). In so doing, the Court overruled the infamous decision in [Plessy v. Ferguson](#), 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule. See [Brown](#), 347 U. S., at 491, 74 S. Ct. 686, 98 L. Ed. 873.

In [West Coast Hotel Co. v. Parrish](#), 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), the Court overruled [Adkins](#) [\*\*\*582] *v. Children's Hosp.*, 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), which had held that a law setting minimum wages for women violated the “liberty” protected by the [Fifth Amendment's Due Process Clause](#). *Id.*, at 545, 43 S. Ct. 394, 67 L. Ed. 785. [West Coast Hotel](#) signaled the demise of an entire line of important precedents that had protected an individual liberty right against state and federal health and welfare legislation. See [Lochner v. New York](#), 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (holding invalid a law setting maximum working hours); [Coppage v. Kansas](#), [\*\*2263] 236 U. S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915) (holding invalid a law banning contracts forbidding employees to join a union); [Jay Burns Baking Co. v. Bryan](#), 264 U. S. 504, 44 S. Ct. 412, 68 L. Ed. 813 (1924) (holding invalid

laws fixing the weight of loaves of bread).

Finally, in [West Virginia Bd. of Ed. v. Barnette](#), 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), after the lapse of only three years, the Court overruled [Minersville School Dist. v. Gobitis](#), 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940), and held that public school students could not be compelled to salute the flag in violation of their sincere beliefs. [Barnette](#) stands out because [\*\*\*\*63] 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. (We include a partial list in the footnote that follows.<sup>48</sup>) Without

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<sup>48</sup> See, e.g., [Obergefell v. Hodges](#), 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (right to same-sex marriage), overruling [Baker v. Nelson](#), 409 U. S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); [Citizens United v. Federal Election Comm'n](#), 558 U. S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (right to engage in campaign-related speech), overruling [Austin v. Michigan Chamber of Commerce](#), 494 U. S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990), and partially overruling [McConnell v. Federal Election Comm'n](#), 540 U. S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003); [Montejo v. Louisiana](#), 556 U. S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (Sixth Amendment right to counsel), overruling [Michigan v. Jackson](#), 475 U. S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986); [Crawford v. Washington](#), 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (Sixth Amendment right to confront witnesses), overruling [Ohio v. Roberts](#), 448 U. S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); [Lawrence v. Texas](#), 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (right to engage in consensual, same-sex intimacy in one's home), overruling [Bowers v. Hardwick](#), 478 U. S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); [Ring v. Arizona](#), 536 U. S. 584, 122 S. Ct. 2428, [\*\*\*583] 153 L. Ed. 2d 556 (2002) (Sixth Amendment right to a jury trial in capital prosecutions), overruling [Walton v. Arizona](#), 497 U. S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); [Agostini v. Felton](#), 521 U. S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (evaluating whether government aid violates the [Establishment Clause](#)), overruling [Aguilar v. Felton](#), 473 U. S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985), and [School Dist. of Grand Rapids v. Ball](#), 473 U. S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267 (1985); [Seminole Tribe of Fla. v. Florida](#), 517 U. S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (lack of congressional power under the [Indian Commerce Clause](#) to abrogate States' [Eleventh Amendment](#) immunity), overruling [Pennsylvania v. Union Gas Co.](#), 491 U. S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 (1989); [Payne v. Tennessee](#), 501 U. S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)

(the [Eighth Amendment](#) does not erect a *per se* bar to the admission of victim impact evidence during the penalty phase of a capital trial), overruling [Booth v. Maryland](#), 482 U. S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), and [South Carolina v. Gathers](#), 490 U. S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989); [Batson v. Kentucky](#), 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (the [Equal Protection Clause](#) guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race), overruling [Swain v. Alabama](#), 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965); [Garcia v. San Antonio Metropolitan Transit Authority](#), 469 U. S. 528, 530, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985) (rejecting the principle that the [Commerce Clause](#) does not empower Congress to enforce requirements, such as minimum wage laws, against the States “in areas of traditional governmental functions”), overruling [National League of Cities v. Usery](#), 426 U. S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976); [Illinois v. Gates](#), 462 U. S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (the [Fourth Amendment](#) requires a totality of the circumstances approach for determining whether an informant’s tip establishes probable cause), overruling [Aguilar v. Texas](#), 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and [Spinelli v. United States](#), 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); [United States v. Scott](#), 437 U. S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (the [Double Jeopardy Clause](#) does not apply to Government appeals from orders granting defense motions to terminate a trial before verdict), overruling [United States v. Jenkins](#), 420 U. S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975); [Craig v. Boren](#), 429 U. S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (gender-based classifications are subject to intermediate scrutiny under the [Equal Protection Clause](#)), overruling [Goesaert v. Cleary](#), 335 U. S. 464, 69 S. Ct. 198, 93 L. Ed. 163 (1948); [Taylor v. Louisiana](#), 419 U. S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) (jury system which operates to exclude women from jury service violates the defendant’s [Sixth](#) and [Fourteenth Amendment](#) right to an impartial jury), overruling [Hoyt v. Florida](#), 368 U. S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961); [Brandenburg v. Ohio](#), 395 U. S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (*per curiam*) (the mere advocacy of violence is protected under the [First Amendment](#) unless it is directed to incite or produce imminent lawless action), overruling [Whitney v. California](#), 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927); [Katz v. United States](#), 389 U. S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ([Fourth Amendment](#) “protects people, not places,” and extends to what a person “seeks to preserve as private”), overruling [Olmstead v. United States](#), 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), and [Goldman v. United States](#), 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942); [Miranda v. Arizona](#), 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (procedural safeguards to protect the [Fifth Amendment](#) privilege against self-incrimination), overruling [Crooker v. California](#), 357 U. S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958), and [Cicenia v. Lagay](#), 357 U. S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1958); [Malloy v. Hogan](#), 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (the [Fifth Amendment](#) privilege against self-incrimination is also protected by the [Fourteenth Amendment](#) against abridgment by the States), overruling [Twining v. New Jersey](#), 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908), and [Adamson v. California](#), 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947); [Wesberry v. Sanders](#), 376 U. S. 1, 7-8,

these decisions, **[\*\*2264]** American **[\*266]** 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 **[\*267]** 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 **[\*268]** considered in making such a decision. [Janus v. State, County, and Municipal Employees](#), 585 U. S. \_\_\_, \_\_\_, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (slip op., at 34-35); [Ramos v. Louisiana](#), 590 U. S. \_\_\_, \_\_\_, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) (KAVANAUGH, J., concurring in part) (slip op., at 7-9).

**[\*\*\*584]** **[\*\*2265]** In this case, five factors weigh strongly in favor of overruling [Roe](#) and

[84 S. Ct. 526](#), 11 L. Ed. 2d 481 (1964) (congressional districts should be apportioned so that “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s”), overruling in effect [Colegrove v. Green](#), 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946); [Gideon v. Wainwright](#), 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to counsel for indigent defendant in a criminal prosecution in state court under the [Sixth](#) and [Fourteenth Amendments](#)), overruling [Betts v. Brady](#), 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942); [Baker v. Carr](#), 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (federal courts have jurisdiction to consider constitutional challenges to state redistricting plans), effectively overruling in part [Colegrove](#), 328 U. S. 549; [Mapp v. Ohio](#), 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513 (1961) (the exclusionary rule regarding the inadmissibility of evidence obtained in violation of the [Fourth Amendment](#) applies to the States), overruling [Wolf v. Colorado](#), 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949); [Smith v. Allwright](#), 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (racial restrictions on the right to vote in primary elections violates the [Equal Protection Clause of the Fourteenth Amendment](#)), overruling [Grovey v. Townsend](#), 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292 (1935); [United States v. Darby](#), 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941) (congressional power to regulate employment conditions under the [Commerce Clause](#)), overruling [Hammer v. Dagenhart](#), 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918); [Erie R. Co. v. Tompkins](#), 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (Congress does not have the power to declare substantive rules of common law; a federal court sitting in diversity jurisdiction must apply the substantive state law), overruling [Swift v. Tyson](#), 41 U.S. 1, 16 Pet. 1, 10 L. Ed. 865 (1842).

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 [\*\*\*\*64] 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.” 163 U.S., at 562, 16 S. Ct. 1138, 41 L. Ed. 256 (Harlan, J., dissenting). It was “egregiously wrong” on the day it was decided, see Ramos, 590 U.S., at \_\_\_\_\_, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (opinion of KAVANAUGH, J.) (slip op., at 7), and as the Solicitor General agreed at oral argument, it should have been overruled at the earliest opportunity, see Tr. of Oral Arg. 92-93.

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,” Doe, 410 U.S., at 222, 93 S. Ct. 739, 35 L. Ed. 2d 201 [\*269] (White, J., dissenting), 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 [\*\*\*\*65] 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.” Casey, 505 U.S., at 995-996, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Scalia, J.). Together, Roe and Casey represent an error that cannot be allowed to stand.

As the Court’s landmark decision in West Coast Hotel illustrates, the [\*\*\*585] Court has previously overruled decisions that wrongly removed an issue from the people and the democratic process. As Justice White later explained, “decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people’s authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation. [\*\*\*\*66] HN13 For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.” Thornburgh, 476 U.S., at 787, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (dissenting opinion).

B

HN14 *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. See Janus, 585 U. S., at \_\_\_\_\_ (slip op., at 38); Ramos, 590 U. S., at \_\_\_\_\_ (opinion [\*\*2266] of [\*270] KAVANAUGH, J.) (slip op., at 7-8). In Part II, supra, 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 [\*\*\*\*67] 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.

The *Casey* plurality, while reaffirming *Roe*’s central holding, pointedly refrained from endorsing most of its reasoning. It revised the textual basis for the abortion right, silently abandoned *Roe*’s erroneous historical narrative, and jettisoned the trimester framework. But it replaced that scheme with an arbitrary “undue burden” test and relied on an exceptional version of *stare decisis* that, as explained below, this Court had never before applied and has never invoked since.

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 [\*271] or regulation. See *410 U.S., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147*. Dividing pregnancy into three trimesters, the Court imposed special rules for each. During the first trimester, [\*\*\*\*68] the Court announced, “the abortion decision and its effectuation must be left to the [\*\*\*586] medical judgment of the pregnant woman’s attending physician.” *Id., at 164, 93 S. Ct. 705, 35 L. Ed. 2d 147*. After that point, a State’s interest in regulating

abortion for the sake of a woman’s health became compelling, and accordingly, a State could “regulate the abortion procedure in ways that are reasonably related to maternal health.” *Ibid.* Finally, in “the stage subsequent to viability,” which in 1973 roughly coincided with the beginning of the third trimester, the State’s interest in “the potentiality of human life” became compelling, and therefore a State could “regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Id., at 164-165, 93 S. Ct. 705, 35 L. Ed. 2d 147*.

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. See Brief for Appellant and Brief for Appellee in *Roe v. Wade*, O. T. 1972, No. 70-18; see also C. Forsythe, *Abuse of Discretion: [\*\*\*\*69] The Inside Story of Roe v. Wade* 127, 141 (2012).

b

Not only did this scheme resemble the work of a legislature, but the Court made little effort to explain how these rules could be deduced from any of the sources [\*\*2267] on which constitutional decisions are usually based. We have already discussed *Roe*’s treatment of constitutional text, and the opinion failed to show that history, precedent, or any other cited source supported its scheme.

*Roe* featured a lengthy survey of history, but much of its discussion was irrelevant, and the Court made no effort to [\*272] explain why it was included. For example, multiple paragraphs were devoted to an account of the views and practices of ancient civilizations where infanticide was widely accepted. See *410 U. S., at 130-132, 93 S. Ct. 705, 35 L. Ed. 2d 147* (discussing ancient Greek and

Roman practices).<sup>49</sup> When it came to the most important historical fact—how the States regulated abortion when the [Fourteenth Amendment](#) was adopted—the Court said almost nothing. It allowed that States had tightened their abortion laws “in the middle and late 19th century,” [id.](#), at 139, 93 S. Ct. 705, 35 L. Ed. 2d 147, but it implied that these laws might have been enacted not to protect fetal life but to further “a Victorian social concern” about “illicit sexual conduct,” [id.](#), at 148, 93 S. Ct. 705, 35 L. Ed. 2d 147.

[Roe](#)’s failure even to note the [\*\*\*\*70] overwhelming consensus of state laws in effect in 1868 is striking, and what it said about the common law was simply wrong. Relying on two discredited articles by an abortion advocate, the Court erroneously suggested—contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority— [\*\*\*587] that the common law had probably never really treated post-quickening abortion as a crime. See [id.](#), at 136, 93 S. Ct. 705, 35 L. Ed. 2d 147 (“[I]t now appear[s] doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus”). This erroneous understanding appears to have played an important part in the Court’s thinking because the opinion cited “the lenity of the common law” as one of the four factors that informed its decision. [Id.](#), at 165, 93 S. Ct. 705, 35 L. Ed. 2d 147.

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 “[t]he position of the American Public Health [\*\*\*273] Association,” as well as the vote by the American

Bar Association’s House of Delegates in February 1972 on proposed abortion legislation. [Id.](#), at 141, 144, 146, 93 S. Ct. 705, 35 L. Ed. 2d 147 (emphasis deleted). Also noted [\*\*\*\*71] were a British judicial decision handed down in 1939 and a new British abortion law enacted in 1967. [Id.](#), at 137-138, 93 S. Ct. 705, 35 L. Ed. 2d 147. 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.

Finally, after all this, the Court turned to precedent. Citing a broad array of cases, the Court found support for a constitutional “right of personal privacy,” [id.](#), at 152, 93 S. Ct. 705, 35 L. Ed. 2d 147, but it conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference. See [Whalen v. Roe](#), 429 U. S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). Only the cases involving this second sense of the term could have any possible relevance to the abortion issue, [\*\*\*2268] and some of the cases in that category involved personal decisions that were obviously very, very far afield. See [Pierce](#), 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (right to send children to religious school); [Meyer](#), 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (right to have children receive German language instruction).

What remained was a handful of cases having something to do with marriage, [Loving](#), 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (right to marry a person of a different race), or procreation, [Skinner](#), 316 U. S. 535, 62 S. Ct. 1252, 86 L. Ed. 1595 (right not to be sterilized); [Griswold](#), 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (right of married persons to obtain [\*\*\*\*72] contraceptives); [Eisenstadt](#), 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (same, for unmarried persons). But none of these decisions involved what is distinctive about abortion: its effect on what [Roe](#) termed “potential life.”

When the Court summarized the basis for the

<sup>49</sup> See, e.g., C. Patterson, “Not Worth the Rearing”: The Causes of Infant Exposure in Ancient Greece, 115 *Transactions Am. Philological Assn.* 103, 111-123 (1985); A. Cameron, The Exposure of Children and Greek Ethics, 46 *Classical Rev.* 105-108 (1932); H. Bennett, The Exposure of Infants in Ancient Rome, 18 *Classical J.* 341-351 (1923); W. Harris, Child-Exposure in the Roman Empire, 84 *J. Roman Studies* 1 (1994).

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 [\*274] present day.” [Roe](#), 410 U. S., at 165, 93 S. Ct. 705, 35 L. Ed. 2d 147. Put aside the second and third factors, which were [\*\*\*588] 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. The scheme [Roe](#) produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.

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 [\*\*\*\*73] rates for abortion at that stage were lower than the mortality rates for childbirth. [Id.](#), at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147. 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](#), 414 U. S. 417, 427, 94 S. Ct. 700, 38 L. Ed. 2d 618 (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.” [410 U. S., at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147.](#)

As Professor Laurence Tribe has written, “[c]learly, this mistakes ‘a definition for a syllogism.’” Tribe 4 (quoting Ely [\*275] 924). 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 [\*\*\*\*74] prenatal life is compelling “after viability,” [410 U. S., at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147](#), why isn’t that interest “equally compelling before viability”? [Webster v. Reproductive Health Services](#), 492 U. S. 490, 519, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989) (plurality opinion) (quoting [Thornburgh](#), 476 U. S., [\*\*\*2269] at 795, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (White, J., dissenting)). [Roe](#) did not say, and no explanation is apparent.

This arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. Some have argued that a fetus should not be entitled to legal protection until it acquires the characteristics that they regard as defining what it means to be a “person.” Among the characteristics that have been offered as essential attributes of “personhood” are sentience, self-awareness, the ability to reason, or some combination thereof.<sup>50</sup> By this logic, it would

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<sup>50</sup> See, e.g., P. Singer, *Rethinking Life & Death* 218 (1994) (defining a person as “a being with awareness of her or his own existence over time, and the capacity to have wants and plans for the future”); B. Steinbock, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* 9-13 (1992) (arguing that “the possession of interests is both necessary and sufficient for moral status” and that the “capacity for conscious awareness is a necessary condition for the possession of interests” (emphasis deleted)); M. Warren, *On the Moral and Legal Status of Abortion*, 57 *The Monist* 1, 5 (1973) (arguing that, to qualify as a person, a being must have at least one of five traits that are “central to the concept of personhood”: (1) “consciousness (of objects and events external and/or internal to the being), and in particular the capacity to feel pain”; (2) “reasoning (the developed capacity to solve new and relatively complex

be an open question [\*276] whether even born individuals, including young children or [\*\*\*589] those afflicted with certain developmental or medical conditions, merit protection as “persons.” But even if one takes the view that “personhood” begins when a certain attribute or combination of attributes is acquired, it is very hard to see why viability should mark the point where “personhood” begins.

The most obvious problem with any such argument is that viability is heavily dependent on factors that [\*\*\*\*75] have nothing to do with the characteristics of a fetus. One is the state of neonatal care at a particular point in time. Due to the development of new equipment and improved practices, the viability line has changed over the years. In the 19th century, a fetus may not have been viable until the 32d or 33d week of pregnancy or even later.<sup>51</sup> When *Roe* was decided, viability was gauged at roughly 28 weeks. See [410 U. S., at 160, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). Today, respondents draw the line at 23 or 24 weeks. Brief for Respondents 8. So, according to *Roe*’s logic, States now have a compelling interest in protecting

a fetus with a gestational age of, say, 26 weeks, but in 1973 States did [\*\*2270] not have an interest in protecting an identical fetus. How can that be?

Viability also depends on the “quality of the available medical facilities.” [Colautti v. Franklin, 439 U. S. 379, 396, 99 S. Ct. 675, 58 L. Ed. 2d 596 \[\\*277\] \(1979\)](#). Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. On what ground could the constitutional status of a fetus depend on the pregnant woman’s location? And if viability is meant to mark a line having universal moral significance, [\*\*\*\*76] can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?

[\*\*\*590] In addition, as the Court once explained, viability is not really a hard-and-fast line. *Ibid.* A physician determining a particular fetus’s odds of surviving outside the womb must consider “a number of variables,” including “gestational age,” “fetal weight,” a woman’s “general health and nutrition,” the “quality of the available medical facilities,” and other factors. [Id., at 395-396, 99 S. Ct. 675, 58 L. Ed. 2d 596](#). It is thus “only with difficulty” that a physician can estimate the “probability” of a particular fetus’s survival. [Id., at 396, 99 S. Ct. 675, 58 L. Ed. 2d 596](#). And even if each fetus’s probability of survival could be ascertained with certainty, settling on a “probabilit[y] of survival” that should count as “viability” is another matter. *Ibid.* Is a fetus viable with a 10 percent chance of survival? 25 percent? 50 percent? Can such a judgment be made by a State? And can a State specify a gestational age limit that applies in all cases? Or must these difficult questions be left entirely to the individual “attending physician on the particular facts of the case before him”? [Id., at 388, 99 S. Ct. 675, 58 L. Ed. 2d 596](#).

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problems”); (3) “self-motivated activity (activity which is relatively independent of either genetic or direct external control”); (4) “the capacity to communicate, by whatever means, messages of an indefinite variety of types”; and (5) “the presence of self-concepts, and self-awareness, either individual or racial, or both” (emphasis deleted)); M. Tooley, *Abortion & Infanticide*, 2 *Philosophy & Pub. Affairs* 37, 49 (Autumn 1972) (arguing that “having a right to life presupposes that one is capable of desiring to continue existing as a subject of experiences and other mental states”).

<sup>51</sup> See W. Lusk, *Science and the Art of Midwifery* 74-75 (1882) (explaining that “[w]ith care, the life of a child born within [the eighth month of pregnancy] may be preserved”); *id.*, at 326 (“Where the choice lies with the physician, the provocation of labor is usually deferred until the thirty-third or thirty-fourth week”); J. Beck, *Researches in Medicine and Medical Jurisprudence* 68 (2d ed. 1835) (“Although children born before the completion of the seventh month have occasionally survived, and been reared, yet in a medico-legal point of view, no child ought to be considered as capable of sustaining an independent existence until the seventh month has been fully completed”); see also J. Baker, *The Incubator and the Medical Discovery of the Premature Infant*, *J. Perinatology* 322 (2000) (explaining that, in the 19th century, infants born at seven to eight months’ gestation were unlikely to survive beyond “the first days of life”).

The viability line, [\*\*\*\*77] which [Casey](#) termed [Roe](#)'s central rule, makes no sense, and it is telling that other countries almost uniformly eschew such a line.<sup>52</sup> The Court thus asserted raw judicial power to impose, as a matter of constitutional [\*278] law, a uniform viability rule that allowed the States less freedom to regulate abortion than the majority of western democracies enjoy.

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 g[ave] almost no sense of an obligation to try to be." Ely 947 (emphasis deleted). Archibald Cox, who served as Solicitor General under President Kennedy, commented that [Roe](#) "read[s] like a set of hospital rules and regulations" that "[n]either historian, layman, nor lawyer will be persuaded . . . are part of . . . the Constitution." *The Role of the Supreme Court in American Government* 113-114 (1976). 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 [\*\*\*\*78] fails to justify any of the lines actually drawn." Tribe 4-5. Mark Tushnet termed [Roe](#) a "totally unreasoned judicial opinion." *Red, White, and Blue: A Critical Analysis of Constitutional Law* 54 (1988). See also P. Bobbitt, *Constitutional Fate* 157 (1982); [\*\*2271] A. Amar, Foreword: The Document and the Doctrine, *114 Harv. L. Rev.* 26, 110 (2000).

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, Inc.](#), 462 U. S. 416, 433-439, 103 S. Ct. 2481, 76 L. Ed. 2d 687 [\*\*\*\*591] (1983); that minors obtain parental consent, [Planned Parenthood of Central Mo. v. Danforth](#), 428 U. S. 52, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976); that women give written consent after being informed of the status of the developing prenatal life and the risks of abortion, [Akron](#), 462 U. S., [\*279] at 442-445, 103 S. Ct. 2481, 76 L. Ed. 2d 687; that women wait 24 hours for an abortion, *id.*, at 449-451, 103 S. Ct. 2481, 76 L. Ed. 2d 687; that a physician determine viability in a particular manner, [Colautti](#), 439 U. S., at 390-397, 99 S. Ct. 675, 58 L. Ed. 2d 596; that a physician performing a post-viability abortion use the technique most likely to preserve the life of the fetus, *id.*, at 397-401, 99 S. Ct. 675, 58 L. Ed. 2d 596; and that fetal remains be treated in a humane and sanitary manner, [Akron](#), 462 U. S., at 451-452, 103 S. Ct. 2481, 76 L. Ed. 2d 687.

Justice White complained that the Court was engaging in "unrestrained imposition of its own extraconstitutional value preferences." [Thornburgh](#), 476 U. S., at 794, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (dissenting opinion). And the United States as *amicus curiae* asked the Court to overrule [Roe](#) five times in the decade [\*\*\*\*79] before [Casey](#), see *505 U. S.*, at 844, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (joint opinion), and then asked the Court to overrule it once more in [Casey](#) itself.

2

When [Casey](#) revisited [Roe](#) almost 20 years later, very little of [Roe](#)'s reasoning was defended or preserved. The Court abandoned any reliance on a privacy right and instead grounded the abortion right entirely on the *Fourteenth Amendment's Due Process Clause*. *505 U. S.*, at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674. The Court did not reaffirm [Roe](#)'s erroneous account of abortion history. In fact, none of the Justices in the majority said anything about the history of the abortion right. And as for precedent, the Court relied on essentially the same body of cases that [Roe](#) had

<sup>52</sup> According to the Center for Reproductive Rights, only the United States and the Netherlands use viability as a gestational limit on the availability of abortion on-request. See Center for Reproductive Rights, *The World's Abortion Laws* (Feb. 23, 2021), <https://reproductiverights.org/maps/worlds-abortion-laws>.

cited. Thus, with respect to the standard grounds for constitutional decisionmaking—text, history, and precedent—[Casey](#) did not attempt to bolster [Roe](#)’s reasoning.

The Court also made no real effort to remedy one of the greatest weaknesses in [Roe](#)’s analysis: its much-criticized discussion of viability. The Court retained what it called [Roe](#)’s “central holding”—that a State may not regulate pre-viability abortions for the purpose of protecting fetal life—but it provided no principled defense of the viability line. [\*280] [505 U. S., at 860, 870-871, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Instead, it merely rephrased what [Roe](#) had said, stating that viability marked the point at which “the independent existence of a second life can [\*\*\*\*80] in reason and fairness be the object of state protection that now overrides the rights of the woman.” [505 U. S., at 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Why “reason and fairness” demanded that the line be drawn at viability the Court did not explain. And the Justices who authored the controlling opinion conspicuously failed to say that they agreed with the viability rule; instead, they candidly acknowledged “the reservations [some] of us may have in reaffirming [that] holding of [Roe](#).” [Id., at 853](#).

The controlling opinion criticized and rejected [Roe](#)’s trimester scheme, [505 U. S., at 872, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#), [\*\*\*592] and substituted a new “undue burden” test, but the basis for this test was obscure. And as we will explain, the test is full of ambiguities and is difficult to apply.

[\*\*2272] [Casey](#), in short, either refused to reaffirm or rejected important aspects of [Roe](#)’s analysis, failed to remedy glaring deficiencies in [Roe](#)’s reasoning, endorsed what it termed [Roe](#)’s central holding while suggesting that a majority might not have thought it was correct, provided no new support for the abortion right other than [Roe](#)’s status as precedent, and imposed a new and problematic test with no firm grounding in

constitutional text, history, or precedent.

As discussed below, [Casey](#) also deployed a novel version of the doctrine of *stare decisis* [\*\*\*\*81]. See *infra*, at 64-69. 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

**HN15** *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 [\*281] is, whether it can be understood and applied in a consistent and predictable manner. [Montejo v. Louisiana](#), 556 U. S. 778, 792, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009); [Patterson v. McLean Credit Union](#), 491 U. S. 164, 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989); [Gulfstream Aerospace Corp. v. Mayacamas Corp.](#), 485 U. S. 271, 283-284, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988). [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.” [505 U. S., at 992, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#); see also [June Medical Services L. L. C. v. Russo](#), 591 U. S. \_\_\_, \_\_\_, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (2020) (GORSUCH, J., dissenting) (slip op., at 17) (“[W]hether a burden is deemed undue depends heavily on which factors the judge considers and how much weight he accords each of them” (internal quotation marks and alterations omitted)).

The [Casey](#) plurality tried to put meaning into the “undue burden” test by setting out three subsidiary rules, but these rules created their own problems. The first rule is [\*\*\*\*82] that “a provision of law is invalid, if its purpose or effect is to place a

*substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability.” [505 U. S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (emphasis added); see also [id., at 877, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). But whether a particular obstacle qualifies as “substantial” is often open to reasonable debate. In the sense relevant here, “substantial” means “of ample or considerable amount, quantity, or size.” Random House Webster’s Unabridged Dictionary 1897 (2d ed. 2001). Huge burdens are plainly “substantial,” and trivial ones are not, but in between these extremes, there is a wide gray area.

This ambiguity is a problem, and the second rule, which applies at all [\[\\*\\*\\*593\]](#) stages of a pregnancy, muddies things further. It states that measures designed “to ensure that the woman’s choice is informed” are constitutional so long as they do [\[\\*282\]](#) not impose “an undue burden on the right.” [Casey, 505 U. S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). To the extent that this rule applies to pre-viability abortions, it overlaps with the first rule and appears to impose a different standard. Consider a law that imposes an insubstantial obstacle but serves little purpose. As applied to a pre-viability abortion, would such a regulation be constitutional on the ground that it [\[\\*\\*\\*\\*83\]](#) does not impose a “*substantial obstacle*”? Or would it be unconstitutional [\[\\*\\*2273\]](#) on the ground that it creates an “*undue burden*” because the burden it imposes, though slight, outweighs its negligible benefits? [Casey](#) does not say, and this ambiguity would lead to confusion down the line. Compare [June Medical, 591 U. S., at \\_\\_\\_ - \\_\\_\\_, 140 S. Ct. 2103, 207 L. Ed. 2d 566](#) (plurality opinion) (slip op., at 1-2), with [id., at \\_\\_\\_ - \\_\\_\\_](#) (ROBERTS, C. J., concurring) (slip op., at 5-6).

The third rule complicates the picture even more. Under that rule, “[u]nnecessary health regulations that have the purpose or effect of presenting a *substantial obstacle* to a woman seeking an abortion impose an *undue burden* on the right.” [Casey, 505 U. S., at 878, 112 S. Ct. 2791, 120 L.](#)

[Ed. 2d 674](#) (emphasis added). This rule contains no fewer than three vague terms. It includes the two already discussed—“undue burden” and “substantial obstacle”—even though they are inconsistent. And it adds a third ambiguous term when it refers to “*unnecessary health regulations*.” The term “necessary” has a range of meanings—from “essential” to merely “useful.” See Black’s Law Dictionary 928 (5th ed. 1979); American Heritage Dictionary of the English Language 877 (1971). [Casey](#) did not explain the sense in which the term is used in this rule.

In addition to these problems, one [\[\\*\\*\\*\\*84\]](#) more applies to all three rules. They all call on courts to examine a law’s effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents [\[\\*283\]](#) a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is “substantial.”

[Casey](#) provided no clear answer to these questions. It said that a regulation is unconstitutional if it imposes a substantial obstacle “in a large fraction of cases in which [it] is relevant,” [505 U. S., at 895, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#), but there is obviously no clear line between a fraction that is “large” and one that is not. Nor is it clear what the Court meant by “cases in which” a regulation is “relevant.” These ambiguities have caused confusion and disagreement. Compare [Whole Woman’s Health v. Hellerstedt, 579 U. S. 582, 627-628, 136 S. Ct. 2292, 195 L. Ed. 2d 665 \(2016\)](#), with [id., at 666-667, and n. 11, 136 S. Ct. 2292, 195 L. Ed. 2d 665](#) (ALITO, J., dissenting).

[\*\*\*594] 2

The difficulty of applying [Casey](#)’s new rules [\*\*\*\*85] surfaced in that very case. The controlling opinion found that Pennsylvania’s 24-hour waiting period requirement and its informed-consent provision did not impose “undue burden[s],” [Casey, 505 U. S., at 881-887, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#), but Justice Stevens, applying the same test, reached the opposite result, [id., at 920-922, 12 S. Ct. 2791, 120 L. Ed. 2d 674](#) (opinion concurring in part and dissenting in part). That did not bode well, and then-Chief Justice Rehnquist aptly observed that “the undue burden standard presents nothing more workable than the trimester framework.” [Id., at 964-966, 12 S. Ct. 2791, 120 L. Ed. 2d 674](#) (opinion concurring in judgment in part and dissenting in part).

The ambiguity of the “undue burden” test also produced disagreement in later cases. In [Whole Woman’s Health](#), the Court adopted the cost-benefit interpretation of the test, stating that “[t]he rule announced in [Casey](#) . . . requires that courts consider the burdens a law imposes on abortion access *together with the benefits those laws confer*.” [579 U. S., at 607, 136 \[\\*\\*2274\] S. Ct. 2292, 195 L. Ed. 2d 665](#) (emphasis added). But five years later, a majority of the Justices rejected that interpretation. See [June Medical, 591 U. S. \\_\\_\\_, 140 S. Ct. 2103, 207 L. Ed. 2d 566](#). Four Justices reaffirmed [Whole Woman’s Health](#)’s instruction to “weigh” a law’s “benefits” against [\*\*284] “the burdens it imposes on abortion access.” [591 U. S., at \\_\\_\\_, 140 S. Ct. 2103, 207 L. Ed. 2d 566](#) (plurality opinion) (slip op., at 2) (internal quotation marks omitted). But THE CHIEF JUSTICE—who cast the deciding vote—argued that “[n]othing about [Casey](#) suggested [\*\*\*\*86] that a weighing of costs and benefits of an abortion regulation was a job for the courts.” [Id., at \\_\\_\\_](#) (opinion concurring in judgment) (slip op., at 6). And the four Justices in dissent rejected the plurality’s interpretation of [Casey](#). See [591 U. S., at \\_\\_\\_, 140 S. Ct. 2103, 207 L. Ed. 2d 566](#) (opinion of ALITO, J., joined in relevant part by THOMAS,

GORSUCH, and KAVANAUGH, JJ.) (slip op., at 4); [id., at \\_\\_\\_-\\_\\_\\_](#) (opinion of GORSUCH, J.) (slip op., at 15-18); [id., at \\_\\_\\_-\\_\\_\\_](#) (opinion of KAVANAUGH, J.) (slip op., at 1-2) (“[F]ive Members of the Court reject the [Whole Woman’s Health](#) cost-benefit standard”).

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, 505 U. S., at 965, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (opinion concurring in judgment in part and dissenting in part).

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, 585 U. S., at \\_\\_\\_](#) (slip op., at 38).

[Casey](#) has generated a long list of Circuit conflicts. Most recently, the Courts of Appeals have disagreed about whether the balancing test from [Whole Woman’s Health](#) correctly states the undue-burden framework.<sup>53</sup> [\*\*\*595] They have disagreed on the legality of parental notification rules.<sup>54</sup> [\*285] They [\*\*\*\*87] have disagreed about bans on certain dilation and evacuation procedures.<sup>55</sup> They have disagreed about when an increase in the time needed to reach a clinic

<sup>53</sup> Compare [Whole Woman’s Health v. Paxton, 10 F. 4th 430, 440 \(CA5 2021\)](#), [EMW Women’s Surgical Center, P.S.C. v. Friedlander, 978 F. 3d 418, 437 \(CA6 2020\)](#), and [Hopkins v. Jegley, 968 F. 3d 912, 915 \(CA8 2020\)](#) (*per curiam*), with [Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F. 3d 740, 751-752 \(CA7 2021\)](#).

<sup>54</sup> Compare [Planned Parenthood of Blue Ridge v. Camblos, 155 F. 3d 352, 367 \(CA4 1998\)](#), with [Planned Parenthood of Ind. & Ky., Inc. v. Adams, 937 F. 3d 973, 985-990 \(CA7 2019\)](#), cert. granted, judgment vacated, 591 U. S. \_\_\_ (2020), and [Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F. 3d 1452, 1460 \(CA8 1995\)](#).

<sup>55</sup> Compare [Whole Woman’s Health v. Paxton, 10 F. 4th, at 435-436](#), with [West Ala. Women’s Center v. Williamson, 900 F. 3d 1310, 1319, 1327 \(CA11 2018\)](#), and [EMW Women’s Surgical Center, P.S.C. v. Friedlander, 960 F. 3d 785, 806-808 \(CA6 2020\)](#).

constitutes an undue burden.<sup>56</sup> And they have disagreed on whether a State may regulate abortions performed because of the fetus's race, sex, or disability.<sup>57</sup>

The Courts of Appeals have experienced particular difficulty in applying the large-fraction-of-relevant-cases test. They have criticized the assignment while reaching **[\*\*2275]** unpredictable results.<sup>58</sup> And they have candidly outlined *Casey*'s many other problems.<sup>59</sup>

**[\*286]** *Casey*'s "undue burden" test has proved to be unworkable. "[P]lucked from nowhere," 505 U. S., at 965, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Rehnquist, C. J.), it "seems calculated

<sup>56</sup> Compare *Tucson Woman's Clinic v. Eden*, 379 F. 3d 531, 541 (CA9 2004), with *Women's Medical Professional Corp. v. Baird*, 438 F. 3d 595, 605 (CA6 2006), and *Greenville Women's Clinic v. Bryant*, 222 F. 3d 157, 171-172 (CA4 2000).

<sup>57</sup> Compare *Preterm-Cleveland v. McCloud*, 994 F. 3d 512, 520-535 (CA6 2021), with *Little Rock Family Planning Servs. v. Rutledge*, 984 F. 3d 682, 688-690 (CA8 2021).

<sup>58</sup> See, e.g., *Bristol Regional Women's Center, P.C. v. Slatery*, 7 F. 4th 478, 485 (CA6 2021); *Reproductive Health Servs. v. Strange*, 3 F. 4th 1240, 1269 (CA11 2021) (*per curiam*); *June Medical Servs., L.L.C. v. Gee*, 905 F. 3d 787, 814 (CA5 2020), *rev'd*, 591 U. S. \_\_\_\_; *Preterm-Cleveland*, 994 F. 3d, at 534; *Planned Parenthood of Ark. & Eastern Okla. v. Jegley*, 864 F. 3d 953, 958-960 (CA8 2017); *McCormack v. Herzog*, 788 F. 3d 1017, 1029-1030 (CA9 2015); compare *A Womans Choice-East Side Womens Clinic v. Newman*, 305 F. 3d 684, 699 (CA7 2002) (Coffey, J., concurring), with *id.*, at 708 (Wood, J., dissenting).

<sup>59</sup> See, e.g., *Memphis Center for Reproductive Health v. Slatery*, 14 F. 4th 409, 451 (CA6 2021) (Thapar, J., concurring in judgment in part and dissenting in part); *Preterm-Cleveland*, 994 F. 3d, at 524; *Planned Parenthood of Ind. & Ky., Inc. v. Commissioner of Ind. State Dept. of Health*, 888 F. 3d 300, 313 (CA7 2018) (Manion, J., concurring in judgment in part and dissenting in part); *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 949 F. 3d 997, 999 (CA7 2019) (Easterbrook, J., concurring in denial of reh'g en banc) ("How much burden is 'undue' is a matter of judgment, which depends on what the burden would be . . . and whether that burden is excessive (a matter of weighing costs against benefits, which one judge is apt to do differently from another, and which judges as a group are apt to do differently from state legislators)"); *Nat'l Abortion Fed'n v. Gonzales*, 437 F. 3d 278, 290-296 (CA2 2006) (Walker, C. J., concurring); *Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens*, 287 F. 3d 910, 931 (CA10 2002) (Baldock, J., dissenting).

to perpetuate give-it-a-try litigation" before judges assigned an unwieldy and inappropriate task. *Lehnert v. Ferris Faculty Assn.*, 500 U. S. 507, 551, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). Continued adherence to that standard would undermine, not **[\*\*\*596]** advance, the "evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U. S., at 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720.

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 **[\*\*\*\*\*88]** decisions. See *Ramos*, 590 U. S., at \_\_\_\_ (opinion of KAVANAUGH, J.) (slip op., at 8); *Janus*, 585 U. S., at \_\_\_\_ (slip op., at 34).

Members of this Court have repeatedly lamented that "no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion." *Thornburgh*, 476 U. S., at 814 (O'Connor, J., dissenting); see *Madsen v. Women's Health Center, Inc.*, 512 U. S. 753, 785, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) (Scalia, J., concurring in judgment in part and dissenting in part); *Whole Woman's Health*, 579 U. S., at 631-633, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (THOMAS, J., dissenting); *id.*, at 645-666, 678-684, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (ALITO, J., dissenting); *June Medical*, 591 U. S., at \_\_\_\_ - \_\_\_\_ (GORSUCH, J., dissenting) (slip op., at 1-15).

The Court's abortion cases have diluted the strict standard for facial constitutional challenges.<sup>60</sup> They have ignored the **[\*287]** Court's third-party standing doctrine.<sup>61</sup> **[\*\*2276]** They have

<sup>60</sup> Compare *United States v. Salerno*, 481 U. S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), with *Casey*, 505 U. S., at 895, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see also *supra*, at 56-59.

