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As of: October 18, 2026 7:14 AM Z

Planned Parenthood v. Casey

Supreme Court of the United States

April 22, 1992, Argued ; June 29, 1992, Decided *

No. 91-744

*Together with No. 91-902, Casey, Governor of Pennsylvania, et al. v. Planned Parenthood of Southeastern Pennsylvania et al., also on certiorari to the same court.

Reporter

505 U.S. 833 *; 112 S. Ct. 2791 **; 120 L. Ed. 2d 674 ***; 1992 U.S. LEXIS 4751 ****; 60 U.S.L.W. 4795; 92 Daily Journal DAR 8982; 6 Fla. L. Weekly Fed. S 663

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, ET AL.,
PETITIONERS 91-744 v. ROBERT P. CASEY,
ET AL., ETC. ROBERT P. CASEY, ET AL.,
ETC., PETITIONERS 91-902 v. PLANNED
PARENTHOOD OF SOUTHEASTERN
PENNSYLVANIA ET AL.

Subsequent History: [****1] As Amended July 2, 1992.

Prior History: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Disposition: [947 F. 2d 682](#): No. 91-902, affirmed; No. 91-744, affirmed in part, reversed in part, and remanded.

Core Terms

abortion, woman, pregnancy, joint opinion, undue burden, fetus, informed consent, viability, trimester, stare decisis, invalidate, terminate, obstacle, notice, notify, marry, unborn, childbirth, spousal, medical emergency, pregnant woman, waiting period, human life, legitimate interest, doctrine, court of appeals, district court, reaffirm, batter, notification

Case Summary

Procedural Posture

Petitioners, abortion clinics and physician, brought suit against respondents, the governor and others, seeking declaratory and injunctive relief from five provisions of the Pennsylvania Abortion Control Act of 1982, [18 Pa. Cons. Stat. §§ 3203-3220](#) (1990). The district court held that the provisions were unconstitutional. The United States Court of Appeals for the Third Circuit affirmed in part and reversed in part. The Court granted certiorari.

Overview

The court of appeals reversed in part, holding that only the husband notification provision, [18 Pa. Cons. Stat. § 3209](#), was unconstitutional. The Court granted certiorari. The Court applied the doctrine of stare decisis and reaffirmed the essential holdings in *Roe v. Wade* because that decision was still workable and its factual underpinnings had not changed. In a joint opinion, three Justices rejected *Roe*'s trimester framework and adopted an undue burden test for determining whether State regulations had the purpose or effect of placing substantial obstacles in the path of a woman seeking an abortion before viability. The Court agreed that [§ 3209](#) imposed a substantial obstacle in a large fraction of cases and was invalid. The Court also affirmed the holding the court of appeals that [18 Pa. Cons. Stat. § 3202](#), the medical emergency provision, did not impose an undue burden on a woman's abortion right. A plurality of the Court determined that [18 Pa. Cons. Stat. § 3214\(a\)\(12\)](#) was also invalid because it required a married woman to provide a reason for her failure to provide notice to her husband.

Outcome

The Court substantially affirmed the holding of the court of appeals, although it also found that the reporting provision related to husband notification was invalid, and remanded the case for further proceedings.

LexisNexis® Headnotes

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Governments > Courts > Judicial Precedent

Process > Scope

HN1 Substantive Due Process, Privacy

The Court reaffirms *Roe v. Wade*'s essential holding, which has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > Abortion > Right to Privacy

Constitutional Law > Substantive Due Process > Scope

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

HN2 Substantive Due Process, Privacy

Constitutional protection of the woman's decision to terminate her pregnancy derives from the [Due Process Clause of the Fourteenth Amendment](#). It declares that no State shall deprive any person of life, liberty, or property, without due process of law.

Constitutional Law > Substantive Due

HN3 Constitutional Law, Substantive Due Process

Although a literal reading of the Due Process Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, the Clause has been understood to contain a substantive component as well, one barring certain government actions regardless of the fairness of the procedures used to implement them. The [Due Process Clause of the Fourteenth Amendment](#) applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Bill of Rights > State Application

HN4 Bill of Rights, Fundamental Rights

The [Due Process Clause of the Fourteenth Amendment](#) incorporates most of the [Bill of Rights](#) against the States.

Constitutional Law > Bill of Rights > General Overview

Criminal Law & Procedure > ... > Domestic Offenses > Illegal Consensual Relations > General Overview

Constitutional Law > Substantive Due Process > Privacy > General Overview

Criminal Law & Procedure > ... > Illegal
Consensual Relations > Interracial
Relations > General Overview

Criminal Law & Procedure > ... > Illegal
Consensual Relations > Interracial
Relations > Elements

Family Law > Marriage > Validity > Interracial
Marriages

HN5 Constitutional Law, Bill of Rights

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.

Constitutional Law > ... > Fundamental
Rights > Search & Seizure > General Overview

Civil Procedure > Special
Proceedings > Eminent Domain
Proceedings > General Overview

Constitutional Law > Bill of Rights > General
Overview

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Religion > General
Overview

Constitutional Law > ... > Freedom of
Speech > Free Press > General Overview

Constitutional Law > ... > Fundamental
Freedoms > Freedom of Speech > Scope

Constitutional Law > Bill of
Rights > Fundamental Rights > General
Overview

Constitutional Law > Bill of
Rights > Fundamental Rights > Right to Bear
Arms

Constitutional Law > Substantive Due
Process > Scope

Criminal Law & Procedure > Search &
Seizure > General Overview

HN6 Fundamental Rights, Search & Seizure

Neither the [Bill of Rights](#) nor the specific practices of States at the time of the adoption of the [Fourteenth Amendment](#) marks the outer limits of the substantive sphere of liberty which the [Fourteenth Amendment](#) protects. [U.S. Const. amend. IX](#). The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This liberty is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

HN7 Substantive Due Process, Privacy

The Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood.