<sup>61</sup> Compare *Warth v. Seldin*, 422 U. S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975), and *Elk Grove Unified School Dist. v. Newdow*,

disregarded standard *res judicata* principles.<sup>62</sup> They have flouted the ordinary rules on the severability of unconstitutional provisions,<sup>63</sup> as well as the rule that statutes should be read where possible to avoid unconstitutionality.<sup>64</sup> And they have distorted [First Amendment](#) doctrines.<sup>65</sup>

When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine “has failed to deliver the ‘principled and intelligible’ development [\*\*\*\*89] of the law that *stare decisis* purports to secure.” [Id.](#), at \_\_\_\_ [\*\*\*597] (THOMAS, J., dissenting) (slip op., at 19) (quoting [Vasquez v. Hillery](#), 474 U. S. 254, 265, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)).

E

*Reliance interests.* We last consider whether overruling [Roe](#) and [Casey](#) will upend substantial reliance interests. See [Ramos](#), 590 U. S., at \_\_\_\_ (opinion of KAVANAUGH, J.) (slip op., at 15); [Janus](#), 585 U. S., at \_\_\_\_ - \_\_\_\_ (slip op., at 34-35).

1

[HN16](#) Traditional reliance interests arise “where advance planning of great precision is most obviously a necessity.” [Casey](#), 505 U. S., at 856,

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542 U. S. 1, 15, 17-18, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004), with [June Medical](#), 591 U. S., at \_\_\_\_ (ALITO, J., dissenting) (slip op., at 28), *id.*, at \_\_\_\_ - \_\_\_\_ (GORSUCH, J., dissenting) (slip op., at 6-7) (collecting cases), and [Whole Woman’s Health](#), 579 U. S., at 632, n. 1, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (THOMAS, J., dissenting).

<sup>62</sup> Compare [id.](#), at 598-606, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (majority opinion), with [id.](#), at 645-666, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (ALITO, J., dissenting).

<sup>63</sup> Compare [id.](#), at 623-626, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (majority opinion), with [id.](#), at 644-645, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (ALITO, J., dissenting).

<sup>64</sup> See [Stenberg v. Carhart](#), 530 U. S. 914, 977-978, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000) (Kennedy, J., dissenting); [id.](#), at 996-997, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (THOMAS, J., dissenting).

<sup>65</sup> See [Hill v. Colorado](#), 530 U. S. 703, 741-742, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (Scalia, J., dissenting); [id.](#), at 765, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (Kennedy, J., dissenting).

[112 S. Ct. 2791](#), 120 L. Ed. 2d 674 (joint opinion); see also [Payne](#), 501 U. S., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720. In [Casey](#), the controlling opinion conceded [\*288] that those traditional reliance interests were not implicated because getting an abortion is generally “unplanned activity,” and “reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.” [505 U. S.](#), at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. For these reasons, we agree with the [Casey](#) plurality that conventional, concrete reliance interests are not present here.

2

Unable to find reliance in the conventional sense, the controlling opinion in [Casey](#) perceived a more intangible form of reliance. It wrote that “people [had] organized intimate relationships and made choices that define their views of themselves and their places in society . . . in reliance on the availability of abortion in the event that contraception should fail” and that [\*\*\*\*90] “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” [Ibid.](#) But this Court is ill-equipped to assess “generalized assertions about the national psyche.” [Id.](#), at 957, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Rehnquist, C. J.). [Casey](#)’s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in “cases involving property and contract rights.” [Payne](#), 501 U. S., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720.

[\*\*2277] When a concrete reliance interest is asserted, courts are equipped to evaluate the claim, but assessing the novel and intangible form of reliance endorsed by the [Casey](#) plurality is another matter. That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women. The contending sides in this

case make impassioned and conflicting arguments about the effects of the abortion right on the lives of women. Compare Brief for Petitioners 34-36; Brief for Women Scholars et al. as *Amici Curiae* 13-20, 29-41, with Brief for [\*289] Respondents 36-41; Brief for National Women’s [\*\*\*\*91] Law Center et al. as *Amici Curiae* 15-32. The contending sides also make conflicting arguments about the status of the fetus. This Court has neither the authority nor the expertise to adjudicate those disputes, and the *Casey* plurality’s speculations and weighing of the relative importance of the fetus and [\*\*\*598] mother represent a departure from the “original constitutional proposition” that “courts do not substitute their social and economic beliefs for the judgment of legislative bodies.” *Ferguson v. Skrupa*, 372 U. S. 726, 729-730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963).

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.<sup>66</sup> In the last election in November 2020, women, who make up around 51.5 percent of the population of Mississippi,<sup>67</sup> constituted 55.5 percent of the voters who cast ballots.<sup>68</sup>

3

Unable to show concrete reliance on *Roe* and *Casey*

<sup>66</sup> See Dept. of Commerce, U. S. Census Bureau (Census Bureau), An Analysis of the 2018 Congressional Election 6 (Dec. 2021) (Fig. 5) (showing that women made up over 50 percent of the voting population in every congressional election between 1978 and 2018).

<sup>67</sup> Census Bureau, QuickFacts, Mississippi (July 1, 2021), <https://www.census.gov/quickfacts/MS>.

<sup>68</sup> Census Bureau, Voting and Registration in the Election of November 2020, Table 4b: Reported Voting and Registration, by Sex, Race and Hispanic Origin, for States: November 2020, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html>.

themselves, the Solicitor General suggests that overruling [\*\*\*\*92] those decisions would “threaten the Court’s precedents holding [\*290] that the *Due Process Clause* protects other rights.” Brief for United States 26 (citing *Obergefell*, 576 U. S. 644; *Lawrence*, 539 U. S. 558, 135 S. Ct. 2584, 192 L. Ed. 2d 609; *Griswold*, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510). That is not correct for reasons we have already discussed. As even the *Casey* plurality recognized, “[a]bortion is a unique act” because it terminates “life or potential life.” 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see also *Roe*, 410 U. S., at 159, 93 S. Ct. 705, 35 L. Ed. 2d 147 (abortion is “inherently different from marital intimacy,” “marriage,” or “procreation”). And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast [\*\*2278] 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.” 505 U. S., at 865, 112 S. Ct. 2791, 120 L. Ed. 2d 674. There is a special danger that the [\*\*\*\*93] public will perceive a decision as having been made for unprincipled reasons when the Court [\*\*\*599] overrules a controversial “watershed” decision, such as *Casey*, 505 U. S., at 866-867, 112 S. Ct. 2791, 120 L. Ed. 2d 674. A decision overruling *Roe* would be perceived as having been made “under fire” and as a “surrender to political pressure,” 505 U. S., at 867, 112 S. Ct. 2791, 120 L. Ed. 2d 674,

and therefore the preservation of public approval of the Court weighs heavily in favor of retaining [Roe](#), see [505 U. S., at 869, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#).

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 [\*291] 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. Cf. [Texas v. Johnson, 491 U. S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 \(1989\); Brown, 347 U. S. 483](#). That is true both when we initially decide a constitutional issue *and* when we consider whether to overrule a prior decision. [HN17](#) As Chief Justice Rehnquist explained, “The Judicial Branch derives its legitimacy, not from following public opinion, [\*\*\*\*94] 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.” [Casey, 505 U. S., at 963, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (opinion concurring in judgment in part and dissenting in part). In suggesting otherwise, the [Casey](#) plurality went beyond this Court’s role in our constitutional system.

The [Casey](#) plurality “call[ed] the contending sides of a national controversy to end their national division,” and claimed the authority to impose a permanent settlement of the issue of a constitutional abortion right simply by saying that the matter was closed. [Id., at 867, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). That unprecedented claim exceeded the power vested in us by the Constitution. As Alexander Hamilton famously put

it, the Constitution gives the judiciary “neither Force nor Will.” The Federalist No. 78, p. 523 (J. Cooke ed. 1961). [HN18](#) Our sole authority is to exercise “judgment”—which is to say, the authority to judge what the law means and how it should apply to the case at hand. *Ibid.* The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation [\*\*\*\*95] under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of [\*292] *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like [Plessy](#) and [Lochner](#) [\*\*2279] would still be the law. That is not how *stare decisis* operates.

The [Casey](#) plurality also misjudged the practical limits of this Court’s influence. [Roe](#) certainly did not succeed in ending division on the issue of abortion. On the contrary, [Roe](#) “inflamed” a national issue that has remained bitterly divisive for the past half century. [Casey, 505 U. S., at 995, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (opinion of Scalia, J.); see also R. [\*\*\*600] Ginsburg, Speaking in a Judicial Voice, [67 N. Y. U. L. Rev. 1185, 1208 \(1992\)](#) ([Roe](#) may have “halted a political process,” “prolonged divisiveness,” and “deferred stable settlement of the issue”). And for the past 30 years, [Casey](#) has done the same.

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 [\*\*\*\*96] 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.” [Doe, 410 U. S., at 222, 93 S. Ct. 739, 35 L. Ed. 2d 201](#) (White, J., dissenting).

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.

[HN19](#) 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.

[\*293] V

A

1

The dissent argues that we have “abandon[ed]” *stare decisis*, *post*, at 30, 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 [\*\*\*\*97] the Court can “poin[t] to major legal or factual changes undermining [the] decision's original basis.” *Post*, at 37. To support this contention, the dissent claims that [Brown v. Board of Education](#), 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, and other landmark cases overruling prior precedents “responded to changed law and to changed facts and attitudes that had taken hold throughout society.” *Post*, at 43. 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? [Post](#), at 44-45.

[\*\*2280] Here is another example. On the dissent's view, it must have been [\*\*\*\*601] wrong for [West Virginia Bd. of Ed. v. Barnette](#), 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, to overrule [Minersville School Dist. v. Gobitis](#), 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375, a bare three years after it was handed down. In both cases, children who were Jehovah's Witnesses refused on religious grounds to salute the flag or recite the pledge of allegiance. The [Barnette](#) Court [\*\*\*\*98] did not claim that its reexamination of the issue was prompted by any intervening legal or factual developments, so if the Court had followed the dissent's new version of *stare decisis*, it would [\*294] have been compelled to adhere to [Gobitis](#) and countenance continued [First Amendment](#) violations for some unspecified period.

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. [Post](#), at 45.

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, see [supra](#), at 33-34, 59-63, 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,” 505 U. S., at 867, 112 S. Ct. 2791, 120 L. Ed. 2d 674. That has not happened, [\*\*\*\*99] 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. See *post*, at 55-57. The dissent characterizes [Casey](#) as a “precedent about precedent” that is permanently shielded from further evaluation under traditional *stare decisis* principles. See *post*, at 57. 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.

[\*295] 3

Finally, the dissent suggests that our decision calls into question [Griswold](#), [Eisenstadt](#), [Lawrence](#), and [Obergefell](#). *Post*, at 4-5, 26-27, n. 8. But we have stated unequivocally that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” *Supra*, at 66. We have also explained why that is so: rights regarding contraception and same-sex relationships are [\*\*\*\*100] inherently different from [\*\*\*602] the right to abortion because the latter (as we have stressed) uniquely involves what [Roe](#) and [Casey](#) termed “potential life.” [Roe](#), 410 U. S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147 (emphasis deleted); [Casey](#), 505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by “appeals to a broader right to autonomy.” *Supra*, at 32. It is hard to see how we could be clearer. Moreover, even putting aside that these cases are distinguishable, [\*\*2281] 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.” *Post*, at 1 (opinion of ROBERTS, C. J.). The concurrence would “leave for another day whether to reject any right to an abortion at all,” *post*, at 7, [\*\*\*\*101] 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, *post*, at 1. The concurrence does not specify what period of time is sufficient [\*\*296] 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.” *Post*, at 2, 10.

There are serious problems with this approach, and it is revealing that nothing like it was recommended by either party. As we have recounted, both parties and the Solicitor General have urged us either to reaffirm or overrule [Roe](#) and [Casey](#). See *supra*, at 4-5. And when the specific approach advanced by the concurrence was broached at oral argument, both respondents and the Solicitor General emphatically rejected it. Respondents’ counsel termed it “completely unworkable” and “less principled and less workable than viability.” Tr. of Oral Arg. 54. The Solicitor General argued that abandoning the viability line would leave courts and others with “no continued guidance.” *Id.*, at 101. What is more, the concurrence has not identified any of the more than 130 *amicus* briefs filed in this case that advocated [\*\*\*\*102] its approach. The concurrence would do exactly what it criticizes [Roe](#) for doing: pulling “out of thin air” a

test that “[n]o party or *amicus* asked the Court to adopt.” *Post*, at 3.

2

The concurrence’s most fundamental defect is its failure to offer any principled basis for its approach. The concurrence would “disca[r]d” “the rule from *Roe* and *Casey* that a woman’s right to terminate her pregnancy extends up to the point that the fetus is regarded as ‘viable’ outside the womb.” *Post*, at 2. [\*\*\*603] But this rule was a critical component of the holdings in *Roe* and *Casey*, and *stare decisis* is “a doctrine of preservation, not transformation,” *Citizens United v. Federal Election Comm’n*, 558 U. S. 310, 384, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (ROBERTS, C. J., concurring). Therefore, a new rule that discards the viability rule cannot be defended on *stare decisis* grounds.

The concurrence concedes that its approach would “not be available” if “the rationale of *Roe* and *Casey* were inextricably [\*297] entangled with and dependent upon the viability standard.” *Post*, at 7. But the concurrence asserts that the viability line is separable from the constitutional right they recognized, and can therefore be “discarded” without disturbing any past precedent. *Post*, at 7-8. That is simply incorrect.

*Roe*’s trimester rule was expressly tied to viability, [\*\*\*\*103] see 410 U. S., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147, and viability played a critical role in later abortion decisions. For example, [\*\*2282] in *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788, the Court reiterated *Roe*’s rule that a “State may regulate an abortion to protect the life of the fetus and even may proscribe abortion” at “the stage *subsequent to viability*.” 428 U. S., at 61, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (emphasis added). The Court then rejected a challenge to Missouri’s definition of viability, holding that the State’s definition was consistent with *Roe*’s. 428 U. S., at 63-64, 96 S. Ct. 2831, 49 L. Ed. 2d 788. If viability was not an essential part

of the rule adopted in *Roe*, the Court would have had no need to make that comparison.

The holding in *Colautti v. Franklin*, 439 U. S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596, is even more instructive. In that case, the Court noted that prior cases had “stressed viability” and reiterated that “[v]iability is the critical point” under *Roe*. 439 U. S., at 388-389, 99 S. Ct. 675, 58 L. Ed. 2d 596. It then struck down Pennsylvania’s definition of viability, *id.*, at 389-394, 99 S. Ct. 675, 58 L. Ed. 2d 596, and it is hard to see how the Court could have done that if *Roe*’s discussion of viability was not part of its holding.

When the Court reconsidered *Roe* in *Casey*, it left no doubt about the importance of the viability rule. It described the rule as *Roe*’s “central holding,” 505 U. S., at 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674, and repeatedly stated that the right it reaffirmed was “the right of the woman to choose to have an abortion *before viability*.” *Id.*, at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (emphasis added). See *id.*, at 871, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (“The woman’s [\*\*\*\*104] right to terminate her pregnancy *before viability* is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce” (emphasis added)); *id.*, at 872, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (A “woman has a right to choose to terminate or [\*298] continue her pregnancy *before viability*” (emphasis added)); *id.*, at 879, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (“[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy *before viability*” (emphasis added)).

Our subsequent cases have continued to recognize the centrality of the viability rule. See *Whole Woman’s Health*, 579 U. S., at 589-590, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (“[A] provision of law is constitutionally [\*\*\*604] invalid, if the ‘purpose or effect’ of the provision ‘is to place a substantial obstacle in the path of a woman seeking an abortion *before the fetus attains viability*’” (emphasis deleted and added)); *id.*, at 627, 136 S. Ct. 2292,

[195 L. Ed. 2d 665](#) (“[W]e now use ‘*viability*’ as the relevant point at which a State may begin limiting women’s access to abortion for reasons unrelated to maternal health” (emphasis added)).

Not only is the new rule proposed by the concurrence inconsistent with *Casey*’s unambiguous “language,” *post*, at 8, it is also contrary to the judgment in that case and later abortion cases. In *Casey*, the Court held that Pennsylvania’s spousal-notification provision was facially [\*\*\*\*105] unconstitutional, not just that it was unconstitutional as applied to abortions sought prior to the time when a woman has had a reasonable opportunity to choose. See [505 U.S., at 887-898, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). The same is true of *Whole Women’s Health*, which held that certain rules that required physicians performing abortions to have admitting privileges at a nearby hospital were facially unconstitutional because they placed “a substantial obstacle in the path of women seeking a *previability abortion*.” [579 U.S., at 591, 136 S. Ct. 2292, 195 L. Ed. 2d 665](#) (emphasis added).

For all these reasons, *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 [\*\*2283] to obtain an abortion is “‘deeply rooted in this Nation’s history and tradition’” and “‘implicit in the concept of ordered liberty.’” [Glucksberg, 521 U.S., \[\\*299\] at 720-721, 117 S. Ct. 1997, 138 L. Ed. 2d 391](#). 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 [\*\*\*\*106] why that right should end after the point at which all “reasonable” women will have decided whether to seek an abortion. [HN20](#) 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.” [Citizens United, 558 U.S., at 375, 130 S. Ct. 876, 175 L. Ed. 2d 753](#) (ROBERTS, C. J., concurring). For the reasons that we have explained, the concurrence’s approach is not.

3

The concurrence would “leave for another day whether to reject any right to an abortion at all,” *post*, at 7, but “another day” would not be long in coming. Some States have set deadlines for obtaining an abortion that are shorter than Mississippi’s. See, e.g., [Memphis Center for Reproductive Health v. Slatery, 14 F. 4th, at 414](#) (considering law with bans “at cascading intervals of two to three weeks” beginning at six weeks), reh’g en banc granted, [18 F.4th 550 \(CA6 2021\)](#). If we held only that Mississippi’s 15-week rule is constitutional, we would soon be called upon to pass on the constitutionality of a panoply of laws with shorter deadlines or no deadline at all. The “measured course” charted by the concurrence would be fraught [\*\*\*605] with turmoil until the Court answered the question that the concurrence seeks to defer.

Even if the Court ultimately adopted the new rule suggested by the concurrence, [\*\*\*\*107] we would be faced with the difficult problem of spelling out what it means. For example, if the period required to give women a “reasonable” opportunity to obtain an abortion were pegged, as the concurrence seems to suggest, at the point when a certain percentage of women make that choice, see [post, at 1-2, 9-10](#), we would have to identify the relevant percentage. It would also be necessary to explain what the concurrence means when it refers to “rare circumstances” that might justify an exception. [\*\*\*300] [Post, at 10](#). And if this new right aims to give women a reasonable opportunity to get an abortion, it would be necessary to decide whether factors other than promptness in deciding might have a bearing on whether such an opportunity was available.

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.

## 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 [\*\*\*\*108] standard.

## A

**HN21** 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. See *supra*, at 8-39.

**HN22** It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged [\*\*2284] under the Constitution, courts cannot “substitute their social and economic beliefs for the judgment of legislative bodies.” *Ferguson*, 372 U. S., at 729-730; see also *Dandridge v. Williams*, 397 U. S. 471, 484-486, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); *United States v. Carolene Products Co.*, 304 U. S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). That respect for a legislature’s judgment applies even when the laws at issue concern matters of great social significance and moral substance. See, e.g., *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U. S. 356, 365-368, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (“treatment of the disabled”); *Glucksberg*, 521 U. S., at 728 (“assisted suicide”); *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 32-35, 55, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) (“financing public education”).

[\*301] **HN23** A law regulating abortion, like other health and welfare laws, is entitled to a “strong presumption of validity.” *Heller v. Doe*, 509 U. S.

312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. *Id.*, at 320; *FCC v. Beach Communications, Inc.*, [\*\*\*606] 508 U. S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993); *New Orleans v. Dukes*, 427 U. S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976) (*per curiam*); *Williamson v. Lee Optical of Okla., Inc.*, 348 U. S. 483, 491, 75 S. Ct. 461, 99 L. Ed. 563 (1955). These legitimate interests include respect for and preservation of prenatal life at all stages of development, *Gonzales*, 550 U. S., at 157-158, 127 S. Ct. 1610, 167 L. Ed. 2d 480; the protection [\*\*\*\*109] 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. See *id.*, at 156-157, 127 S. Ct. 1610, 167 L. Ed. 2d 480; *Roe*, 410 U. S., at 150, 93 S. Ct. 705, 35 L. Ed. 2d 147; cf. *Glucksberg*, 521 U. S., at 728-731 (identifying similar interests).

## B

These legitimate interests justify Mississippi’s Gestational Age Act. **HN24** 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.” *Miss. Code Ann. §41-41-191(4)(b)*. 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.” *§2(b)(i)*. 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.” *§2(b)(i)(8)*; see also *Gonzales*, 550 U. S., at 135-143 (describing such procedures). These legitimate

interests provide a rational basis for [\*\*\*\*110] the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

## [\*302] VII

We end this opinion where we began. Abortion presents a profound moral question. [HN25](#) The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. [Roe](#) and [Casey](#) arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

[\*\*2285] The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

## 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):

Sec. 12. "That every person who shall wilfully and maliciously administer or cause to be administered to or taken by any person, any poison, or other noxious, poisonous or destructive substance or liquid, with an intention to harm him or her thereby to murder, or thereby *to cause or procure the miscarriage of [\*\*\*607] any woman then being with child*, and shall thereof be duly convicted, shall suffer imprisonment not exceeding seven years, and be fined not exceeding [\*\*\*\*111] three thousand dollars."<sup>69</sup>

<sup>69</sup> 1825 Mo. Laws p. 283 (emphasis added); see also, Mo. Rev. Stat., Art. II, §§10, 36 (1835) (extending liability to abortions performed by instrument and establishing differential penalties for pre- and post-quickening abortion) (emphasis added).

### 2. Illinois (1827):

Sec. 46. "Every person who shall wilfully and maliciously administer, or cause to be administered to, or taken by any person, any poison, or other noxious or [\*303] destructive substance or liquid, with an intention to cause the death of such person, *or to procure the miscarriage of any woman, then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and be fined in a sum not exceeding one thousand dollars."<sup>70</sup>

### 3. New York (1828):

Sec. 9. "Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree."

Sec. 21. "Every person who shall willfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or [\*\*\*\*112] other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."<sup>71</sup>

<sup>70</sup> Ill. Rev. Code §46 (1827) (emphasis added); see also Ill. Rev. Code §46 (1833) (same); 1867 Ill. Laws p. 89 (extending liability to abortions "by means of any instrument[s]" and raising penalties to imprisonment "not less than two nor more than ten years").

<sup>71</sup> N. Y. Rev. Stat., pt. 4, ch. 1, Tit. 2, §9 (emphasis added); Tit. 6,

**[\*304] 4. Ohio (1834):**

**[\*\*2286]** Sec. 1. “Be it enacted by the General Assembly of State of Ohio, That any physician, or other person, who shall wilfully administer *to any pregnant woman* any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.”

**[\*\*\*608]** Sec. 2. “That any physician, or other person, who shall administer *to any woman pregnant with a quick [\*\*\*\*113] child*, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such child or mother in consequence thereof, be deemed guilty of high misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than seven years, nor less than one year.”<sup>72</sup>

**5. Indiana (1835):**

Sec. 3. “That every person who shall wilfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the

life of such woman, shall upon conviction be punished **[\*305]** by imprisonment in the county jail any term of [time] not exceeding twelve months and be fined any sum not exceeding five hundred dollars.”<sup>73</sup>

**6. Maine (1840):**

Sec. 13. “Every person, who shall administer *to any woman pregnant with child, whether such child be quick or not*, any **[\*\*\*\*114]** medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done as necessary to preserve the life of the mother, shall be punished by imprisonment in the state prison, not more than five years, or by fine, not exceeding one thousand dollars, and imprisonment in the county jail, not more than one year.”

Sec. 14. “Every person, who shall administer *to any woman, pregnant with child, whether such child shall be quick or not*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same shall have been done, as necessary to preserve her life, shall be punished by imprisonment in the county jail, not more than one year, or by fine, not exceeding one thousand dollars.”<sup>74</sup>

**7. Alabama (1841):**

Sec. 2. “Every person who shall wilfully administer *to any pregnant woman [\*\*2287]* any medicines, drugs, substance or thing whatever, or shall use and employ any instrument or means whatever with intent thereby to procure the miscarriage **[\*\*\*\*115]** of such woman, unless the same shall be

§21 (1828) (emphasis added); 1829 N. Y. Laws p. 19 (codifying these provisions in the revised statutes).

<sup>72</sup> 1834 Ohio Laws pp. 20-21 (emphasis deleted and added).

<sup>73</sup> 1835 Ind. Laws p. 66 (emphasis added).

<sup>74</sup> Me. Rev. Stat., Tit. 12, ch. 160, §§13-14 (1840) (emphasis added).

necessary to preserve her life, or shall have been advised by a respectable physician to be necessary for that [\*306] purpose, shall upon [\*\*\*609] conviction, be punished by fine not exceeding five hundred dollars, and by imprisonment in the county jail, not less than three, and not exceeding six months.”<sup>75</sup>

## 8. Massachusetts (1845):

Ch. 27. “Whoever, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow, any poison, drug, medicine or noxious thing, or shall cause or procure her with like intent, to take or swallow any poison, drug, medicine or noxious thing; and whoever maliciously and [\*\*\*610] without lawful justification, shall use any instrument or means whatever with the like intent, and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned not more than twenty years, nor less than five years in the State Prison; and if the woman doth not die in consequence thereof, such [\*\*\*\*116] offender shall be guilty of a misdemeanor, and shall be punished by imprisonment not exceeding seven years, nor less than one year, in the state prison or house of correction, or common jail, and by fine not exceeding two thousand dollars.”<sup>76</sup>

## 9. Michigan (1846):

Sec. 33. “Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve

the life of such mother, or shall have been [\*307] advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter.”

Sec. 34. “Every person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment [\*\*\*\*117] in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.”<sup>77</sup>

## 10. Vermont (1846):

Sec. 1. “Whoever maliciously, or without lawful justification with intent to cause and procure the miscarriage of a woman, then pregnant with child, shall administer [\*\*\*611] to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing, or shall cause or procure her, with like intent, to take or swallow any poison, [\*\*2288] drug, medicine or noxious thing, and whoever maliciously and without lawful justification, shall use any instrument or means whatever, with the like intent, [\*\*2289] and every person, with the like intent, knowingly aiding and assisting such offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned in the state prison, not more than ten years, nor less than five years; and if the woman does not die in consequence thereof, such offenders shall be deemed guilty of a misdemeanor; and

<sup>75</sup> 1841 Ala. Acts p. 143 (emphasis added).

<sup>76</sup> 1845 Mass. Acts p. 406 (emphasis added).

<sup>77</sup> Mich. Rev. Stat., Tit. 30, ch. 153, §§33-34 (1846) (emphasis added).

shall be punished by imprisonment in the state prison not exceeding [\*308] three years, nor less than one year, and pay a fine not exceeding two hundred dollars.”<sup>78</sup>

#### 11. Virginia [\*\*\*\*118] (1848):

Sec. 9. “Any free person who shall administer *to any pregnant woman*, any medicine, drug or substance whatever, or use or employ any instrument or other means with intent thereby to destroy the child with which such woman may be pregnant, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, unless the same shall have been done to preserve the life of such woman, shall be punished, if the death of a quick child be thereby produced, by confinement in the penitentiary, for not less than one nor more than five years, or if the death of a child, not quick, be thereby produced, by confinement in the jail for not less than one nor more than twelve months.”<sup>79</sup>

#### 12. New Hampshire (1849):

Sec. 1. “That every person, who shall wilfully administer *to any pregnant woman*, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or means whatever with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by [\*\*\*\*119] imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment at the discretion of the Court.”

Sec. 2. “Every person who shall administer *to*

*any woman pregnant with a quick child*, any medicine, drug or substance whatever, or shall use or employ any instrument [\*309] or means whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for such purpose, shall, upon conviction, be punished by fine not exceeding one thousand dollars, and by confinement to hard labor not less than one year, nor more than ten years.”<sup>80</sup>

#### 13. New Jersey (1849):

“That if any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage *of a woman then pregnant with child*, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument or means whatever, with the like intent; and every person, with [\*\*\*\*120] the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor; and if the woman die in consequence thereof, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labour for any term not exceeding fifteen years, or both; and if the woman doth not die in consequence thereof, such offender shall, on conviction thereof, be adjudged guilty of a misdemeanor, and be punished by fine, not exceeding five hundred dollars, or imprisonment at hard labour, for any term not exceeding seven years, or both.”<sup>81</sup>

#### 14. California (1850):

Sec. 45. “And every person who shall

<sup>78</sup> 1846 Vt. Acts & Resolves pp. 34-35 (emphasis added).

<sup>79</sup> 1848 Va. Acts p. 96 (emphasis added).

<sup>80</sup> 1849 N. H. Laws p. 708 (emphasis added).

<sup>81</sup> [1849 N. J. Laws pp. 266-267](#) (emphasis added).

administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments [\*310] whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the State Prison for a term not less than two years, nor more than five years: Provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the [\*\*\*\*121] miscarriage of any woman in order to save her life.”<sup>82</sup>

#### 15. Texas (1854):

Sec. 1. “If any person, with the intent to procure the miscarriage *of any woman being with child*, unlawfully and maliciously shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or any means whatever, with like intent, every such offender, and every person counselling or aiding or abetting such offender, shall be punished by confinement to hard labor in the Penitentiary not exceeding ten years.”<sup>83</sup>

#### 16. Louisiana (1856):

Sec. 24. “Whoever shall feloniously administer or cause to be administered any drug, potion, or any other thing to any woman, for the purpose of procuring a premature delivery, and whoever shall administer or cause to be administered *to any woman pregnant with child*, any drug, potion, or any other thing, for the purpose of procuring abortion, or a premature delivery, shall be imprisoned at hard labor, for not less than one, nor more than ten years.”<sup>84</sup>

#### 17. Iowa (1858):

Sec. 1. “That every person who shall willfully administer *to any pregnant woman*, any medicine, drug, substance [\*311] or thing whatever, or shall use or employ any instrument [\*\*\*612] or other means [\*\*\*\*122] whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and be fined in a sum not exceeding one thousand dollars.”<sup>85</sup>

#### 18. Wisconsin (1858):

[\*\*2290] Sec. 11. “Every person who shall administer *to any woman pregnant with a child* any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.”<sup>86</sup>

Sec. 58. “Every person who shall administer *to any pregnant woman*, or prescribe for any such woman, or advise or procure any such woman to take, any medicine, drug, or substance or thing whatever, or shall use or employ any instrument or other means whatever, or advise or procure the same to be used, with intent thereby to procure the miscarriage of [\*\*\*\*123] any such woman, shall upon conviction be punished by imprisonment in a county jail, not more than one year nor less than three months, or by fine, not exceeding five hundred dollars, or by both fine and

<sup>82</sup> 1850 Cal. Stats. p. 233 (emphasis added and deleted).

<sup>83</sup> 1854 Tex. Gen. Laws p. 58 (emphasis added).

<sup>84</sup> La. Rev. Stat. §24 (1856) (emphasis added).

<sup>85</sup> 1858 Iowa Acts p. 93 (codified in Iowa Rev. Laws §4221) (emphasis added).

<sup>86</sup> Wis. Rev. Stat., ch. 164, §11, ch. 169, §58 (1858) (emphasis added).

imprisonment, at the discretion of the court.”

#### **[\*312] 19. Kansas (1859):**

Sec. 10. “Every person who shall administer *to any woman, pregnant with a quick child*, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree.”

Sec. 37. “Every physician or other person who shall wilfully administer *to any pregnant woman* any medicine, drug or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor, [\*\*\*\*124] and punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment.”<sup>87</sup>

#### **20. Connecticut (1860):**

Sec. 1. “That any person with intent *to procure the miscarriage or [\*\*\*613] abortion of any woman*, shall give or administer to her, prescribe for her, or advise, or direct, or cause or procure her to take, any medicine, drug or substance whatever, or use or advise the use of any instrument, or other means whatever, with the like intent, unless the same shall have been necessary to preserve the life of such woman, or of her unborn child, shall be deemed guilty of felony, and upon due conviction thereof

shall be punished by imprisonment in the Connecticut [\*313] state prison, not more than five years or less than one year, or by a fine of one thousand dollars, or both, at the discretion of the court.”<sup>88</sup>

#### **21. Pennsylvania (1860):**

[\*\*2291] Sec. 87. “If any person shall unlawfully administer *to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child*, any drug, poison, or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage [\*\*\*\*125] of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years.”

Sec. 88. “If any person, with intent *to procure the miscarriage of any woman*, shall unlawfully administer to her any poison, drug or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years.”<sup>89</sup>

#### **22. Rhode Island (1861):**

Sec. 1. “Every person who shall be convicted of wilfully administering *to any pregnant woman, or to any woman supposed by such person to be pregnant*, anything whatever, or shall employ any means whatever, with intent

<sup>88</sup> 1860 Conn. Pub. Acts p. 65 (emphasis added).

<sup>89</sup> 1861 Pa. Laws pp. 404-405 (emphasis added).

<sup>87</sup> 1859 Kan. Laws pp. 233, 237 (emphasis added).

thereby to procure the miscarriage of such [\*314] woman, unless the same is necessary to preserve her life, shall be imprisoned not [\*\*\*\*126] exceeding one year, or fined not exceeding one thousand dollars.”<sup>90</sup>

### 23. Nevada (1861):

Sec. 42. “[E]very person who shall administer, or cause to be administered or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention to *procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison, for a term not less than two years, nor more than five years; provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his [\*\*\*614] professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.”<sup>91</sup>

### 24. West Virginia (1863):

*West Virginia’s Constitution adopted the laws of Virginia when it became its own State:*

“Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this Constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the Legislature.”<sup>92</sup>

*The Virginia law in force in 1863 stated:*

Sec. 8. “Any free person who [\*\*\*\*127] shall administer to, or cause to be taken, *by a woman*, any drug or other thing, or use any means, with intent to destroy her unborn child,

or to produce abortion or miscarriage, and shall thereby destroy [\*\*2292] such child, or produce such abortion or [\*315] miscarriage, shall be confined in the penitentiary not less than one, nor more than five years. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child.”<sup>93</sup>

### 25. Oregon (1864):

Sec. 509. “If any person shall administer to *any woman pregnant with child*, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter.”<sup>94</sup>

### 26. Nebraska (1866):

Sec. 42. “Every person who shall willfully and maliciously administer or cause to be administered to or taken by any person, any poison or other noxious or destructive substance or liquid, with the intention to cause the death of such person, and being [\*\*\*\*128] thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year and not more than seven years. And every person who shall administer or cause to be administered or taken, any such poison, substance or liquid, with the intention to *procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars.”<sup>95</sup>

<sup>90</sup> 1861 R. I. Acts & Resolves p. 133 (emphasis added).

<sup>91</sup> 1861 Nev. Laws p. 63 (emphasis added and deleted).

<sup>92</sup> [W. Va. Const., Art. XI, §8](#) (1862).

<sup>93</sup> Va. Code, Tit. 54, ch. 191, §8 (1849) (emphasis added); see also W. Va. Code, ch. 144, §8 (1870) (similar).

<sup>94</sup> Ore. Gen. Laws, Crim. Code, ch. 43, §509 (1865).

<sup>95</sup> Neb. Rev. Stat., Tit. 4, ch. 4, §42 (1866) (emphasis added); see

**[\*316] 27. Maryland (1868):**

Sec. 2. “And be it enacted, That any person who shall knowingly **[\*\*\*615]** advertise, print, publish, distribute or circulate, or knowingly cause to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language, giving or conveying any notice, hint or reference to any person, or to the name of any person real or fictitious, from whom; or to any place, house, shop or office, when any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever; for the purpose of producing abortion, or who shall knowingly sell, or cause to be sold **[\*\*\*\*129]** any such poison, drug, mixture, preparation, medicine or noxious thing or instrument of any kind whatever; or where any advice, direction, information or knowledge may be obtained *for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy*, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished by imprisonment in the penitentiary for not less than three years, or by a fine of not less than five hundred nor more than one thousand dollars, or by both, in the discretion of the Court; and in case of fine being imposed, one half thereof shall be paid to the State of Maryland, and one-half to the School **[\*\*2293]** Fund of the city or county where the offence was committed; provided, however, that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously, either as the result of accident, constitutional debility, or any other natural

cause, or the production of abortion by a regular practitioner of medicine when, after **[\*\*\*\*130]** consulting with one or more respectable physicians, **[\*317]** he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother.”<sup>96</sup>

**28. Florida (1868):**

Ch. 3, Sec. 11. “Every person who shall administer *to any woman pregnant with a quick child* any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.”

Ch. 8, Sec. 9. “Whoever, with intent *to procure miscarriage of any woman*, unlawfully administers to her, or advises, or prescribes for her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the State penitentiary not exceeding **[\*\*\*616]** seven years, nor less than **[\*\*\*\*131]** one year, or by fine not exceeding one thousand dollars.”<sup>97</sup>

**29. Minnesota (1873):**

Sec. 1. “That any person who shall administer *to any woman with child*, or prescribe for any such woman, or suggest to, or advise, or procure her to take any medicine, drug, substance or thing whatever, or who shall use or employ, or advise or suggest the use or

also Neb. Gen. Stat., ch. 58, §§6, 39 (1873) (expanding criminal liability for abortions by other means, including instruments).

<sup>96</sup> 1868 Md. Laws p. 315 (emphasis deleted and added).

<sup>97</sup> 1868 Fla. Laws, ch. 1637, pp. 64, 97 (emphasis added).

employment of any instrument or other means or force whatever, with intent thereby to cause or procure the miscarriage [\*318] or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for a term not more than ten (10) years nor less than three (3) years.”

Sec. 2. “Any person who shall administer *to any woman with child*, or prescribe, or procure, or provide for any such woman, or suggest to, or advise, or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ, or suggest, or advise the use or employment of any instrument or [\*\*\*\*132] other means or force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall upon conviction thereof be punished by imprisonment in the state prison for a term not more than two years nor less than one year, or by fine not more than five thousand dollars nor less than five hundred dollars, or by such [\*\*2294] fine and imprisonment both, at the discretion of the court.”<sup>98</sup>

### 30. Arkansas (1875):

Sec. 1. “That it shall be unlawful for any one to administer or prescribe any medicine or drugs *to any woman with child*, with intent to produce an abortion, or premature delivery of any foetus before the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending against the provision of this section, shall be fined in any sum not exceeding one thousand (\$1000) dollars, and imprisoned in the penitentiary not

less than one (1) nor more than five (5) years; provided, that this section shall not apply to any abortion produced by any regular practicing [\*319] physician, for the purpose of saving the mother’s life.”<sup>99</sup>

### 31. Georgia (1876):

Sec. 2. “That every person who shall administer *to any woman pregnant [\*\*\*\*133] with a child*, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the [\*\*\*\*617] death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder.”

Sec. 3. “That any person who shall wilfully administer *to any pregnant woman* any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia.”<sup>100</sup>

### 32. North Carolina (1881):

Sec. 1. “That every person who shall wilfully administer *to any woman either pregnant or quick with child*, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall [\*\*\*\*134] use or employ any instrument or other means with intent thereby to destroy said child, unless the same

<sup>98</sup> 1873 Minn. Laws pp. 117-118 (emphasis added).

<sup>99</sup> 1875 Ark. Acts p. 5 (emphasis added and deleted).

<sup>100</sup> 1876 Ga. Acts & Resolutions p. 113 (emphasis added).

shall have been necessary to preserve the life of such mother, shall be guilty of a felony, and [\*320] shall be imprisoned in the state penitentiary for not less than one year nor more than ten years, and be fined at the discretion of the court.”

Sec. 2. “That every person who shall administer *to any pregnant woman*, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or any thing whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, shall be guilty of a misdemeanor, and, on conviction, shall be imprisoned in the jail or state penitentiary for not less than one year or more than five years, and fined at the discretion of the court.”<sup>101</sup>

#### [\*\*2295] 33. Delaware (1883):

Sec. 2. “Every person who, with the intent to procure the miscarriage *of any pregnant woman or women supposed by such person to be pregnant*, unless the same be necessary to preserve her life, shall administer to her, advise, or prescribe for her, or cause to be taken by [\*\*\*\*135] her any poison, drug, medicine, or other noxious thing, or shall use any instrument or other means whatsoever, or shall aid, assist, or counsel any person so intending to procure a miscarriage, whether said miscarriage be accomplished or not, shall be guilty of a felony, and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars and be imprisoned for a term not exceeding five years nor less than one year.”<sup>102</sup>

#### 34. Tennessee (1883):

Sec. 1. “That every person who shall

administer *to any woman pregnant with child, whether such child be [\*321] quick or not*, any medicine, drug or substance whatever, or [\*\*\*618] shall use or employ any instrument, or other means whatever with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve the life of the mother, shall be punished by imprisonment in the penitentiary not less than one nor more than five years.”

Sec. 2. “Every person who shall administer any substance with the intention *to procure the miscarriage of a woman then being with child*, or shall use or employ any instrument or other means with such intent, unless the same [\*\*\*\*136] shall have been done with a view to preserve the life of such mother, shall be punished by imprisonment in the penitentiary not less than one nor more than three years.”<sup>103</sup>

#### 35. South Carolina (1883):

Sec. 1. “That any person who shall administer *to any woman with child*, or prescribe for any such woman, or suggest to or advise or procure her to take, any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the Penitentiary for a term not more than twenty years nor less than five years.”

Sec. 2. “That any person who shall administer

<sup>101</sup> 1881 N.C. Sess. Laws pp. 584-585 (emphasis added).

<sup>102</sup> 1883 Del. Laws, ch. 226 (emphasis added).

<sup>103</sup> 1883 Tenn. Acts pp. 188-189 (emphasis added).

to any woman with child, or prescribe or procure or provide [\*322] for any such woman, or advise or procure any such woman to take, any medicine, drug, substance or thing whatever, or [\*\*\*\*137] shall use or employ or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the Penitentiary for a term not more than five years, or by fine not more than five thousand dollars, or by such fine and imprisonment both, at the discretion of the Court; but no conviction shall be [\*\*2296] had under the provisions of Section 1 or 2 of this Act upon the uncorroborated evidence of such woman.”<sup>104</sup>

### 36. Kentucky (1910):

Sec. 1. “It shall be unlawful for any person to prescribe or administer to any pregnant woman, or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or substance, whatsoever, with the intent thereby to procure the miscarriage of such woman, or with like intent, to use any instrument or means whatsoever, unless such miscarriage is necessary to preserve her life; and any person so offending, shall be punished by a fine of not less than five hundred [\*\*\*619] nor more than one thousand dollars, and imprisoned in the State prison for not less than one nor [\*\*\*\*138] more than ten years.”

Sec. 2. “If by reason of any of the acts described in Section 1 hereof, the miscarriage of such woman is procured, and she does miscarry, causing the death of the unborn child, whether before or after quickening time, the person so offending shall be guilty of a felony, and confined in the penitentiary for not less

than two, nor more than twenty-one years.”

[\*323] Sec. 3. “If, by reason of the commission of any of the acts described in Section 1 hereof, the woman to whom such drug or substance has been administered, or upon whom such instrument has been used, shall die, the person offending shall be punished as now prescribed by law, for the offense of murder or manslaughter, as the facts may justify.”

Sec. 4. “The consent of the woman to the performance of the operation or administering of the medicines or substances, referred to, shall be no defense, and she shall be a competent witness in any prosecution under this act, and for that purpose she shall not be considered an accomplice.”<sup>105</sup>

### 37. Mississippi (1952):

Sec. 1. “Whoever, by means of any instrument, medicine, drug, or other means whatever shall willfully and knowingly cause any woman pregnant with child to abort or miscarry, [\*\*\*\*139] or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother’s life, shall be imprisoned in the state penitentiary no less than one (1) year, nor more than ten (10) years; or if the death of the mother results therefrom, the person procuring, causing, or attempting to procure or cause the abortion or miscarriage shall be guilty of murder.”

Sec. 2. “No act prohibited in section 1 hereof shall be considered as necessary for the preservation of the mother’s life unless upon the prior advice, in writing, of two reputable licensed physicians.”

Sec. 3. “The license of any physician or nurse shall be automatically revoked upon conviction

<sup>104</sup> 1883 S.C. Acts pp. 547-548 (emphasis added).

<sup>105</sup> 1910 Ky. Acts pp. 189-190 (emphasis added).

under the provisions of this act.”<sup>106</sup>

## [\*324] B

This appendix contains statutes criminalizing abortion at all stages in each of the Territories that became States and in [\*2297] the District of Columbia. The statutes appear in chronological order of enactment.

### 1. Hawaii (1850):

Sec. 1. “Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing *to a woman then with child*, in order to produce her mis-carriage, or maliciously uses any instrument [\*\*\*\*140] or other means with like intent, shall, if such woman be then quick with child, be punished by fine not exceeding one thousand [\*\*\*620] dollars and imprisonment at hard labor not more than five years. And if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars, and imprisonment at hard labor not more than two years.”

Sec. 2. “Where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified.”<sup>107</sup>

### 2. Washington (1854):

Sec. 37. “Every person who shall administer *to any woman pregnant with a quick child*, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death

of such child or of such mother be thereby produced, on conviction thereof, be imprisoned in the penitentiary not more than twenty years, nor less than one year.”

[\*325] Sec. 38. “Every person who shall administer *to any pregnant woman, or to any woman who he supposes to be pregnant*, any medicine, drug, or substance whatever, or shall [\*\*\*\*141] use or employ any instrument, or other means, thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall on conviction thereof, be imprisoned in the penitentiary not more than five years, nor less than one year, or be imprisoned in the county jail not more than twelve months, nor less than one month, and be fined in any sum not exceeding one thousand dollars.”<sup>108</sup>

### 3. Colorado (1861):

Sec. 42. “[E]very person who shall administer substance or liquid, or who shall use or cause to be used any instrument, of whatsoever kind, with the intention *to procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and fined in a sum not exceeding one thousand dollars; and if any woman, by reason of such treatment, shall die, the person or persons administering, or causing to be administered, such poison, substance or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished accordingly.”<sup>109</sup>

### 4. Idaho (1864):

Sec. 42. “[E]very person who shall administer

<sup>106</sup> 1952 Miss. Laws p. 289 (codified at Miss. Code Ann. §2223 (1956) (emphasis added)).

<sup>107</sup> Haw. Penal Code, ch. 12, §§1-2 (1850) (emphasis added). Hawaii became a State in 1959. See Presidential Proclamation No. 3309, 73 Stat. c74-c75.

<sup>108</sup> Terr. of Wash. Stat., ch. 2, §§37-38, p. 81 (1854) (emphasis added). Washington became a State in 1889. See Presidential Proclamation No. 8, 26 Stat. 1552-1553.

<sup>109</sup> 1861 Terr. of Colo. Gen. Laws pp. 296-297. Colorado became a State in 1876. See Presidential Proclamation No. 7, 19 Stat. 665-666.

or cause to be administered, or [\*\*\*\*142] taken, any medicinal substance, or shall use or cause to be used, any instruments [\*\*2298] whatever, with the intention *to procure the miscarriage [\*326] of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two [\*\*\*621] years, nor more than five years: *Provided*, That no physician shall be effected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.”<sup>110</sup>

### 5. Montana (1864):

Sec. 41. “[E]very person who shall administer, or cause to be administered, or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention *to produce the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years. *Provided*, That no physician shall be affected by the last clause of this section, who in the discharge of his professional duties deems it necessary to produce the miscarriage of any woman in order to save her life.”<sup>111</sup>

### 6. Arizona [\*\*\*\*143] (1865):

Sec. 45. “[E]very person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention *to procure the miscarriage of any woman then being with child*, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a

term not less than two years nor more than five years: *Provided*, that no [\*327] physician shall be affected by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.”<sup>112</sup>

### 7. Wyoming (1869):

Sec. 25. “[A]ny person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention *to procure the miscarriage of any woman then being with child*, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, in the penitentiary, and fined in a sum not exceeding one thousand dollars; and if any woman by reason of such treatment shall die, the person, or persons, administering, or causing to [\*\*\*\*144] be administered such poison, substance, or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished by imprisonment for a term not less than three years in the penitentiary, and fined in a sum not exceeding one thousand dollars, unless it appear that such miscarriage was procured or attempted by, or under advice of a physician or surgeon, with intent to save the life [\*\*\*622] of such woman, or to prevent serious and permanent bodily injury to her.”<sup>113</sup>

### [\*\*2299] 8. Utah (1876):

Sec. 142. “Every person who provides, supplies, or administers *to any pregnant woman*, or procures any such woman to take

<sup>110</sup> 1863-1864 Terr. of Idaho Laws p. 443. Idaho became a State in 1890. See [26 Stat. 215-219](#).

<sup>111</sup> 1864 Terr. of Mont. Laws p. 184. Montana became a State in 1889. See Presidential Proclamation No. 7, 26 Stat. 1551-1552.

<sup>112</sup> Howell Code, ch. 10, §45 (1865). Arizona became a State in 1912. See [Presidential Proclamation of Feb. 14, 1912, 37 Stat. 1728-1729](#).

<sup>113</sup> 1869 Terr. of Wyo. Gen. Laws p. 104 (emphasis added). Wyoming became a State in 1890. See [26 Stat. 222-226](#).

any medicine, drug, or substance, or uses [\*328] or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the penitentiary not less than two nor more than ten years.”<sup>114</sup>

## 9. North Dakota (1877):

Sec. 337. “Every person who administers to *any pregnant woman*, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever [\*\*\*\*145] with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the territorial prison not exceeding three years, or in a county jail not exceeding one year.”<sup>115</sup>

## 10. South Dakota (1877): *Same as North Dakota.*

## 11. Oklahoma (1890):

Sec. 2187. “Every person who administers to *any pregnant woman*, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the Territorial prison not exceeding [\*329] three years, or in a county jail not exceeding one year.”<sup>116</sup>

<sup>114</sup> Terr. of Utah Comp. Laws §1972 (1876) (emphasis added). Utah became a State in 1896. See Presidential Proclamation No. 9, 29 Stat. 876-877.

<sup>115</sup> Dakota Penal Code §337 (1877) (codified at N. D. Rev. Code §7177 (1895)), and S. D. Rev. Penal Code Ann. §337 (1883). North and South Dakota became States in 1889. See Presidential Proclamation No. 5, 26 Stat. 1548-1551.

<sup>116</sup> Okla. Stat. §2187 (1890) (emphasis added). Oklahoma became a

## 12. Alaska (1899):

Sec. 8. “That if any person shall administer to *any woman pregnant with a child* any medicine, drug, or substance whatever, or shall use any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter, and shall [\*\*\*\*146] be punished accordingly.”<sup>117</sup>

## 13. New Mexico (1919):

Sec. 1. “Any person who shall administer to *any pregnant woman* any medicine, drug or substance [\*\*\*623] whatever, or attempt by operation or any other method or means to produce an abortion or miscarriage upon such woman, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand (\$2,000.00) Dollars, nor less than five hundred (\$500.00) Dollars, or imprisoned in the penitentiary for a period of not less than one nor more than five years, or by both such fine and [\*\*2300] imprisonment in the discretion of the court trying the case.”

Sec. 2. “Any person committing such act or acts mentioned in section one hereof which shall culminate in the death of the woman shall be deemed guilty of murder in the second degree; *Provided*, however, an abortion may be produced when two physicians licensed to practice in [\*330] the State of New Mexico, in consultation, deem it necessary to preserve the life of the woman, or to prevent serious and permanent bodily injury.”

Sec. 3. “For the purpose of the act, the term “pregnancy” is defined as that condition of a

State in 1907. See [Presidential Proclamation of Nov. 16, 1907, 35 Stat. 2160-2161](#).

<sup>117</sup> 1899 Alaska Sess. Laws ch. 2, p. 3 (emphasis added). Alaska became a State in 1959. See Presidential Proclamation No. 3269, 73 Stat. c16.

woman *from the date of conception to the birth of her child.*”<sup>118</sup>

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#### District of Columbia [\*\*\*\*147] (1901):

Sec. 809. “Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.”<sup>119</sup>

**Concur by:** THOMAS; KAVANAUGH;  
ROBERTS

#### Concur

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JUSTICE THOMAS, concurring.

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.” [Washington v. Glucksberg](#), 521 U. S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772

<sup>118</sup> 1919 N. M. Laws p. 6 (emphasis added). New Mexico became a State in 1912. See [Presidential Proclamation of Jan. 6, 1912](#), 37 Stat. 1723-1724.

<sup>119</sup> §809, 31 Stat. 1322 (1901) (emphasis added).

(1997) (internal [\*331] quotation marks omitted). “[T]he idea that the Framers of the [Fourteenth Amendment](#) understood the [Due Process Clause](#) [\*\*\*\*148] to protect a right to abortion is farcical.” [June Medical Services L.L.C. v. Russo](#), 591 U. S. \_\_\_, \_\_\_, 140 S. Ct. 2103, 207 L. Ed. 2d 566, 617 (2020) (THOMAS, J., dissenting).

[\*\*\*624] I write separately to emphasize a second, more fundamental reason why there is no abortion guarantee lurking in the [Due Process Clause](#). Considerable historical evidence indicates that “due process of law” merely required executive and judicial actors to comply with legislative enactments and the common law when depriving a person of life, liberty, or property. See, e.g., [Johnson v. United States](#), 576 U. S. 591, 623, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (THOMAS, J., concurring in judgment). Other sources, by contrast, suggest that “due process of law” prohibited legislatures “from authorizing the deprivation of a person’s life, liberty, or property without providing him the customary procedures to which freemen were entitled by the old law of England.” [United States v. Vaello Madero](#), 596 U. S. \_\_\_, \_\_\_, 142 S. Ct. 1539, 212 L. Ed. 2d 496, 504 (2022) (THOMAS, J., concurring) (internal quotation [\*\*2301] marks omitted). Either way, the [Due Process Clause](#) at most guarantees *process*. It does not, as the Court’s substantive due process cases suppose, “forbi[d] the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided.” [Reno v. Flores](#), 507 U. S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); see also, e.g., [Collins v. Harker Heights](#), 503 U. S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).

As I have previously explained, “substantive due process” is an oxymoron that “lack[s] any basis in the Constitution.” [\*\*\*\*149] [Johnson](#), 576 U. S., at 607-608, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (opinion of THOMAS, J.); see also, e.g., [Vaello Madero](#), 596 U. S., at \_\_\_, 142 S. Ct. 1539, 212 L. Ed. 2d 496, at 504 (THOMAS, J., concurring) (“[T]ext and history provide little support for

modern substantive due process doctrine”). “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.” [\*McDonald v. Chicago\*, 561 U. S. 742, 811, 130 S. Ct. 3020, 177 L. Ed. 2d 894 \(2010\)](#) (THOMAS, J., concurring in part and concurring [\*332] in judgment); see also [\*United States v. Carlton\*, 512 U. S. 26, 40, 114 S. Ct. 2018, 129 L. Ed. 2d 22 \(1994\)](#) (Scalia, J., concurring in judgment). 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\*, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 \(1965\)](#) (right of married persons to obtain contraceptives) \*; [\*Lawrence v. Texas\*, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 \(2003\)](#) (right to engage in private, consensual sexual acts); and [\*Obergefell v. Hodges\*, \[\\*\\*\\*625\] 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 \(2015\)](#) (right to same-sex marriage), are not at issue. The Court’s abortion cases are unique, see *ante*, at 31-32, 66, 71-72, and no party has asked us to decide “whether our entire [\*Fourteenth Amendment\*](#) jurisprudence must be preserved or revised,” [\*McDonald\*, 561 U. S., at 813, 130 S. Ct. 3020, 177 L. Ed. 2d 894](#) (opinion of THOMAS, J.). Thus, I agree that “[n]othing [\*\*\*\*150] in [the Court’s] opinion should be understood to cast doubt

on precedents that do not concern abortion.” *Ante*, at 66.

For that reason, in future cases, we should reconsider all of this Court’s substantive due process precedents, including [\*Griswold\*](#), [\*Lawrence\*](#), and [\*Obergefell\*](#). Because any substantive due process decision is “demonstrably erroneous,” [\*Ramos v. Louisiana\*, 590 U. S. \\_\\_\\_, \\_\\_\\_, 140 S. Ct. 1390, 206 L. Ed. 2d 583, 618 \(2020\)](#) (THOMAS, J., concurring in judgment), we have a duty to “correct the error” established in those precedents, [\*Gamble v. United States\*, 587 U. S. \\_\\_\\_, \\_\\_\\_, 139 S. Ct. 1960, 204 L. Ed. 2d 322, 348 \(2019\)](#) (THOMAS, J., concurring). [\*333] After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions [\*\*2302] guarantee the myriad rights that our substantive due process cases have generated. For example, we could consider whether any of the rights announced in this Court’s substantive due process cases are “privileges or immunities of citizens of the United States” protected by the [\*Fourteenth Amendment\*](#). Amdt. 14, §1; see [\*McDonald\*, 561 U. S., at 806, 130 S. Ct. 3020, 177 L. Ed. 2d 894](#) (opinion of THOMAS, J.). To answer that question, we would need to decide important antecedent questions, including whether the Privileges or Immunities Clause protects *any* rights that are not enumerated in the Constitution and, if so, how to identify those [\*\*\*\*151] rights. See *id.*, at 854, 130 S. Ct. 3020, 177 L. Ed. 2d 894. That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach. See *ante*, at 15, n. 22.

Moreover, apart from being a demonstrably incorrect reading of the [\*Due Process Clause\*](#), the “legal fiction” of substantive due process is “particularly dangerous.” [\*McDonald\*, 561 U. S., at 811, 130 S. Ct. 3020, 177 L. Ed. 2d 894](#) (opinion of THOMAS, J.); accord, [\*Obergefell\*, 576 U. S., at 722, 135 S. Ct. 2584, 192 L. Ed. 2d 609](#) (THOMAS, J., dissenting). At least three dangers favor jettisoning

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\* *Griswold v. Connecticut* purported not to rely on the [\*Due Process Clause\*](#), but rather reasoned “that specific guarantees in the [\*Bill of Rights\*](#)”—including rights enumerated in the [\*First\*](#), [\*Third\*](#), [\*Fourth\*](#), [\*Fifth\*](#), and [\*Ninth Amendments\*](#)—“have penumbras, formed by emanations,” that create “zones of privacy.” [\*381 U. S., at 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510\*](#). Since *Griswold*, the Court, perhaps recognizing the facial absurdity of *Griswold*’s penumbral argument, has characterized the decision as one rooted in substantive due process. See, e.g., [\*Obergefell v. Hodges\*, 576 U. S. 644, 663, 135 S. Ct. 2584, 192 L. Ed. 2d 609 \(2015\)](#); [\*Washington v. Glucksberg\*, 521 U. S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 \(1997\)](#).

the doctrine entirely.

First, “substantive due process exalts judges at the expense of the People from whom they derive their authority.” *Ibid.* Because the [Due Process Clause](#) “speaks only to ‘process,’ the Court has long struggled to define what substantive rights it protects.” [Timbs v. Indiana, 586 U. S. \\_\\_\\_\\_\\_, 139 S. Ct. 682, 203 L. Ed. 2d 11, 21 \(2019\)](#) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). In practice, the Court’s approach for identifying those “fundamental” rights “unquestionably involves policymaking rather than neutral legal analysis.” [Carlton, 512 U. S., at 41-42, 114 S. Ct. 2018, 129 L. Ed. 2d 22](#) (opinion of Scalia, J.); see also [McDonald, 561 U. S., at 812, 130 S. Ct. 3020, 177 L. Ed. 2d 894](#) (opinion of THOMAS, [\*\*\*626] J.) (substantive due process is “a jurisprudence devoid of a guiding [\*334] principle”). The Court divines new rights in line with “its own, extraconstitutional value preferences” [\*\*\*\*152] and nullifies state laws that do not align with the judicially created guarantees. [Thornburgh v. American College of Obstetricians and Gynecologists, 476 U. S. 747, 794, 106 S. Ct. 2169, 90 L. Ed. 2d 779 \(1986\)](#) (White, J., dissenting).

Nowhere is this exaltation of judicial policymaking clearer than this Court’s abortion jurisprudence. In [Roe v. Wade, 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 \(1973\)](#), the Court divined a right to abortion because it “fe[lt]” 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.” [Id., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). In [Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 \(1992\)](#), 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.” [Id., at 851, 112 S. Ct.](#)

[2791, 120 L. Ed. 2d 674](#). As the Court’s preferred manifestation of “liberty” changed, so, too, did the test used to protect it, as [Roe](#)’s author lamented. See [Casey, 505 U. S., at 930, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part) (“[T]he [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 [\*\*2303] and the United States propose no fewer than three different interests [\*\*\*\*153] that supposedly spring from the [Due Process Clause](#). They include “bodily integrity,” “personal autonomy in matters of family, medical care, and faith,” Brief for Respondents 21, and “women’s equal citizenship,” Brief for United States as *Amicus Curiae* 24. That 50 years have passed since [Roe](#) and abortion advocates still cannot coherently articulate the right (or rights) at stake proves [\*335] 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, e.g., [Eisenstadt v. Baird, 405 U. S. 438, 453-454, 92 S. Ct. 1029, 31 L. Ed. 2d 349 \(1972\)](#) (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. See, e.g., [Armour v. Indianapolis, 566 U. S. 673, 680, 132 S. Ct. 2073, 182 L. Ed. 2d 998 \(2012\)](#). 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. See, e.g., [Johnson, 576 U. S., at 618-621, 135 S. Ct. 2551, 192 L. Ed. 2d 569](#)

(opinion [\*\*\*\*154] of THOMAS, J.); *United States v. Sineneng-Smith*, 590 U. S. , - , 140 S. Ct. 1575, [\*\*\*627] 206 L. Ed. 2d 866 (2020) (THOMAS, J., concurring) (slip op., at 3-5). “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.” *Johnson*, 576 U. S., at 620-621, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (opinion of THOMAS, J.). Therefore, regardless of the doctrinal context, the Court often “demand[s] extra justifications for encroachments” on “preferred rights” while “relax[ing] purportedly higher standards of review for less-preferred rights.” *Whole Woman’s Health v. Hellerstedt*, 579 U. S. 582, 640-642, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) (THOMAS, J., dissenting). 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.” *Gamble*, 587 U. S., at , 139 S. Ct. 1960, 204 L. Ed. 2d 322, at 354 (THOMAS, J., concurring). For instance, in *Dred Scott v. Sandford*, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (1857), the Court invoked a species of substantive due process to announce that Congress was powerless to emancipate [\*336] slaves brought into the federal territories. See *id.*, at 452, 19 How. 393, 15 L. Ed. 691. While *Dred Scott* “was overruled on the battlefields of the Civil War and by constitutional amendment after Appomattox,” *Obergefell*, 576 U. S., at 696, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (Roberts, C. J., dissenting), that overruling was “[p]urchased at the price of immeasurable human suffering,” *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 240, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (THOMAS, J., concurring [\*\*\*\*155] in part and concurring in judgment). Now today, the Court rightly overrules *Roe* and *Casey* —two of this Court’s “most notoriously incorrect” substantive due process decisions, *Timbs*, 586 U. S., at , 139 S. Ct. 682, 203 L. Ed. 2d 11, at 22 (opinion of THOMAS, J.)—after more than 63 million abortions have been

performed, see National Right to Life Committee, *Abortion Statistics* (Jan. 2022), <https://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf>. The harm caused by [\*\*2304] this Court’s forays into substantive due process remains immeasurable.

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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.” *Carlton*, 512 U. S., at 42, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (opinion of Scalia, J.). 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 [\*\*\*\*156] opportunity.

JUSTICE KAVANAUGH, concurring.

I write separately to explain my additional views about why *Roe* was wrongly decided, why *Roe* should be overruled at this time, and the future implications of today’s decision.

[\*337] [\*\*\*628] I

Abortion is a profoundly difficult and contentious issue because it presents an irreconcilable conflict between the interests of a pregnant woman who seeks an abortion and the interests in protecting fetal life. The interests on both sides of the abortion issue are extraordinarily weighty.

On the one side, many pro-choice advocates forcefully argue that the ability to obtain an abortion is critically important for women’s personal and professional lives, and for women’s health. They contend that the widespread

availability of abortion has been essential for women to advance in society and to achieve greater equality over the last 50 years. And they maintain that women must have the freedom to choose for themselves whether to have an abortion.

On the other side, many pro-life advocates forcefully argue that a fetus is a human life. They contend that all human life should be protected as a matter of human dignity and fundamental morality. And they stress that a significant percentage [\*\*\*\*157] of Americans with pro-life views are women.

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. 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 unenumerated rights that are deeply rooted in this Nation's [\*338] 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.<sup>1</sup>

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<sup>1</sup>The Court's opinion today also recounts the pre-constitutional common-law history in England. That English history supplies background information on the issue of abortion. As I see it, the dispositive point in analyzing American history and tradition for purposes of the [Fourteenth Amendment](#) inquiry is that abortion was largely prohibited in most American States as of 1868 when the

[\*\*2305] On the question [\*\*\*\*158] 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—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.

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 [\*\*\*629] 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 (about 24 weeks of pregnancy). 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.

Some *amicus* briefs argue that the [\*\*\*\*159] Court today should not only overrule [Roe](#) and return to a position of judicial neutrality on abortion, but should go further and hold that the [\*339] Constitution *outlaws* abortion throughout the United States. No Justice of this Court has ever advanced that position. I respect those who advocate for that position, just as I respect those who argue that this Court should hold that the Constitution legalizes pre-viability abortion throughout the United States. But both positions are wrong as a constitutional matter, in my view. The Constitution neither outlaws abortion nor legalizes

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[Fourteenth Amendment](#) was ratified, and that abortion remained largely prohibited in most American States until [Roe](#) was decided in 1973.

abortion.

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.” [\*Planned Parenthood of Southeastern Pa. v. Casey\*, 505 U. S. 833, 979, 112 S. Ct. 2791, 120 L. Ed. 2d 674 \(1992\)](#) (opinion concurring in judgment in part and dissenting in part).

Today’s decision therefore does not prevent the [\*\*\*\*160] numerous States that readily allow abortion from continuing to readily allow abortion. That includes, if they choose, the *amici* States supporting the plaintiff in this Court: New York, California, Illinois, Maine, Massachusetts, Rhode Island, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Michigan, Wisconsin, Minnesota, New Mexico, Colorado, Nevada, Oregon, Washington, and Hawaii. By contrast, other States may maintain laws that more strictly limit abortion. After today’s decision, all of the States may evaluate the competing interests and decide how to address this consequential issue.<sup>2</sup>

[\*340] [\*\*2306] In arguing for a *constitutional* right to abortion that would override the people’s choices in the democratic process, the plaintiff Jackson Women’s Health Organization and its *amici* emphasize that the Constitution does not freeze the American people’s rights as of 1791 or 1868. I fully agree. To begin, I agree that

constitutional [\*\*\*630] rights apply to situations that were unforeseen in 1791 or 1868—such as applying the [First Amendment](#) to the Internet or the [Fourth Amendment](#) to cars. Moreover, the Constitution authorizes the creation of new rights—state and federal, statutory and constitutional. But when it comes to [\*\*\*\*161] creating new rights, the Constitution directs the people to the various processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments. See generally [Amdt. 9](#); [Amdt. 10](#); [Art. I, §8](#); [Art. V](#); J. Sutton, 51 *Imperfect Solutions: States and the Making of American Constitutional Law* 7-21, 203-216 (2018); A. Amar, *America’s Constitution: A Biography* 285-291, 315-347 (2005).

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. As Justice Rehnquist stated, this Court has not “been granted a roving commission, either by the Founding Fathers or by the framers of the [Fourteenth Amendment](#), to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court.” [Furman v. Georgia](#), 408 U. S. 238, 467, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (dissenting opinion); see [Washington v. Glucksberg](#), 521 U. S. 702, 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997); [Cruzan v. Director, Mo. Dept. of Health](#), 497 U. S. 261, 292-293, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (Scalia, J., concurring).

[\*341] This Court therefore does not possess the authority either to declare a constitutional right to abortion or to declare a constitutional prohibition of abortion. See [Casey](#), 505 U. S., at 953, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (Rehnquist, C. J., concurring [\*\*\*\*162] in judgment in part and dissenting in part); *id.*, at 980, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of Scalia, J.); [Roe v. Wade](#), 410 U. S. 113, 177, 93 S. Ct. 705, 35 L. Ed. 2d 147

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<sup>2</sup> In his dissent in [Roe](#), Justice Rehnquist indicated that an exception to a State’s restriction on abortion would be constitutionally required when an abortion is necessary to save the life of the mother. See [Roe v. Wade](#), 410 U. S. 113, 173, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother. Some statutes also provide other exceptions.

(1973) (Rehnquist, J., dissenting); [Doe v. Bolton](#), 410 U. S. 179, 222, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973) (White, J., dissenting).

In sum, the Constitution is neutral on the issue of abortion and allows the people and their elected representatives to address the issue through the democratic process. In my respectful view, the Court in [Roe](#) therefore erred by taking sides on the issue of abortion.

## II

The more difficult question in this case is *stare decisis*—that is, whether to overrule the [Roe](#) decision.

The principle of *stare decisis* requires respect for the Court’s precedents and for the accumulated wisdom of the judges who have previously addressed the same issue. *Stare decisis* is rooted in Article III of the Constitution and is fundamental to the American judicial system and to the stability of American law.

Adherence to precedent is the norm, and *stare decisis* imposes a high bar before **[\*\*2307]** this Court may overrule a precedent. This Court’s history shows, however, that *stare decisis* is not absolute, and indeed cannot be absolute. Otherwise, as the Court today explains, many long-since-overruled cases such as [Plessy v. Ferguson](#), 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896); [Lochner v. New York](#) **[\*\*\*631]**, 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905); [Minersville School Dist. v. Gobitis](#), 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940); and [Bowers v. Hardwick](#), 478 U. S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), would never have been overruled and would still be the law.

In his canonical [Burnet](#) opinion in 1932, Justice **[\*\*\*\*163]** Brandeis stated that in “cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.” **[\*342]** [Burnet v. Coronado Oil & Gas](#)

[Co.](#), 285 U. S. 393, 406-407, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932) (dissenting opinion). That description of the Court’s practice remains accurate today. Every current Member of this Court has voted to overrule precedent. And over the last 100 years beginning with Chief Justice Taft’s appointment in 1921, every one of the 48 Justices appointed to this Court has voted to overrule precedent. Many of those Justices have voted to overrule a substantial number of very significant and longstanding precedents. See, e.g., [Obergefell v. Hodges](#), 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (overruling [Baker v. Nelson](#)); [Brown v. Board of Education](#), 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (overruling [Plessy v. Ferguson](#)); [West Coast Hotel Co. v. Parrish](#), 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937) (overruling [Adkins v. Children’s Hospital of D. C.](#) and in effect [Lochner v. New York](#)).

But that history alone does not answer the critical question: When precisely should the Court overrule an erroneous constitutional precedent? The history of *stare decisis* in this Court establishes that a constitutional precedent may be overruled only when (i) the prior decision is not just wrong, but is egregiously wrong, (ii) the prior decision has caused significant negative jurisprudential or real-world consequences, **[\*\*\*\*164]** and (iii) overruling the prior decision would not unduly upset legitimate reliance interests. See [Ramos v. Louisiana](#), 590 U. S. \_\_\_, \_\_\_, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) (KAVANAUGH, J., concurring in part) (slip op., at 7-8).

Applying those factors, I agree with the Court today that [Roe](#) should be overruled. The Court in [Roe](#) erroneously assigned itself the authority to decide a critically important moral and policy issue that the Constitution does not grant this Court the authority to decide. As Justice Byron White succinctly explained, [Roe](#) was “an improvident and extravagant exercise of the power of judicial review” because “nothing in the language or history of the Constitution” supports a constitutional right

to abortion. [Bolton, 410 U. S., at 221-222, 93 S. Ct. 739, 35 L. Ed. 2d 201](#) (dissenting opinion).

[\*343] Of course, the fact that a precedent is wrong, even egregiously wrong, does not alone mean that the precedent should be overruled. But as the Court today explains, [Roe](#) has caused significant negative jurisprudential and real-world consequences. By taking sides on a difficult and contentious issue on which the Constitution is neutral, [Roe](#) overreached and exceeded this Court’s constitutional authority; gravely distorted the Nation’s understanding of this Court’s proper constitutional role; and caused significant harm to what [Roe](#) itself [\*\*\*\*165] recognized as the State’s “important and legitimate interest” in protecting fetal life. [410 U. S., at 162, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). All of that explains why tens of millions of Americans—and [\*\*\*632] the 26 States that explicitly [\*\*2308] ask the Court to overrule [Roe](#)—do not accept [Roe](#) even 49 years later. Under the Court’s longstanding *stare decisis* principles, [Roe](#) should be overruled.<sup>3</sup>

But the *stare decisis* analysis here is somewhat more complicated because of [Casey](#). In 1992, 19 years after [Roe](#), [Casey](#) acknowledged the continuing dispute over [Roe](#). The Court sought to

find common ground that would resolve the abortion debate and end the national controversy. After careful and thoughtful consideration, the [Casey](#) plurality reaffirmed [\*344] a right to abortion through viability (about 24 weeks), while also allowing somewhat more regulation of abortion than [Roe](#) had allowed.<sup>4</sup>

I have deep and unyielding respect for the Justices who wrote the [Casey](#) plurality opinion. And I respect the [Casey](#) plurality’s good-faith effort to locate some middle ground or compromise that could resolve this controversy for America.

But as has become increasingly evident over time, [Casey](#)’s well-intentioned effort did not resolve the abortion debate. The national division has not ended. In recent years, [\*\*\*\*166] a significant number of States have enacted abortion restrictions that directly conflict with [Roe](#). Those laws cannot be dismissed as political stunts or as outlier laws. Those numerous state laws collectively represent the sincere and deeply held views of tens of millions of Americans who continue to fervently believe that allowing abortions up to 24 weeks is far too radical and far too extreme, and does not sufficiently account for what [Roe](#) itself recognized as the State’s “important and legitimate interest” in protecting fetal life. [410 U. S., at 162, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). In this case, moreover, a majority of the States—26 in all—ask the Court to overrule [Roe](#) and return the abortion issue to the States.

In short, [Casey](#)’s *stare decisis* analysis rested in part on a predictive judgment about the future

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<sup>3</sup> I also agree with the Court’s conclusion today with respect to reliance. Broad notions of societal reliance have been invoked in support of [Roe](#), but the Court has not analyzed reliance in that way in the past. For example, American businesses and workers relied on [Lochner v. New York](#), 198 U. S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), and [Adkins v. Children’s Hospital of D. C.](#), 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923), to construct a laissez-faire economy that was free of substantial regulation. In [West Coast Hotel Co. v. Parrish](#), 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937), the Court nonetheless overruled [Adkins](#) and in effect [Lochner](#). An entire region of the country relied on [Plessy v. Ferguson](#), 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), to enforce a system of racial segregation. In [Brown v. Board of Education](#), 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the Court overruled [Plessy](#). Much of American society was built around the traditional view of marriage that was upheld in [Baker v. Nelson](#), 409 U. S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), and that was reflected in laws ranging from tax laws to estate laws to family laws. In [Obergefell v. Hodges](#), 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), the Court nonetheless overruled [Baker](#).

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<sup>4</sup> As the Court today notes, [Casey](#)’s approach to *stare decisis* pointed in two directions. [Casey](#) reaffirmed [Roe](#)’s viability line, but it expressly overruled the [Roe](#) trimester framework and also expressly overruled two landmark post-[Roe](#) abortion cases—[Akron v. Akron Center for Reproductive Health, Inc.](#), 462 U. S. 416, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983), and [Thornburgh v. American College of Obstetricians and Gynecologists](#), 476 U. S. 747, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986). See [Casey](#), 505 U. S., at 870, 872-873, 878-879, 882, 112 S. Ct. 2791, 120 L. Ed. 2d 674. [Casey](#) itself thus directly contradicts any notion of absolute *stare decisis* in abortion cases.

development of state laws and of the people's views on the abortion issue. But that predictive judgment has not borne out. As the **[\*\*\*633]** Court today explains, the experience over the last 30 years conflicts **[\*345]** with [Casey](#)'s predictive judgment and **[\*\*2309]** therefore undermines [Casey](#)'s precedential force.<sup>5</sup>

In any event, although [Casey](#) is relevant to the *stare decisis* analysis, the question of whether to overrule [Roe](#) cannot be dictated by [Casey](#) alone. To illustrate **[\*\*\*\*167]** that *stare decisis* point, consider an example. Suppose that in 1924 this Court had expressly reaffirmed [Plessy v. Ferguson](#) and upheld the States' authority to segregate people on the basis of race. Would the Court in [Brown](#) some 30 years later in 1954 have reaffirmed [Plessy](#) and upheld racially segregated schools simply because of that intervening 1924 precedent? Surely the answer is no.

In sum, I agree with the Court's application today of the principles of *stare decisis* and its conclusion that [Roe](#) should be overruled.

### 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. That issue will be resolved by the people and their representatives in the democratic process in the States or Congress. But the parties' arguments have raised other related questions, and I address some of them here.

*First* is the question of how this decision will affect other precedents involving issues such as

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<sup>5</sup> To be clear, public opposition to a prior decision is not a basis for overruling (or reaffirming) that decision. Rather, the question of whether to overrule a precedent must be analyzed under this Court's traditional *stare decisis* factors. The only point here is that [Casey](#) adopted a special *stare decisis* principle with respect to [Roe](#) based on the idea of resolving the national controversy and ending the national division over abortion. The continued and significant opposition to [Roe](#), as reflected in the laws and positions of numerous States, is relevant to assessing [Casey](#) on its own terms.

contraception and marriage—in particular, the decisions in [Griswold v. Connecticut](#), **[\*346]** 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); [Eisenstadt v. Baird](#), 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); [Loving v. Virginia](#), 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); and [Obergefell v. Hodges](#), 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). I emphasize what the Court today states: Overruling [Roe](#) does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents. **[\*\*\*\*168]**

*Second*, as I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel. May a State retroactively impose liability or punishment for an abortion that occurred before today's decision takes effect? In my view, the answer is no based on the *Due Process Clause* or the *Ex Post Facto Clause*. Cf. [Bouie v. City of Columbia](#), 378 U. S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

Other abortion-related legal questions may emerge in the future. But this Court will no longer decide the fundamental question of whether abortion must be allowed throughout the United States through 6 weeks, or **[\*\*\*634]** 12 weeks, or 15 weeks, or 24 weeks, or some other line. The Court will no longer decide how to evaluate the interests of the pregnant woman and the interests in protecting fetal life throughout pregnancy. Instead, those difficult moral and policy questions will be decided, as the Constitution dictates, by the people and their elected representatives through the constitutional processes of democratic self-government.

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**[\*\*2310]** The [Roe](#) Court took sides on a consequential **[\*\*\*\*169]** 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 [\*347] the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level.” [Casey](#), 505 U. S., at 995, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion concurring in judgment in part and dissenting in part).

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.

To be sure, many Americans will disagree with the Court’s decision today. That would be true no matter how the Court decided this case. Both sides on the abortion issue believe sincerely and passionately in the rightness of their cause. Especially in those difficult and fraught circumstances, the Court must scrupulously adhere to the Constitution’s neutral position on the issue of abortion.