Constitutional Law > Substantive Due
Process > Scope

HN8 Constitutional Law, Substantive Due Process

The adjudication of substantive due process claims may call upon the Court in interpreting the

Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean that the court is free to invalidate state policy choices with which it disagrees; yet neither does it permit the court to shrink from the duties of its office.

Constitutional Law > Substantive Due
Process > Scope

Criminal Law &
Procedure > ... > Miscellaneous
Offenses > Flag Desecration > General
Overview

[HN9](#) **Constitutional Law, Substantive Due Process**

It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, a State may not compel or enforce one view or the other.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Governments > Courts > Judicial Precedent

Constitutional Law > Substantive Due
Process > Privacy > General Overview

[HN10](#) **Privacy, Personal Decisions**

The law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. 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 is recognized by the courts. Court precedents have respected the private realm of family life which the state cannot enter. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the [Fourteenth Amendment](#). At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Governments > Courts > Judicial Precedent

[HN11](#) **Courts, Judicial Precedent**

Even when the decision to overrule a prior case is not virtually foreordained, it is common wisdom that the rule of stare decisis is not an "inexorable command," and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, the Court may ask whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Governments > Courts > Judicial Precedent

Governments > Courts > Judicial Precedent

HN12 Courts, Judicial Precedent

The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN13 Substantive Due Process, Privacy

A State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.

Constitutional Law > Substantive Due Process > Privacy > General Overview

HN14 Substantive Due Process, Privacy

The liberty which encompasses those decisions includes the interest in independence in making certain kinds of important decisions. While the outer limits of this aspect of protected liberty have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.

Governments > Courts > Judicial Precedent

HN15 Courts, Judicial Precedent

A decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.

HN16 Courts, Judicial Precedent

Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Criminal Abortion > General Overview

Healthcare Law > Medical Treatment > Abortion > General Overview

Healthcare Law > Medical Treatment > General Overview

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

Healthcare Law > ... > Reproductive Services > Reproductive Technology > General Overview

HN17 Homicide, Manslaughter & Murder, Criminal Abortion

Under the Pennsylvania Abortion Control Act of 1982, a medical emergency is that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function. [18 Pa. Cons. Stat. § 3203](#) (1990).

Governments > Courts > Judicial Precedent

HN18 Courts, Judicial Precedent

The Court defers to the construction of a state statute given it by the lower federal courts. Indeed, the Court will defer to lower court interpretations of state law unless they amount to "plain" error. This reflects the belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.

Healthcare Law > Medical
Treatment > Abortion > General Overview

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Healthcare Law > Medical Treatment > General
Overview

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

Healthcare Law > Medical Treatment > Patient
Consent > General Overview

Healthcare Law > Medical Treatment > Patient
Consent > Informed Consent

Healthcare Law > ... > Reproductive
Services > Reproductive Technology > General
Overview

HN19 Medical Treatment, Abortion

The medical emergency definition in the Pennsylvania Abortion Control Act of 1982, [18 Pa. Cons. Stat. § 3203](#) (1990), imposes no undue burden on a woman's abortion right.

Criminal Law & Procedure > ... > Domestic
Offenses > Domestic Assault > Elements

Healthcare Law > Medical

Treatment > Abortion > General Overview

Criminal Law & Procedure > ... > Sexual
Assault > Abuse of Adults > General Overview

Criminal Law & Procedure > ... > Sexual
Assault > Abuse of Adults > Elements

Healthcare Law > Medical Treatment > General
Overview

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

Healthcare Law > ... > Reproductive
Services > Reproductive Technology > General
Overview

HN20 Domestic Assault, Elements

[Section 3209](#) of the Pennsylvania Abortion Control Act of 1982 provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

Healthcare Law > ... > Reproductive
Services > Reproductive Technology > General
Overview

HN21 Reproductive Services, Reproductive Technology

The spousal notification requirement of [§ 3209](#) of the Pennsylvania Abortion Control Act of 1982 is likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

[HN22](#) Case or Controversy, Constitutionality of Legislation

Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Constitutional Law > Substantive Due Process > Privacy > General Overview

Healthcare Law > Medical Treatment > Abortion > Minors

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

Healthcare Law > Medical Treatment > Incompetent, Mentally Disabled & Minors > Parental Notice

[HN23](#) Substantive Due Process, Privacy

In a large fraction of the cases in which [§ 3209](#) of the Pennsylvania Abortion Control Act of 1982 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

Constitutional Law > Substantive Due Process > Privacy > General Overview

[HN24](#) Substantive Due Process, Privacy

With regard to the children he has fathered and raised, the Court has recognized a man's "cognizable and substantial" interest in their custody. If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.

Constitutional Law > Substantive Due Process > Privacy > Personal Decisions

Family Law > Marriage > Nature of Marriage

Constitutional Law > Substantive Due Process > Privacy > General Overview

[HN25](#) Privacy, Personal Decisions

When the wife and the husband disagree on the abortion decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor. This conclusion rests upon the basic nature of marriage and the nature of the Constitution: The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Constitutional Law > Substantive Due
Process > Privacy > General Overview

Constitutional Law > Equal
Protection > Parentage

HN26 Substantive Due Process, Privacy

The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family.