Since [\*\*\*\*170] 1973, more than 20 Justices of this Court have now grappled with the divisive issue of abortion. I greatly respect all of the Justices, past and present, who have done so. Amidst extraordinary controversy and challenges, all of them have addressed the abortion issue in good faith after careful deliberation, and based on their sincere understandings of the Constitution and of precedent. I have endeavored to do the same.

In my judgment, on the issue of abortion, the Constitution is neither pro-life nor pro-choice. The Constitution is neutral, and this Court likewise must be scrupulously neutral. The Court today properly heeds the constitutional principle of judicial neutrality and returns the issue of abortion to the people and their elected representatives in the democratic process.

CHIEF JUSTICE ROBERTS, concurring in the judgment.

We granted certiorari to decide one question: “Whether all pre-viability prohibitions on elective abortions are unconstitutional.” [\*348] Pet. for Cert. i. That question is directly implicated here: Mississippi’s Gestational Age Act, [Miss. Code Ann. §41-41-191](#) (2018), generally prohibits abortion after the fifteenth week of pregnancy—several weeks before a fetus is regarded as “viable” outside [\*\*\*\*171] 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 [\*\*\*635] its favor would “not require the Court to overturn” [Roe v. Wade](#), 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and [Planned Parenthood of Southeastern Pa. v. Casey](#), 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). Pet. for Cert. 5.

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 [\*\*2311] beyond the point at which it is considered “late” to discover a pregnancy. See A. Ayoola, *Late Recognition of Unintended Pregnancies*, 32 Pub. Health Nursing 462 (2015) (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 [\*\*\*\*172] 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 [\*349] 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

Let me begin with my agreement with the Court, on the only question we need decide here: whether to retain the rule from *Roe* and *Casey* that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded as "viable" outside the womb. I agree that this rule should be discarded.

First, this Court seriously erred in *Roe* in adopting viability as the earliest point at which a State may legislate to advance [\*\*\*\*173] its substantial interests in the area of abortion. See *ante*, at 50-53. *Roe* set forth a rigid three-part framework anchored to viability, which more closely resembled a regulatory code than a body of constitutional law. That framework, moreover, came out of thin air. Neither the Texas statute challenged in *Roe* nor the Georgia statute at issue in its companion case, *Doe v. Bolton*, 410 U. S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), included any gestational age limit. No party or *amicus* asked the Court to adopt a bright line viability rule. And as for *Casey*, arguments for or against the viability rule played only a *de minimis* role in the parties' briefing and in the oral argument. See Tr. of Oral Arg. 17-18, 51 (fleeting discussion of the viability rule).

It is thus hardly surprising that neither *Roe* nor *Casey* made a persuasive [\*\*\*636] or even colorable argument for why the time for terminating a pregnancy must extend to viability.

The Court's jurisprudence on this issue is a textbook illustration of the perils of deciding a question neither presented nor briefed. As has been often noted, *Roe*'s defense of the line boiled down to the circular assertion that the State's interest is compelling only when an unborn child can live [\*350] outside the womb, because that is when the unborn child [\*\*\*\*174] can live outside the womb. See 410 U. S., at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147; see also J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 924 (1973) (*Roe*'s reasoning "mistake[s] a definition for a syllogism").

Twenty years later, the best defense of the viability line the *Casey* plurality could conjure up was workability. See 505 U. S., at 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But see *ante*, at 53 (opinion of the Court) (discussing the difficulties in applying the viability standard). Although the plurality attempted to add more content by opining that "it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child," *Casey*, 505 U. S., at 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674, that mere suggestion provides no basis for choosing viability as the critical [\*\*2312] tipping point. A similar implied consent argument could be made with respect to a law banning abortions after fifteen weeks, well beyond the point at which nearly all women are aware that they are pregnant. A. Ayoola, M. Nettleman, M. Stommel, & R. Canady, *Time of Pregnancy Recognition and Prenatal Care Use: A Population-based Study in the United States* 39 (2010) (Pregnancy Recognition). The dissent, which would retain the viability line, offers no justification for it either.

This Court's jurisprudence since *Casey*, moreover, has "eroded" the "underpinnings" of the viability line, such [\*\*\*\*175] as they were. *United States v. Gaudin*, 515 U. S. 506, 521, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of "potential life." *Roe*, 410 U. S., at

[162-163](#), [93 S. Ct. 705](#), [35 L. Ed. 2d 147](#). That changed with [Gonzales v. Carhart](#), [550 U. S. 124](#), [127 S. Ct. 1610](#), [167 L. Ed. 2d 480](#) (2007). There, we recognized a broader array of interests, such as drawing “a bright line that clearly distinguishes abortion and infanticide,” maintaining societal ethics, and preserving the integrity of the medical profession. [Id.](#), at 157-160, [127 S. Ct. 1610](#), [167 L. Ed. 2d 480](#). The viability line has nothing to do with advancing such permissible goals. Cf. [id.](#), at 171, [127 S. Ct. 1610](#), [167 L. Ed. 2d 480](#) (Ginsburg, [\*351] J., dissenting) ([Gonzales](#) “blur[red] the line, firmly drawn in [Casey](#), between previability and postviability abortions”); see also R. Beck, [Gonzales](#), [Casey](#), and the Viability Rule, [103 Nw. U. L. Rev. 249](#), 276-279 (2009).

Consider, for example, statutes passed in a number of jurisdictions that forbid abortions after twenty weeks of pregnancy, premised on the theory that a fetus can feel pain at that stage of development. See, e.g., [Ala. Code §26-23B-2](#) (2018). Assuming that prevention of fetal pain is a legitimate state interest after [Gonzales](#), there seems to be no reason why viability would be relevant to the permissibility of such laws. The same is [\*\*\*637] true of laws designed to “protect[ ] the integrity and ethics of the medical profession” and restrict procedures [\*\*\*\*176] likely to “coarsen society” to the “dignity of human life.” [Gonzales](#), [550 U. S.](#), at 157, [127 S. Ct. 1610](#), [167 L. Ed. 2d 480](#). Mississippi’s law, for instance, was premised in part on the legislature’s finding that the “dilation and evacuation” procedure is a “barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession.” [Miss. Code Ann. §41-41-191\(2\)\(b\)\(i\)\(8\)](#). That procedure accounts for most abortions performed after the first trimester—two weeks before the period at issue in this case—and “involve[s] the use of surgical instruments to crush and tear the unborn child apart.” *Ibid.*; see also [Gonzales](#), [550 U. S.](#), at 135, [127 S. Ct. 1610](#), [167 L. Ed. 2d 480](#). Again, it would make little sense to focus on viability when evaluating a law based on these permissible goals.

In short, the viability rule was created outside the ordinary course of litigation, is and always has been completely unreasoned, and fails to take account of state interests since recognized as legitimate. It is indeed “telling that other countries almost uniformly eschew” a viability line. *Ante*, at 53 (opinion of the Court). Only a handful of countries, among them China and North Korea, permit elective abortions after twenty weeks; the rest have coalesced around a 12-week line. See *The World’s Abortion Laws*, Center for Reproductive Rights (Feb. 23, [\*\*\*\*177] 2021) (online source archived [\*352] at [www.supremecourt.gov](#)) (Canada, China, Iceland, Guinea-Bissau, the Netherlands, North Korea, Singapore, and Vietnam permit elective abortions after twenty weeks). The Court rightly rejects the arbitrary viability rule today.

## [\*\*2313] II

None of this, however, requires that we also take the dramatic step of altogether eliminating the abortion right first recognized in *Roe*. Mississippi itself previously argued as much to this Court in this litigation.

When the State petitioned for our review, its basic request was straightforward: “clarify whether abortion prohibitions before viability are always unconstitutional.” Pet. for Cert. 14. The State made a number of strong arguments that the answer is no, *id.*, at 15-26—arguments that, as discussed, I find persuasive. And it went out of its way to make clear that it was *not* asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy: “To be clear, the questions presented in this petition do not require the Court to overturn [Roe](#) or [Casey](#).” *Id.*, at 5. Mississippi tempered that statement with an oblique one-sentence footnote intimating that, if the Court could not reconcile [Roe](#) and [Casey](#) with current facts or [\*\*\*\*178] other cases, it “should not retain erroneous precedent.” Pet. for Cert. 5-6, n. 1. But the State never argued that we should grant review for that purpose.

After we granted certiorari, however, Mississippi

changed course. In its principal brief, the State bluntly announced that the Court should overrule [Roe](#) and [Casey](#). The Constitution does not protect a right to an abortion, it argued, and a State should be able to prohibit elective abortions if a rational basis supports doing so. See Brief for Petitioners 12-13.

**[\*\*\*638]** The Court now rewards that gambit, noting three times that the parties presented “no half-measures” and argued that “we must either reaffirm or overrule [Roe](#) and [Casey](#).” **[\*353]** *Ante*, at 5, 8, 72. Given those two options, the majority picks the latter.

This framing is not accurate. In its brief on the merits, Mississippi in fact argued at length that a decision simply rejecting the viability rule would result in a judgment in its favor. See Brief for Petitioners 5, 38-48. But even if the State had not argued as much, it would not matter. There is no rule that parties can confine this Court to disposing of their case on a particular ground—let alone when review was sought and granted on a different one. **[\*\*\*\*179]** Our established practice is instead not to “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” [Washington State Grange v. Washington State Republican Party](#), 552 U. S. 442, 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (quoting [Ashwander v. TVA](#), 297 U. S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring)); see also [United States v. Raines](#), 362 U. S. 17, 21, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960).

Following that “fundamental principle of judicial restraint,” [Washington State Grange](#), 552 U. S., at 450, 128 S. Ct. 1184, 170 L. Ed. 2d 151, we should begin with the narrowest basis for disposition, proceeding to consider a broader one only if necessary to resolve the case at hand. See, e.g., [Office of Personnel Management v. Richmond](#), 496 U. S. 414, 423, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990). It is only where there is no valid narrower ground of decision that we should go on to address a broader issue, such as whether a constitutional

decision should be overturned. See [Federal Election Comm’n v. Wisconsin Right to Life, Inc.](#), 551 U. S. 449, 482, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (opinion of Roberts, C. J.) (declining to address the claim that a constitutional decision should be overruled when the appellant prevailed on its narrower constitutional argument).

**[\*\*2314]** 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. See [Webster v. Reproductive Health Services](#), 492 U. S. 490, 518, 521, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989) (plurality opinion) **[\*354]** (rejecting [Roe](#)’s viability line as “rigid” and “indeterminate,” while also finding “no occasion to revisit the holding of [Roe](#)” that, under the Constitution, **[\*\*\*\*180]** a State must provide an opportunity to choose to terminate a pregnancy).

Of course, such an approach would not be available if the rationale of [Roe](#) and [Casey](#) was inextricably entangled with and dependent upon the viability standard. It is not. Our precedents in this area ground the abortion right in a woman’s “right to choose.” See [Carey v. Population Services Int’l](#), 431 U. S. 678, 688-689, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (“underlying foundation of the holdings” in [Roe and Griswold v. Connecticut](#), 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), was the “right of decision in matters of childbearing”); [Maher v. Roe](#), 432 U. S. 464, 473, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977) ([Roe](#) and other cases “recognize a constitutionally protected interest in making certain **[\*\*\*639]** kinds of important decisions free from governmental compulsion” (internal quotation marks omitted)); *id.*, at 473-474, 97 S. Ct. 2376, 53 L. Ed. 2d 484 ([Roe](#) “did not declare an unqualified constitutional right to an abortion,” but instead protected “the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy” (internal quotation marks omitted));

[\*Webster\*, 492 U. S., at 520, 109 S. Ct. 3040, 106 L. Ed. 2d 410](#) (plurality opinion) (*Roe* protects “the claims of a woman to decide for herself whether or not to abort a fetus she [is] carrying”); [\*Gonzales\*, 550 U. S., at 146, 127 S. Ct. 1610, 167 L. Ed. 2d 480](#) (a State may not “prohibit any woman from making the ultimate decision to terminate her pregnancy”). If that is the basis for *Roe*, *Roe*’s viability line should be scrutinized from the same perspective. And there is nothing [\*\*\*\*181] inherent in the right to choose that requires it to extend to viability or any other point, so long as a real choice is provided. See [\*Webster\*, 492 U. S., at 519, 109 S. Ct. 3040, 106 L. Ed. 2d 410](#) (plurality opinion) (finding no reason “why the State’s interest in protecting potential human life should come into existence only at the point of viability”).

To be sure, in reaffirming the right to an abortion, *Casey* termed the viability rule *Roe*’s “central holding.” [\*505 U. S., at 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674\*](#). Other cases of ours have repeated that language. [\*355] See, e.g., [\*Gonzales\*, 550 U. S., at 145-146, 127 S. Ct. 1610, 167 L. Ed. 2d 480](#). But simply declaring it does not make it so. The question in *Roe* was whether there was any right to abortion in the Constitution. See Brief for Appellants and Brief for Appellees, in *Roe v. Wade*, O. T. 1971, No. 70-18. How far the right extended was a concern that was separate and subsidiary, and—not surprisingly—entirely unbriefed.

The Court in *Roe* just chose to address both issues in one opinion: It first recognized a right to “choose to terminate [a] pregnancy” under the Constitution, see [\*410 U. S., at 129-159, 93 S. Ct. 705, 35 L. Ed. 2d 147\*](#), and then, having done so, explained that a line should be drawn at viability such that a State could not proscribe abortion before that period, see [\*id.\*, at 163, 93 S. Ct. 705, 35 L. Ed. 2d 147](#). The viability line is a separate rule fleshing out the metes and bounds of *Roe*’s core holding. Applying [\*\*\*\*182] principles of *stare decisis*, I would excise that additional rule—and only that rule—from our jurisprudence.

The majority lists a number of cases that have stressed the importance of the [\*\*2315] viability rule to our abortion precedents. See *ante*, at 73-74. I agree that—whether it was originally holding or dictum—the viability line is clearly part of our “past precedent,” and the Court has applied it as such in several cases since *Roe*. *Ante*, at 73. My point is that *Roe* adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State’s legitimate interests when the fetus is viable outside the womb. The latter is obviously distinct from the former. I would abandon that timing rule, but see no need in this case to consider the basic right.

The Court contends that it is impossible to address *Roe*’s conclusion that [\*\*\*640] the Constitution protects the woman’s right to abortion, without also addressing *Roe*’s rule that the State’s interests are not constitutionally adequate to justify a ban on abortion until viability. See *ibid*. But we have partially overruled precedents before, see, e.g., [\*United \[\\*356\] States v. Miller\*, 471 U. S. 130, 142-144, 105 S. Ct. 1811, 85 L. Ed. 2d 99 \(1985\)](#); [\*Daniels v. Williams\*, 474 U. S. 327, 328-331, 106 S. Ct. 662, 88 L. Ed. 2d 662 \(1986\)](#); [\*Batson v. Kentucky\*, 476 U. S. 79, 90-93, 106 S. Ct. 1712, 90 L. Ed. 2d 69 \(1986\)](#), and certainly have never [\*\*\*\*183] held that a distinct holding defining the contours of a constitutional right must be treated as part and parcel of the right itself.

Overruling the subsidiary rule is sufficient to resolve this case in Mississippi’s favor. The law at issue allows abortions up through fifteen weeks, providing an adequate opportunity to exercise the right *Roe* protects. By the time a pregnant woman has reached that point, her pregnancy is well into the second trimester. Pregnancy tests are now inexpensive and accurate, and a woman ordinarily discovers she is pregnant by six weeks of gestation. See A. Branum & K. Ahrens, Trends in Timing of Pregnancy Awareness Among US Women, 21 Maternal & Child Health J. 715, 722 (2017). Almost all know by the end of the first trimester.

Pregnancy Recognition 39. Safe and effective abortifacients, moreover, are now readily available, particularly during those early stages. See I. Adibi et al., *Abortion*, [22 Geo. J. Gender & L. 279, 303 \(2021\)](#). Given all this, it is no surprise that the vast majority of abortions happen in the first trimester. See Centers for Disease Control and Prevention, *Abortion Surveillance—United States 1* (2020). Presumably most of the remainder would also take place earlier if later abortions were not a legal option. Ample evidence [\*\*\*\*184] thus suggests that a 15-week ban provides sufficient time, absent rare circumstances, for a woman “to decide for herself ” whether to terminate her pregnancy. [Webster](#), [492 U. S., at 520](#), [109 S. Ct. 3040](#), [106 L. Ed. 2d 410](#) (plurality opinion).\*

### [\*357] III

Whether a precedent should be overruled is a question “entirely within the discretion of the court.” [Hertz v. Woodman](#), [218 U. S. 205](#), [212](#), [30 S. Ct. 621](#), [54 L. Ed. 1001](#), [T.D. 1636 \(1910\)](#); see also [Payne v. Tennessee](#), [501 U. S. 808](#), [828](#), [111 S. Ct. 2597](#), [115 L. Ed. 2d 720 \(1991\)](#) (*stare decisis* is a “principle of policy”). In my respectful [\*\*2316] view, the sound exercise of that discretion should have led the Court to resolve the case on the narrower grounds set forth above, rather than overruling [Roe](#) and [Casey](#) entirely. The Court says there is no “principled basis” for this approach, *ante*, at 73, but in fact it is firmly grounded in basic principles of *stare decisis* and judicial restraint.

The Court’s decision to overrule [Roe](#) and [Casey](#) is a serious jolt to the legal [\*\*\*641] 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.

Our cases say that the effect of overruling a precedent on reliance interests is a factor to consider in deciding whether to take such a step, and respondents argue that generations of women have relied on the right to an abortion [\*\*\*\*185] in organizing their relationships and planning their futures. Brief for Respondents 36-41; see also [Casey](#), [505 U. S., at 856](#) (making the same point). The Court questions whether these concerns are pertinent under our precedents, see *ante*, at 64-65, but the issue would not even arise with a decision rejecting only the viability line: It cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks.

In support of its holding, the Court cites three seminal constitutional decisions that involved overruling prior precedents: [\*358] [Brown v. Board of Education](#), [347 U. S. 483](#), [74 S. Ct. 686](#), [98 L. Ed. 873 \(1954\)](#), [West Virginia Bd. of Ed. v. Barnette](#), [319 U. S. 624](#), [63 S. Ct. 1178](#), [87 L. Ed. 1628 \(1943\)](#), and [West Coast Hotel Co. v. Parrish](#), [300 U. S. 379](#), [57 S. Ct. 578](#), [81 L. Ed. 703 \(1937\)](#). See *ante*, at 40-41. The opinion in [Brown](#) was unanimous and eleven pages long; this one is neither. [Barnette](#) was decided only three years after the decision it overruled, three Justices having had second thoughts. And [West Coast Hotel](#) was issued against a backdrop of unprecedented economic despair that focused attention on the fundamental flaws of existing precedent. It also was part of a sea change in this Court’s interpretation of the Constitution, “signal[ing] the demise of an entire line of important precedents,” *ante*, at 40—a feature the Court expressly disclaims in today’s decision, see *ante*, at 32, 66. [\*\*\*\*186] None of these leading cases, in short, provides a template for what the Court does today.

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\*The majority contends that “nothing like [my approach] was recommended by either party.” *Ante*, at 72. But as explained, Mississippi in fact pressed a similar argument in its filings before this Court. See Pet. for Cert. 15-26; Brief for Petitioners 5, 38-48 (urging the Court to reject the viability rule and reverse); Reply Brief 20-22 (same). The approach also finds support in prior opinions. See [Webster](#), [492 U. S., at 518-521](#), [109 S. Ct. 3040](#), [106 L. Ed. 2d 410](#) (plurality opinion) (abandoning “key elements” of the [Roe](#) framework under *stare decisis* while declining to reconsider [Roe](#)’s holding that the Constitution protects the right to an abortion).

The Court says we should consider whether to overrule [Roe](#) and [Casey](#) now, because if we delay we would be forced to consider the issue again in short order. See *ante*, at 76-77. There would be “turmoil” until we did so, according to the Court, because of existing state laws with “shorter deadlines or no deadline at all.” *Ante*, at 76. But under the narrower approach proposed here, state laws outlawing abortion altogether would still violate binding precedent. And to the extent States have laws that set the cutoff date earlier than fifteen weeks, any litigation over that timeframe would proceed free of the distorting effect that the viability rule has had on our constitutional debate. The same could be true, for that matter, with respect to legislative consideration in the States. We would then be free to exercise our discretion in deciding whether and when to take up the issue, from a more informed perspective.

\*\*\*

Both the Court’s opinion and the dissent display a relentless freedom from doubt on the legal issue that I cannot [\*359] share. I am not sure, for example, [\*\*\*642] that a ban on terminating a pregnancy from the [\*\*\*\*187] moment of [\*\*2317] conception must be treated the same under the Constitution as a ban after fifteen weeks. A thoughtful Member of this Court once counseled that the difficulty of a question “admonishes us to observe the wise limitations on our function and to confine ourselves to deciding only what is necessary to the disposition of the immediate case.” [Whitehouse v. Illinois Central R. Co.](#), 349 U. S. 366, 372-373, 75 S. Ct. 845, 99 L. Ed. 1155 (1955) (Frankfurter, J., for the Court). I would decide the question we granted review to answer—whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. The answer to that question is no, and there is no need to go further to decide this case.

I therefore concur only in the judgment.

**Dissent by:** KAGAN

## Dissent

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JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN, dissenting.

For half a century, [Roe v. Wade](#), 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and [Planned Parenthood of Southeastern Pa. v. Casey](#), 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), 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. [Roe](#) held, and [Casey](#) reaffirmed, 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 [\*\*\*\*188] of a woman’s life: It could not determine what the woman’s future would be. See [Casey](#), 505 U. S., at 853, 112 S. Ct. 2791, 120 L. Ed. 2d 674; [Gonzales v. Carhart](#), 550 U. S. 124, 171-172, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007) (Ginsburg, J., dissenting). 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 [\*360] hold profoundly different views about the “moral[ity]” of “terminating a pregnancy, even in its earliest stage.” [Casey](#), 505 U. S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674. 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.” *Id.*, at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674. 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) [\*\*\*\*189] thought proper, in light of all the circumstances and complexities of her own life. *Ibid.*

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 [\*\*\*643] 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 [\*\*2318] 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 [\*\*\*\*190] young girl [\*361] 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 [\*\*\*\*191] expansive effects of its holding. Today’s decision, the majority says, permits “each State” to address abortion as it pleases. *Ante*, at 79. 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, [\*362] 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. *Ante*, at 1. The challenge for a woman will be to finance a trip not to “New York [or] California” but to Toronto. *Ante*, at 4 (KAVANAUGH, J., concurring).

[\*\*\*644] Whatever the exact scope of the coming [\*\*\*\*192] laws, one result of today’s decision is certain: the curtailment of women’s rights, and of their status as free and equal citizens. 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 "[t]he ability of women to participate equally in [this Nation's] economic and social life." [\*Casey\*, 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). 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. Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or **[\*\*2319]** 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 **[\*\*\*\*193]** 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.

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 **[\*363]** right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See [\*Griswold v. Connecticut\*, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 \(1965\)](#); [\*Eisenstadt v. Baird\*, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 \(1972\)](#). In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See [\*Lawrence v. Texas\*, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 \(2003\)](#); [\*Obergefell v. Hodges\*, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 \(2015\)](#). 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 "cast[s] doubt on precedents that do

not concern abortion." *Ante*, at 66; cf. *ante*, at 3 (THOMAS, J., concurring) (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 **[\*\*\*\*194]** history": Not until [\*Roe\*](#), the majority argues, did people think abortion fell within the Constitution's guarantee of liberty. *Ante*, at 32. 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]." *Ante*, at 15. So one of two things must be true. Either the majority does not **[\*\*\*645]** 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.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. *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 **[\*364]** has **[\*\*\*\*195]** 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 **[\*\*2320]** 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.” [Payne v. Tennessee](#), 501 U. S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); [Vasquez v. Hillery](#), 474 U. S. 254, 265, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986). Today, the proclivities of individuals rule. The Court departs from its obligation **[\*\*\*\*196]** to faithfully and impartially apply the law. We dissent.

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 **[\*365]** 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. For in this Nation, we do not believe that a government controlling all private choices is compatible with a free people. So **[\*\*\*\*197]** we do not (as the majority insists today) place everything within **[\*\*\*646]** “the reach of majorities and

[government] officials.” [West Virginia Bd. of Ed. v. Barnette](#), 319 U. S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). 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. [410 U. S., at 116, 93 S. Ct. 705, 35 L. Ed. 2d 147.](#) 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. 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.” [Id., at 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147](#) (citations omitted). For the same reasons, the Court **[\*\*\*\*198]** held, the Constitution must protect “a woman’s decision **[\*366]** whether or not to terminate her pregnancy.” [Id., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147.](#) The Court recognized the myriad ways bearing a child can alter the “life and future” of a woman and other members of her family. *Ibid.* A State could not, “by adopting one theory of life,” override all “rights of the pregnant woman.” [Id., at 162, 93 S. Ct. 705, 35 L. Ed. 2d 147.](#)

**[\*\*2321]** At the same time, though, the Court recognized “valid interest[s]” of the State “in regulating the abortion decision.” [Id., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147.](#) The Court noted in particular “important interests” in “protecting potential life,” “maintaining medical standards,”

and “safeguarding [the] health” of the woman. *Id.*, at 154, 93 S. Ct. 705, 35 L. Ed. 2d 147. No “absolut[ist]” account of the woman’s right could wipe away those significant state claims. *Ibid.*

The Court therefore struck a balance, turning on the stage of the pregnancy at which the abortion would occur. The Court explained that early on, a woman’s choice must prevail, but that “at some point the state interests” become “dominant.” *Id.*, at 155, 93 S. Ct. 705, 35 L. Ed. 2d 147. 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, [\*\*\*\*199] 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. *Id.*, at 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147.

In the 20 years between *Roe* and *Casey*, the Court expressly reaffirmed *Roe* on two occasions, and applied it on many more. Recognizing that “arguments [against *Roe*] continue to be [\*\*\*647] made,” we responded that the doctrine of *stare decisis* “demands respect in a society governed by the rule of law.” *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 419-420, 103 S. Ct. 2481, 76 L. Ed. 2d 687 (1983). And we avowed that the “vitality” of “constitutional principles cannot be allowed to yield simply because of disagreement with them.” [\*367] *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U. S. 747, 759, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986). So the Court, over and over, enforced the constitutional principles *Roe* had declared. See, e.g., *Ohio v. Akron Center for Reproductive Health*, 497 U. S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990); *Hodgson v. Minnesota*, 497 U. S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990); *Simopoulos v. Virginia*, 462 U.

*S.* 506, 103 S. Ct. 2532, 76 L. Ed. 2d 755 (1983); *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U. S. 476, 103 S. Ct. 2517, 76 L. Ed. 2d 733 (1983); *H. L. v. Matheson*, 450 U. S. 398, 101 S. Ct. 1164, 67 L. Ed. 2d 388 (1981); *Bellotti v. Baird*, 443 U. S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979); *Planned Parenthood of Central Mo. v. Danforth*, 428 U. S. 52, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976).

Then, in *Casey*, the Court considered the matter anew, and again upheld *Roe*’s core precepts. *Casey* is in significant measure a precedent about the doctrine of precedent—until today, one of the Court’s most important. But we leave for later that aspect of the Court’s decision. The key thing now is the substantive aspect of the Court’s considered conclusion that “the essential holding of [\*\*\*\*200] *Roe v. Wade* should be retained and once again reaffirmed.” 505 U. S., at 846, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

Central to that conclusion was a full-throated restatement of a woman’s right to choose. Like *Roe*, *Casey* grounded that right 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.” 505 U. S., at 847-848, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And the guarantee of liberty encompasses conduct today that was not protected at the time of the [\*\*\*2322] *Fourteenth Amendment*. See *id.*, at 848, 112 S. Ct. 2791, 120 L. Ed. 2d 674. “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.” *Id.*, at 849, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (citations omitted); see *id.*, at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (similarly describing the constitutional protection given to “personal decisions relating to marriage, procreation, contraception, [and] family

relationships”). Especially important in this web of [\*368] precedents protecting an individual’s most “personal choices” were those guaranteeing the right to contraception. *Ibid.*; see *id.*, at 852-853, 112 S. Ct. 2791, 120 L. Ed. 2d 674. In those cases, the Court had recognized “the right of the individual” [\*\*\*\*201] to make the vastly consequential “decision whether to bear” a child. *Id.*, at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (emphasis deleted). So too, *Casey* reasoned, the liberty clause protects the decision of a woman confronting an unplanned pregnancy. Her decision [\*\*\*648] about abortion was central, in the same way, to her capacity to chart her life’s course. See *id.*, at 853, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

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.” 505 U.S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And each State has an interest in “the protection of potential life”—as *Roe* itself had recognized. 505 U.S., at 871, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). 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.” *Id.*, at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (majority opinion). It could not force her to bear the “pain” and “physical constraints” of “carr[ying] a child to full term” when she would have chosen an early abortion. *Id.*, at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But on the other hand, the State had, as *Roe* had held, an exceptionally significant interest in disallowing abortions [\*\*\*\*202] in the later phase of a pregnancy. And it had an ever-present interest in “ensur[ing] that the woman’s choice is informed” and in presenting the case for “choos[ing] childbirth over abortion.” 505 U.S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion).

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. 505 U.S., at 860, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (majority opinion). 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 [\*369] State’s efforts to preserve potential life. *Id.*, at 870, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). At that point, a “second life” was capable of “independent existence.” *Ibid.* 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.” *Ibid.* 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 “promot[e] prenatal life.” 505 U.S., at 873, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). In particular, the State could ensure informed choice [\*\*\*\*203] and could try to promote childbirth. See *id.*, at 877-878, 112 S. Ct. 2791, 120 L. Ed. 2d 674. But the State still could not place an “undue burden”—or “substantial obstacle”—“in the path of a woman seeking an abortion.” *Id.*, at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Prior to viability, the woman, consistent with the constitutional “meaning of [\*\*\*2323] liberty,” must “retain the ultimate control over her destiny and her body.” *Id.*, at 869, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

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.” *Ante*, at 38. Nothing could get those decisions more wrong. As just described, [\*\*\*649] *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](#).<sup>1</sup> But what [Roe](#) and [Casey](#) also recognized—which [\*370] 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 [\*\*\*\*204] for “repeatedly prais[ing] the ‘balance’” the two cases arrived at (with the word “balance” in scare quotes). *Ante*, at 38. 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. 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).

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The majority makes this change based on a single

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<sup>1</sup> For this reason, we do not understand the majority’s view that our analogy between the right to an abortion and the rights to contraception and same-sex marriage shows that we think “[t]he Constitution does not permit the States to regard the destruction of a ‘potential life’ as a matter of any significance.” *Ante*, at 38. To the contrary. The liberty interests underlying those rights are, as we will describe, quite similar. See *infra*, at 22-24. But only in the sphere of abortion is the state interest in protecting potential life involved. So only in that sphere, as both [Roe](#) and [Casey](#) recognized, may a State impinge so far on the liberty interest (barring abortion after viability and discouraging it before). The majority’s failure to understand this fairly obvious point stems from its rejection of the idea of balancing interests in this (or maybe in any) constitutional context. Cf. [New York State Rifle & Pistol Assn., Inc. v. Bruen](#), 597 U. S. \_\_\_, \_\_\_ (2022) (slip op., at 8, 15-17). The majority thinks that a woman has no liberty or equality interest in the decision to bear a child, so a State’s interest in protecting fetal life necessarily prevails.

question: Did the reproductive right recognized in [Roe](#) and [Casey](#) exist in “1868, the year when the [Fourteenth Amendment](#) was ratified”? *Ante*, at 23. The majority says (and with [\*371] this much we agree) that the answer to this question [\*\*\*\*205] 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. See *ante*, at 17. But that turns out to be wheel-spinning. First, it is not clear what relevance [\*\*2324] such early history should have, even to the majority. See [New York State Rifle & Pistol Assn., Inc. v. Bruen](#), 597 U. S. \_\_\_, \_\_\_ [\*\*\*650] (2022) (slip op., at 26) (“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. See *ibid.* (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.<sup>2</sup> And early American law followed the common-law rule.<sup>3</sup> So the criminal law of that early time might be taken as roughly consonant with [Roe’s](#) and [Casey’s](#) different treatment of [\*\*\*\*206] early and late abortions. Better, then,

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<sup>2</sup> See, e.g., 1 W. Blackstone, *Commentaries on the Laws of England* 129-130 (7th ed. 1775) (Blackstone); E. Coke, *Institutes of the Laws of England* 50 (1644).

<sup>3</sup> See J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, pp. 3-4 (1978). The majority offers no evidence to the contrary—no example of a founding-era law making pre-quickening abortion a crime (except when a woman died). See *ante*, at 20-21. And even in the mid-19th century, more than 10 States continued to allow pre-quickening abortions. See Brief for American Historical Association et al. as *Amici Curiae* 27, and n. 14.

to move forward in time. On the other side of 1868, the majority occasionally notes that many States barred abortion up to the [\*372] time of [Roe](#). See *ante*, at 24, 36. 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.” *New York State Rifle & Pistol Assn., Inc.*, 597 U. S., at \_\_\_\_-\_\_\_\_ (slip op., at 27-28). 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. See *ante*, at 47 (“[T]he most important historical fact [is] how the States regulated abortion when the [Fourteenth Amendment](#) was adopted”); see also *ante*, at 5, 16, and n. 24, 23, 25, 28. 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 [\*\*\*\*207] rights as part of the guarantee of liberty conferred in the [Fourteenth Amendment](#), then those rights do not exist.

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 [\*\*\*651] 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 [\*\*2325] 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 [\*373] 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. [\*\*\*\*208] 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. See *infra*, at 23-24. 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. See [505 U. S., at 896-897, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#) (majority opinion) (citing [Bradwell v. State](#), [83 U.S. 130, 16 Wall. 130, 21 L. Ed. 442 \(1873\)](#)). “There was a time,” [Casey](#) explained, when the Constitution did not protect “men and women alike.” [505 U. S., at 896, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). 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. [Id., at 897, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Now, “[t]he Constitution protects all individuals, male or female,” from “the abuse of governmental power” or “unjustified state interference.” [\*\*\*\*209] [Id., at 896, 898, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#).

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 [\*374] 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." [NLRB v. Noel Canning](#), 573 U. S. 513, 533-534, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014). 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. [\*\*\*652] [McCulloch v. Maryland](#), 17 U.S. 316, 4 Wheat. 316, 415, 4 L. Ed. 579 (1819). 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 [\*\*\*\*210] 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.

[\*\*2326] 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, based on [Washington v. Glucksberg](#), 521 U. S. 702, 117 S.

[Ct. 2258](#), 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997), 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. [Obergefell](#), 576 U. S., at 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609. [\*375] And the Court specifically rejected that view.<sup>4</sup> In doing so, the Court reflected on what the proposed, historically circumscribed approach would have meant for interracial marriage. See *ibid.* 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. [\*\*\*\*211] Yet the Court in [Loving v. Virginia](#), 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), 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. 576 U. S., at 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609. 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." *Ante*, at 14. 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

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<sup>4</sup>The majority ignores that rejection. See *ante*, at 5, 13, 36. But it is unequivocal: The [Glucksberg](#) test, [Obergefell](#) said, "may have been appropriate" in considering physician-assisted suicide, but "is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy." 576 U. S., at 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609.

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. See *ante*, at 32, 66, 71-72; [\*\*\*653] *ante*, at 10 (KAVANAUGH, J., concurring); but see *ante*, at 3 (THOMAS, J., concurring). But that is a matter [\*\*\*\*212] we discuss [\*376] later. See *infra*, at 24-29. 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.” *Poe v. Ullman*, 367 U. S. 497, 542, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961) (dissenting opinion). Yet they also must recognize that the constitutional “tradition” of this country is not captured whole at a single moment. *Ibid*. 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. [\*\*2327] 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.

All that is what *Casey* understood. *Casey* explicitly rejected the present majority’s method. “[T]he specific [\*\*\*\*213] 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.” 505 U. S., at 848, 112 S. Ct. 2791, 120 L. Ed. 2d 674.<sup>5</sup> To hold otherwise—as

[\*377] the majority does today—“would be inconsistent with our law.” *Id.*, at 847, 112 S. Ct. 2791, 120 L. Ed. 2d 674. 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.” *Id.*, at 847, 849, 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. *Casey* described in detail the Court’s contraception cases. See *id.*, at 848-849, 851-853, 112 S. Ct. 2791, 120 L. Ed. 2d 674. It noted decisions protecting the right to marry, including to someone of another race. See *id.*, at 847-848, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (“[I]nterracial 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 [\*\*\*654] decades and decades of constitutional law, *Casey* could draw but one conclusion: Whatever was true in 1868, “[i]t 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.” *Id.*, at 849, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

And that conclusion still [\*\*\*\*214] 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

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a constitutional right? *Ante*, at 33. It has. And indeed, it has given no other reason for overruling *Roe* and *Casey*. *Ante*, at 15-16. We are not mindreaders, but here is our best guess as to what the majority means. It says next that “[a]bortion is nothing new.” *Ante*, at 33. So apparently, the *Fourteenth Amendment* might provide protection for things wholly unknown in the 19th century; maybe one day there could be constitutional protection for, oh, time travel. But as to anything that was known back then (such as abortion or contraception), no such luck.

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<sup>5</sup> In a perplexing paragraph in its opinion, the majority declares that it need not say whether that statement from *Casey* is true. See *ante*, at 32-33. But how could that be? Has not the majority insisted for the prior 30 or so pages that the “specific practice[ ]” respecting abortion at the time of the *Fourteenth Amendment* precludes its recognition as

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. See *ante*, at 31-32 (asserting that recognizing a relationship among them, as addressing aspects of personal autonomy, would ineluctably [\*378] “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. [\*\*\*\*215]

[\*\*2328] 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. *Ante*, at 2-3, 5, 7, 11-12 (concurring opinion). 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? *Ante*, at 3. 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. 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 [\*\*\*\*216] 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 [\*\*\*655] it is: A brook-no-compromise refusal to recognize a woman’s right [\*379] 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.

Consider first, then, the line of this Court’s cases protecting “bodily integrity.” *Casey*, 505 U. S., at 849, 112 S. Ct. 2791, 120 L. Ed. 2d 674. “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*, 141 U. S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891); see *Cruzan v. Director, Mo. Dept. of Health*, 497 U. S. 261, 269, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (Every adult “has a right to determine what shall be done with his own body”). Or to put it more simply: Everyone, including [\*\*\*\*217] 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. See, e.g., *Winston v. Lee*, 470 U. S. 753, 766-767, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (forced surgery); *Rochin v. California*, 342 U. S. 165, 166, 173-174, 72 S. Ct. 205, 96 L. Ed. 183 (1952) (forced stomach pumping); *Washington v. Harper*, 494 U. S. 210, 229, 236, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (forced administration of antipsychotic drugs).

*Casey* recognized the “doctrinal affinity” between those precedents and *Roe*. 505 U. S., at 857, 112 S. Ct. 2791, 120 L. Ed. 2d 674. 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. See [\*Whole Woman's Health v. Hellerstedt\*, 579 U. S. 582, 618, \[\\*\\*2329\] 136 S. Ct. 2292, 195 L. Ed. 2d 665 \(2016\)](#). 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 [\*380] for some women, as *Roe* recognized, abortions are medically necessary to prevent harm. See [\*410 U. S., at 153, 93 S. Ct. 705, 35 L. Ed. 2d 147\*](#). The majority does not say—which is itself ominous—whether a State may prevent a woman from obtaining [\*\*\*\*218] an abortion when she and her doctor have determined it is a needed medical treatment.