Constitutional Law > ... > Case or
Controversy > Constitutionality of
Legislation > General Overview

Family Law > Parental Duties &
Rights > Consent > Abortion

Healthcare Law > ... > Reproductive
Services > Reproductive Technology > General
Overview

HN27 Case or Controversy, Constitutionality of Legislation

[18 Pa. Cons. Stat. § 3209](#) (1990) is invalid.

Lawyers' Edition Display

Decision

Pennsylvania abortion legislation held valid, except for spousal-notice provisions, under due process clause of [Federal Constitution's Fourteenth Amendment](#).

Summary

In 1988 and 1989, a Pennsylvania abortion statute was amended to provide that (1) a woman seeking an abortion is required to give her informed consent prior to the abortion procedure and to be provided, at least 24 hours before the abortion is performed,

with certain information concerning her decision whether to undergo an abortion, (2) a minor seeking an abortion is required to obtain the informed consent of one of her parents or guardians, but has available a judicial bypass option if the minor does not wish to or cannot obtain such consent, (3) unless certain exceptions apply, a married woman seeking an abortion is required to sign a statement indicating that she has notified her husband of her intended abortion, (4) compliance with the foregoing requirements is exempted in the event of a "medical emergency," which term is defined in another statutory provision as a pregnant woman's medical condition that on the basis of a physician's good-faith clinical judgment, necessitates an immediate abortion to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function, and (5) facilities providing abortion services are subject to certain reporting and record-keeping requirements, which do not include the disclosure of the identities of women who have undergone abortions, but which include a requirement of reporting of a married woman's failure to provide notice to her husband of her intended abortion. Before any of these provisions took effect, five abortion clinics and one physician representing himself as well as a class of physicians who provided abortion services brought suit seeking declaratory and injunctive relief on the basis of the allegation that each provision was unconstitutional on its face. The United States District Court for the Eastern District of Pennsylvania, after entering a preliminary injunction against enforcement of the provisions, held that all the provisions were unconstitutional and entered a permanent injunction against the state's enforcement of the provisions ([744 F Supp 1323](#)). The United States Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all the provisions except for the spousal-notice requirement ([947 F2d 682](#)).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. A majority of the members of the court joined

portions of an opinion holding that (1) the statutory provision defining a medical emergency did not violate the due process clause, (2) the provision requiring spousal notice violated the due process clause, and (3) the essential holding of [*Roe v Wade* \(1973\) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705](#)--which held that (a) a woman has the right to choose to have an abortion before her fetus is viable and to obtain an abortion without undue interference from a state, (b) a state has the power to restrict abortions after fetal viability, if the state law imposing such a restriction contains exceptions for pregnancies which endanger a woman's life or health, and (c) a state has legitimate interests from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the fetus that may become a child--should be retained and reaffirmed. Although unable to agree on an opinion as to the other statutory provisions, (1) seven members of the court (O'Connor, Kennedy, and Souter, JJ., Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ.) agreed that the provisions requiring informed consent, the 24-hour waiting period, and parental consent did not violate the due process clause, (2) eight members (O'Connor, Kennedy, Souter, and Stevens, JJ., Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ.) agreed that the provisions requiring record keeping and reporting, at least except for the provision requiring reporting of failure to provide spousal notice, did not violate the due process clause, and (3) five members (O'Connor, Kennedy, Souter, Stevens, and Blackmun, JJ.) agreed that the provision requiring reporting of failure to provide spousal notice violated the due process clause.

In a joint opinion by O'Connor, Kennedy, and Souter, JJ., announcing the judgment of the court, and joined in pertinent part by Stevens and Blackmun, JJ., it was held that (1) the statutory provision defining a medical emergency did not violate the due process clause, because, as construed by the Court of Appeals to include serious conditions that could lead to an illness with substantial and irreversible consequences, the definition imposed no undue burden on a woman's

abortion rights; (2) the provision requiring spousal notice violated the due process clause by imposing an undue burden on a woman's abortion rights, because the notice requirement enabled a husband to wield, in effect, an unconstitutional veto over his wife's decision concerning an abortion; and (3) consideration of the fundamental constitutional questions resolved by *Roe v Wade*, of principles of institutional integrity, and of the rule of stare decisis required that the essential holding of *Roe v Wade* be retained and reaffirmed. Also, O'Connor, Kennedy, and Souter, JJ., expressed the view that (1) the provision concerning a pregnant woman's informed consent and the 24-hour waiting period did not violate the due process clause, because the provision did not place an undue burden upon a woman's right to decide whether to terminate her pregnancy; (2) the provision requiring parental consent did not violate the due process clause, because prior Supreme Court cases have upheld a parental consent requirement, provided that there is an adequate judicial bypass procedure; (3) the record-keeping and reporting requirements, except for the provision requiring reporting of failure to provide spousal notice, did not violate the due process clause, because such requirements related to maternal health and did not pose a substantial obstacle to a woman's choice; (4) the provision requiring reporting of failure to provide spousal notice violated the due process clause by placing an undue burden on a woman's choice; and (5) the trimester framework of *Roe v Wade* should be rejected.

Stevens, J., concurring in part and dissenting in part, expressed the view that (1) *Roe v Wade* was an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women; (2) a state interested in protecting fetal life after viability could go so far as to proscribe abortion during that period, except when an abortion was necessary to preserve the life or health of the mother; (3) a state could promote its preference for normal childbirth by funding childbirth, creating and maintaining alternatives to abortion, and espousing the virtues of family, but

must respect an individual's freedom to choose between childbirth and abortion; (4) the court properly determined that (a) the medical emergency provision was valid, (b) the provision requiring spousal notice was invalid, and (c) the provisions requiring record keeping and reporting were valid, except that the provision requiring reporting of failure to provide spousal notice was invalid; and (5) with respect to the statutory provision concerning informed consent, (a) the portion requiring a physician or counselor to provide a woman with a range of materials clearly designed to persuade her to choose not to undergo an abortion was unconstitutional, because the state could not inject such information into a woman's deliberations just as she was weighing such an important choice, and (b) the 24-hour waiting period was unconstitutional, where there was no evidence that the mandated delay benefited women or was necessary to enable a physician to convey any relevant information to a patient.