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\*, 505 U. S., at 851, 857, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#); [\*Roe\*, 410 U. S., at 152-153, 93 S. Ct. 705, 35 L. Ed. 2d 147](#); see also *ante*, at 31-32 (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 [\*\*\*656] 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.” [\*Casey\*, 505 U. S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). 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 [\*\*\*\*219] 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. Compare [\*Obergefell\*, 576 U. S., at 672-675, 135 S. Ct. 2584, 192 L. Ed. 2d 609](#), with *ante*, at 10-11. So before *Roe* and *Casey*, the Court expanded in successive cases those who could claim the right to marry—though their relationships [\*381] would have been outside the law's protection in the mid-19th century. See, e.g., [\*Loving\*, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010](#) (interracial couples); [\*Turner v. Safley\*, 482 U. S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 \(1987\)](#) (prisoners); see also, e.g., [\*Stanley v. Illinois\*, 405 U. S. 645, 651-652, 92 S. Ct. 1208, 31 L. Ed. 2d 551 \(1972\)](#) (offering constitutional protection to untraditional “family unit[s]”). 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. See [\*Lawrence\*, 539 U. S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508](#); [\*Obergefell\*, 576 U. S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609](#). In considering that question, the Court held, “[h]istory and tradition,” especially as reflected in the course of our precedent, “guide and discipline [the] inquiry.” *Id.*, at 664, 135 S. Ct. 2584, 192 L. Ed. 2d 609. But the sentiments of 1868 alone do not and cannot “rule the present.” *Ibid.*

*Casey* similarly recognized the need to extend the [\*\*\*\*220] 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. See *supra*, at 15.

A woman then, *Casey* wrote, “had no **[\*\*2330]** legal existence separate from her husband.” *505 U. S., at 897, 112 S. Ct. 2791, 120 L. Ed. 2d 674.* Women were seen only “as the center of home and family life,” without “full and independent legal status under the Constitution.” *Ibid.* But that could not be true any longer: The State could not now insist on the historically dominant “vision of the woman’s role.” *Id., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674.* 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, **[\*\*\*657]** political, and legal aspects—“has been facilitated by their ability to control their reproductive lives.” *Id., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674.* 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.

**[\*382]** For much that reason, *Casey* made clear that the precedents *Roe* most closely tracked were those involving **[\*\*\*\*221]** 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. See *Griswold*, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510; *Eisenstadt*, 405 U. S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349; *Carey v. Population Services Int’l*, 431 U. S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). 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.” *Eisenstadt*, 405 U. S., at 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349; see *Carey*, 431 U. S., at 684-685, 97 S. Ct. 2010, 52 L. Ed. 2d 675. *Casey* saw *Roe* as of a piece: In “critical respects the abortion decision is of the same character.” *505 U. S., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674.* “[R]easonable 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.” *Id., at 853, 859, 112 S. Ct. 2791, 120 L. Ed. 2d 674.* 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.” *Id., at 852, 112 S. Ct. 2791, 120 L. Ed. 2d 674.* No State could undertake to resolve the moral questions raised “in such a definitive way” as to deprive a woman of all choice. *Id., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674.*

Faced with all these connections between **[\*\*\*\*222]** *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.” *Ante*, at 32; *Casey*, 505 U. S., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674. **[\*383]** 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. See *supra*, at 23.<sup>6</sup> On **[\*\*2331]** its later tries, though, the majority **[\*\*\*658]** includes those too: “Nothing in this opinion should be understood

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<sup>6</sup> And note, too, that the author of the majority opinion recently joined a statement, written by another member of the majority, lamenting that *Obergefell* deprived States of the ability “to resolve th[e] question [of same-sex marriage] through legislation.” *Davis v. Ermold*, 592 U. S. \_\_\_, \_\_\_, 141 S. Ct. 3, 208 L. Ed. 2d 137, 137 (2020) (statement of THOMAS, J.). That might sound familiar. Cf. *ante*, at 44 (lamenting that *Roe* “short-circuited the democratic process”). And those two Justices hardly seemed content to let the matter rest: The Court, they said, had “created a problem that only it can fix.” *Davis*, 592 U. S., at \_\_\_, 141 S. Ct. 3, 208 L. Ed. 2d 137, at 139.

to cast doubt on precedents that do not concern abortion.” *Ante*, at 66; see *ante*, at 71-72. That right is unique, the majority asserts, “because [abortion] terminates life or potential life.” *Ante*, at 66 (internal quotation marks omitted); see *ante*, at 32, 71-72. So the majority depicts today’s decision as “a restricted railroad ticket, good for this day and train only.” *Smith v. Allwright*, 321 U. S. 649, 669, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (Roberts, [\*\*\*\*223] J., dissenting). 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. See *ante*, at 7 (“[T]his case does not present the opportunity to reject” those precedents). But he lets us know what he wants to do when they are. “[I]n future cases,” he says, “we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.” *Ante*, at 3; see also *supra*, at 25, and n. 6. And when we reconsider them? Then “we have a duty” to “overrul[e] these demonstrably erroneous decisions.” *Ante*, at 3. [\*384] 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. [\*\*\*\*224] 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.” *Ante*, at 65; see *ante*, at 32 (aligning itself with *Roe*’s and *Casey*’s stance of not deciding whether life or potential life is involved); *ante*, at 38-39 (similar). 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).<sup>7</sup> According to the majority, no liberty interest is present—because (and only because) the law offered no [\*\*\*659] protection to the woman’s choice in the [\*\*2332] 19th century. But here is the rub. The law also did not then (and would not for ages) protect a wealth of other [\*385] 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 v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942), not to be sterilized without consent. So if the majority is [\*\*\*\*225] 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

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<sup>7</sup>Indulge a few more words about this point. The majority had a choice of two different ways to overrule *Roe* and *Casey*. It could claim that those cases underrated the State’s interest in fetal life. Or it could claim that they overrated a woman’s constitutional liberty interest in choosing an abortion. (Or both.) The majority here rejects the first path, and we can see why. Taking that route would have prevented the majority from claiming that it means only to leave this issue to the democratic process—that it does not have a dog in the fight. See *ante*, at 38-39, 65. And indeed, doing so might have suggested a revolutionary proposition: that the fetus is itself a constitutionally protected “person,” such that an abortion ban is constitutionally mandated. The majority therefore chooses the second path, arguing that the *Fourteenth Amendment* does not conceive of the abortion decision as implicating liberty, because the law in the 19th century gave that choice no protection. The trouble is that the chosen path—which is, again, the solitary rationale for the Court’s decision—provides no way to distinguish between the right to choose an abortion and a range of other rights, including contraception.

rights. *Ante*, at 32.<sup>8</sup>

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. Rights can expand in that way. Dissenting in *Lawrence*, Justice Scalia explained why he took no comfort in the Court's statement that a decision recognizing the right to same-sex intimacy did “not involve” same-sex marriage. *539 U. S., at 604, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. That could be true, he wrote, “only if one entertains the belief that principle and logic have nothing to do with [\*\*\*\*226] the decisions of this Court.” *Id., at 605, 123 S. Ct. 2472, 156 L. Ed. 2d 508*. Score one [\*386] for the dissent, as a matter of prophecy. And logic and principle are not one-way ratchets. Rights can contract in the same way and for the same reason—because whatever today's majority might say, one thing really does lead to another. We fervently hope that does not happen because of today's decision. We hope that we will not join Justice Scalia in the book of prophets. But we cannot understand how anyone can be confident that today's opinion will be the last of its kind.

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 [\*\*\*660] after the Civil War was littered with bans on the sale of contraceptive

devices. So again, there seem to be two choices. See *supra*, at 5, 26-27. 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 [\*\*\*\*227] 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.<sup>9</sup>

[\*\*2333] Anyway, today's decision, taken on its own, is catastrophic enough. As a matter of constitutional method, the majority's [\*387] 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.

As a matter of constitutional substance, the majority's opinion has all the flaws its method [\*\*\*\*228] would suggest. Because laws in

<sup>8</sup> The majority briefly (very briefly) gestures at the idea that some *stare decisis* factors might play out differently with respect to these other constitutional rights. But the majority gives no hint as to why. And the majority's (mis)treatment of *stare decisis* in this case provides little reason to think that the doctrine would stand as a barrier to the majority's redoing any other decision it considered egregiously wrong. See *infra*, at 30-57.

<sup>9</sup> As this Court has considered this case, some state legislators have begun to call for restrictions on certain forms of contraception. See I. Stevenson, After *Roe* Decision, Idaho Lawmakers May Consider Restricting Some Contraception, *Idaho Statesman* (May 10, 2022), <https://www.idahostatesman.com/news/politics-government/state-politics/article261207007.html>; T. Weinberg, “Anything's on the Table”: Missouri Legislature May Revisit Contraceptive Limits Post-*Roe*, *Missouri Independent* (May 20, 2022), <https://www.missouriindependent.com/2022/05/20/anythings-on-the-table-missouri-legislature-may-revisit-contraceptive-limits-post-ro/>.

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*” means “to stand by things decided.” Black’s Law Dictionary 1696 (11th ed. 2019). [\*388] Blackstone [\*\*\*661] called it the “established rule to abide by former precedents.” 1 Blackstone 69. *Stare decisis* “promotes the evenhanded, predictable, [\*\*\*\*229] and consistent development of legal principles.” [Payne](#), 501 U. S., at 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. It maintains a stability that allows people to order their lives under the law. See H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 568-569 (1994).

*Stare decisis* also “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.” [Vasquez](#), 474 U. S., at 265, 106 S. Ct. 617, 88 L. Ed. 2d 598. As Hamilton wrote: It “avoid[s] an arbitrary discretion in the courts.” *The Federalist* No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). And as Blackstone said before him: It “keep[s] the scale of justice even and steady, and not liable to waver with every new judge’s opinion.” 1

Blackstone 69. The “glory” of our legal system is that it “gives preference to precedent rather than . . . jurists.” H. Humble, *Departure From Precedent*, 19 Mich. L. Rev. 608, 614 (1921). That is why, the story goes, Chief Justice John [\*\*2334] 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.

That means the Court may not overrule a decision, even a constitutional one, without [\*\*\*\*230] a “special justification.” [Gamble v. United States](#), 587 U. S. \_\_\_, \_\_\_, 139 S. Ct. 1960, 204 L. Ed. 2d 322, 350 (2019). *Stare decisis* is, of course, not an “inexorable command”; it is sometimes appropriate to overrule an earlier decision. [Pearson v. Callahan](#), 555 U. S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). But the Court must have a good reason to do so over and above the belief “that the precedent was wrongly decided.” [Halliburton Co. v. Erica P. John Fund, Inc.](#), 573 U. S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014). “[I]t is not alone sufficient that we would decide a case differently now than we did then.” [Kimble v. Marvel Entertainment, LLC](#), 576 U. S. 446, 455, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (2015).

[\*389] The majority today lists some 30 of our cases as overruling precedent, and argues that they support overruling [Roe](#) and [Casey](#). But none does, as further described below and in the Appendix. See *infra*, at 61-66. In some, the Court only partially modified or clarified a precedent. And in the rest, the Court relied on one or more of the traditional *stare decisis* factors in reaching its conclusion. The Court found, for example, (1) a change in legal doctrine that undermined or made obsolete the earlier decision; (2) a factual change that had the same effect; or (3) an absence of reliance because the earlier decision was less than a decade old. (The majority is wrong when it says that we insist on a test of changed law or fact alone, although that is present in most of the cases. See *ante*, at 69.) None of those factors apply [\*\*\*\*231] here: Nothing—and in particular, no significant

legal or factual change—supports overturning a half-century of settled law giving women control over their reproductive lives.

First, for all the reasons we have given, [Roe](#) and [Casey](#) were correct. In holding that a State could not “resolve” [\*\*\*662] the debate about abortion “in such a definitive way that a woman lacks all choice in the matter,” the Court protected women’s liberty and women’s equality in a way comporting with our [Fourteenth Amendment](#) precedents. [Casey](#), 505 U. S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Contrary to the majority’s view, the legal status of abortion in the 19th century does not weaken those decisions. And the majority’s repeated refrain about “usurp[ing]” state legislatures’ “power to address” a publicly contested question does not help it on the key issue here. *Ante*, at 44; see *ante*, at 1. To repeat: The point of a right is to shield individual actions and decisions “from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” [Barnette](#), 319 U. S., at 638, 63 S. Ct. 1178, 87 L. Ed. 1628; *supra*, at 7. However divisive, a right is not at the people’s mercy.

[\*390] In any event “[w]hether or not we . . . agree” with a prior precedent is the beginning, [\*\*\*\*232] not the end, of our analysis—and the remaining “principles of *stare decisis* weigh heavily against overruling” [Roe](#) and [Casey](#). [Dickerson v. United States](#), 530 U. S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). [Casey](#) itself applied those principles, in one of this Court’s most important precedents about precedent. After assessing the traditional *stare decisis* factors, [Casey](#) reached the only conclusion possible—that *stare decisis* operates powerfully here. It still does. The standards [Roe](#) and [Casey](#) set out are perfectly workable. No changes in either law or fact have eroded the two decisions. And tens of millions of American women have [\*\*2335] relied, and continue to rely, on the right to choose. So under traditional *stare decisis* principles, the majority has

no special justification for the harm it causes.

And indeed, the majority comes close to conceding that point. The majority barely mentions any legal or factual changes that have occurred since [Roe](#) and [Casey](#). It suggests that the two decisions are hard for courts to implement, but cannot prove its case. In the end, the majority says, all it must say to override *stare decisis* is one thing: that it believes [Roe](#) and [Casey](#) “egregiously wrong.” *Ante*, at 70. That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees. [\*\*\*\*233] So how does that approach prevent the “scale of justice” from “waver[ing] with every new judge’s opinion”? 1 Blackstone 69. It does not. It makes radical change too easy and too fast, based on nothing more than the new views of new judges. The majority has overruled [Roe](#) and [Casey](#) for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.

A

Contrary to the majority’s view, there is nothing unworkable about [Casey](#)’s “undue burden” standard. Its primary focus on whether a State has placed a “substantial obstacle” [\*391] on a woman seeking an abortion is “the sort of inquiry familiar to judges across a variety of contexts.” [June Medical Services L.L.C. v. Russo](#), 591 U. S. \_\_\_, [\*\*\*663] 140 S. Ct. 2103, 207 L. Ed. 2d 566, 601 (2020) (ROBERTS, C. J., concurring in judgment). And it has given rise to no more conflict in application than many standards this Court and others unhesitatingly apply every day.

General standards, like the undue burden standard, are ubiquitous in the law, and particularly in constitutional adjudication. When called on to give effect to the Constitution’s broad principles, this Court often crafts flexible standards that can be applied case-by-case to a myriad [\*\*\*\*234] of unforeseeable circumstances. See [Dickerson](#), 530 U. S., at 441, 120 S. Ct. 2326, 147 L. Ed. 2d 405

(“No court laying down a general rule can possibly foresee the various circumstances” in which it must apply). So, for example, the Court asks about undue or substantial burdens on speech, on voting, and on interstate commerce. See, e.g., [Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett](#), 564 U. S. 721, 748, 131 S. Ct. 2806, 180 L. Ed. 2d 664 (2011); [Burdick v. Takushi](#), 504 U. S. 428, 433-434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992); [Pike v. Bruce Church, Inc.](#), 397 U. S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970). The [Casey](#) undue burden standard is the same. It also resembles general standards that courts work with daily in other legal spheres—like the “rule of reason” in antitrust law or the “arbitrary and capricious” standard for agency decisionmaking. See [Standard Oil Co. of N. J. v. United States](#), 221 U. S. 1, 62, 31 S. Ct. 502, 55 L. Ed. 619 (1911); [Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.](#), 463 U. S. 29, 42-43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983). Applying general standards to particular cases is, in many contexts, just what it means to do law.

And the undue burden standard has given rise to no unusual difficulties. Of course, it has provoked some disagreement among judges. [Casey](#) knew it would: That much “is to be expected in the application of any legal standard which must accommodate life’s complexity.” 505 U. S., at 878, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (plurality opinion). Which is to say: That much is to be expected in the application of any legal standard. But the majority vastly overstates the divisions among judges applying [\*392] the standard. We [\*\*2336] count essentially two. THE CHIEF JUSTICE disagreed with other Justices in the *June Medical* majority about whether [Casey](#) called for [\*\*\*\*235] weighing the benefits of an abortion regulation against its burdens. See 591 U. S., at —, 140 S. Ct. 2103, 207 L. Ed. 2d 566 (slip op., at 6-7); *ante*, at 59, 60, and n. 53.<sup>10</sup> We agree

that the *June Medical* difference is a difference—but not one that would actually make a difference in the result of most cases (it did not in *June Medical*), and not one incapable of resolution were it ever to matter. As for lower courts, there is now a one-year-old, one-to-one Circuit split about how the undue burden standard applies to state laws that ban abortions for certain reasons, like fetal abnormality. See *ante*, at 61, and n. 57. That [\*\*\*664] is about it, as far as we can see.<sup>11</sup> And that is not much. This Court mostly does not even [\*393] grant certiorari on one-year-old, one-to-one Circuit splits, because we know that a bit of disagreement is an inevitable part of our legal system. To borrow an old saying that might apply here: Not one or even a couple of swallows can make the majority’s summer.

Anyone concerned about workability should consider the majority’s substitute standard. The majority says a law regulating or banning abortion “must be sustained if there is a rational basis on which the legislature could have thought that it

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to determine the precedential effects of a divided decision.

<sup>11</sup> The rest of the majority’s supposed splits are, shall we say, unimpressive. The majority says that lower courts have split over how to apply the undue burden standard to parental notification laws. See *ante*, at 60, and n. 54. But that is not so. The state law upheld had an exemption for minors demonstrating adequate maturity, whereas the ones struck down did not. Compare [Planned Parenthood of Blue Ridge v. Camblos](#), 155 F. 3d 352, 383-384 (CA4 1998), with [Planned Parenthood of Ind. & Ky., Inc. v. Adams](#), 937 F. 3d 973, 981 (CA7 2019), cert. granted, judgment vacated, 591 U. S. —, 141 S. Ct. 187, 207 L. Ed. 2d 1112 (2020), and [Planned Parenthood, Sioux Falls Clinic v. Miller](#), 63 F. 3d 1452, 1460 (CA8 1995). The majority says there is a split about bans on certain types of abortion procedures. See *ante*, at 61, and n. 55. But the one court to have separated itself on that issue did so based on a set of factual findings significantly different from those in other cases. Compare [Whole Woman’s Health v. Paxton](#), 10 F.4th 430, 447-453 (CA5 2021), with [EMW Women’s Surgical Center, P.S.C. v. Friedlander](#), 960 F. 3d 785, 798-806 (CA6 2020), and [West Ala. Women’s Center v. Williamson](#), 900 F. 3d 1310, 1322-1324 (CA11 2018). Finally, the majority says there is a split about whether an increase in travel time to reach a clinic is an undue burden. See *ante*, at 61, and n. 56. But the cases to which the majority refers predate this Court’s decision in [Whole Woman’s Health v. Hellerstedt](#), 579 U. S. 582, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016), which clarified how to apply the undue burden standard to that context.

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<sup>10</sup> Some lower courts then differed over which opinion in *June Medical* was controlling—but that is a dispute not about the undue burden standard, but about the “Marks rule,” which tells courts how

would serve legitimate state interests.” *Ante*, at 77. [\*\*\*\*236] And the majority lists interests like “respect for and preservation of prenatal life,” “protection of maternal health,” elimination of certain “medical procedures,” “mitigation of fetal pain,” and others. *Ante*, at 78. This Court will surely face critical questions about how that test applies. Must a state law allow abortions when necessary to protect a woman’s life and health? And if so, exactly when? How much risk to a woman’s life can a State force her to incur, before the [Fourteenth Amendment’s](#) protection of life kicks in? Suppose a patient with pulmonary hypertension has a 30-to-50 percent risk of dying with ongoing pregnancy; is that enough? And short of death, how much illness or injury can the State require her to accept, consistent with the Amendment’s protection of liberty and [\*\*2337] equality? Further, the Court may face questions about the application of abortion regulations to medical care most people view as quite different from abortion. What about the morning-after pill? IUDs? In vitro fertilization? And how about the use of dilation and evacuation or medication for miscarriage management? See generally L. Harris, *Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the [\*\*\*\*237] Overturn of [Roe](#) v. [Wade](#)*, 386 New England J. Med. 2061 (2022).<sup>12</sup>

[\*394] Finally, the majority’s ruling today invites a host of questions about interstate [\*\*\*665] conflicts. See *supra*, at 3; see generally D. Cohen,

G. Donley, & R. Rebouché, *The New Abortion Battleground*, 123 Colum. L. Rev. (forthcoming 2023), <https://ssrn.com/abstract=4032931>. Can a State bar women from traveling to another State to obtain an abortion? Can a State prohibit advertising out-of-state abortions or helping women get to out-of-state providers? Can a State interfere with the mailing of drugs used for medication abortions? The Constitution protects travel and speech and interstate commerce, so today’s ruling will give rise to a host of new constitutional questions. Far from removing the Court from the abortion issue, the majority puts the Court at the center of the coming “interjurisdictional abortion wars.” *Id.*, at \_\_\_\_ (draft, at 1).

In short, the majority does not save judges from unwieldy tests or extricate them from the sphere of controversy. To the contrary, it discards a known, workable, and predictable standard in favor of something novel and probably far more complicated. It forces the Court to wade further into hotly contested [\*\*\*\*238] issues, including moral and philosophical ones, that the majority criticizes [Roe](#) and [Casey](#) for addressing.

B

When overruling constitutional precedent, the Court has almost always pointed to major legal or factual changes undermining a decision’s original basis. A review of the Appendix to this dissent proves the point. See *infra*, at 61-66. [\*395] Most “successful proponent[s] 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.” [Vasquez](#), 474 U. S., at 266, 106 S. Ct. 617, 88 L. Ed. 2d 598. Certainly, that was so of the main examples the majority cites: [Brown v. Board of Education](#), 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and [West Coast Hotel Co. v. Parrish](#), 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937). But it is not so today. Although nodding to some arguments others have made about “modern developments,” the majority does not really rely on

<sup>12</sup>To take just the last, most medical treatments for miscarriage are identical to those used in abortions. See Kaiser Family Foundation (Kaiser), G. Weigel, L. Sobel, & A. Salganicoff, *Understanding Pregnancy Loss in the Context of Abortion Restrictions and Fetal Harm Laws* (Dec. 4, 2019), <https://www.kff.org/womens-health-policy/issue-brief/understanding-pregnancy-loss-in-the-context-of-abortion-restrictions-and-fetal-harm-laws/>. Blanket restrictions on “abortion” procedures and medications therefore may be understood to deprive women of effective treatment for miscarriages, which occur in about 10 to 30 percent of pregnancies. See Health Affairs, J. Strasser, C. Chen, S. Rosenbaum, E. Schenk, & E. Dewhurst, *Penalizing Abortion Providers Will Have Ripple Effects Across Pregnancy Care* (May 3, 2022), <https://www.healthaffairs.org/doi/10.1377/forefront.20220503.129912/>.

them, no doubt seeing their slimness. *Ante*, at 33; see *ante*, at 34. The majority briefly invokes the current controversy over abortion. See *ante*, at 70-71. But it has to acknowledge that the same dispute has existed for decades: Conflict **[\*\*2338]** 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, **[\*\*\*\*239]** than to jettison, existing precedent. See *infra*, at 55-57.) In the end, the majority throws longstanding precedent to the winds without showing that anything significant has changed **[\*\*\*666]** to justify its radical reshaping of the law. See *ante*, at 43.

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Subsequent legal developments have only reinforced *Roe* and *Casey*. The Court has continued to embrace all the decisions *Roe* and *Casey* cited, decisions which recognize a constitutional right for an individual to make her own choices about “intimate relationships, the family,” and contraception. *Casey*, 505 U. S., at 857, 112 S. Ct. 2791, 120 L. Ed. 2d 674. *Roe* and *Casey* have themselves formed the legal foundation for subsequent decisions protecting these profoundly personal choices. As discussed earlier, the Court relied on *Casey* to hold that the *Fourteenth Amendment* protects same-sex intimate relationships. See *Lawrence*, 539 U. S., at 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508; *supra*, at 23. The Court later invoked the same set of precedents to accord constitutional recognition to same-sex marriage. See *Obergefell*, 576 U. S., at 665-666, 135 S. Ct. 2584, 192 L. Ed. 2d 609; **[\*396]** *supra*, at 23. In sum, *Roe* and *Casey* are inextricably interwoven with decades of precedent about the meaning of the *Fourteenth Amendment*. See *supra*, at 21-24. While the majority might wish it otherwise, *Roe* and *Casey* are the very opposite of “obsolete constitutional thinking.” *Agostini v. Felton*, 521 U. S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Casey*, 505 U. S., at 857, 112 S. Ct. 2791, 120 L. Ed. 2d 674).

Moreover, no subsequent factual developments

have undermined **[\*\*\*\*240]** *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. See *supra*, at 22. 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.<sup>13</sup> 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. See *ante*, at 33-34. Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare **[\*397]** services **[\*\*\*667]** may be far away.<sup>14</sup> **[\*\*2339]** Women also continue to face pregnancy **[\*\*\*\*241]** discrimination that interferes with their ability to earn a living. Paid family leave remains inaccessible to many who need it most. Only 20

<sup>13</sup> See L. Harris, Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of *Roe* v. *Wade*, 386 New England J. Med. 2061, 2063 (2022). This projected racial disparity reflects existing differences in maternal mortality rates for black and white women. Black women are now three to four times more likely to die during or after childbirth than white women, often from preventable causes. See Brief for Howard University School of Law Human and Civil Rights Clinic as *Amicus Curiae* 18.

<sup>14</sup> See Centers for Medicare and Medicaid Services, Issue Brief: Improving Access to Maternal Health Care in Rural Communities 4, 8, 11 (Sept. 2019), <https://www.cms.gov/About-CMS/Agency-Information/OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf>. In Mississippi, for instance, 19 percent of women of reproductive age are uninsured and 60 percent of counties lack a single obstetrician-gynecologist. Brief for Lawyers’ Committee for Civil Rights Under Law et al. as *Amici Curiae* 12-13.

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.<sup>15</sup>

The majority briefly notes the growing prevalence of safe haven laws and demand for adoption, see *ante*, at 34, and nn. 45-46, but, to the degree that these are changes at all, they too are irrelevant.<sup>16</sup> 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.<sup>17</sup> The vast majority [\*398] 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.<sup>18</sup>

<sup>15</sup> Dept. of Labor, National Compensation Survey: Employee Benefits in the United States, Table 31 (Sept. 2020), <https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf#page=299>.

<sup>16</sup> Safe haven laws, which allow parents to leave newborn babies in designated safe spaces without threat of prosecution, were not enacted as an alternative to abortion, but in response to rare situations in which birthing mothers in crisis would kill their newborns or leave them to die. See Centers for Disease Control and Prevention (CDC), R. Wilson, J. Kleven, D. Williams, & L. Xu, Infant Homicides Within the Context of Safe Haven Laws—United States, 2008-2017, 69 Morbidity and Mortality Weekly Report 1385 (2020).

<sup>17</sup> A study of women who sought an abortion but were denied one because of gestational limits found that only 9 percent put the child up for adoption, rather than parenting themselves. See G. Sisson, L. Ralph, H. Gould, & D. Foster, Adoption Decision Making Among Women Seeking Abortion, 27 Women's Health Issues 136, 139 (2017).

<sup>18</sup> The majority finally notes the claim that “people now have a new appreciation of fetal life,” partly because of viewing sonogram images. *Ante*, at 34. It is hard to know how anyone would evaluate such a claim and as we have described above, the majority's reasoning does not rely on any reevaluation of the interest in protecting fetal life. See *supra*, at 26, and n. 7. It is worth noting that sonograms became widely used in the 1970s, long before *Casey*. Today, 60 percent of women seeking abortions have at least one child, and one-third have two or more. See CDC, K. Kortsmitt et al., Abortion Surveillance—United States, 2019, 70 Morbidity and

Mississippi's own record illustrates how little facts on the ground have changed since *Roe* and *Casey*, notwithstanding the majority's [\*\*\*\*242] supposed “modern developments.” *Ante*, at 33. Sixty-two percent of pregnancies in Mississippi are unplanned, yet Mississippi does not require insurance to cover contraceptives and prohibits educators from [\*\*\*668] demonstrating proper contraceptive use.<sup>19</sup> The State [\*\*2340] neither bans pregnancy discrimination nor requires provision of paid parental leave. Brief for Yale Law School Information Society Project as *Amicus Curiae* 13 (Brief for Yale Law School); Brief for National Women's Law Center et al. as *Amici Curiae* 32. It has strict eligibility requirements for Medicaid and nutrition assistance, leaving many women and families without [\*399] basic medical care or enough food. See Brief for 547 Deans, Chairs, Scholars and Public Health Professionals et al. as *Amici Curiae* 32-34 (Brief for 547 Deans). 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. See Brief for Yale Law School 12-13. Perhaps unsurprisingly, health outcomes in Mississippi are abysmal for both women and children. Mississippi has the highest infant mortality rate in the country, and [\*\*\*\*243] some of the highest rates for preterm birth, low birthweight, cesarean section, and maternal death.<sup>20</sup>

Mortality Weekly Report 6 (2021). These women know, even as they choose to have an abortion, what it is to look at a sonogram image and to value a fetal life.

<sup>19</sup> Guttmacher Institute, K. Kost, Unintended Pregnancy Rates at the State Level: Estimates for 2010 and Trends Since 2002, Table 1 (2015), [https://www.guttmacher.org/sites/default/files/report\\_pdf/stateup10.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/stateup10.pdf); Kaiser, State Requirements for Insurance Coverage of Contraceptives (May 1, 2022), <https://www.kff.org/state-category/womens-health/family-planning>; *Miss. Code Ann. §37-13-171(2)(d)* (Cum. Supp. 2021) (“In no case shall the instruction or program include any demonstration of how condoms or other contraceptives are applied”).

<sup>20</sup> See CDC, Infant Mortality Rates by State (Mar. 3, 2022), [https://www.cdc.gov/nchs/pressroom/sosmap/infant\\_mortality\\_rates/infant\\_mortality.htm](https://www.cdc.gov/nchs/pressroom/sosmap/infant_mortality_rates/infant_mortality.htm); Mississippi State Dept. of Health, Infant

It is approximately 75 times more dangerous for a woman in the State to carry a pregnancy to term than to have an abortion. See Brief for 547 Deans 9-10. 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. See Brief for 547 Deans 23-34.

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 [\*400] comes to abortion regulation. See *ante*, at 6, and n. 15. 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. See Brief for [\*\*\*\*244] International and Comparative Legal Scholars as *Amici Curiae* 18-22. Canada has decriminalized abortion at any point in a pregnancy. See *id.*, at 13-15. Most Western European countries impose restrictions on [\*\*\*669] 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. See *id.*, at 24-27; Brief for European Law Professors as *Amici Curiae* 16-17, Appendix. They also typically make access to early abortion easier, for example, by helping cover its cost.<sup>21</sup>

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Mortality Report 2019 & 2020, pp. 18-19 (2021), [https://www.msdh.ms.gov/msdhsite/\\_static/resources/18752.pdf](https://www.msdh.ms.gov/msdhsite/_static/resources/18752.pdf); CDC, Percentage of Babies Born Low Birthweight by State (Feb. 25, 2022), [https://www.cdc.gov/nchs/pressroom/sosmap/lbw\\_births/lbw.htm](https://www.cdc.gov/nchs/pressroom/sosmap/lbw_births/lbw.htm); CDC, Cesarean Delivery Rate by State (Feb. 25, 2022), [https://www.cdc.gov/nchs/pressroom/sosmap/cesarean\\_births/cesareans.htm](https://www.cdc.gov/nchs/pressroom/sosmap/cesarean_births/cesareans.htm); Mississippi State Dept. of Health, Mississippi Maternal Mortality Report 2013-2016, pp. 5, 25 (Mar. 2021), [https://www.msdh.ms.gov/msdhsite/\\_static/resources/8127.pdf](https://www.msdh.ms.gov/msdhsite/_static/resources/8127.pdf).

<sup>21</sup> See D. Grossman, K. Grindlay, & B. Burns, Public Funding for

Perhaps most notable, [\*\*2341] more than 50 countries around the world—in Asia, Latin America, Africa, and Europe—have expanded access to abortion in the past 25 years. See Brief for International and Comparative Legal Scholars as *Amici Curiae* 28-29. In light of that worldwide liberalization of abortion laws, it is American States that will become international outliers after today.

In sum, the majority can point to neither legal nor factual developments in support of its decision. Nothing that has happened in this country or the world in recent decades undermines the core insight of [Roe](#) and [Casey](#). It continues to be true that, within the constraints those decisions [\*\*\*\*245] established, a woman, not the government, should choose whether she will bear the burdens of pregnancy, childbirth, and parenting.

2

In support of its holding, see *ante*, at 40, the majority invokes two watershed cases overruling prior constitutional [\*401] precedents: [West Coast Hotel Co. v. Parrish](#) and [Brown v. Board of Education](#). But those decisions, unlike today's, responded to changed law and to changed facts and attitudes that had taken hold throughout society. As [Casey](#) recognized, the two cases are relevant only to show—by stark contrast—how unjustified overturning the right to choose is. See [505 U. S., at 861-864](#), [112 S. Ct. 2791](#), [120 L. Ed. 2d 674](#).

[West Coast Hotel](#) overruled [Adkins v. Children's Hospital of D. C.](#), [261 U. S. 525](#), [43 S. Ct. 394](#), [67 L. Ed. 785](#) (1923), and a whole line of cases beginning with [Lochner v. New York](#), [198 U. S. 45](#), [25 S. Ct. 539](#), [49 L. Ed. 937](#) (1905). [Adkins](#) had found a state minimum-wage law unconstitutional because, in the Court's view, the law interfered with a constitutional right to contract. [261 U. S., at 554-555](#), [43 S. Ct. 394](#), [67 L. Ed. 785](#). But then the Great Depression hit, bringing with it unparalleled economic despair. The experience undermined—in

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Abortion Where Broadly Legal, 94 *Contraception* 451, 458 (2016) (discussing funding of abortion in European countries).

fact, it disproved—*Adkins*’s assumption that a wholly unregulated market could meet basic human needs. As Justice Jackson (before becoming a Justice) wrote of that time: “The older world of *laissez faire* was recognized everywhere outside the Court to be dead.” The Struggle for Judicial Supremacy 85 (1941). In *West Coast Hotel*, the Court caught [\*\*\*\*246] up, recognizing through the lens of experience the flaws of existing legal doctrine. See also *ante*, at 11 (ROBERTS, C. J., concurring in judgment). The havoc the Depression had worked on ordinary Americans, the Court noted, was “common knowledge through the length and breadth of the land.” 300 U. S., at 399, 57 S. Ct. 578, 81 L. Ed. 703. The *laissez-faire* approach had led to “the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living.” *Ibid.* And [\*\*\*670] since *Adkins* was decided, the law had also changed. In several decisions, the Court had started to recognize the power of States to implement economic policies designed to enhance their citizens’ economic well-being. See, e.g., *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940 (1934); *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U. S. 251, 51 S. Ct. 130, 75 L. Ed. 324 (1931). The statements in those decisions, *West Coast Hotel* explained, were “impossible to reconcile” [\*402] with *Adkins*. 300 U. S., at 398, 57 S. Ct. 578, 81 L. Ed. 703. There was no escaping the need for *Adkins* to go.

*Brown v. Board of Education* overruled *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), along with its doctrine of “separate but equal.” By 1954, decades of Jim Crow had made clear what *Plessy*’s turn of phrase actually meant: “inherent[ ] [in]equal[ity].” *Brown*, 347 U. S., at 495, 74 S. Ct. 686, 98 L. Ed. 873. Segregation was not, and could not ever be, consistent with [\*\*2342] the Reconstruction Amendments, ratified to give the former slaves full citizenship. Whatever might have been thought in *Plessy*’s time, the *Brown* Court explained, [\*\*\*\*247] both experience and “modern authority” showed the “detrimental effect[s]” of state-sanctioned

segregation: It “affect[ed] [children’s] hearts and minds in a way unlikely ever to be undone.” 347 U. S., at 494, 74 S. Ct. 686, 98 L. Ed. 873. By that point, too, the law had begun to reflect that understanding. In a series of decisions, the Court had held unconstitutional public graduate schools’ exclusion of black students. See, e.g., *Sweatt v. Painter*, 339 U. S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950); *Sipuel v. Board of Regents of Univ. of Okla.*, 332 U. S. 631, 68 S. Ct. 299, 92 L. Ed. 247 (1948) (*per curiam*); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 59 S. Ct. 232, 83 L. Ed. 208 (1938). The logic of those cases, *Brown* held, “appl[ied] with added force to children in grade and high schools.” 347 U. S., at 494, 74 S. Ct. 686, 98 L. Ed. 873. Changed facts and changed law required *Plessy*’s end.

The majority says that in recognizing those changes, we are implicitly supporting the half-century interlude between *Plessy* and *Brown*. See *ante*, at 70. That is not so. First, if the *Brown* Court had used the majority’s method of constitutional construction, it might not ever have overruled *Plessy*, whether 5 or 50 or 500 years later. *Brown* thought that whether the ratification-era history supported desegregation was “[a]t best . . . inconclusive.” 347 U. S., at 489, 74 S. Ct. 686, 98 L. Ed. 873. But even setting that aside, we are not saying that a decision can *never* be overruled just because it is terribly wrong. Take *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, which the majority also relies on. See *ante*, at 40–41, 70. [\*403] That overruling took place just three [\*\*\*\*248] years after the initial decision, before any notable reliance interests had developed. It happened as well because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors. Both *Barnette* and *Brown*, moreover, share another feature setting them apart from the Court’s ruling today. They protected individual rights with a strong basis in the Constitution’s most fundamental commitments; they did not, as the majority does [\*\*\*671] here, take away a right that individuals have held, and relied on, for 50

years. To take *that* action based on a new and bare majority's declaration that two Courts got the result egregiously wrong? And to justify that action by reference to *Barnette*? Or to *Brown*—a case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice? These questions answer themselves.

*Casey* itself addressed both *West Coast Hotel* and *Brown*, and found that neither supported *Roe*'s overruling. In *West Coast Hotel*, *Casey* explained, "the facts of economic life" had proved "different from those previously assumed." 505 U.S., at 862, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And even though "*Plessy* was wrong the day it was decided," the passage of time had made that ever more clear to ever more citizens: "Society's understanding [\*\*\*\*249] of the facts" in 1954 was "fundamentally different" than in 1896. *Id.*, at 863, 112 S. Ct. 2791, 120 L. Ed. 2d 674. So the Court needed to reverse course. "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations." *Id.*, at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And because such dramatic change had occurred, the public could understand why the Court was acting. "[T]he Nation could accept each decision" as a "response to the Court's constitutional duty." *Ibid.* But that would not be true of a reversal of *Roe*—"because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed." 505 U.S., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674.

[\*\*2343] That is just as much so today, because *Roe* and *Casey* continue to reflect, not diverge from, broad trends in American [\*404] 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. *Hoyt v. Florida*, 368 U. S. 57, 62, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961). By 1973, when the Court decided *Roe*, fundamental social change [\*\*\*\*250] was underway regarding the place of women—and the law had begun to follow. See *Reed v. Reed*, 404 U. S. 71, 76, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971) (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." 505 U.S., at 897, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see *supra*, at 15, 23-24. 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.

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 [\*\*\*672] 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." *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U. S. 147, 154, 101 S. Ct. 1032, 67 L. Ed. 2d 132 (1981) (Stevens, J., concurring). So when overruling precedent "would dislodge [individuals'] settled rights and expectations," *stare decisis* has "added force." *Hilton v. South Carolina Public Railways Comm'n*, 502 U. S. 197, 202, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991). *Casey* understood that [\*405] to deny individuals' reliance on *Roe* was to "refuse to face the fact[s]." 505 U.S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. Today [\*\*\*\*251] 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. *Ante*, at 37. By

characterizing [Casey](#)’s reliance arguments as “generalized assertions about the national psyche,” *ante*, at 64, it reveals how little it knows or cares about women’s lives or about the suffering its decision will cause.