Blackmun, J., concurring in the judgment in part, and dissenting in part, expressed the view that (1) the Federal Constitution and the decisions of the Supreme Court required that a state's abortion restrictions be subjected to strict scrutiny; (2) state restrictions on abortion (a) violated a woman's right of privacy by infringing upon her right to bodily integrity and depriving her of the right to make her own decision about reproduction and family planning, and (b) implicated constitutional guarantees of gender equality; (3) the trimester framework required in *Roe v Wade* should not be disturbed; and (4) except for the medical emergency provision which the court properly held valid, stare decisis and application of the strict scrutiny standard necessitated the invalidation of all the challenged statutory provisions, because (a) under the guise of informed consent, the statute required the dissemination of information that was not relevant to such consent, and thus advanced no legitimate state interest, (b) the 24-hour waiting period furthered no legitimate state interest, (c) the parental consent provision was not narrowly drawn to serve the state's interest in encouraging parental

involvement in a minor's abortion decision, and (d) the statute's reporting requirements were not shown either to have added to the pool of scientific knowledge concerning abortion or to have been reasonably related to the state's interest in maternal health.

Rehnquist, Ch. J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part, expressed the view that (1) *Roe v Wade* was wrongly decided and should be overruled; (2) a woman's interest in having an abortion is a form of liberty protected by the due process clause, but states may regulate abortion procedures in ways rationally related to a legitimate state interest; and (3) the challenged statutory provisions should be upheld in their entirety, because (a) the informed consent provision was rationally related to the state's interest in assuring that a woman's consent to an abortion be fully informed, and the 24-hour waiting period reasonably furthered the state's legitimate interests in maternal health and in the unborn life of the fetus, (b) the parental consent provision was consistent with the Supreme Court's previous decisions involving parental consent requirements, (c) the spousal notice provision was a rational attempt to improve truthful communication between spouses and encourage collaborative decisionmaking, (d) the court properly determined that the medical emergency provision was valid, and (e) the statute's reporting requirements rationally furthered the state's legitimate interests in medical knowledge concerning maternal health and prenatal life, in gathering statistical information concerning patients, and in assuring compliance with other provisions of the statute.

Scalia, J., joined by Rehnquist, Ch. J., and White and Thomas, JJ., concurring in the judgment in part and dissenting in part, expressed the view that (1) a woman's liberty to abort her unborn child is not a liberty protected by the Federal Constitution, because (a) the Constitution says nothing about abortion, and (b) the longstanding traditions of American society permitted abortion to be legally

proscribed; (2) applying the rational-basis test, the state statute should be upheld in its entirety; (3) *Roe v Wade* was plainly wrong, and the Supreme Court should get out of this area of the law, where it has no right to be; and (4) the undue burden standard was inherently manipulable and would prove unworkable in practice.

Headnotes

ABORTION §16 > state regulation -- exemption for medical emergency -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

A state abortion statute's provision defining a "medical emergency" as a pregnant woman's medical condition that, on the basis of a physician's good-faith clinical judgment, necessitates an immediate abortion, to avert the woman's death or to avert a serious risk of substantial and irreversible impairment of a major bodily function, does not violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#)--where the statute provides, in the event of a medical emergency, an exemption from various of the statute's requirements, including requirements that (1) a woman seeking an abortion give her informed consent prior to the abortion procedure and be provided with certain information at least 24 hours before the abortion is performed, and (2) a minor seeking an abortion obtain the informed consent of one of her parents or follow a judicial bypass procedure if parental consent is not obtained--because (1) although the statutory definition of a medical emergency could be interpreted in an unconstitutional manner, a Federal Court of Appeals (a) has construed the phrase "serious risk" in the definition to include serious conditions that could lead to an illness with substantial and irreversible consequences, and (b) has read the medical emergency exception as intended by the state legislature to assure that compliance with the state's abortion regulations will not in any way pose

a significant threat to the life or health of a woman, and (2) the United States Supreme Court, in deferring to the Court of Appeals' construction of the state statute, will conclude that as construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman's abortion rights.

ABORTION §7 > informed consent -- 24-hour waiting period -- > Headnote:

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

The United States Supreme Court will hold that a state statute's provision concerning a pregnant woman's informed consent to an abortion--which provision requires that except in a medical emergency, (1) at least 24 hours before performing an abortion, a physician must inform the woman of the nature of the abortion procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child, (2) the physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the state describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion, and (3) the woman must certify in writing that she has been informed of the availability of these materials, and that if she has chosen to view the materials, she has been provided with them--does not violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#), where (1) three Justices of the Supreme Court express the view that the provision does not place an undue burden upon a woman's right to decide whether to terminate a pregnancy; and (2) four Justices express the view that (a) the informed consent provision is rationally related to the state's interest in assuring that a woman's consent to an abortion be fully informed, and (b) the 24-hour

waiting period reasonably furthers the state's legitimate interests. [Per O'Connor, Kennedy, and Souter, JJ., Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ. Dissenting: Stevens and Blackmun, JJ.]

ABORTION §16 > spousal notice -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B] [LEdHN\[3C\]](#) [3C] [LEdHN\[3D\]](#) [3D] [LEdHN\[3E\]](#) [3E]

A state abortion statute's provision concerning spousal notice--which provision prohibits a physician from performing an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion, unless the woman provides an alternative signed statement certifying that (1) her husband is not the man who impregnated her, (2) her husband cannot be located, (3) her pregnancy is the result of a spousal sexual assault which she has reported, or (4) she believes that notifying her husband will cause him or someone else to inflict bodily injury upon her--is an undue burden on a woman's right, under the due process clause of the [Federal Constitution's Fourteenth Amendment](#), to undergo an abortion, and thus is unconstitutional, because (1) the vast majority of women notify their male partners of the decision to obtain an abortion; (2) in many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair; (3) when the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence; (4) victims of a spousal sexual assault are extremely reluctant to report the assault to the government, and thus the spousal notification requirement imposes a substantial obstacle that is likely to prevent a significant number of women from procuring an abortion as surely as if the state had outlawed abortion in all cases; (5) the spousal notice

provision embodies a view of marriage that is repugnant to the modern understanding of marriage and of the nature of the rights secured by the Constitution; (6) women do not lose their constitutionally protected liberty when they marry; (7) state regulation with respect to the child a woman is carrying has a far greater impact on the mother's liberty than on the father's liberty, and the effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the state has touched upon not only the private sphere of the family, but also the bodily integrity of the pregnant woman; (8) the right of privacy includes the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters that so fundamentally affect a person as does the decision whether to bear or beget a child; (9) the Constitution protects all individuals, male or female, married or unmarried, from unjustified state interference, even when the interference is employed for the supposed benefit of a member of the individual's family, including the individual's spouse; (10) the women most affected by a spousal notice requirement are those who most reasonably fear the consequences of notifying their husbands; and (11) a husband's interest in the life of the child his wife is carrying does not permit a state to empower him with an effective veto power over his wife's decision to procure an abortion. (Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ., dissented from this holding.)

ABORTION §8 > parental consent -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B] [LEdHN\[4C\]](#) [4C] [LEdHN\[4D\]](#) [4D]

A state abortion statute's provision concerning parental consent--which provision states that except in a medical emergency, an unemancipated woman under 18 years of age may not obtain an abortion unless (1) she and one of her parents or guardians provide informed consent, or (2) if neither a parent

nor a guardian provides consent, a court authorizes the performance of an abortion upon a determination that (a) the woman is mature and capable of giving informed consent and has done so, or (b) an abortion would be in her best interest--does not violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#), where the United States Supreme Court's prior decisions have upheld such a parental consent requirement provided that there is an adequate judicial bypass procedure. [Per O'Connor, Kennedy, and Souter, JJ., Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ. Dissenting: Blackmun, J.]

ABORTION §15 > record keeping and reporting --
> Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B] [LEdHN\[5C\]](#) [5C] [LEdHN\[5D\]](#) [5D] [LEdHN\[5E\]](#) [5E]

The United States Supreme Court will hold that the record-keeping and reporting requirements of a state abortion statute--under which statute (1) every facility performing abortions is required to file a report stating the facility's name and address as well as the name and address of any related entity, (2) such information, when it comes from state-funded institutions, becomes public, (3) for each abortion, a report must be filed specifying such information as (a) the performing physician, (b) the facility, (c) the referring physician or agency, (d) the pregnant woman's age, (e) the number of prior pregnancies and abortions the woman has had, (f) gestational age, (g) the type of abortion procedure, (h) the date of the abortion, (i) whether there were any pre-existing medical conditions that would have complicated pregnancy, (j) the basis for the determination that the abortion was medically necessary, and (k) the weight of the aborted fetus; and (4) in all events, the identity of each woman who has had an abortion remains confidential--do not violate the due process clause of the [Federal Constitution's Fourteenth Amendment](#), where (1)

four Justices of the Supreme Court express the view that such requirements relate to maternal health and do not pose a substantial obstacle to a woman's choice as to whether to terminate a pregnancy; and (2) four Justices express the view that such requirements rationally further the state's legitimate interests in medical knowledge concerning maternal health and prenatal life, in gathering statistical information concerning patients, and in assuring compliance with other provisions of the abortion statute. [Per O'Connor, Kennedy, Souter, and Stevens, JJ., Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ. Dissenting: Blackmun, J.]

ABORTION §15 > reporting as to failure to notify husband -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B] [LEdHN\[6C\]](#) [6C] [LEdHN\[6D\]](#) [6D] [LEdHN\[6E\]](#) [6E] [LEdHN\[6F\]](#) [6F]

The United States Supreme Court will hold that a state statutory provision--requiring that facilities performing abortions report a married woman's reason for failure to notify her husband of her decision to obtain an abortion--violates the due process clause of the [Federal Constitution's Fourteenth Amendment](#), where (1) four Justices of the Supreme Court express the view that the provision by, in effect, requiring women, as a condition of obtaining an abortion, to provide the state with the precise information that many women have pressing reasons not to reveal, places an undue burden on a woman's choice whether to terminate a pregnancy; and (2) a fifth Justice expresses the view that (a) the state's abortion restrictions should be subjected to strict scrutiny, and (b) under this standard, the state's statutory requirements concerning reporting of abortion-related information must be invalidated. [Per O'Connor, Kennedy, Souter, Stevens, and Blackmun, JJ. Dissenting: Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ.]