In [Casey](#), the Court observed that for two decades individuals “have organized intimate relationships and made” significant life choices “in reliance on the availability of abortion in the event that contraception should fail.” [505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). Over another 30 years, that reliance has solidified. For half a century now, in [Casey](#)’s words, “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Ibid.*; see *supra*, at 23-24. Indeed, all women now of childbearing age have grown up expecting that they would be able to avail themselves of [Roe](#)’s and [Casey](#)’s protections.

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 [\*\*\*\*252] of pregnancies in this country end in abortion, and about one quarter of [\*\*2344] American women will have an abortion before the age of 45.<sup>22</sup> 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. [\*406] 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 [\*\*\*673] to participate fully and equally in the Nation’s political, social, and economic life. See Brief for Economists as *Amici* [\*\*\*\*253] *Curiae* 13 (showing that abortion availability has “large effects on women’s education, labor force participation, occupations, and earnings” (footnotes omitted)).

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.” *Ante*, at 64 (quoting [Casey](#), [505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#)).<sup>23</sup> The facts are: 45 percent of pregnancies in the United States are unplanned. See Brief for 547 Deans 5. Even the most effective contraceptives fail, and effective contraceptives are not universally accessible.<sup>24</sup> Not all sexual activity is consensual and not all contraceptive choices are made by the party who risks pregnancy. See Brief for Legal Voice et al. as *Amici Curiae* 18-19. The Mississippi [\*407] 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

<sup>23</sup> Astoundingly, the majority casts this statement as a “conce[ssion]” from [Casey](#) with which it “agree[s].” *Ante*, at 64. In fact, [Casey](#) used this language as part of describing an argument that it *rejected*. See [505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674](#). It is only today’s Court that endorses this profoundly mistaken view.

<sup>24</sup> See Brief for 547 Deans 6-7 (noting that 51 percent of women who terminated their pregnancies reported using contraceptives during the month in which they conceived); Brief for Lawyers’ Committee for Civil Rights Under Law et al. as *Amici Curiae* 12-14 (explaining financial and geographic barriers to access to effective contraceptives).

<sup>22</sup> See CDC, K. Kortsmit et al., Abortion Surveillance—United States, 2019, 70 Morbidity and Mortality Weekly Report 7 (2021); Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 9.

during a pregnancy. See *supra*, at 49. Human bodies care little for hopes and plans. Events can occur after conception, from [\*\*\*\*254] 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 [\*\*2345] where the greatest burden will fall. *Casey*, 505 U. S., at 855, 112 S. Ct. 2791, 120 L. Ed. 2d 674. In States that bar abortion, women of means will still be able to travel to obtain the services they need.<sup>25</sup> It is women who cannot afford to do so who will suffer most. These [\*\*\*674] 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. See Brief for 547 Deans 7; Brief for Abortion Funds and Practical Support Organizations as [\*\*\*\*255] *Amici Curiae* 8 (Brief for Abortion Funds). [\*408] Even with *Roe*’s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy. See Brief for Abortion

Funds 7-12.<sup>26</sup> 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.<sup>27</sup>

Finally, the expectation of reproductive control is integral to many women’s identity and their place in the Nation. See *Casey*, 505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674. That expectation helps define a woman as an “equal citizen[ ],” with all the rights, privileges, and obligations that status entails. *Gonzales*, 550 U. S., at 172, 127 S. Ct. 1610, 167 L. Ed. 2d 480 [\*409] (Ginsburg, J., dissenting); see *supra*, at 23-24. It reflects that she is an autonomous person, and that society and the law recognize her as such. Like many constitutional rights, the right to choose situates a woman in

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<sup>26</sup> The average cost of a first-trimester abortion is about \$500. See Brief for Abortion Funds 7. Federal insurance generally does not cover the cost of abortion, and 35 percent of American adults do not have cash on hand to cover an unexpected expense that high. Guttmacher Institute, M. Donovan, In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact (Jan. 5, 2017), <https://www.guttmacher.org/gpr/2017/01/real-life-federal-restrictions-abortion-coverage-and-women-they-impact#:~:text=Although%20the%20Hyde%20Amendment%20bars,provide%20abortion%20coverage%20to%20enrollees;> Brief for Abortion Funds 11.

<sup>27</sup> Mississippi is likely to be one of the States where these costs are highest, though history shows that it will have company. As described above, Mississippi provides only the barest financial support to pregnant women. See *supra*, at 41-42. The State will greatly restrict abortion care without addressing any of the financial, health, and family needs that motivate many women to seek it. The effects will be felt most severely, as they always have been, on the bodies of the poor. The history of state abortion restrictions is a history of heavy costs exacted from the most vulnerable women. It is a history of women seeking illegal abortions in hotel rooms and home kitchens; of women trying to self-induce abortions by douching with bleach, injecting lye, and penetrating themselves with knitting needles, scissors, and coat hangers. See L. Reagan, When Abortion Was a Crime 42-43, 198-199, 208-209 (1997). It is a history of women dying.

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<sup>25</sup> This statement of course assumes that States are not successful in preventing interstate travel to obtain an abortion. See *supra*, at 3, 36-37. Even assuming that is so, increased out-of-state demand will lead to longer wait times and decreased availability of service in States still providing abortions. See Brief for State of California et al. as *Amici Curiae* 25-27. This is what happened in Oklahoma, Kansas, Colorado, New Mexico, and Nevada last fall after Texas effectively banned abortions past six weeks of gestation. See *United States v. Texas*, 595 U. S. \_\_\_, \_\_\_, 142 S. Ct. 14, 211 L. Ed. 2d 225 (2021) (SOTOMAYOR, J., concurring in part and dissenting in part) (slip op., at 6).

relationship to [\*\*\*\*256] others and to the government. It helps define a [\*\*2346] sphere of freedom, in which a person has the capacity to make choices free of government control. As *Casey* recognized, the right “order[s]” her “thinking” as well as her “living.” *505 U. S., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674*. Beyond any individual choice about residence, or education, or career, her whole life reflects the control and authority that the right grants.

[\*\*\*675] Withdrawing a woman’s right to choose whether to continue a pregnancy does not mean that no choice is being made. It means that a majority of today’s Court has wrenched this choice from women and given it to the States. To allow a State to exert control over one of “the most intimate and personal choices” a woman may make is not only to affect the course of her life, monumental as those effects might be. *Id., at 851, 112 S. Ct. 2791, 120 L. Ed. 2d 674*. It is to alter her “views of [herself]” and her understanding of her “place[ ] in society” as someone with the recognized dignity and authority to make these choices. *Id., at 856, 112 S. Ct. 2791, 120 L. Ed. 2d 674*. Women have relied on *Roe* and *Casey* in this way for 50 years. Many have never known anything else. When *Roe* and *Casey* disappear, the loss of power, control, and dignity will be immense.

The Court’s failure to perceive the whole swath of expectations *Roe* and *Casey* created reflects [\*\*\*\*257] an impoverished view of reliance. According to the majority, a reliance interest must be “very concrete,” like those involving “property” or “contract.” *Ante*, at 64. While many of this Court’s cases addressing reliance have been in the “commercial context,” *Casey, 505 U. S., at 855, 112 S. Ct. 2791, 120 L. Ed. 2d 674*, none holds that interests must be analogous to commercial ones to warrant *stare decisis* protection.<sup>28</sup> This unprecedented assertion

is, at bottom, a radical [\*410] claim to power. By disclaiming any need to consider broad swaths of individuals’ interests, the Court arrogates to itself the authority to overrule established legal principles without even acknowledging the costs of its decisions for the individuals who live under the law, costs that this Court’s *stare decisis* doctrine instructs us to privilege when deciding whether to change course.

The majority claims that the reliance interests women have in *Roe* and *Casey* are too “intangible” for the Court to consider, even if it were inclined to do so. *Ante*, at 65. This is to ignore as judges what we know as men and women. The interests women have in *Roe* and *Casey* are perfectly, viscerally concrete. Countless women will now make different decisions about careers, education, relationships, and [\*\*\*\*258] whether to try to become pregnant than they would have when *Roe* served as a backstop. Other women will carry pregnancies to term, with all the costs and risk of harm that involves, when they would previously have chosen to obtain an abortion. For millions of women, *Roe* and *Casey* have been critical in giving them control of their bodies and their lives. Closing our eyes to the suffering today’s decision will impose will not make that suffering disappear. The majority cannot escape its obligation to “count[ ] the cost[s]” of its decision by invoking the “conflicting arguments” of “contending sides.” *Casey, [\*\*\*676] 505 U. S., at 855, 112 S. Ct. [\*\*2347] 2791, 120 L. Ed. 2d 674; ante*, at 65. *Stare decisis* requires that the Court calculate the costs of a decision’s repudiation on those who have relied on the decision, not on those who have disavowed it. See *Casey, 505 U. S., at 855, 112 S. Ct. 2791, 120 L. Ed. 2d 674*.

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involving “procedural and evidentiary rules.” *Id., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720*. Unlike the individual right at stake here, those rules do “not alter primary conduct.” *Hohn v. United States, 524 U. S. 236, 252, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998)*. Accordingly, they generally “do not implicate the reliance interests of private parties” at all. *Alleyn v. United States, 570 U. S. 99, 119, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)* (SOTOMAYOR, J., concurring).

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<sup>28</sup> The majority’s sole citation for its “concreteness” requirement is *Payne v. Tennessee, 501 U. S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*. But *Payne* merely discounted reliance interests in cases

More broadly, the majority’s approach to reliance cannot be reconciled with our Nation’s understanding of constitutional [\*411] rights. The majority’s insistence on a “concrete,” economic showing would preclude a finding of reliance on a wide variety of decisions recognizing constitutional rights—such as the right to express opinions, or choose whom to marry, or decide how to educate children. The Court, on the majority’s logic, [\*\*\*\*259] could transfer those choices to the State without having to consider a person’s settled understanding that the law makes them hers. That must be wrong. All those rights, like the right to obtain an abortion, profoundly affect and, indeed, anchor individual lives. To recognize that people have relied on these rights is not to dabble in abstractions, but to acknowledge some of the most “concrete” and familiar aspects of human life and liberty. *Ante*, at 64.

All those rights, like the one here, also have a societal dimension, because of the role constitutional liberties play in our structure of government. See, e.g., *Dickerson*, 530 U. S., at 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (recognizing that *Miranda* “warnings have become part of our national culture” in declining to overrule *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). Rescinding an individual right in its entirety and conferring it on the State, an action the Court takes today for the first time in history, affects all who have relied on our constitutional system of government and its structure of individual liberties protected from state oversight. *Roe* and *Casey* have of course aroused controversy and provoked disagreement. But the right those decisions conferred and reaffirmed is part of society’s understanding of constitutional law and of how the [\*\*\*\*260] Court has defined the liberty and equality that women are entitled to claim.

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

#### [\*412] D

One last consideration counsels against the majority’s ruling: the very controversy surrounding *Roe* and *Casey*. The majority accuses *Casey* of acting outside the bounds of the law to quell the conflict over abortion—of imposing an unprincipled “settlement” of the issue in an effort to end “national division.” *Ante*, at 67. But that is not what *Casey* did. As shown above, *Casey* applied traditional principles of *stare decisis*—which the majority today ignores—in reaffirming *Roe*. *Casey* carefully assessed changed circumstances (none) and reliance interests (profound). It considered every aspect of how *Roe*’s framework operated. It adhered to the law in its analysis, and [\*\*\*677] it reached the conclusion that the law required. True enough that *Casey* took notice of the “national controversy” [\*\*\*\*261] about abortion: The Court knew in 1992, as it did in 1973, that abortion was a “divisive issue.” *Casey*, 505 U. S., at 867-868, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see *Roe*, 410 U. S., at 116, 93 S. Ct. 705, 35 L. Ed. 2d 147. But *Casey*’s reason for acknowledging public conflict was the exact opposite of what the majority insinuates. *Casey* addressed the national controversy in order to emphasize how important it was, in that case of all cases, [\*\*2348] for the Court to stick to the law. Would that today’s majority had done likewise.

Consider how the majority itself summarizes this aspect of *Casey*:

“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.’” *Ante*, at 66-67 (citations omitted).

[\*413] That seems to us a good description. And it seems to us right. The majority responds (if we understand it correctly): well, yes, but we have to apply the law. See *ante*, at 67. To which [Casey](#) would have [\*\*\*\*262] said: That is exactly the point. Here, more than anywhere, the Court needs to apply the law—particularly the law of *stare decisis*. Here, we know that citizens will continue to contest the Court’s decision, because “[m]en and women of good conscience” deeply disagree about abortion. [Casey](#), 505 U. S., at 850, 112 S. Ct. 2791, 120 L. Ed. 2d 674. When that contestation takes place—but when there is no legal basis for reversing course—the Court needs to be steadfast, to stand its ground. That is what the rule of law requires. And that is what respect for this Court depends on.

“The promise of constancy, once given” in so charged an environment, [Casey](#) explained, “binds its maker for as long as” the “understanding of the issue has not changed so fundamentally as to render the commitment obsolete.” *Id.*, at 868, 112 S. Ct. 2791, 120 L. Ed. 2d 674. A breach of that promise is “nothing less than a breach of faith.” *Ibid.* “[A]nd no Court that broke its faith with the people could sensibly expect credit for principle.” *Ibid.* No Court breaking its faith in that way would *deserve* credit for principle. As one of [Casey](#)’s authors wrote in another case, “Our legitimacy requires, above all, that we adhere to *stare decisis*” in “sensitive political contexts” where “partisan controversy abounds.” [Bush v. Vera](#), 517 U. S. 952, 985, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (opinion of O’Connor, [\*\*\*\*263] J.).

Justice Jackson once called a decision he dissented from a “loaded weapon,” ready to hand for improper uses. [Korematsu v. United States](#), 323 U. S. 214, 246, 65 S. Ct. 193, 89 L. Ed. 194 (1944).

We fear that today’s decision, departing from *stare decisis* for no legitimate reason, is its own loaded weapon. Weakening *stare decisis* threatens to upend bedrock legal doctrines, far beyond any single decision. [\*\*\*678] Weakening *stare decisis* creates profound legal instability. And as [Casey](#) recognized, weakening *stare decisis* in a hotly contested case like this one calls into question this Court’s commitment to legal principle. It [\*414] makes the Court appear not restrained but aggressive, not modest but grasping. In all those ways, today’s decision takes aim, we fear, at the rule of law.

### III

“Power, not reason, is the new currency of this Court’s decisionmaking.” [Payne](#), 501 U. S., at 844, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (Marshall, J., dissenting). [Roe](#) has stood for fifty years. [Casey](#), a precedent about precedent specifically confirming [Roe](#), has stood for thirty. And the doctrine of *stare decisis*—a critical element of the rule of law—stands foursquare behind their continued existence. The right those decisions established and preserved is embedded in our constitutional law, both originating in and leading to other rights protecting bodily [\*\*2349] integrity, personal [\*\*\*\*264] autonomy, and family relationships. The abortion right is also embedded in the lives of women—shaping their expectations, influencing their choices about relationships and work, supporting (as all reproductive rights do) their social and economic equality. Since the right’s recognition (and affirmation), nothing has changed to support what the majority does today. Neither law nor facts nor attitudes have provided any new reasons to reach a different result than [Roe](#) and [Casey](#) did. All that has changed is this Court.

Mississippi—and other States too—knew exactly what they were doing in ginning up new legal challenges to [Roe](#) and [Casey](#). The 15-week ban at issue here was enacted in 2018. Other States quickly followed: Between 2019 and 2021, eight States banned abortion procedures after six to eight

weeks of pregnancy, and three States enacted all-out bans.<sup>29</sup> Mississippi itself decided in 2019 that it had not gone [\*415] far enough: The year after enacting the law under review, the State passed a 6-week restriction. A state senator who championed both Mississippi laws said the obvious out loud. “[A] lot of people thought,” he explained, that “finally, we have” a conservative Court “and so now would be a good time [\*\*\*\*265] to start testing the limits of *Roe*.”<sup>30</sup> In its petition for certiorari, the State had exercised a smidgen of restraint. It had urged the Court merely to roll back *Roe* and *Casey*, specifically assuring the Court that “the questions presented in this petition do not require the Court to overturn” those precedents. Pet. for Cert. 5; see *ante*, at 5-6 (ROBERTS, C. J., concurring [\*\*\*679] in judgment). But as Mississippi grew ever more confident in its prospects, it resolved to go all in. It urged the Court to overrule *Roe* and *Casey*. Nothing but everything would be enough.

Earlier this Term, this Court signaled that Mississippi’s stratagem would succeed. Texas was one of the fistful of States to have recently banned abortions after six weeks of pregnancy. It added to that “flagrantly unconstitutional” restriction an unprecedented scheme to “evade judicial scrutiny.” *Whole Woman’s Health v. Jackson*, 594 U. S. \_\_\_, \_\_\_, 141 S. Ct. 2494, 210 L. Ed. 2d 1014, 1017

<sup>29</sup> Guttmacher Institute, E. Nash, State Policy Trends 2021: The Worst Year for Abortion Rights in Almost Half a Century (Dec. 16, 2021), <https://www.guttmacher.org/article/2021/12/state-policy-trends-2021-worst-year-abortion-rights-almost-half-century>; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2020: Reproductive Health and Rights in a Year Like No Other (Dec. 15, 2020), <https://www.guttmacher.org/article/2020/12/state-policy-trends-2020reproductive-health-and-rights-year-no-other>; Guttmacher Institute, E. Nash, L. Mohammed, O. Cappello, & S. Naide, State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back (Dec. 10, 2019), <https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back>.

<sup>30</sup> A. Pittman, Mississippi’s Six-Week Abortion Ban at 5th Circuit Appeals Court Today, Jackson Free Press (Oct. 7, 2019), <https://www.jacksonfreepress.com/news/2019/oct/07/mississippi-six-week-abortion-ban-5th-circuit-app/>.

(2021) (SOTOMAYOR, J., dissenting). And five Justices acceded to that cynical maneuver. They let Texas defy this Court’s constitutional rulings, nullifying *Roe* and *Casey* ahead of schedule in the Nation’s second largest State.

And now the other shoe drops, courtesy of that same five-person majority. (We believe that THE CHIEF JUSTICE’S [\*416] opinion is wrong too, [\*\*\*\*266] but no one should think that there is not a large difference between upholding a 15-week ban on the [\*\*2350] grounds he does and allowing States to prohibit abortion from the time of conception.) Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey*. It converts a series of dissenting opinions expressing antipathy toward *Roe* and *Casey* into a decision greenlighting even total abortion bans. See *ante*, at 57, 59, 63, and nn. 61-64 (relying on former dissents). It eliminates a 50-year-old constitutional right that safeguards women’s freedom and equal station. It breaches a core rule-of-law principle, designed to promote constancy in the law. In doing all of that, it places in jeopardy other rights, from contraception to same-sex intimacy and marriage. And finally, it undermines the Court’s legitimacy.

*Casey* itself made the last point in explaining why it would not overrule *Roe*—though some members of its majority might not have joined *Roe* in the first instance. Just as we did here, *Casey* explained the importance of *stare decisis*; the inappropriateness of *West Coast Hotel* and *Brown*; the absence of any “changed circumstances” (or other reason) justifying the reversal of precedent. 505 U. S., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674; see *supra*, at 30-33, 37-47 [\*\*\*\*267]. “[T]he Court,” *Casey* explained, “could not pretend” that overruling *Roe* had any “justification beyond a present doctrinal disposition to come out differently from the Court of 1973.” 505 U. S., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674. And to overrule for that reason? Quoting Justice Stewart, *Casey* explained that to do so—to reverse prior law “upon a ground no firmer than a change in [the Court’s] membership”—

would invite the view that “this institution is little different from the two political branches of the Government.” *Ibid.* No view, [Casey](#) thought, could do “more lasting injury to this Court and to the system of law which it is our abiding mission to serve.” *Ibid.* For overruling [Roe](#), [Casey](#) concluded, the Court would pay a “terrible price.” [505 U. S., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674.](#)

**[\*417]** The Justices who wrote those words—O’Connor, Kennedy, and Souter—they were judges of wisdom. They would not have won any contests for the kind of ideological purity **[\*\*\*680]** some court watchers want Justices to deliver. But if there were awards for Justices who left this Court better than they found it? And who for that reason left this country better? And the rule of law stronger? Sign those Justices up.

They knew that “the legitimacy of the Court [is] earned over time.” [Id., at 868, 112 S. Ct. 2791, 120 L. Ed. 2d 674.](#) They also would have recognized that it can be destroyed much more quickly. They worked hard to avert that outcome in [Casey](#). The American public, they thought, should never conclude that its constitutional protections hung by a thread—that a new majority, adhering to a new “doctrinal school,” could “by dint of numbers” alone expunge their rights. [Id., at 864, 112 S. Ct. 2791, 120 L. Ed. 2d 674.](#) It is hard—no, it is impossible—to conclude that anything else has happened here. One of us once said that “[i]t is not often in the law that so few have so quickly changed so much.” S. Breyer, *Breaking the Promise of Brown: The Resegregation of America’s Schools* 30 (2022). For all of us, in our time on this Court, that has never been more true **[\*\*\*\*268]** than today. In overruling [Roe](#) and [Casey](#), this Court betrays its guiding principles.

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

## APPENDIX

This Appendix analyzes in full each of the 28 cases the majority says support today’s decision to overrule [Roe v. Wade, \[\\*\\*2351\] 410 U. S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 \(1973\)](#), and [Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 \(1992\)](#). As explained herein, the Court in each case relied on traditional *stare decisis* factors in overruling.

A great many of the overrulings the majority cites involve a prior precedent that had been rendered out of step with or **[\*418]** effectively abrogated by contemporary case law in light of intervening developments in the broader doctrine. See [Ramos v. Louisiana, 590 U. S. , , 140 S. Ct. 1390, 206 L. Ed. 2d 583 \(2020\)](#) (slip op., at 22) (holding the [Sixth Amendment](#) requires a unanimous jury verdict in state prosecutions for serious offenses, and overruling [Apodaca v. Oregon, 406 U. S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 \(1972\)](#), because “in the years since [Apodaca](#), this Court ha[d] spoken inconsistently about its meaning” and had undercut its validity “on at least eight occasions”); [Ring v. Arizona, 536 U. S. 584, 608-609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 \(2002\)](#) (recognizing a [Sixth Amendment](#) right to have a jury find the aggravating factors necessary to impose a death sentence and, in so doing, rejecting [Walton v. Arizona, 497 U. S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 \(1990\)](#), as overtaken by and irreconcilable with [Apprendi v. New Jersey, 530 U. S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 \(2000\)](#)); [Agostini v. Felton, 521 U. S. 203, 235-236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 \(1997\)](#) (considering the Establishment Clause’s constraint on government **[\*\*\*\*269]** aid to religious instruction, and overruling [Aguilar v. Felton, 473 U. S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 \(1985\)](#), in light of several related doctrinal developments that had so undermined [Aguilar](#) and the assumption on which it rested as to render it no longer good **[\*\*\*681]** law); [Batson v. Kentucky, 476 U. S. 79, 93-96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 \(1986\)](#) (recognizing that a defendant may make a prima facie showing of purposeful racial discrimination in selection of a jury venire by relying solely on the facts in his

case, and, based on subsequent developments in equal protection law, rejecting part of [Swain v. Alabama](#), 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), which had imposed a more demanding evidentiary burden); [Brandenburg v. Ohio](#), 395 U. S. 444, 447-448, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam) (holding that mere advocacy of violence is protected by the [First Amendment](#), unless intended to incite it or produce imminent lawlessness, and rejecting the contrary rule in [Whitney v. California](#), 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), as having been “thoroughly discredited by later decisions”); [Katz v. United States](#), 389 U. S. 347, 351, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (recognizing that the [Fourth Amendment](#) extends to material and communications that a person “seeks to preserve as private,” and rejecting the more limited construction [\*419] articulated in [Olmstead v. United States](#), 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), because “we have since departed from the narrow view on which that decision rested,” and “the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling”); [Miranda v. Arizona](#), 384 U. S. 436, 463-467, 479, n. 48, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (recognizing that the [\*\*\*\*270] [Fifth Amendment](#) requires certain procedural safeguards for custodial interrogation, and rejecting [Crooker v. California](#), 357 U. S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958), and [Cicenia v. Lagay](#), 357 U. S. 504, 78 S. Ct. 1297, 2 L. Ed. 2d 1523 (1958), which had already been undermined by [Escobedo v. Illinois](#), 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964)); [Malloy v. Hogan](#), 378 U. S. 1, 6-9, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (explaining that the [Fifth Amendment](#) privilege against “self-incrimination is also protected by the [Fourteenth Amendment](#) [\*2352] against abridgment by the States,” and rejecting [Twining v. New Jersey](#), 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908), in light of a “marked shift” in [Fifth Amendment](#) precedents that had “necessarily repudiated” the prior

decision); [Gideon v. Wainwright](#), 372 U. S. 335, 343-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (acknowledging a right to counsel for indigent criminal defendants in state court under the [Sixth](#) and [Fourteenth Amendments](#), and overruling the earlier precedent failing to recognize such a right, [Betts v. Brady](#), 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942));<sup>31</sup> [Smith v. Allwright](#), 321 U. S. 649, 659-662, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (recognizing all-white primaries are unconstitutional after reconsidering in light of “the unitary character of the electoral process” recognized in [United States v. Classic](#), 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941), and overruling [Grovey v. Townsend](#), 295 U. S. 45, 55 S. Ct. 622, 79 L. Ed. 1292 (1935)); [United States v. Darby](#), 312 U. S. 100, 115-117, 61 S. Ct. 451, 85 L. Ed. 609 (1941) (recognizing Congress’s [Commerce Clause](#) power to regulate employment conditions and explaining as “inescapable” the “conclusion . . . that [Hammer v. Dagenhart](#), [247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918)],” and its contrary rule had “long since been” overtaken by precedent construing the [Commerce Clause](#) power more broadly); [Erie R. Co. v. Tompkins](#), 304 U. S. 64, 78-80, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (applying state substantive law in diversity actions in federal courts and overruling [Swift v. Tyson](#), 41 U.S. 1, 16 Pet. 1, 10 L. Ed. 865 (1842), because an intervening decision had “made clear” the “fallacy underlying the rule”).

Additional cases the majority cites involved fundamental factual changes that had [\*\*\*\*271] undermined the basic premise of the prior precedent. See [Citizens United v. Federal Election Comm’n](#), 558 U. S. 310, 364, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (expanding [First Amendment](#)

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<sup>31</sup> We have since come to understand [Gideon](#) as part of a larger doctrinal shift—already underway at the time of [Gideon](#)—where “the Court began to hold that the [Due Process Clause](#) fully incorporates particular rights contained in the first eight Amendments.” [McDonald v. Chicago](#), 561 U. S. 742, 763, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); see also *id.*, at 766, 130 S. Ct. 3020, 177 L. Ed. 2d 894.

protections for campaign-related speech and citing technological changes that undermined the distinctions of the earlier regime and made workarounds easy, and overruling [Austin v. Michigan Chamber of Commerce](#), 494 U. S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990), and partially overruling [McConnell v. Federal Election Comm’n](#), 540 U. S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)); [Crawford v. Washington](#), 541 U. S. 36, 62-65, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (expounding on the [Sixth Amendment](#) right to confront witnesses and rejecting the prior framework, based on its practical failing to keep out core testimonial evidence, and overruling [Ohio v. Roberts](#), 448 U. S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)); [Mapp v. Ohio](#), 367 U. S. 643, 651-652, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 *Ohio Law Abs.* 513 (1961) (holding that the exclusionary rule under the [Fourth Amendment](#) applies to the States, and overruling the contrary rule of [Wolf v. Colorado](#), 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), after considering and rejecting “the current validity of the factual grounds upon which [Wolf](#) was based”).

Some cited overrulings involved *both* significant doctrinal developments *and* changed facts or understandings that had [**\*\*2353**] together undermined a basic premise of the prior decision. See [Janus v. State, County, and Municipal Employees](#), 585 U. S. , , - , 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018) (slip op., at 42, 47-49) (holding that requiring public-sector union dues from nonmembers violates the [First Amendment](#), and overruling [Abood v. Detroit Bd. of Ed.](#), 431 U. S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977), based on “both factual and legal” developments that had “eroded the decision’s underpinnings and left [**\*421**] it an outlier among our [First Amendment](#) cases” (internal quotation marks omitted)); [Obergefell v. Hodges](#), 576 U. S. 644, 659-663, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015) (holding that the [Fourteenth Amendment](#) protects the right of same-sex couples to marry in light [**\*\*\*\*272**] of doctrinal developments, as well as fundamentally changed social understanding);

[Lawrence v. Texas](#), 539 U. S. 558, 572-578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (overruling [Bowers v. Hardwick](#), 478 U. S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), after finding anti-sodomy laws to be inconsistent with the [Fourteenth Amendment](#) in [**\*\*\*683**] light of developments in the legal doctrine, as well as changed social understanding of sexuality); [United States v. Scott](#), 437 U. S. 82, 101, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (overruling [United States v. Jenkins](#), 420 U. S. 358, 95 S. Ct. 1006, 43 L. Ed. 2d 250 (1975), three years after it was decided, because of developments in the Court’s double jeopardy case law, and because intervening practice had shown that government appeals from midtrial dismissals requested by the defendant were practicable, desirable, and consistent with double jeopardy values); [Craig v. Boren](#), 429 U. S. 190, 197-199, 210, n. 23, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (holding that sex-based classifications are subject to intermediate scrutiny under the [Fourteenth Amendment’s Equal Protection Clause](#), including because [Reed v. Reed](#), 404 U. S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), and other equal protection cases and social changes had overtaken any “inconsistent” suggestion in [Goesaert v. Cleary](#), 335 U. S. 464, 69 S. Ct. 198, 93 L. Ed. 163 (1948)); [Taylor v. Louisiana](#), 419 U. S. 522, 535-537, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) (recognizing as “a foregone conclusion from the pattern of some of the Court’s cases over the past 30 years, as well as from legislative developments at both federal and state levels,” that women could not be excluded from jury service, and explaining that the prior decision approving such practice, [Hoyt v. Florida](#), 368 U. S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961), had been rendered inconsistent with equal protection jurisprudence).

Other overrulings occurred very close in time to [**\*\*\*\*273**] the original decision so did not engender substantial reliance and could not be described as having been “embedded” as “part of our national culture.” [Dickerson v. United States](#), 530 U. S. 428, 443, [**\*422**] 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); see [Payne v. Tennessee](#), 501 U.

[\*S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 \(1991\)\*](#) (revising procedural rules of evidence that had barred admission of certain victim-impact evidence during the penalty phase of capital cases, and overruling [\*South Carolina v. Gathers, 490 U. S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 \(1989\)\*](#), and [\*Booth v. Maryland, 482 U. S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 \(1987\)\*](#), which had been decided two and four years prior, respectively); [\*Seminole Tribe of Fla. v. Florida, 517 U. S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 \(1996\)\*](#) (holding that Congress cannot abrogate state-sovereign immunity under its [\*Article I\*](#) commerce power, and rejecting the result in [\*Pennsylvania v. Union Gas Co., 491 U. S. 1, 109 S. Ct. 2273, 105 L. Ed. 2d 1 \(1989\)\*](#), seven years later; the decision in [\*Union Gas\*](#) never garnered a majority); **[\*\*2354]** [\*Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528, 531, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 \(1985\)\*](#) (holding that local governments are not constitutionally immune from federal employment laws, and overruling [\*National League of Cities v. Usery, 426 U. S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 \(1976\)\*](#), after “eight years” of experience under that regime showed [\*Usery\*](#)’s standard was unworkable and, in practice, undermined the federalism principles the decision sought to protect).

The rest of the cited cases were relatively minor in their effect, modifying part or an application of a prior precedent’s test or analysis. See [\*Montejo v. Louisiana, 556 U. S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 \(2009\)\*](#) **[\*\*\*684]** (citing workability and practical concerns with additional layers of prophylactic procedural safeguards for defendants’ right to counsel, as had been enshrined in [\*Michigan v. Jackson, 475 U. S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 \(1986\)\*](#)); [\*Illinois v. Gates, 462 U. S. 213, 227-228, 103 S. Ct. 2317, 76 L. Ed. 2d 527 \(1983\)\*](#) (replacing a two-pronged test **[\*\*\*\*274]** under [\*Aguilar v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 \(1964\)\*](#), and [\*Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 \(1969\)\*](#), in favor of a traditional totality-of-the-circumstances approach to evaluate probable cause

for issuance of a warrant); [\*Wesberry v. Sanders, 376 U. S. 1, 4, 84 S. Ct. 526, 11 L. Ed. 2d 481 \(1964\)\*](#), and [\*Baker v. Carr, 369 U. S. 186, 202, 82 S. Ct. 691, 7 L. Ed. 2d 663 \(1962\)\*](#) (clarifying that the “political question” passage of the minority opinion in [\*Colegrove v. Green, 328 U. S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 \(1946\)\*](#), was not controlling law).

**[\*423]** In sum, none of the cases the majority cites is analogous to today’s decision to overrule 50- and 30-year-old watershed constitutional precedents that remain unweakened by any changes of law or fact.

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## **Eisenstadt v. Baird**

Supreme Court of the United States

November 17-18, 1971, Argued ; March 22, 1972, Decided

No. 70-17

### **Reporter**

405 U.S. 438 \*; 92 S. Ct. 1029 \*\*; 31 L. Ed. 2d 349 \*\*\*; 1972 U.S. LEXIS 145 \*\*\*\*

EISENSTADT, SHERIFF v. BAIRD

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

**Disposition:** [429 F.2d 1398](#), affirmed.

### **Core Terms**

contraceptive, married person, dispense, unmarried person, foam, medicinal, marry, distributor, register, lecture, birth control, classification, deterrence, fornicate, pregnancy, prescribe, prescribe, license, vaginal, distribution of contraceptives, single person, unmarried, audience, hazard, sexual, constitutional right, marital status, premarital, display, pharmacist

### **Case Summary**

#### **Procedural Posture**

Appellee sheriff sought review of an order of the United States Court of Appeals for the First Circuit vacating the district court's order dismissing appellant's petition for a writ of habeas corpus to challenge his conviction, under Mass. Gen. Law Ann. ch. 272, [§ 21](#), for distributing contraceptive foam to an unmarried woman.

#### **Overview**

Appellant was convicted of, among other things, giving vaginal foam to an unmarried woman at the

close of a lecture, a violation of Mass. Gen. Law Ann. ch. 272, [§ 21](#). The district court dismissed appellant's petition for habeas corpus relief, but the circuit court vacated the district court's order, and remanded with instructions to grant the writ. The Court affirmed the circuit court's order. Appellant had standing to assert the rights of unmarried people to access the contraception because he served as an advocate for this third-party right. In so ruling, the Court emphasized that the reason for giving away the foam was to test the statute. Then, the Court held that the state statute violated the [Equal Protection Clause](#) of [U.S. Const. amend. XIV](#). There was no rational reason for the different treatment of married and unmarried people. The right of privacy to be free of unwanted intrusions into the fundamental decision of whether to have children was the same for married and unmarried alike. The Court rejected appellee's argument that the distinction was health related, noting that unmarried persons had as great an interest in avoiding the spread of harmful diseases.

#### **Outcome**

The Court affirmed the circuit court's order vacating the district court's dismissal of appellant's petition for a writ of habeas corpus.

### **LexisNexis® Headnotes**

Business & Corporate  
Compliance > Contracts > Types of

Contracts > Covenants  
 Contracts Law > Types of  
 Contracts > Covenants

Civil  
 Procedure > ... > Justiciability > Standing > General Overview

Real Property  
 Law > Encumbrances > Restrictive  
 Covenants > Enforcement of Restrictive  
 Covenants

Civil Procedure > Preliminary  
 Considerations > Justiciability > General  
 Overview

Constitutional Law > ... > Case or  
 Controversy > Standing > Third Party Standing

Real Property  
 Law > Encumbrances > Restrictive  
 Covenants > General Overview

### **HN1 Types of Contracts, Covenants**

The doctor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the constitutional rights of another. The relationship may be that of one who acted to protect the rights of a minority and the minority itself. In any event, more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on third-party interests.

Constitutional Law > Equal Protection > Nature  
 & Scope of Protection

### **HN2 Equal Protection, Nature & Scope of Protection**

In applying the [Equal Protection Clause, U.S. Const. amend. XIV](#) does not deny to states the power to treat different classes of persons in

different ways. The [Equal Protection Clause](#) of [U.S. Const. amend. XIV](#) does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Constitutional Law > Substantive Due  
 Process > Privacy > General Overview

### **HN3 Substantive Due Process, Privacy**

If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Constitutional Law > Substantive Due  
 Process > Privacy > General Overview

### **HN4 Substantive Due Process, Privacy**

Fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

Constitutional Law > Substantive Due  
 Process > Privacy > General Overview

Constitutional Law > Equal  
 Protection > Parentage

Constitutional Law > Equal Protection > Nature  
 & Scope of Protection

### **HN5 Substantive Due Process, Privacy**

By providing dissimilar treatment for married and

unmarried persons who are similarly situated, Mass. Gen. Law. Ann. ch. 272, §§ 21 and 21A, violate the [Equal Protection Clause](#).

## Lawyers' Edition Display

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### Summary

After delivering a lecture on overpopulation and contraception, the appellee invited members of the audience to come to the stage and to help themselves to contraceptive articles, and he personally handed a package of contraceptive foam to a young woman. As a result of giving the foam to the woman, he was convicted in a Massachusetts state court for violating a Massachusetts statute which made it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians were permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists were permitted to fill prescriptions for contraceptive drugs or articles for married persons. This conviction was affirmed by the [Massachusetts Supreme Judicial Court \(335 Mass 746, 247 NE2d 574\)](#). The United States District Court for the District of Massachusetts dismissed the appellee's petition for a writ of habeas corpus ([310 F Supp 951](#)), but the United States Court of Appeals for the First Circuit vacated the District Court's order and remanded the case with instructions to grant the writ discharging the appellee ([429 F2d 1398](#)).

On appeal, the United States Supreme Court affirmed the judgment of the Court of Appeals. In an opinion by Brennan, J., expressing the views of four members of the court, it was held that (1) although the appellee was not a physician or pharmacist and was not an unmarried person denied access to contraceptives, he had standing to assert the rights of unmarried persons denied access to contraceptives, and (2) the Massachusetts statute could not be upheld as a deterrent to fornication, or as a health measure, or as simply a prohibition on contraception, and the statute, by providing

dissimilar treatment for married and unmarried persons who were similarly situated, violated the [equal protection clause of the Fourteenth Amendment](#).

Douglas, J., concurring, joined the court's opinion, but would also base the decision on the [First Amendment](#), since passing a contraceptive article to a member of the audience could be regarded as merely a projection of the appellee's visual aid in conjunction with his lecture, and therefore as a permissible adjunct of free speech.

White and Blackmun, JJ., concurring in the result, stated that since the appellee could not constitutionally be convicted for distributing contraceptive foam to a married person, and since nothing in the record indicated whether the recipient of the foam was married or unmarried, (1) the conviction should be overturned because of the court's inability to ascertain whether the appellee was in fact convicted for making a constitutionally protected distribution of the foam to a married person, and (2) there was no reason to reach the constitutional question whether the state could restrict or forbid the distribution of contraceptives to unmarried persons.

Burger, Ch. J., dissenting, stated (1) that the Massachusetts statute validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician's prescription, (2) that the marital status of the recipient of the contraceptive foam had no bearing on the present case, and (3) that the appellee was properly convicted for dispensing medicinal material without a license.

Powell and Rehnquist, JJ., did not participate.