COURTS §775 > adherence to former decision --
constitutionality of state abortion laws -- > Headnote:
[LEdHN\[7A\]](#) [7A][LEdHN\[7B\]](#) [7B][LEdHN\[7C\]](#)
[7C]

Consideration of the fundamental constitutional questions resolved by [Roe v Wade \(1973\) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705](#), of principles of institutional integrity, and of the rule of stare decisis requires that the essential holding of Roe v Wade--which held that (1) a woman has the right to choose to have an abortion before her fetus is viable and to obtain an abortion without undue interference from a state, (2) a state has the power to restrict abortions after fetal viability, if the state law imposing such a restriction contains exceptions for pregnancies which endanger a woman's life or health, and (3) a state has legitimate interests from the outset of a pregnancy in protecting the health of the pregnant woman and the life of the fetus that may become a child--be adhered to by the United States Supreme Court, because (1) Roe v Wade, in seeking to protect the personal liberty that is protected under the due process clause of the [Federal Constitution's Fourteenth Amendment](#), invoked the reasoning and the tradition of the Supreme Court's precedents granting protection to substantive liberties of the person; (2) Roe v Wade has not proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable; (3) the cost of overruling Roe v Wade for people who have ordered their thinking and living around the case cannot be dismissed; (4) no evolution of legal principle has left the doctrinal footings of Roe v Wade weaker than they were when the case was decided; (5) no change in the factual underpinning of Roe v Wade (a) has left obsolete the decision's central holding that viability marks the earliest point at which a state's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions, or (b) supports an argument for overruling the decision; (6) a decision to overrule should rest on some

special reason over and above the belief that a prior case was wrongly decided; and (7) to overrule the essential holding of Roe v Wade would seriously weaken the Supreme Court's capacity to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law. (Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ., dissented from this holding.)

ABORTION §1 > right to choose -- > Headnote:
[LEdHN\[8\]](#) [8]

A woman has the right, under the due process clause of the [Federal Constitution's Fourteenth Amendment](#), to choose to have an abortion before fetal viability and to obtain an abortion without undue interference from the state, because before viability, a state's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to a woman's effective right to elect the procedure. (Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ., dissented from this holding.)

ABORTION §2 > restriction by state -- > Headnote:
[LEdHN\[9\]](#) [9]

A state has the power, under the due process clause of the [Federal Constitution's Fourteenth Amendment](#), to restrict abortions after fetal viability, if the law containing the restriction contains exceptions for pregnancies which endanger a woman's life or health.

ABORTION §2 > regulation -- state interests --
> Headnote:
[LEdHN\[10\]](#) [10]

With respect to the question of the validity, under the due process clause of the [Federal Constitution's Fourteenth Amendment](#), of state regulation of abortion, a state has legitimate interests from the outset of pregnancy in protecting the health of the pregnant woman and the life of the fetus that may become a child.

ABORTION §1 > CONSTITUTIONAL LAW
 §513 > due process -- liberty -- > Headnote:
[LEdHN\[11A\]](#) [11A][LEdHN\[11B\]](#)
 [11B][LEdHN\[11C\]](#) [11C]

Constitutional protection of a woman's decision to terminate her pregnancy derives from the due process clause of the [Federal Constitution's Fourteenth Amendment](#), which prohibits states from depriving any person of liberty without due process of law, because (1) the due process clause applies to matters of substantive law as well as to matters of procedure, and thus, all fundamental rights comprised within the term "liberty" are protected by the Federal Constitution from invasion by the states; (2) neither the [Bill of Rights](#) nor the specific practices of the states at the time of the adoption of the [Fourteenth Amendment](#) mark the outer limits of the substantive sphere of liberty which the [Fourteenth Amendment](#) protects; (3) the full scope of the liberty guaranteed by the due process clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution, and this liberty is a rational continuum which, broadly speaking, includes freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes that certain interests require particularly careful scrutiny of the state needs asserted to justify the abridgement of the interests; (4) 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; and (5) the Constitution protects personal decisions relating to marriage, procreation, contraception,

family relationships, child rearing, and education, and these matters are central to the liberty protected by the [Fourteenth Amendment](#). (Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ., dissented in part from this holding.)

CONSTITUTIONAL LAW §528.5 > due process -- liberty -- marriage -- > Headnote:
[LEdHN\[12\]](#) [12]

Marriage is an aspect of liberty protected against state interference by the substantive component of the due process clause of the [Federal Constitution's Fourteenth Amendment](#).

COURTS §766 > stare decisis -- > Headnote:
[LEdHN\[13\]](#) [13]

Although the concept of the rule of law underlying the Federal Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable, the rule of stare decisis is not an inexorable command in a constitutional case or otherwise; rather, when the United States Supreme Court re-examines a prior Supreme Court holding, the court's judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.

ABORTION §2 > regulation by state -- > Headnote:
[LEdHN\[14A\]](#) [14A][LEdHN\[14B\]](#)
 [14B][LEdHN\[14C\]](#) [14C][LEdHN\[14D\]](#) [14D]

Under the due process clause of the [Federal Constitution's Fourteenth Amendment](#), a state (1)

may take steps to insure that a woman's decision whether to have an abortion is thoughtful and informed, and (2) is free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning as does a decision whether to terminate a pregnancy. [Per O'Connor, Kennedy, Souter, Stevens, and Blackmun, JJ.]

ABORTION §1 > state's preference for childbirth --
> Headnote:

[LEdHN\[15A\]](#) [15A] [LEdHN\[15B\]](#)
[15B] [LEdHN\[15C\]](#) [15C] [LEdHN\[15D\]](#) [15D]

The Federal Constitution does not forbid a state from expressing a preference for normal childbirth rather than for abortion. [Per O'Connor, Kennedy, Souter, Stevens, and Blackmun, JJ.]

ABORTION §2 > regulation by state -- trimester framework -- > Headnote:

[LEdHN\[16A\]](#) [16A] [LEdHN\[16B\]](#)
[16B] [LEdHN\[16C\]](#) [16C] [LEdHN\[16D\]](#) [16D]

The United States Supreme Court will reject the trimester framework established in [Roe v Wade \(1973\) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705](#), to determine the validity, under the Federal Constitution, of state regulation of abortion--under which framework (1) almost no regulation is permitted during the first trimester of pregnancy, (2) regulations designed to protect a pregnant woman's health, but not to further a state's interest in potential life, are permitted during the second trimester, and (3) during the third trimester, when the fetus is viable, prohibitions are permitted provided that the life or health of the mother is not at stake--where (1) three Justices of the Supreme Court express the view that (a) the trimester framework is not part of the essential holding of *Roe v Wade*, (b) a logical reading of the central

holding in *Roe v Wade*, and a necessary reconciliation of a woman's liberty protected under the due process clause of the [Federal Constitution's Fourteenth Amendment](#) with the interest of a state in promoting prenatal life, require abandonment of the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life, and (c) the undue burden standard--under which standard a state law that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus is invalid under the [Fourteenth Amendment](#)--is the appropriate means of reconciling a state's interest with a woman's constitutionally protected liberty; and (2) four Justices express the view that *Roe v Wade* was wrongly decided and should be overruled. [Per O'Connor, Kennedy, and Souter, JJ., Rehnquist, Ch. J., and White, Scalia, and Thomas, JJ. Dissenting: Stevens and Blackmun, JJ.]

APPEAL §1258.5 > construction of state statute --
> Headnote:

[LEdHN\[17\]](#) [17]

In reviewing lower federal courts' decisions, the United States Supreme Court will normally defer to the lower federal courts' construction of a state statute.

CONSTITUTIONAL LAW §9 > focus of inquiry --
> Headnote:

[LEdHN\[18\]](#) [18]

Legislation is measured for consistency with the Federal Constitution by the impact of the legislation on those whose conduct it effects; the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

HUSBAND AND WIFE §2 > rights of husband --
> Headnote:

[LEdHN\[19\]](#) [19]

A husband has no enforceable right under state law to require his wife to advise him before she exercises her personal choices; a state may not give to a man the kind of dominion over his wife that parents exercise over their children.

APPEAL §1750 > remand -- issues to be considered --
> Headnote:

[LEdHN\[20\]](#) [20]

On certiorari to review a Federal Court of Appeals decision concerning the constitutionality of certain provisions of a state's abortion statute, the United States Supreme Court, upon affirming in part and reversing in part, will remand for proceedings including consideration of the question of severability, where the Supreme Court has held that some of the statutory provisions are constitutionally valid and others are not.

Syllabus

At issue are five provisions of the Pennsylvania Abortion Control Act of 1982: [§ 3205](#), which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; [§ 3206](#), which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; [§ 3209](#), which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; [§ 3203](#), which defines a "medical emergency" that will [\[****2\]](#) excuse

compliance with the foregoing requirements; and [§§ 3207\(b\)](#), [3214\(a\)](#), and [3214\(f\)](#), which impose certain reporting requirements on facilities providing abortion services. Before any of the provisions took effect, the petitioners, five abortion clinics and a physician representing himself and a class of doctors who provide abortion services, brought this suit seeking a declaratory judgment that each of the provisions was unconstitutional on its face, as well as injunctive relief. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the husband notification provision but upholding the others.

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

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER delivered the opinion of the Court with respect to Parts I, II, and III, concluding that consideration of the fundamental constitutional [\[****3\]](#) question resolved by [Roe v. Wade](#), [410 U.S. 113](#), [35 L. Ed. 2d 147](#), [93 S. Ct. 705](#), principles of institutional integrity, and the rule of *stare decisis* require that *Roe's* essential holding be retained and reaffirmed as to each of its three parts: (1) a recognition of a woman's right to choose to have an abortion before fetal viability and to obtain it without undue interference from the State, whose previability interests are not strong enough to support an abortion prohibition or the imposition of substantial obstacles to the woman's effective right to elect the procedure; (2) a confirmation of the State's power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman's life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. Pp. 844-869.

(a) A reexamination of the principles that define the woman's rights and the State's authority regarding

abortion is required by the doubt this Court's subsequent decisions have cast upon the meaning and reach of *Roe's* central holding, by the fact [****4] that THE CHIEF JUSTICE would overrule *Roe*, and by the necessity that state and federal courts and legislatures have adequate guidance on the subject. Pp. 844-845.

(b) *Roe* determined that a woman's decision to terminate her pregnancy is a "liberty" protected against state interference by the substantive component of the *Due Process Clause of the Fourteenth Amendment*. Neither the *Bill of Rights* nor the specific practices of States at the time of the *Fourteenth Amendment's* adoption marks the outer limits of the substantive sphere of such "liberty." Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society. The Court's decisions have afforded constitutional protection to personal decisions relating to marriage, see, e. g., *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817, procreation, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110, family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438, child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571, [****5] and contraception, *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678, and have recognized the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child, *Eisenstadt v. Baird*, 405 U.S. 438, 453, 31 L. Ed. 2d 349, 92 S. Ct. 1029. *Roe's* central holding properly invoked the reasoning and tradition of these precedents. Pp. 846-853.