## Headnotes

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COURTS §805 > interpretation of state statute --  
> Headnote:

[LEdHN\[1\]](#) [1]

The construction of a state statute by the state's highest court is binding on the United States Supreme Court.

ADULTERY AND FORNICATION §1 > deterrence  
of extramarital relations -- > Headnote:

[LEdHN\[2A\]](#) [2A][LEdHN\[2B\]](#) [2B]

The purpose of state legislation restricting the distribution of contraceptives is not to promote marital fidelity, nor is the effect of such legislation to deter extramarital sexual relations, where the legislation permits contraceptives to be made available to married persons without regard to whether they are living with their spouses or the uses to which the contraceptives are to be put.

STATUTES §37 > standing to challenge --

> Headnote:

[LEdHN\[3\]](#) [3]

A person who has given a woman a package of contraceptive foam, and has been prosecuted for violating a state statute restricting the distribution of contraceptives, has sufficient interest in challenging the statute's validity to satisfy the "case or controversy" requirement of Article 3 of the Constitution.

STATUTES §37 > standing to challenge --

> Headnote:

[LEdHN\[4A\]](#) [4A][LEdHN\[4B\]](#) [4B]

Although an accused is not a physician or pharmacist and is not an unmarried person denied access to contraceptives, he has standing to assert

the rights of unmarried persons denied access to contraceptives, where (1) he has given a woman a package of contraceptive foam and has been prosecuted for violating a state statute which makes it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians are permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists are permitted to fill prescriptions for contraceptive drugs or articles for married persons, (2) the relationship between the accused and those whose rights he seeks to assert is that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so, the very point of his giving away the foam having been to challenge the statute which limited access to contraceptives, and (3) unmarried persons denied access to contraceptives are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights.

PARTIES §3 > standing -- > Headnote:

[LEdHN\[5\]](#) [5]

With respect to the determination whether a litigant has standing to assert the rights of third parties, the impact of the litigation on third-party interests is more important than the nature of the relationship between the litigant and those whose rights he seeks to assert.

CONSTITUTIONAL LAW §317 >

CONSTITUTIONAL LAW §319 > equal protection --  
classifications -- > Headnote:

[LEdHN\[6\]](#) [6]

Although the [equal protection clause of the Fourteenth Amendment](#) does not deny to states the power to treat different classes of persons in different ways, nevertheless the [equal protection](#)

[clause](#) denies to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.

CONSTITUTIONAL LAW §319 > equal protection -- reasonable classification -- > Headnote:

[LEdHN\[7\]](#) [7]

Under the [equal protection clause of the Fourteenth Amendment](#), a statutory classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

CONSTITUTIONAL LAW §318 > equal protection -- basis for classification -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

If a state statute impinges upon fundamental freedoms protected by the Constitution, the statutory classification must, under the [equal protection clause](#), be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest.

CONSTITUTIONAL LAW §501 > equal protection -- criminal statute -- distribution of contraceptives -- > Headnote:

[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B]

There is no ground of difference that rationally explains the different treatment accorded married and unmarried persons under a state statute which makes it a crime to sell, lend, or give away any

contraceptive drug, medicine, instrument, or article, except that physicians are permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists are permitted to fill prescriptions for contraceptive drugs or articles for married persons; consequently, by providing dissimilar treatment for married and unmarried persons who are similarly situated, the statute violates the [equal protection clause of the Fourteenth Amendment](#).

CONSTITUTIONAL LAW §321 > equal protection -- > Headnote:

[LEdHN\[10\]](#) [10]

A state may, consistently with the [equal protection clause of the Fourteenth Amendment](#), regard the problems of extramarital and premarital sexual relations as evils of different dimensions and proportions, requiring different remedies.

ADULTERY AND FORNICATION §1 > deterrence of premarital relations -- > Headnote:

[LEdHN\[11\]](#) [11]

The deterrence of premarital sexual relations may not reasonably be regarded as the purpose of a state statute restricting the distribution of contraceptives, where (1) the statute makes it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians are permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists are permitted to fill prescriptions for contraceptive drugs or articles for married persons, (2) it would be plainly unreasonable to assume that the state has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, (3) even if the fear of pregnancy may be assumed to operate as a deterrent to fornication, the statute does not regulate the distribution of contraceptives

when they are to be used to prevent not pregnancy, but the spread of disease, and in making contraceptives available to married persons without regard to their intended use, the state does not attempt to deter married persons from engaging in illicit sexual relations with unmarried persons, and (4) the statute on its face has a dubious relation to the state's criminal prohibition on fornication, since a violation of the statute is a felony punishable by 5 years in prison, whereas fornication is a misdemeanor punishable by a \$ 30 fine or by 3 months in jail.

HEALTH §1.5 > restricting distribution of contraceptives -- > Headnote:

[LEdHN\[12A\]](#) [12A][LEdHN\[12B\]](#) [12B]

Despite a state statute's superficial earmarks as a health measure, the statute may not reasonably be regarded as a health measure where (1) the statute makes it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians are permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists are permitted to fill prescriptions for contraceptive drugs or articles for married persons, (2) if health were the rationale of the statute, it would be both discriminatory in some respects and overbroad in other respects, and (3) prior to the enactment of the statute, other laws, both state and federal, already regulated the distribution of harmful drugs.

CONSTITUTIONAL LAW §336 > equal protection -- invidious discrimination -- health measure --

> Headnote:

[LEdHN\[13\]](#) [13]

If a state statute is intended as a health measure--where such statute prohibits the distribution of any contraceptive drug, medicine, instrument, or article,

except that physicians are permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists are permitted to fill prescriptions for contraceptive drugs or articles for married persons--the statute invidiously discriminates against unmarried persons, since the need to have a physician prescribe, and a pharmacist dispense, contraceptives is as great for unmarried persons as for married persons.

STATUTES §18 > overbreadth -- > Headnote:

[LEdHN\[14\]](#) [14]

If a state statute is intended as a health measure, such statute making it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians are permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists are permitted to fill prescriptions for contraceptive drugs or articles for married persons, the statute is overbroad with respect to married persons, since not all contraceptives are potentially dangerous.

CONSTITUTIONAL LAW §501 > equal protection -- criminal statute -- distribution of contraceptives --

> Headnote:

[LEdHN\[15A\]](#) [15A][LEdHN\[15B\]](#) [15B]

A state statute restricting the distribution of contraceptives cannot be sustained simply as a prohibition on contraception, where the statute makes it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians are permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists are permitted to fill prescriptions for contraceptive drugs or articles for married persons; whatever the rights of the individual to access to contraceptives may be, the rights must, under the [equal protection clause](#), be

the same for unmarried persons and married persons; if the distribution of contraceptives to married persons cannot constitutionally be prohibited, a ban on distribution to unmarried persons would be equally impermissible, and if there is no constitutional bar to a prohibition on the distribution of contraceptives, a state may not, consistently with the [equal protection clause](#), outlaw distribution to unmarried but not to married persons, since in each case the evil, as perceived by the state, would be identical, and the underinclusion would be invidious.

PRIVACY §1 > right to -- > Headnote:

[LEdHN\[16\]](#) [16]

The right of privacy gives an individual, married or single, the 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.

PRIVACY §1 > right to -- > Headnote:

[LEdHN\[17A\]](#) [17A][LEdHN\[17B\]](#) [17B]

The right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy, is a fundamental right.

## Syllabus

Appellee attacks his conviction of violating Massachusetts law for giving a woman a contraceptive foam at the close of his lecture to students on contraception. That law makes it a felony for anyone to give away a drug, medicine, instrument, or article for the prevention of conception except in the case of (1) a registered physician administering or prescribing it for a married person or (2) an active registered

pharmacist furnishing it to a married person presenting a registered physician's prescription. The District Court dismissed appellee's petition for a writ of habeas corpus. The Court of Appeals vacated the dismissal, holding that the statute is a prohibition on contraception *per se* and conflicts "with fundamental human rights" under [Griswold v. Connecticut, 381 U.S. 479](#). Appellant, *inter alia*, argues that appellee lacks standing to assert the rights of unmarried persons denied access to contraceptives because he was neither an authorized distributor under the statute nor a single person unable to obtain contraceptives. *Held* [\*\*\*\*2] :

1. If, as the Court of Appeals held, the statute under which appellee was convicted is not a health measure, appellee may not be prevented, because he was not an authorized distributor, from attacking the statute in its alleged discriminatory application to potential distributees. Appellee, furthermore, has standing to assert the rights of unmarried persons denied access to contraceptives because their ability to obtain them will be materially impaired by enforcement of the statute. Cf. [Griswold, supra](#); [Barrows v. Jackson, 346 U.S. 249](#). Pp. 443-446.

2. By providing dissimilar treatment for married and unmarried persons who are similarly situated, the statute violates the [Equal Protection Clause of the Fourteenth Amendment](#). Pp. 446-455.

(a) The deterrence of fornication, a 90-day misdemeanor under Massachusetts law, cannot reasonably be regarded as the purpose of the statute, since the statute is riddled with exceptions making contraceptives freely available for use in premarital sexual relations and its scope and penalty structure are inconsistent with that purpose. Pp. 447-450.

(b) Similarly, the protection of public health through [\*\*\*\*3] the regulation of the distribution of potentially harmful articles cannot reasonably be regarded as the purpose of the law, since, if health were the rationale, the statute would be both discriminatory and overbroad, and federal and state

laws already regulate the distribution of drugs unsafe for use except under the supervision of a licensed physician. Pp. 450-452.

(c) Nor can the statute be sustained simply as a prohibition on contraception *per se*, for whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. If under [Griswold, supra](#), the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible, since the constitutionally protected right of privacy inheres in the individual, not the marital couple. If, on the other hand, *Griswold* is no bar to a prohibition on the distribution of contraceptives, a prohibition limited to unmarried persons would be under inclusive and invidiously discriminatory. Pp. 452-455.

**Counsel:** Joseph R. Nolan, Special Assistant Attorney General of Massachusetts, argued [\*\*\*\*4] the cause for appellant. With him on the brief were Robert H. Quinn, Attorney General, John J. Irwin, Jr., and Ruth I. Abrams, Assistant Attorneys General, and Garrett H. Byrne.

Joseph D. Tydings argued the cause for appellee. With him on the briefs was Joseph J. Balliro.

Briefs of amici curiae urging affirmance were filed by Harriet F. Pilpel and Nancy F. Wechsler for the Planned Parenthood Federation of America, Inc.; by Roger P. Stokey for the Planned Parenthood League of Massachusetts; by Melvin L. Wulf for the American Civil Liberties Union et al.; and by Sylvia S. Ellison for Human Rights for Women, Inc.

**Judges:** Brennan, J., delivered the opinion of the Court, in which Douglas, Stewart, and Marshall, JJ., joined. Douglas, J., filed a concurring opinion, post, p. 455. White, J., filed an opinion concurring in the result, in which Blackmun, J., joined, post, p. 460. Burger, C. J., filed a dissenting opinion, post, p. 465. Powell and Rehnquist, JJ., took no part in the consideration or decision of the case.

**Opinion by:** BRENNAN

## Opinion

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[\*440] [\*\*\*354] [\*\*1031] MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts [\*\*\*\*5] Superior Court under [Massachusetts General Laws Ann., c. 272, § 21](#), first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.<sup>1</sup> The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's [First Amendment](#) rights, but by a four-to-three vote sustained the conviction for [\*\*\*355] giving away the foam. [Commonwealth v. Baird, 355 Mass. 746, 247 N. E. 2d 574 \(1969\)](#). Baird subsequently filed a petition for a federal writ of habeas corpus, which the [\*\*1032] District Court dismissed. [310 F.Supp. 951 \(1970\)](#). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird. [429 F.2d 1398 \(1970\)](#). This appeal by the Sheriff of Suffolk County, Massachusetts, followed, and we noted probable jurisdiction. [401 U.S. 934 \(1971\)](#). We affirm.

[\*\*\*\*6] [LEdHN\[1\]](#) [1][Massachusetts General Laws Ann., c. 272, § 21](#), under which Baird was convicted, provides a maximum five-year term of imprisonment for "whoever . . . gives away . . . any drug, medicine, instrument or article whatever [\*\*441] for the prevention of conception," except as authorized in [§ 21A](#). Under [§ 21A](#), "[a] registered physician may administer to or prescribe

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<sup>1</sup>The Court of Appeals below described the recipient of the foam as "an unmarried adult woman." [429 F.2d 1398, 1399 \(1970\)](#). However, there is no evidence in the record about her marital status.

for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician." <sup>2</sup> As interpreted by the State Supreme Judicial [\*442] Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of [§ 21A](#), to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees -- *first*, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; *second*, single persons may not obtain [\*\*\*\*7]

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<sup>2</sup> [Section 21](#) provides in full:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

[Section 21A](#) provides in full:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

contraceptives from anyone to prevent pregnancy; and, *third*, married or single persons may obtain contraceptives from anyone to prevent, not pregnancy, but the spread of disease. This construction [\*\*\*356] of state law is, of course, binding on us. *E. g.*, [Gropi v. Wisconsin, 400 U.S. 505, 507 \(1971\)](#).

[\*\*\*\*8] [LEdHN\[2A\]](#) [2A]The legislative purposes that the statute is meant to serve are not altogether clear. In [Commonwealth v. Baird, supra](#), the Supreme Judicial Court noted only the State's interest in protecting the health of its citizens: "The prohibition in [§ 21](#)," the court declared, "is directly related to" the State's goal of "preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." [355 Mass., at 753, 247 N. E. 2d, at 578](#). In a subsequent decision, [Sturgis v. Attorney General, 358 Mass. 37, \[\\*\\*1033\] 260 N. E. 2d 687, 690 \(1970\)](#), the court, however, found "a second and more compelling ground for upholding the statute" -- namely, to protect morals through "regulating the private sexual lives of single persons." <sup>3</sup> The Court of Appeals, for reasons that will [\*443] appear, did not consider the promotion of health or the protection of morals through the deterrence of fornication to be the legislative aim. Instead, the court concluded that the statutory goal was to limit contraception in and of itself -- a [\*\*\*\*9] purpose that the court held conflicted "with fundamental human rights" under [Griswold v. Connecticut, 381 U.S. 479 \(1965\)](#), where this Court struck down Connecticut's prohibition against the use of contraceptives as an unconstitutional infringement

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<sup>3</sup> Appellant suggests that the purpose of the Massachusetts statute is to promote marital fidelity as well as to discourage premarital sex. Under [§ 21A](#), however, contraceptives may be made available to married persons without regard to whether they are living with their spouses or the uses to which the contraceptives are to be put. Plainly the legislation has no deterrent effect on extramarital sexual relations.

of the right of marital privacy. [429 F.2d, at 1401-1402](#).

### [LEdHN\[2B\]](#) [2B]

We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of [§§ 21](#) and [21A](#). And we hold that the statute, viewed as a prohibition on contraception *per se* [\*\*\*\*10], violates the rights of single persons under the [Equal Protection Clause of the Fourteenth Amendment](#).

I

[LEdHN\[3\]](#) [3][LEdHN\[4A\]](#) [4A]We address at the outset appellant's contention that Baird does not have standing to assert the rights of unmarried persons denied access to contraceptives because he was neither an authorized distributor under [§ 21A](#) nor a single person unable to obtain contraceptives. There can be no question, of course, that Baird has sufficient interest in challenging the statute's validity to satisfy the "case or controversy" requirement of Article III of the Constitution.<sup>4</sup> Appellant's argument, however, is that [\*444] this case is [\*\*\*357] governed by the Court's self-imposed rules of restraint, *first*, that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional," [United States v. Raines, 362 U.S. 17, 21 \(1960\)](#), and, *second*, the "closely related corollary that a litigant

may only assert his own constitutional rights or immunities," [id., at 22](#). [\*\*\*\*11] Here, appellant contends that Baird's conviction rests on the restriction in [§ 21A](#) on permissible distributors and that that restriction serves a valid health interest independent of the limitation on authorized distributees. Appellant urges, therefore, that Baird's action in giving away the foam fell squarely within the conduct that the legislature meant and had power to prohibit and that Baird should not be allowed to attack the statute in its application to potential recipients. In any event, appellant concludes, since Baird was not himself a single person denied access to contraceptives, he should not be heard to assert their rights. We cannot agree.

[\*\*\*\*12] The Court of Appeals held that the statute under which Baird was convicted is not a health measure. If that view is correct, we do not see how Baird [\*\*1034] may be prevented, because he was neither a doctor nor a druggist, from attacking the statute in its alleged discriminatory application to potential distributees. We think, too, that our self-imposed rule against the assertion of third-party rights must be relaxed in this case just as in [Griswold v. Connecticut, supra](#). There the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician who had prescribed contraceptives for married persons and been convicted as accessories to the crime of using contraceptives were held to have standing to raise the constitutional rights of the patients with whom they had a professional relationship. [\*445] Appellant here argues that the absence of a professional or aiding-and-abetting relationship distinguishes this case from *Griswold*. Yet, as the Court's discussion of prior authority in [Griswold, 381 U.S., at 481](#), indicates, [HN1](#) the doctor-patient and accessory-principal relationships are not the only circumstances [\*\*\*\*13] in which one person has been found to have standing to assert the rights of another. Indeed, in [Barrows v. Jackson, 346 U.S. 249 \(1953\)](#), a seller of land was entitled to defend against an action for damages for breach of a racially restrictive covenant on the ground that enforcement of the covenant violated

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<sup>4</sup>This factor decisively distinguishes [Tileston v. Ullman, 318 U.S. 44 \(1943\)](#), where the Court held that a physician lacked standing to bring an action for declaratory relief to challenge, on behalf of his patients, the Connecticut law prohibiting the use of contraceptives. The patients were fully able to bring their own action. Underlying the decision was the concern that "the standards of 'case or controversy' in Article III of the Constitution [not] become blurred," [Griswold v. Connecticut, 381 U.S. 479, 481 \(1965\)](#) -- a problem that is not at all involved in this case.

the equal protection rights of prospective non-Caucasian purchasers. The relationship there between the defendant and those whose rights he sought to assert was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself. *Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599, 631 (1962). And so here the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so. The very point of Baird's giving away the [\*\*\*358] vaginal foam was to challenge the Massachusetts statute that limited access to [\*\*\*\*14] contraceptives.

[LEdHN\[5\]](#) [5]In any event, more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests.<sup>5</sup> In [Griswold](#), 381 U.S., at 481, the [\*446] Court stated: "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." A similar situation obtains here. Enforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives. In fact, the case for according standing to assert third-party rights is stronger in this regard here than in *Griswold* because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves

subject to prosecution and, to that extent, are denied a forum in which to assert their own rights. Cf. [NAACP v. Alabama](#), 357 U.S. 449 (1958); [Barrows v. Jackson](#), *supra*.<sup>6</sup> The Massachusetts statute, unlike the Connecticut law [\*\*\*\*15] considered in [\*\*1035] *Griswold*, prohibits, not use, but distribution.

[LEdHN\[4B\]](#) [4B]For the foregoing reasons we hold that Baird, who [\*\*\*\*16] is now in a position, and plainly has an adequate incentive, to assert the rights of unmarried persons denied access to contraceptives, has standing to do so. We turn to the merits.

## II

[LEdHN\[6\]](#) [6][LEdHN\[7\]](#) [7][LEdHN\[8A\]](#) [8A][LEdHN\[9A\]](#) [9A]The basic principles governing application of the [Equal Protection Clause of the Fourteenth Amendment](#) are familiar. As THE CHIEF JUSTICE only recently explained in [Reed v. Reed](#), 404 U.S. 71, 75-76 (1971):

[HN2](#) "In applying that clause, this Court has consistently recognized that the [Fourteenth Amendment](#) [\*447] does not deny to States the power to treat different classes of persons in different ways. [Barbier v. Connolly](#), 113 U.S. 27 (1885); [Lindsley v. Natural Carbonic Gas Co.](#), 220 U.S. 61 (1911); [Railway Express Agency v. New York](#), 336 U.S. 106 (1949); [McDonald v. Board of Election Commissioners](#), 394 U.S. 802 (1969). The [Equal Protection Clause](#) of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the [\*\*\*359] basis of criteria wholly unrelated to the objective of

<sup>5</sup> Indeed, in [First Amendment](#) cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech. *E. g.*, [Thornhill v. Alabama](#), 310 U.S. 88, 97-98 (1940). See [United States v. Raines](#), 362 U.S. 17, 22 (1960).

<sup>6</sup> See also [Prince v. Massachusetts](#), 321 U.S. 158 (1944), where a custodian, in violation of state law, furnished a child with magazines to distribute on the streets. The Court there implicitly held that the custodian had standing to assert alleged freedom of religion and equal protection rights of the child that were threatened in the very litigation before the Court and that the child had no effective way of asserting herself.

that [\*\*\*\*17] statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)."

The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under *Massachusetts General Laws Ann., c. 272, §§ 21 and 21A*.<sup>7</sup> For the reasons that follow, we conclude that no such ground exists.

[LEdHN\[8B\]](#) [8B]

[\*\*\*\*18] [LEdHN\[10\]](#) [10] [LEdHN\[11\]](#) [11] *First. Section 21* stems from Mass. Stat. 1879, c. 159, § 1, which prohibited, without exception, distribution of articles intended to be used as contraceptives. In *Commonwealth v. Allison*, 227 Mass. 57, 62, 116 N. E. 265, 266 [\*448] (1917), the Massachusetts Supreme Judicial Court explained that the law's "plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women." Although the State clearly abandoned that purpose with the enactment of [§ 21A](#), at least insofar as the illicit sexual activities of married persons are concerned, see n. 3, *supra*, the court reiterated in *Sturgis v.*

*Attorney General, supra*, that the object of the legislation is to discourage premarital sexual intercourse. Conceding that the State could, consistently with the *Equal Protection Clause*, regard the problems of extramarital and premarital sexual relations as "evils . . . of different dimensions and proportions, requiring different remedies," *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), [\*\*\*\*19] we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law.

[\*\*1036] It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under *Massachusetts General Laws Ann., c. 272, § 18*. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective. What Mr. Justice Goldberg said in *Griswold v. Connecticut, supra, at 498* (concurring opinion), concerning the effect of Connecticut's prohibition on the use of contraceptives in discouraging extramarital sexual relations, is equally applicable here. "The rationality of this justification is dubious, particularly in light of the [\*\*\*360] admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the [\*449] prevention of disease, as distinguished from the prevention of conception." [\*\*\*\*20] See also *id., at 505-507* (WHITE, J., concurring in judgment). Like Connecticut's laws, [§§ 21 and 21A](#) do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease. *Commonwealth v. Corbett*, 307 Mass. 7, 29 N. E. 2d 151 (1940), cited with approval in *Commonwealth v. Baird*, 355 Mass., at 754, 247 N. E. 2d, at 579. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual

<sup>7</sup>Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. *E. g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967). But just as in *Reed v. Reed*, 404 U.S. 71 (1971), we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.

Moreover, [§§ 21](#) and [21A](#) on their face have a dubious relation to the State's criminal prohibition on fornication. As the Court of Appeals explained, "Fornication is a misdemeanor [in Massachusetts], entailing a thirty dollar fine, or three months in jail. [Massachusetts \[\\*\\*\\*\\*21\] General Laws Ann. c. 272 § 18](#). Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor." [429 F.2d, at 1401](#). Even conceding the legislature a full measure of discretion in fashioning means to prevent fornication, and recognizing that the State may seek to deter prohibited conduct by punishing more severely those who facilitate than those who actually engage in its commission, we, like the Court of Appeals, cannot believe that in this instance Massachusetts has chosen to expose the aider and abetter who simply *gives away* a contraceptive to [\[\\*450\]](#) 20 times the 90-day sentence of the offender himself. The very terms of the State's criminal statutes, coupled with the *de minimis* effect of [§§ 21](#) and [21A](#) in deterring fornication, thus compel the conclusion that such deterrence cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons.

[LEdHN\[12A\]](#) [12A]Second. [Section 21A](#) was added [\[\\*\\*\\*\\*22\]](#) to the Massachusetts General Laws by Stat. 1966, c. 265, § 1. The Supreme Judicial Court in [Commonwealth v. Baird, supra](#), held that the purpose of the amendment was to serve the health needs of the community by regulating the distribution of potentially harmful articles. It is plain that Massachusetts had no such

purpose in mind before the enactment of [§ 21A](#). As the Court of Appeals remarked, "Consistent with the fact that the statute was contained in a chapter dealing with 'Crimes Against Chastity, Morality, Decency and Good Order,' it was cast only in terms of morals. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. [Commonwealth v. Gardner, 1938, 300 Mass. 372, 15 N. E. 2d 222](#)." [429 F.2d, at 1401](#). Nor did the Court of Appeals "believe [\[\\*\\*1037\]](#) that the legislature [in enacting [§ 21A](#)] suddenly reversed its field and developed an interest in health. Rather, it merely made what [\[\\*\\*\\*361\]](#) it thought to be the precise accommodation necessary to escape the *Griswold* ruling." *Ibid*.

[LEdHN\[13\]](#) [13][LEdHN\[14\]](#) [14]Again, we must agree with the Court of Appeals. If health [\[\\*\\*\\*\\*23\]](#) were the rationale of [§ 21A](#), the statute would be both discriminatory and overbroad. Dissenting in [Commonwealth v. Baird, 355 Mass., at 758, 247 N. E. 2d, at 581](#), Justices Whittemore and Cutter stated that they saw "in [§ 21](#) and [§ 21A](#), read together, no public health purpose. If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons." [\[\\*451\]](#) The Court of Appeals added: "If the prohibition [on distribution to unmarried persons] . . . is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality." [429 F.2d, at 1401](#). <sup>8</sup> [\[\\*\\*\\*\\*25\]](#) Furthermore, we must join the Court of Appeals in

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<sup>8</sup> Appellant insists that the unmarried have no right to engage in sexual intercourse and hence no health interest in contraception that needs to be served. The short answer to this contention is that the same devices the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease. It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same.

noting that not all contraceptives are potentially dangerous.<sup>9</sup> As a result, if the Massachusetts statute were a health measure, it would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married, a fact that the Supreme [\*\*\*\*24] Judicial Court itself seems to have conceded in *Sturgis v. Attorney General*, 358 Mass., at , 260 N. E. 2d, at 690, where it noted that "it may well be that certain contraceptive medication and devices constitute no hazard to health, in which event it could be argued that the statute swept too broadly in its prohibition." "In this posture," as the Court of [\*452] Appeals concluded, "it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married." [429 F.2d, at 1401](#).

[LEdHN\[12B\]](#) [12B]But if further proof that the Massachusetts statute is not a health measure is necessary, the argument of Justice Spiegel, who also dissented in [Commonwealth v. Baird](#), 355 Mass., at 759, 247 N. E. 2d, at 582, is conclusive: "It is at best a strained conception to say that the Legislature intended to prevent the distribution of articles 'which may have undesirable, if not dangerous, physical consequences.' If that was the Legislature's [\*\*\*\*26] goal, [§ 21](#) is not required" in view of the federal and state laws *already* regulating the [\*\*\*362] distribution of harmful drugs. See Federal Food, Drug, and Cosmetic Act, § 503, 52 Stat. 1051, as amended, [21 U. S. C. § 353](#); [Mass. Gen. Laws Ann., c. 94, § 187A](#), as

amended. We conclude, accordingly, that, despite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations.

[\*\*1038] [LEdHN\[15A\]](#) [15A]Third. If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? The Court of Appeals analysis "led inevitably to the conclusion that, so far as morals are concerned, it is contraceptives per se that are considered immoral -- to the extent that *Griswold* will permit such a declaration." [429 F.2d, at 1401-1402](#). The Court of Appeals went on to hold, [id., at 1402](#):

"To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, [\*\*\*\*27] means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and [\*453] for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state."

We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

[LEdHN\[16\]](#) [16] [LEdHN\[17A\]](#) [17A]If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an

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<sup>9</sup> The Court of Appeals stated, [429 F.2d, at 1401](#):

"We must take notice that not all contraceptive devices risk 'undesirable . . . [or] dangerous physical consequences.' It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a 'redingote anglais.' The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products."

independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. [HN3](#) If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from [\*\*\*\*28] unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See [Stanley v. Georgia, 394 U.S. 557 \(1969\)](#).

<sup>10</sup> See also [Skinner v. Oklahoma, \[\\*454\] 316 U.S. 535 \[\\*\\*\\*363\] \(1942\)](#); [Jacobson v. Massachusetts, 197 U.S. 11, 29 \(1905\)](#).

[LEdHN\[17B\]](#) [17B]

[\*\*\*\*29] [LEdHN\[9B\]](#) [9B][LEdHN\[15B\]](#) [15B] On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the [Equal Protection Clause](#), outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. Mr. Justice Jackson, concurring in [Railway Express Agency v. New York, 336 U.S. 106, 112-113 \(1949\)](#), made the point:

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<sup>10</sup> In [Stanley, 394 U.S., at 564](#), the Court stated:

"Also [HN4](#) fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

""The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized man.' [Olmstead v. United States, 277 U.S. 438, 478 \(1928\)](#) (Brandeis, J., dissenting).

"See [Griswold v. Connecticut, supra](#); cf. [NAACP v. Alabama, 357 U.S. 449, 462 \(1958\)](#)."

"The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. [**\*\*1039**] Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Although Mr. Justice [\*\*\*\*30] Jackson's comments had reference to administrative regulations, the principle he affirmed has equal application to the legislation here. We hold that [HN5](#) by providing dissimilar treatment for married and unmarried persons who are similarly situated, [Massachusetts \[\\*455\] General Laws Ann., c. 272, §§ 21 and 21A](#), violate the [Equal Protection Clause](#). The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

**Concur by:** DOUGLAS; WHITE

**Concur**

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MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to me is a simple [First Amendment](#) case, that amendment being applicable to the States by reason of the Fourteenth. [Stromberg v. California, 283 U.S. 359](#).

Under no stretch of the law as presently stated could Massachusetts require a license for those who desire to lecture on planned parenthood,

contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. As to license taxes on [First Amendment](#) rights we said in [Murdock v. Pennsylvania, 319 U.S. 105, 115](#): [\*\*\*\*31]

"A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the [First Amendment](#) along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

We held in [Thomas v. Collins, 323 U.S. 516](#), that a person speaking at a labor [\*\*\*364] union rally could not be required to register or obtain a license:

"As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights [\*456] of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others [\*\*\*\*32] to assemble and discuss their affairs and to enlist the support of others.

....

". . . If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the [First Amendment](#)." [Id., at 539, 540](#).

Baird addressed an audience of students and faculty at Boston University on the subject of birth control and overpopulation. His address was approximately one hour in length and consisted of a discussion of various contraceptive devices displayed by means of diagrams on two demonstration boards, as well as a display of contraceptive devices [\*\*1040] in their original packages. In addition, Baird spoke of the respective merits of various contraceptive devices; overpopulation in the world; crises throughout the world due to overpopulation; the large number of abortions performed on unwed mothers; and quack abortionists [\*\*\*\*33] and the potential harm to women resulting from abortions performed by quack abortionists. Baird also urged members of the audience to petition the Massachusetts Legislature and to make known their feelings [\*457] with regard to birth control laws in order to bring about a change in the laws. At the close of the address Baird invited members of the audience to come to the stage and help themselves to the contraceptive articles. We do not know how many accepted Baird's invitation. We only know that Baird personally handed one woman a package of Emko Vaginal Foam. He was then arrested and indicted (1) for exhibiting contraceptive devices and (2) for giving one such device away. The conviction for the first offense was reversed, the Supreme Judicial Court of Massachusetts holding that the display of the articles was essential to a graphic representation of the lecture. But the conviction for the giving away of one article was sustained. [355 Mass. 746, 247 N. E. 2d 574](#). The case reaches us by federal habeas corpus.

Had Baird not "given away" a sample of one of the devices whose use he advocated, there could be no question about the protection afforded [\*\*\*\*34] him by the [First Amendment](#). A State may not "contract the spectrum of available knowledge." [Griswold v. Connecticut, 381 U.S. 479, 482](#). See also [Thomas v. Collins, supra](#); [Pierce v. Society of Sisters, 268 U.S. 510](#); [Meyer v. Nebraska, 262 U.S. 390](#). However noxious Baird's ideas might [\*\*\*365] have been to the authorities, the freedom

to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the "conventional wisdom," may not be abridged. Terminiello v. Chicago, 337 U.S. 1. Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully apprised of the merits of a controversy.

"Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102.

The teachings of Baird and those of Galileo might be [\*458] of a different order; [\*\*\*\*35] but the suppression of either is equally repugnant.

As Milton said in the Areopagitica, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

It is said that only Baird's conduct is involved and United States v. O'Brien, 391 U.S. 367, is cited. That case involved a registrant under the Selective Service Act burning his Selective Service draft card. When prosecuted for that act, he defended his conduct as "symbolic speech." The Court held it was not.

Whatever may be thought of that decision on the merits, <sup>1</sup> *O'Brien* is not controlling here. The distinction between "speech" and "conduct" is a valid one, insofar as it helps to determine in a particular case whether the purpose of the activity was to aid in the communication of ideas, and whether the form of the communication so interferes with the rights of others that reasonable

regulations may be imposed. <sup>2</sup> See Public [\*\*1041] Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (DOUGLAS, J., dissenting). [\*459] Thus, excessive noise might well be "conduct" -- a form of pollution -- which can be made subject to precise, [\*\*\*\*36] narrowly drawn regulations. See Adderley v. Florida, 385 U.S. 39, 54 (DOUGLAS, J., dissenting). But "this Court has repeatedly stated, [First Amendment] rights are not confined to verbal expression. They embrace appropriate types of action . . . ." Brown v. Louisiana, 383 U.S. 131, 141-142.

[\*\*\*\*37] Baird gave an hour's lecture on [\*\*\*366] birth control and as an aid to understanding the ideas which he was propagating he handed out one sample of one of the devices whose use he was endorsing. A person giving a lecture on coyote-getters would certainly improve his teaching technique if he passed one out to the audience; and he would be protected in doing so unless of course the device was loaded and ready to explode, killing or injuring people. The same holds true in my mind for mousetraps, spray guns, or any other article not dangerous *per se* on which speakers give educational lectures.

It is irrelevant to the application of these principles that Baird went beyond the giving of information about birth control and advocated the use of contraceptive articles. The First Amendment protects the opportunity to persuade to action

<sup>2</sup> In Giboney v. Empire Storage Co., 336 U.S. 490, the Court upheld a state court injunction against peaceful picketing carried on in violation of a state "anti-restraint-of-trade" law. *Giboney*, however, is easily distinguished from the present case. Under the circumstances there present, "There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making [state antitrust] policy a dead letter . . . . They were exercising their economic power together with that of their allies to compel Empire to abide by union rather than by state regulation of trade." *Id.*, at 503 (footnote omitted; emphasis supplied). There is no such coercion in the instant case nor is there a similar frustration of state policy, see text at n. 4, *infra*. For an analysis of the state policies underlying the Massachusetts statute which Baird was convicted of having violated, see Dienes, *The Progeny of Comstockery -- Birth Control Laws Return to Court*, 21 Am. U. L. Rev. 1, 3-44 (1971).

<sup>1</sup> I have earlier expressed my reasons for believing that the *O'Brien* decision was not consistent with First Amendment rights. See Brandenburg v. Ohio, 395 U.S. 444, 455 (concurring opinion).

whether that action be unwise or immoral, or whether the speech incites to action. See, e. g., [Brandenburg v. Ohio](#), 395 U.S. 444; [Edwards v. South Carolina](#), 372 U.S. 229; [Terminiello v. Chicago](#), *supra*.

In this case there was not even incitement to action.

<sup>3</sup> There is no evidence [\*\*\*\*38] or finding that Baird intended that the young lady take the foam home with her when he handed it to her or that she would not have examined the [\*460] article and then returned it to Baird, had he not been placed under arrest immediately upon handing the article over.<sup>4</sup>

[First Amendment](#) rights are not limited to verbal expression.<sup>5</sup> The right to petition often involves the right to walk. The right of assembly may mean pushing or jostling. Picketing [\*\*\*\*39] involves physical activity as well as a display of a sign. A sit-in can be a quiet, dignified protest that has [First Amendment](#) protection even though no speech is involved, as we held in [Brown v. Louisiana](#), *supra*. Putting contraceptives on display is certainly an aid to speech and discussion. Handing an article under discussion to a member of the audience is a technique known to all teachers and is commonly used. A handout may be on such a scale as to smack of a vendor's marketing scheme. But passing one article to an [\*\*1042] audience is merely a projection of the visual aid and should be a permissible adjunct of free speech. Baird was not making a prescription nor purporting to give

medical advice. Handing out the article was not even a suggestion that the lady use it. At most it suggested that she become familiar with the product line.

[\*\*\*\*40] I do not see how we can have a Society of the Dialogue, which the [First Amendment](#) envisages, if time-honored teaching techniques are barred to those who give educational lectures.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in the result.

[\*\*\*367] In [Griswold v. Connecticut](#), 381 U.S. 479 (1965), we reversed criminal convictions for advising married persons [\*461] with respect to the use of contraceptives. As there applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded a zone of marital privacy protected by the [Bill of Rights](#). The Connecticut law did not regulate the manufacture or sale of such products and we expressly left open any question concerning the permissible scope of such legislation. 381 U.S., at 485.

Chapter 272, § 21, of the Massachusetts General Laws makes it a criminal offense to distribute, sell, or give away any drug, medicine, or article for the prevention of conception. [Section 21A](#) excepts from this prohibition registered physicians who prescribe for and administer such articles to married persons and registered pharmacists who dispense [\*\*\*\*41] on medical prescription.<sup>1</sup>

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<sup>3</sup> Even under the restrictive meaning which the Court has given the [First Amendment](#), as applied to the States by the Fourteenth, advocacy of law violation is permissible "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [Brandenburg v. Ohio](#), *supra*, n. 1, at 447.

<sup>4</sup> This factor alone would seem to distinguish [O'Brien](#), *supra*, as that case turned on the Court's judgment that O'Brien's "conduct" frustrated a substantial governmental interest.

<sup>5</sup> For a partial collection of cases involving action that comes under [First Amendment](#) protection see [Brandenburg v. Ohio](#), *supra*, n. 1, at 455-456 (concurring opinion).

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<sup>1</sup> [Section 21](#) provides as follows:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor

[\*\*\*\*42] [\*462] Appellee Baird was indicted for giving away Emko Vaginal Foam, a "medicine and article for the prevention of conception . . . ." <sup>2</sup> [\*\*\*\*43] The State did not purport to charge or convict Baird for distributing to an unmarried person. No proof was offered as to the marital status of the recipient. The gravamen of the offense charged was that Baird [\*\*1043] had no license and therefore no authority to distribute to anyone. As the Supreme Judicial Court of Massachusetts noted, the constitutional validity of Baird's conviction rested [\*\*\*368] upon his lack of status as a "distributor and not . . . the marital status of the recipient." *Commonwealth v. Baird*, 355 Mass. 746, 753, 247 N. E. 2d 574, 578 (1969). The Federal District Court was of the same view. <sup>3</sup>

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more than one thousand dollars."

[Section 21A](#) makes these exceptions:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

"A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

"This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

<sup>2</sup> The indictment states:

"The Jurors for the Commonwealth of Massachusetts on their oath present that William R. Baird, on the sixth day of April, in the year of our Lord one thousand nine hundred and sixty-seven, did unlawfully give away a certain medicine and article for the prevention of conception, to wit: Emko Vaginal Foam, the giving away of the said medicine and article by the said William R. Baird not being in accordance with, or authorized or permitted by, the provisions of [Section 21A](#) of Chapter 272, of the General Laws of the said Commonwealth."

<sup>3</sup> Had [§ 21A](#) authorized registered physicians to administer or prescribe contraceptives for unmarried as well as for married persons, the legal position of the petitioner would not have been in any way altered. Not being a physician he would still have been

[\*463] I assume that a State's interest in the health of its citizens empowers it to restrict to medical channels the distribution of products whose use should be accompanied by medical advice. I also do not doubt that various contraceptive medicines and articles are properly available only on prescription, and I therefore have no difficulty with the Massachusetts court's characterization of the statute at issue here as expressing "a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences." *Id.*, at 753, 247 N. E. 2d, at 578. Had Baird distributed a supply of the so-called "pill," I would sustain his conviction under this [\*\*\*\*44] statute. <sup>4</sup> Requiring a prescription to obtain potentially dangerous contraceptive material may place a substantial burden upon the right recognized in *Griswold*, but that burden is justified by a strong state interest and does not, as did the statute at issue in *Griswold*, sweep unnecessarily broadly or seek "to achieve its goals by means having a maximum destructive impact upon" a protected relationship. *Griswold v. Connecticut*, 381 U.S., at 485.

Baird, however, was found guilty of giving away vaginal foam. Inquiry into the validity of this conviction does [\*\*\*\*45] not come to an end merely because some contraceptives are harmful and their distribution may be restricted. Our general reluctance to question a State's judgment on matters of public health must give way where, as here, the restriction at issue burdens the constitutional [\*464] rights of married persons to use contraceptives. In these circumstances we may not accept on faith the State's classification of a

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prohibited by [§ 21](#) from 'giving away' the contraceptive." 310 F.Supp. 951, 954 (Mass. 1970).

<sup>4</sup> The Food and Drug Administration has made a finding that birth control pills pose possible hazards to health. It therefore restricts distribution and receipt of such products in interstate commerce to properly labeled packages that must be sold pursuant to a prescription. 21 CFR § 130.45. A violation of this law is punishable by imprisonment for one year, a fine of not more than \$ 10,000, or both. 21 U. S. C. §§ 331, 333.

particular contraceptive as dangerous to health. Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose, or the relevant facts concerning the product must be such as to fall within the range of judicial notice.

Neither requirement is met here. Nothing in the record even suggests that the distribution of vaginal foam should be accompanied by medical advice in order to protect the user's health. Nor does the opinion of the Massachusetts court or the State's brief filed here marshal facts demonstrating that the hazards of using vaginal foam are common knowledge or so incontrovertible that they may be noticed judicially. [\*\*\*369] On the contrary, [\*\*\*\*46] the State acknowledges that Emko is a product widely available without prescription. Given *Griswold v. Connecticut*, *supra*, and absent proof of the probable hazards of using vaginal foam, we could not sustain appellee's conviction had it been for selling or giving away foam to a married person. Just as in *Griswold*, where the right of married [\*\*1044] persons to use contraceptives was "diluted or adversely affected" by permitting a conviction for giving advice as to its exercise, *id.*, *at* 481, so here, to sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right.

That Baird could not be convicted for distributing Emko to a married person disposes of this case. Assuming, *arguendo*, that the result would be otherwise had the recipient been unmarried, nothing has been placed in the record to indicate her marital status. The State has maintained that marital status is irrelevant because an unlicensed person cannot legally dispense vaginal foam [\*465] either to married or unmarried persons. This approach is plainly erroneous and requires [\*\*\*\*47] the reversal of Baird's conviction; for on the facts of this case, it deprives us of knowing whether Baird was in fact convicted for making a constitutionally protected distribution

of Emko to a married person.

The principle established in *Stromberg v. California*, 283 U.S. 359 (1931), and consistently adhered to is that a conviction cannot stand where the "record fail[s] to prove that the conviction was not founded upon a theory which could not constitutionally support a verdict." *Street v. New York*, 394 U.S. 576, 586 (1969). To uphold a conviction even "though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Williams v. North Carolina*, 317 U.S. 287, 292 (1942).

Because this case can be disposed of on the basis of settled constitutional doctrine, I perceive no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried. Cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348 (1936) [\*\*\*\*48] (Brandeis, J., concurring).

**Dissent by: BURGER**

## **Dissent**

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MR. CHIEF JUSTICE BURGER, dissenting.

The judgment of the Supreme Judicial Court of Massachusetts in sustaining appellee's conviction for dispensing medicinal material without a license seems eminently correct to me and I would not disturb it. It is undisputed that appellee is not a physician or pharmacist and was prohibited under Massachusetts law from dispensing contraceptives to anyone, regardless of marital status. To my mind the validity of this restriction on dispensing medicinal substances is the only issue before the Court, [\*466] and appellee has no standing to challenge that part of the statute restricting the persons to whom contraceptives are available. There is no need to labor this point, however, for everyone seems to agree that if Massachusetts has

[\*\*\*370] validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician's prescription, then the statutory distinction based on marital status has no bearing on this case. [United States v. Raines, 362 U.S. 17, 21 \(1960\)](#).

The opinion of the Court today brushes aside appellee's status as an unlicensed [\*\*\*\*49] layman by concluding that the Massachusetts Legislature was not really concerned with the protection of health when it passed this statute. MR. JUSTICE WHITE acknowledges the statutory concern with the protection of health, but finds the restriction on distributors overly broad because the State has failed to adduce facts showing the health hazards of the particular substance dispensed by appellee as distinguished from other contraceptives. MR. JUSTICE DOUGLAS' concurring opinion does not directly challenge the power of Massachusetts to prohibit laymen from dispensing contraceptives, but considers that appellee rather than dispensing the substance was resorting to a "time-honored teaching [\*\*1045] technique" by utilizing a "visual aid" as an adjunct to his protected speech. I am puzzled by this third characterization of the case. If the suggestion is that appellee was merely displaying the contraceptive material without relinquishing his ownership of it, then the argument must be that the prosecution failed to prove that appellee had "given away" the contraceptive material. But appellee does not challenge the sufficiency of the evidence, and himself summarizes the record [\*\*\*\*50] as showing that "at the close of his lecture he invited members of the audience . . . to come and help themselves." On the other hand, if the concurring opinion means that the [First Amendment](#) protects the distribution [\*467] of all articles "not dangerous *per se*" when the distribution is coupled with some form of speech, then I must confess that I have misread certain cases in the area. See, e. g., [United States v. O'Brien, 391 U.S. 367, 376 \(1968\)](#); [Cox v. Louisiana, 379 U.S. 536, 555 \(1965\)](#); [Giboney v. Empire Storage Co., 336 U.S. 490, 502 \(1949\)](#).

My disagreement with the opinion of the Court and that of MR. JUSTICE WHITE goes far beyond mere puzzlement, however, for these opinions seriously invade the constitutional prerogatives of the States and regrettably hark back to the heyday of substantive due process.

In affirming appellee's conviction, the highest tribunal in Massachusetts held that the statutory requirement that contraceptives be dispensed only through medical channels served the legitimate interest of the State in protecting the health of its citizens. The Court today blithely hurdles this [\*\*\*\*51] authoritative state pronouncement and concludes that the statute has no such purpose. Three basic arguments are advanced: First, since the distribution of contraceptives was prohibited as a moral matter in Massachusetts prior to 1966, it is impossible to believe that the legislature was concerned with health when it lifted the complete ban but insisted on medical supervision. I fail to see why the historical predominance of an unacceptable legislative [\*\*\*371] purpose makes incredible the emergence of a new and valid one.<sup>1</sup> See [McGowan \[\\*468\] v. Maryland, 366 U.S. 420, 445-449 \(1961\)](#). The second argument, finding its origin in a dissenting opinion in the Supreme Judicial Court of Massachusetts, rejects a health purpose because, "if there is need to have a physician prescribe . . . contraceptives, that need is as great for unmarried persons as for married persons." [355 Mass. 746, 758, 247 N. E. 2d 574, 581](#). This argument confuses the validity of the restriction on distributors with the validity of the further restriction on distributees, a part of the statute not properly before the Court. Assuming

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<sup>1</sup>The Court places some reliance on the opinion of the Supreme Judicial Court of Massachusetts in [Sturgis v. Attorney General, 358 Mass. , 260 N. E. 2d 687 \(1970\)](#), to show that § 21A is intended to regulate morals rather than public health. In *Sturgis* the state court rejected a challenge by a group of physicians to that part of the statute prohibiting the distribution of contraceptives to unmarried women. The court accepted the State's interest in "regulating the private sexual lives of single persons," that interest being expressed in the restriction on distributees. *Id., at , 260 N. E. 2d, at 690*. The purpose of the restriction on distributors was not in issue.

the legislature too [\*\*\*\*52] broadly restricted the class of persons who could obtain contraceptives, it hardly follows that it saw no need to protect the health of all persons to whom they are made available. Third, the Court sees no health purpose underlying the restriction on distributors because other state and federal laws regulate the distribution of harmful drugs. I know of no rule that all enactments relating to a particular purpose must be neatly consolidated in one package in the statute books for, if so, the United States Code will not pass [\*\*1046] muster. I am unable to draw any inference as to legislative purpose from the fact that the restriction on dispensing contraceptives was not codified with other statutory provisions regulating the distribution of medicinal substances. And the existence of nonconflicting, nonpre-emptive federal laws is simply without significance in judging the validity or purpose of a state law on the same subject matter.

[\*\*\*\*53] It is possible, of course, that some members of the Massachusetts Legislature desired contraceptives to be dispensed only through medical channels in order to minimize their use, rather than to protect the health of their users, but I do not think it is the proper function of this Court to dismiss as dubious a state court's explication of a state statute absent overwhelming and irrefutable reasons for doing so.

[\*469] MR. JUSTICE WHITE, while acknowledging a valid legislative purpose of protecting health, concludes that the State lacks power to regulate the distribution of the contraceptive involved in this case as a means of protecting health.<sup>2</sup> The opinion grants that appellee's conviction would be valid if he had given away a potentially harmful substance, but rejects the State's placing this particular contraceptive in that category. So far as I am aware, this Court has

never before challenged the police power of a State to protect the public from the risks of possibly spurious and deleterious [\*\*\*372] substances sold within its borders. Moreover, a statutory classification is not invalid

"simply because some innocent articles or transactions may be found within the [\*\*\*\*54] proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co. v. Lynch*, 226 U.S. 192, 204 (1912).

But since the Massachusetts statute seeks to protect health by regulating contraceptives, the opinion invokes *Griswold v. Connecticut*, 381 U.S. 479 (1965), and puts the statutory classification to an unprecedented test: either the record must contain evidence supporting the classification or the health hazards of the particular contraceptive must be judicially noticeable. This is indeed a novel constitutional doctrine and not surprisingly no authority is cited for it.

[\*\*\*\*55] Since the potential harmfulness of this particular medicinal substance has never been placed in issue in the [\*470] state or federal courts, the State can hardly be faulted for its failure to build a record on this point. And it totally mystifies me why, in the absence of some evidence in the record, the factual underpinnings of the statutory classification must be "incontrovertible" or a matter of "common knowledge."

The actual hazards of introducing a particular foreign substance into the human body are frequently controverted, and I cannot believe that unanimity of expert opinion is a prerequisite to a State's exercise of its police power, no matter what the subject matter of the regulation. Even assuming no present dispute among medical authorities, we cannot ignore that it has become commonplace for

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<sup>2</sup> The opinion of the Court states in passing that if the restriction on distributors were in fact intended as a health measure, it would be overly broad. Since the Court does not develop this argument in detail, my response is addressed solely to the reasoning in the opinion of MR. JUSTICE WHITE, concurring in the result.

a drug or food additive to be universally regarded as harmless on one day and to be condemned as perilous on the next. It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.

Even if it were conclusively [\*\*\*\*56] established once and for all that the product [\*\*1047] dispensed by appellee is not actually or potentially dangerous in the somatic sense, I would still be unable to agree that the restriction on dispensing it falls outside the State's power to regulate in the area of health. The choice of a means of birth control, although a highly personal matter, is also a health matter in a very real sense, and I see nothing arbitrary in a requirement of medical supervision.<sup>3</sup> It is generally acknowledged that contraceptives vary in degree of effectiveness [\*471] and potential harmfulness.<sup>4</sup> [\*\*\*\*58] There may [\*\*\*373] be compelling health reasons for certain women to choose the most effective means of birth control available, no matter how harmless the less effective alternatives.<sup>5</sup> Others might be advised not to use a highly effective means of contraception

because of their peculiar susceptibility to an adverse side effect.<sup>6</sup> Moreover, there may be information known to the medical profession that a particular brand of contraceptive is to be preferred or avoided, or that it has not been adequately tested. Nonetheless, the concurring opinion would hold, as a constitutional matter, that a [\*\*\*\*57] State must allow someone without medical training the same power to distribute this medicinal substance as is enjoyed by a physician.

It is revealing, I think, that those portions of the majority and concurring opinions rejecting the statutory limitation on distributors rely on no particular provision of the Constitution. I see nothing in the [Fourteenth Amendment](#) or any other part of the Constitution [\*472] that even vaguely suggests that these medicinal forms of contraceptives must be available in the open market. I do not challenge [Griswold v. Connecticut, supra](#), despite its tenuous moorings to the text of the Constitution, but I cannot view it as controlling authority for this case. The Court was there confronted with a statute flatly prohibiting the use of contraceptives, not one regulating their distribution. I simply cannot believe that the limitation on the class of lawful distributors has significantly impaired the right to use contraceptives in Massachusetts. [\*\*\*\*59] By relying on *Griswold* in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections.

The need for dissemination of information on birth control is not impinged in the slightest by limiting the distribution of medicinal substances to medical and pharmaceutical channels as Massachusetts has done by statute. The appellee has succeeded, it seems, in cloaking his activities in some new permutation of the [First Amendment](#) although his conviction rests in fact and law on dispensing a medicinal substance without a license. I am constrained to [\*\*1048] suggest that if the

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<sup>3</sup> For general discussions of the need for medical supervision before choosing a means of birth control, see *Manual of Family Planning and Contraceptive Practice* 47-53 (M. Calderone ed. 1970); *Advanced Concepts in Contraception* 22-24 (F. Hoffman & R. Kleinman ed. 1968).

<sup>4</sup> See U.S. Commission on Population Growth and the American Future, *Population and the American Future*, pt. II, pp. 38-39 (Mar. 16, 1972); *Manual of Family Planning, supra*, at 268-274, 316, 320, 342, 346; Jaffe, *Toward the Reduction of Unwanted Pregnancy*, 174 *Science* 119, 121 (Oct. 8, 1971); G. Hardin, *Birth Control* 128 (1970); E. Havemann, *Birth Control* (1967). The contraceptive substance dispensed by appellee, vaginal foam, is thought to be between 70% and 80% effective. See Jaffe, *supra*, at 121; Dingle & Tietze, *Comparative Study of Three Contraceptive Methods*, 85 *Amer. J. Obst. & Gyn.* 1012, 1021 (1963). The birth control pill, by contrast, is thought to be better than 99% effective. See Havemann, *Birth Control, supra*.

<sup>5</sup> See Perkin, *Assessment of Reproductive Risk in Nonpregnant Women -- A Guide to Establishing Priorities for Contraceptive Care*, 101 *Amer. J. Obst. & Gyn.* 709 (1968).

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<sup>6</sup> See *Manual of Family Planning, supra*, at 301, 332-333, 336-340.

Constitution can be strained to invalidate the Massachusetts statute underlying appellee's conviction, we could quite as well employ it for the protection of a "curbstone quack," reminiscent of the "medicine man" of times past, who attracted a crowd of the curious with a soapbox lecture and then plied them with "free samples" of some unproved remedy. Massachusetts presumably outlawed such activities long ago, but today's holding seems to invite their return.

## References

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12 Am Jur 2d, Birth [\*\*\*\*60] Control 4; 16 Am Jur 2d, *Constitutional Law* 122

US L Ed Digest, Adultery and Fornication 1; Constitutional Law 501; Health 1.5; Statutes 37

ALR Digests, Birth Control 3; Statutes 44

L Ed Index to Anno, Constitutional Law; Statutes

ALR Quick Index, Birth Control

Federal Quick Index, Birth Control

Annotation References:

Validity of regulations as to contraceptives or the dissemination of birth control information. [96 ALR2d 955](#).



Caution

As of: October 18, 2026 6:38 AM Z

## *Estate of Kievernagel*

Court of Appeal of California, Third Appellate District

September 11, 2008, Filed

C055516

### **Reporter**

166 Cal. App. 4th 1024 \*; 83 Cal. Rptr. 3d 311 \*\*; 2008 Cal. App. LEXIS 1417 \*\*\*

Estate of JOSEPH M. KIEVERNAGEL, Deceased.  
IRIS KIEVERNAGEL, Petitioner and Appellant, v.  
PATSY KIEVERNAGEL et al., Objectors and  
Respondents.

**Prior History:** [\*\*\*1] APPEAL from the  
judgment of the Superior Court of Sacramento  
County, No. 05PR01333, Jerilyn Borack, Judge.

**Disposition:** Affirmed.

### **Case Summary**

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#### **Procedural Posture**

The Superior Court of Sacramento County, California, denied distribution of frozen sperm to appellant widow. Respondents, the parents of the deceased husband, objected to the preliminary distribution as interested parties. The widow appealed.

#### **Overview**

In denying distribution of the frozen sperm, the probate court relied on the intent of the husband, as indicated by an agreement with the company storing the sperm that the sperm would be discarded on the husband's death and by evidence that the husband was opposed to having children but agreed to fertility procedures due to the widow's strong desire for children. In affirming, the court held that the probate court properly determined that the disposition of the frozen sperm was governed by the intent of the husband. In determining the disposition of gamete material, to which no other party had contributed and thus as to

which another party's right to procreational autonomy was not implicated, the intent of the donor controlled. The disposition of the frozen sperm did not implicate the widow's right to procreative autonomy. Therefore, the probate court properly declined to employ a balancing test.

#### **Outcome**

The court affirmed the decision denying distribution of the frozen sperm to the widow.

### **LexisNexis® Headnotes**

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Family Law > Paternity &  
Surrogacy > Surrogacy > Disposition of Eggs,  
Preembryos & Sperm

**HN1** In determining the disposition of gamete material, to which no other party has contributed and thus another party's right to procreational autonomy is not implicated, the intent of the donor must control.

Estate, Gift & Trust Law > General Overview

Family Law > Paternity &  
Surrogacy > Surrogacy > Disposition of Eggs,  
Preembryos & Sperm

**HN2** A decedent's interest in the frozen sperm vials occupies an interim category that entitles them to special respect because of their potential for human

life.

Estate, Gift & Trust Law > General Overview

Family Law > Paternity &

Surrogacy > Surrogacy > Disposition of Eggs,  
Preembryos & Sperm

**HN3** Gametic material, with its potential to produce life, is a unique type of property and thus not governed by the general laws relating to gifts or personal property or transfer of personal property upon death. The person who provided the gametic material has at his or her death an interest, in the nature of ownership, to the extent that he or she had decisionmaking authority as to the use of the gametic material for reproduction.

Civil Procedure > Appeals > Standards of  
Review > General Overview

**HN4** In a judgment roll appeal every presumption is in favor of the validity of the judgment and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it. The sufficiency of the evidence to support the findings is not open to review.

Family Law > Paternity &  
Surrogacy > Surrogacy > Disposition of Eggs,  
Preembryos & Sperm

**HN5** The right of procreative autonomy dictates that decisional authority rests in gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status.

## Headnotes/Summary

### Summary

CALIFORNIA OFFICIAL REPORTS  
SUMMARY

The probate court denied distribution of frozen sperm to a widow whose petition was opposed by the deceased husband's parents, as interested parties. In denying distribution of the frozen sperm, the probate court relied on the intent of the husband, as indicated by an agreement with the company storing the sperm, that the sperm would be discarded on the husband's death and by evidence that the husband was opposed to having children but agreed to fertility procedures due to his wife's strong desire for children. (Superior Court of Sacramento County, No. 05PR01333, Jerilyn L. Borack, Judge.)

The Court of Appeal affirmed the decision denying distribution of the frozen sperm. The court held that the probate court properly determined that the disposition of the frozen sperm was governed by the intent of the husband. In determining the disposition of gametic material, to which no other party has contributed and thus as to which another party's right to procreational autonomy is not implicated, the intent of the donor must control. The disposition of the frozen sperm did not implicate the widow's right to procreative autonomy. Therefore, the probate court properly declined to employ a balancing test. (Opinion by Morrison, J., with Raye, Acting P. J., and Robie, J., concurring.)

### Headnotes

CALIFORNIA OFFICIAL REPORTS  
HEADNOTES

### CA(1) (1)

**Procreation § 2—Gametic Material—Disposition on Death—Intent of Donor.**

In determining the disposition of gametic material, to which no other party has contributed and thus as to which another party's right to procreational autonomy is not implicated, the intent of the donor

must control. Therefore, the probate court properly denied distribution of a decedent's frozen sperm to his widow based on the decedent's intent. The evidence of intent included an agreement with the company storing the frozen sperm, which provided that the sperm sample was to be [\*1025] discarded upon death. There was also evidence that the husband was opposed to having children but agreed to fertility procedures due to his wife's strong desire for children.

[[Cal. Forms of Pleading and Practice \(2008\) ch. 359, Marriage, § 359.17](#); 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 45.]

## [CA\(2\) \(2\)](#)

### **Procreation § 2—Gametic Material—Disposition on Death.**

Gametic material, with its potential to produce life, is a unique type of property and thus not governed by the general laws relating to gifts or personal property or transfer of personal property upon death. The person who provided the gametic material has at his or her death an interest, in the nature of ownership, to the extent that he or she had decisionmaking authority as to the use of the gametic material for reproduction.

## [CA\(3\) \(3\)](#)

### **Procreation § 2—Gametic Material—Autonomy of Provider.**

The right of procreative autonomy dictates that decisional authority rests in the providers of gametic material alone, at least to the extent that their decisions have an impact upon their individual reproductive status.

**Counsel:** Friedberg & Parker, Edward Freidberg and Suzanne M. Alves for Petitioner and Appellant.

Jay-Allen Eisen, C. Athena Roussos; Childers & Murray and John M. Murray for Objectors and

Respondents.

**Judges:** Opinion by Morrison, J., with Raye, Acting P. J., and Robie, J., concurring.

**Opinion by:** Morrison

## **Opinion**

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[\*\*312] **MORRISON, J.**—In this case we must decide whether a widow has the right to use her late husband's frozen sperm to attempt to conceive a child where her late husband signed an agreement with the company storing the frozen sperm providing that the frozen sperm was to be discarded upon his death. We conclude that [HN1](#) in determining the disposition of gametic material, to which no other party has contributed and thus another party's right to procreational autonomy is not implicated, the intent of the donor must control. In this judgment roll appeal, the widow cannot challenge the probate court's finding that the decedent's intent was to have his frozen sperm discarded upon his death. Accordingly, we affirm the decision denying distribution of the frozen sperm to the widow.

[\*1026]

### **FACTUAL AND PROCEDURAL BACKGROUND**

Joseph [\*\*\*2] and Iris Kievernagel were married for 10 years prior to Joseph's death. They contracted with the Northern California Fertility Medical Center, Inc., to perform in vitro fertilization (IVF) to allow Iris to conceive. The fertility center operated a sperm cryopreservation storage program under which sperm was collected and stored at temperatures as low as -196 degrees centigrade. The frozen sperm could then be thawed and used for insemination. The center required Joseph to store a sperm sample under this program in case his live sperm could not be used on the day of insemination.

As part of the sperm cryopreservation storage

program, the center required an IVF backup sperm storage and consent agreement (the Agreement). Iris completed the Agreement and Joseph signed it. The Agreement provided that the sperm sample was Joseph's sole and separate property and he retained all authority to control its disposition. The Agreement provided for two options for the disposition of the sperm sample upon death or incapacitation: donate the sperm to his wife or discard the sperm sample. The box indicating the sperm sample was to be discarded was checked and Joseph initialed it. The Agreement also provided [\*\*\*3] the sperm sample was to be discarded upon divorce. Iris signed, acknowledging the sperm sample was Joseph's sole and separate property.

Joseph died in a helicopter crash in July 2005.

Iris was appointed administrator of Joseph's estate. She petitioned under [Probate Code section 11623](#) for a preliminary distribution of an “asset of no financial value” but “of immense sentimental value to the widow.” The item she sought was a vial of Joseph's frozen sperm. The fertility center would not release it without a court order.

Joseph's parents, as interested parties, objected to the preliminary distribution. They contended it was contrary to Joseph's express wishes, as set forth in the Agreement, that upon his death, his sperm sample was to be discarded. The Agreement comported with their understanding that their son did not wish to father a child posthumously.

[CA\(1\) \(1\)](#) After an evidentiary hearing, the probate court issued a tentative decision. The court found the following undisputed evidence. [\*\*313] Joseph and Iris “loved each other deeply and completely.” Joseph was opposed to having children, but agreed to the fertility procedures due to Iris's strong desire for children. The couple's dispute over having children [\*\*\*4] led them to marriage counseling. According to the marriage counselor, Joseph believed Iris would divorce him if he did not agree to have children and a divorce would [\*1027] devastate him. The Agreement provided the sperm sample was to be discarded

upon Joseph's death. This option was selected instead of the option to donate the sperm sample to Iris. Iris completed the Agreement, making the selections. Joseph signed it.

The probate court found the key issue was the intent of the decedent regarding use of his sperm. The court's analysis was based on [Hecht v. Superior Court \(1993\) 16 Cal.App.4th 836 \[20 Cal. Rptr. 2d 275\]](#) (*Hecht*), a case involving a dispute over disposition of frozen sperm, and [Davis v. Davis \(Tenn. 1992\) 842 S.W.2d 588](#) (*Davis*), involving a dispute over disposition of frozen preembryos. The court found the Agreement evidenced the intent of both Iris and Joseph that the sperm be discarded upon his death. There was no evidence they ever discussed changing the provisions of the Agreement.

Iris objected to the tentative decision. She questioned the court's analysis of intent. She argued her testimony that Joseph did not even read the Agreement was admissible evidence with probative value. Finally, she asserted [\*\*\*5] Joseph's intent was that she have his child.

The court denied the request for clarification of its analysis. It found Iris failed to prove the Agreement did not express Joseph's intent. By a preponderance of the evidence, the court found Joseph's intent was to stop the fertility process upon his death by discarding his frozen sperm.

The petition for distribution of the sperm sample was denied.

## DISCUSSION

In making its decision, the court below found “little to no guiding precedent,” but found some guidance in the [Hecht, supra, 16 Cal.App.4th 836](#), and [Davis, supra, 842 S.W.2d 588](#), cases. Iris contends the court erred in applying *Hecht*, and argues that its requirement of an “unequivocal” intent provides an unworkable standard. Iris further contends the surviving spouse has a right to procreate that should be considered and the balancing test set forth in *Davis* should be applied. In applying the balancing

test, the surviving spouse's interest prevails.

We begin our analysis by discussing the *Hecht* and *Davis* cases. We then conclude the probate court properly determined that the disposition of the frozen sperm is governed by the intent of the deceased donor and that the *Davis* balancing test is inappropriate [\*\*\*6] in these circumstances.

In *Hecht, supra, 16 Cal.App.4th 836*, William Kane deposited 15 vials of his sperm in an account at a sperm bank and then took his own life. The [\*1028] storage agreement provided that upon Kane's death, the sperm bank was to continue to store the specimens upon request of the executor of Kane's estate or to release the specimens to the executor. Kane's will named his girlfriend, Deborah Hecht, as executor. The will also bequeathed the sperm specimens stored at the sperm bank to Hecht for her to become impregnated, if she wished. (*Id. at p. 840.*) Kane wrote a letter to his children about family memories and why he was committing suicide. It was addressed to his two children from a previous marriage, but included the possibility that he could have posthumous children [\*\*314] by Hecht. (*Id. at p. 841.*)

Kane's will was admitted into probate and a special administrator appointed. Kane's children contested the will. (*Hecht, supra, 16 Cal.App.4th at p. 841.*) The parties attempted to settle the dispute, entering into two settlement agreements. The first was a tentative agreement that did not specifically mention the sperm. (*Ibid.*) The second agreement sought to assign the estate's [\*\*\*7] interest in the sperm to Hecht. (*Id. at p. 842.*) In proceedings to settle the estate, the administrator, at the request of the children, petitioned for instructions to order the sperm destroyed on public policy grounds, or for an order of a preliminary distribution of either 100 or 80 percent of the sperm to the children on alternate theories of entitlement. (*Id. at p. 843.*) The probate court ordered the sperm destroyed and Hecht petitioned the appellate court for a writ of mandate or prohibition to vacate the order. (*Id. at pp. 844–845.*)

The appellate court first determined that the frozen sperm fell within the broad definition of property in *Probate Code section 62*, so the probate court had jurisdiction over it. (*Hecht, supra, 16 Cal.App.4th at p. 846.*) The court began with the acknowledgment that the law on property rights in the human body was unsettled. (*Id. at p. 847.*) It looked to ethical standards in the IVF field. The American Fertility Society took the position that gametes and concepti are the property of the donors and donors had the right to decide their disposition. (*Id. at p. 848.*) The court also found the *Davis, supra, 842 S.W.2d 588*, case informative. Relying on *Davis*, [\*\*\*8] the court concluded *HN2* the decedent's interest in the frozen sperm vials “occupies ‘an interim category that entitles them to special respect because of their potential for human life.’ ” (*Hecht, supra, at p. 846.*) At the time of his death, Kane “had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction.” (*Id. at p. 850.*)

The *Hecht* court then turned to whether the probate court's order to destroy the sperm could be upheld. It found the decision could not be upheld on the basis of the will or the parties' settlement agreement because neither permitted destruction of all the sperm. (*Hecht, supra, 16 Cal.App.4th at p. 851.*) It found no public policy against insemination of an unmarried woman. (*Id. at pp. 852–855.*) Finally, the court found no public policy against postmortem [\*1029] artificial insemination. (*Id. at pp. 855–861.*) The court noted it was premature to address the issue of family integrity urged by the children and speculative whether any child conceived by Hecht using Kane's sperm would be a burden to society. (*Id. at pp. 855, 860.*) The appellate court found the order for destruction of the sperm was an abuse [\*\*\*9] of discretion. (*Id. at p. 861.*)

In discussing the public policy concerns of postmortem artificial insemination, the *Hecht* court discussed a French case, *Parpalaix v. CECOS*, as described in Shapiro & Sonnenblick, *The Widow*

*and the Sperm: The Law of Post-Mortem Insemination* (1986) 1 J.L. & Health 229 (Shapiro & Sonnenblick). Alain Parpalaix, a 24 year old suffering from testicular cancer, made a deposit of sperm at CECOS, with no instructions for its future use. At the time, Alain was living with his girlfriend; he married her two days before his [\*\*315] death. She then requested the sperm deposit. When CECOS denied the request, the widow, joined by her in-laws, went to court. (Shapiro & Sonnenblick, *supra*, 1 J.L. & Health at pp. 229–230.) Their complaint sounded in contract; they claimed they were owners of the sperm as Alain's natural heirs and CECOS had broken the contract of bailment by refusing to return the sperm. (*Id.* at p. 230.) The widow's attorney also argued she had a moral right to the sperm. (*Id.* at p. 231.) The French court noted the difficulties under French law governing inheritance rights and illegitimacy posed by children born postmortem, but offered no solutions. (*Id.* at pp. 231–232.)

The [\*\*\*10] French court refused to apply contract principles to the case. It also refused to consider the sperm as an indivisible body part; “it described sperm as ‘the seed of life ... tied to the fundamental liberty of a human being to conceive or not to conceive.’ ” (Shapiro & Sonnenblick, *supra*, 1 J.L. & Health at p. 232, fn. omitted.) The fate of the sperm was to be decided by the person from whom it was drawn; the sole issue was that of intent. (*Ibid.*) “The court had to decide not only whether Alain Parpalaix had intended his widow to be artificially inseminated with his sperm, but also whether that intent was ‘unequivocal.’ ” (*Ibid.*, fn. omitted.) From the testimony of Alain's wife and parents, the French court found Alain intended to make his wife the mother of his child. (*Ibid.*)

Relying on this description of the French case, the *Hecht* court appears to have accepted the rule that the sperm donor's intent controls in disposition of his frozen sperm after his death. (*Hecht, supra*, 16 Cal.App.4th at p. 857.) The *Hecht* court did not have to actually decide that question because, as it made clear repeatedly, it was not deciding the issue

of intent or the actual disposition of the frozen [\*\*\*11] sperm; factual issues remained to be resolved. (*Id.* at pp. 851–852, 859 & fn. 9, 861.) For purposes of determining whether the probate court order to destroy the sperm could be upheld, the *Hecht* court [\*1030] assumed “that decedent intended to allow Hecht to use his sperm for posthumous artificial insemination.” (*Id.* at p. 859.)

The *Davis* case arose in a divorce action after the parties agreed on all the terms of dissolution except one. They could not agree on the disposition of seven cryogenically preserved preembryos stored by a fertility clinic that had assisted the Davises with IVF. (*Davis, supra*, 842 S.W.2d 588, 589.) The court found the preembryos were neither persons nor property, but held an intermediate position, entitled to greater respect than property but not accorded the respect of persons. (*Id.* at p. 596.) “We conclude that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.” (*Id.* at p. 597.) The Davises did not have a true property interest in the preembryos, but “they do have an interest in the nature of ownership, to the extent that they have [\*\*\*12] decision-making authority concerning disposition of the preembryos, within the scope of policy set by law.” (*Ibid.*)

The *Davis* court held that an agreement regarding disposition of untransferred preembryos in the event of contingencies (such as death or divorce) should be presumed valid and enforceable. (*Davis, supra*, 842 S.W.2d at p. 597.) “This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.” (*Ibid.*, fn. omitted.)

[\*\*316] The Davises had not made such an agreement, so the court was required to resolve the dispute. “[W]e hold that disputes involving the disposition of preembryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes

cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a [\*\*\*13] reasonable possibility of achieving parenthood by means other than use of the preembryos in question.” (*Davis, supra, 842 S.W.2d at p. 604.*)

**CA(2) (2)** We agree with the *Hecht* court that **HN3** gametic material, with its potential to produce life, is a unique type of property and thus not governed by the general laws relating to gifts or personal property or transfer of personal property upon death.<sup>1</sup> (*Hecht, supra, 16 Cal.App.4th at p. 850.*) We [\*\*\*1031] also agree that Joseph, as the person who provided the gametic material, had at his death an interest, in the nature of ownership, to the extent he had decisionmaking authority as to the use of the gametic material for reproduction. (*Ibid.*; *Davis, supra, 842 S.W.2d at p. 597.*) Accordingly, in determining the disposition of Joseph's frozen sperm, the trial court properly relied on Joseph's intent as to its use after his death.

Using the intent of the donor to determine the disposition of gametic material upon the donor's death is consistent with California law in this area. *Probate Code section 249.5* addresses the property rights of a child of a decedent conceived and born after the death of the decedent. Such a child is deemed to have been born within the decedent's lifetime, if, among other things, it is proved by clear and convincing evidence that the decedent specified in writing “that his or her genetic material shall be used for the posthumous conception of a child.” (*Prob. Code, § 249.5, subd. (a).*) Under the

Uniform Anatomical Gift Act (*Health & Saf. Code, § 7150 et seq.*), a person has the right to make, amend, revoke, or refuse to make a donation of any part of his body to take effect after his death. (*Health & Saf. Code, §§ 7150.20–7150.30*; see also *Moore v. Regents of University of California (1990) 51 Cal.3d 120, 141 [271 Cal. Rptr. 146, 793 P.2d 479]* [suggesting patient may have limited right to control use of excised cells].) This law suggests that when the issue is postmortem reproduction using gametic material from a deceased donor, the decedent's intent as to such use should control.

The probate court found Joseph intended that his frozen sperm be discarded [\*\*\*15] upon his death. Iris faults the court for relying on the Agreement and contract law to find Joseph's intent. Iris cannot attack the court's finding. The record on appeal does not contain a transcript of the hearing. **HN4** “In a judgment roll appeal every presumption is in favor of the validity of the judgment and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it. [Citation.] The sufficiency of the evidence to support the findings is not open to review. [Citation.]” (*Wheelright v. County of Marin (1970) 2 Cal.3d 448, 454 [\*\*\*317] [85 Cal. Rptr. 809, 467 P.2d 537].*)

Iris contends *Hecht* requires a finding of the decedent's “unequivocal” intent. She argues both that the probate court failed to follow *Hecht* on this point and that the “unequivocal” intent test is unworkable. “Unequivocal” intent is not the test set forth in *Hecht*. Although the term is used by the *Hecht* court in quoting the *Parpalaix* case (*Hecht, supra, 16 Cal.App.4th at p. 857*), it nowhere else in the opinion refers to an unequivocal intent. Rather, the court speaks only of the “decedent's actual intention” or the “decedent's [\*\*\*1032] intent.” (*Id. at pp. 851, 859, fn. 9.*) The probate court found by a preponderance [\*\*\*16] of evidence that it was Joseph's intent that his sperm be discarded upon his death. That finding was sufficient.

Iris argues intent is difficult to determine because

<sup>1</sup>In this regard, we note the gametic material at issue here is distinguishable from the preembryos at issue in *Davis, supra, 842 S.W.2d 588*. It is further removed from potential life because Joseph's sperm could not produce life until joined with an egg. We express no opinion as to the proper resolution of a dispute regarding disposition [\*\*\*14] of preembryos.

those undergoing IVF face great emotional and psychological turmoil, circumstances change, and their intent may change over time. (See, e.g., [Roman v. Roman \(Tex.App. 2006\) 193 S.W.3d 40](#) [upholding agreement to discard frozen embryos upon divorce despite woman's desire to use embryo]; [A.Z. v. B.Z. \(2000\) 431 Mass. 150 \[725 N.E.2d 1051\]](#) [declining to enforce agreement to give preembryos to wife upon divorce over husband's objection]; [Kass v. Kass \(1997\) 235 A.D.2d 150 \[663 N.Y.S.2d 581\]](#) [enforcing informed consent agreement to permit IVF program to retain cryopreserved prezygotes for approved research despite woman's change of heart].) Further, those undergoing IVF may not consider the possibility of their premature death. That may be and we can only encourage those undergoing IVF to fully consider all its ramifications and plan for all contingencies. (See [Health & Saf. Code, § 1644.7](#) [form for establishing donor's intent as to use of genetic material for conception after death].) We need not consider what disposition [\*\*\*17] is appropriate where the donor's intent cannot be determined because in this case the court was able to determine Joseph's intent.

Finally, Iris contends the probate court's decision ignores the fundamental right of the donee spouse to procreate. She contends the balancing test of *Davis* should be employed. The *Hecht* court indicated the *Davis* balancing test would be pertinent if the trier of fact determined the decedent's intent was contrary to *Hecht*'s intent to bear his child. ([Hecht, supra, 16 Cal.App.4th at p. 859, fn. 9.](#)) Iris further contends that since procreative rights are based on the right to privacy, and that right ends at death, in balancing the relative interests, hers prevails.

**CA(3) (3)** We disagree that the *Davis* balancing test applies in this situation. The *Davis* court noted, “the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation.” ([Davis, supra, 842 S.W.2d at p. 601.](#)) Although the court recognized the impact of the IVF procedure was

more severe on women, considering the joys of desired parenthood or the anguish of unwanted parenthood, it found the *Davises* “must be seen as entirely equivalent [\*\*\*18] gamete-providers.” (*Ibid.*) **HN5** The right of procreative autonomy “dictates that decisional authority rests in the gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status.” (*Id. at p. 602.*)

In this case, there is only one gamete provider. The material at issue is Joseph's sperm, not a preembryo. Only Joseph had “an interest, in the nature [\*1033] of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction.” ([Hecht, supra, 16 Cal.App.4th at \[\\*\\*\\*318\] p. 850.](#)) The disposition of Joseph's frozen sperm does not implicate Iris's right to procreative autonomy. That would be so only if she could show that she could become pregnant only with Joseph's sperm.

## DISPOSITION

The judgment is affirmed.

Raye, Acting P. J., and Robie, J., concurred.

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