(c) Application of the doctrine of *stare decisis* confirms that *Roe's* essential holding should be reaffirmed. In reexamining that holding, the Court's judgment is informed by a series of prudential and

pragmatic considerations designed to test the consistency of overruling the holding with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling. Pp. 854-855.

(d) Although *Roe* has engendered opposition, it has in no sense proven unworkable, representing as it does a simple limitation beyond which a state law is unenforceable. P. 855.

(e) The *Roe* rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of [****6] economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed. Pp. 855-856.

(f) No evolution of legal principle has left *Roe's* central rule a doctrinal anachronism discounted by society. If *Roe* is placed among the cases exemplified by *Griswold, supra*, it is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the liberty recognized in such cases. Similarly, if *Roe* is seen as stating a rule of personal autonomy and bodily integrity, akin to cases recognizing limits on governmental power [****7] to mandate medical treatment or to bar its rejection, this Court's post-*Roe* decisions accord with *Roe's* view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. See, e. g., *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 111 L. Ed. 2d 224, 110 S. Ct. 2841. Finally, if *Roe* is classified as *sui generis*, there

clearly has been no erosion of its central determination. It was expressly reaffirmed in [Akron v. Akron Center for Reproductive Health, Inc.](#), 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (*Akron I*), and [Thornburgh v. American College of Obstetricians and Gynecologists](#), 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169; and, in [Webster v. Reproductive Health Services](#), 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040, a majority either voted to reaffirm or declined to address the constitutional validity of *Roe's* central holding. Pp. 857-859.

(g) No change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for its overruling. Although subsequent maternal health care advances allow for later abortions safe to the pregnant [****8] woman, and post-*Roe* neonatal care developments have advanced viability to a point somewhat earlier, these facts go only to the scheme of time limits on the realization of competing interests. Thus, any later divergences from the factual premises of *Roe* have no bearing on the validity of its central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on when viability occurs. Whenever it may occur, its attainment will continue to serve as the critical fact. P. 860.

(h) A comparison between *Roe* and two decisional lines of comparable significance -- the line identified with [Lochner v. New York](#), 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539, and the line that began with [Plessy v. Ferguson](#), 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 -- confirms the result reached here. Those lines were overruled -- by, respectively, [West Coast Hotel Co. v. Parrish](#), 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578, and [Brown v. Board of Education](#), 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 -- [****9] on the basis of facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. The overruling decisions

were comprehensible to the Nation, and defensible, as the Court's responses to changed circumstances. In contrast, because neither the factual underpinnings of *Roe's* central holding nor this Court's understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining *Roe* with any justification beyond a present doctrinal disposition to come out differently from the *Roe* Court. That is an inadequate basis for overruling a prior case. Pp. 861-864.

(i) Overruling *Roe's* central holding would not only reach an unjustifiable result under *stare decisis* principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. Where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in *Roe*, its decision has a dimension not present in normal cases and is entitled to rare precedential [****10] force to counter the inevitable efforts to overturn it and to thwart its implementation. Only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. Moreover, the country's loss of confidence in the Judiciary would be underscored by condemnation for the Court's failure to keep faith with those who support the decision at a cost to themselves. A decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law. Pp. 864-869.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER concluded in Part IV that an examination of [Roe v. Wade](#), 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, and subsequent cases, reveals a number of guiding principles that should

control the assessment of the Pennsylvania statute:

(a) To protect the central right recognized by [****11] *Roe* while at the same time accommodating the State's profound interest in potential life, see *id.*, at 162, the undue burden standard should be employed. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.

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

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

(d) Adoption of the undue burden standard does not disturb *Roe's* holding that regardless of whether exceptions are made for particular circumstances, [****12] a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) *Roe's* holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" is also reaffirmed. *Id.*, at 164-165. Pp. 869-879.

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

1. As construed by the Court of Appeals, § 3203's medical emergency definition is intended to assure that compliance with the State's abortion regulations would not in any way pose a significant threat to a woman's life or health, and thus does not violate the essential holding of *Roe, supra*, at 164. Although the definition could be interpreted in an unconstitutional manner, this Court defers to lower federal court interpretations of state law unless they amount to "plain" error. Pp. 879-880.

2. Section 3209's husband [****13] notification provision constitutes an undue burden and is therefore invalid. A significant number of women will likely be prevented from obtaining an abortion just as surely as if Pennsylvania had outlawed the procedure entirely. The fact that § 3209 may affect fewer than one percent of women seeking abortions does not save it from facial invalidity, since the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant. Furthermore, it cannot be claimed that the father's interest in the fetus' welfare is equal to the mother's protected liberty, since it is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband. Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to this Court's present understanding of marriage and of the nature of the rights secured by the Constitution. See *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 69, 49 L. Ed. 2d 788, 96 S. Ct. 2831. Pp. 887-898.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER, [****14] joined by JUSTICE STEVENS, concluded in Part V-E that all of the statute's recordkeeping and reporting requirements, except that relating to spousal notice, are constitutional. The reporting provision relating to the reasons a married woman has not notified her husband that she intends to have an abortion must be invalidated because it places an undue burden on a woman's choice. Pp. 900-901.

JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER concluded in Parts V-B and V-D that:

1. [Section 3205](#)'s informed consent provision is not an undue burden on a woman's constitutional right to decide to terminate a pregnancy. To the extent [Akron I](#), [462 U.S. at 444](#), and [Thornburgh](#), [476 U.S. at 762](#), find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus, those cases are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled. Requiring that the woman be informed of [****15] the availability of information relating to the consequences to the fetus does not interfere with a constitutional right of privacy between a pregnant woman and her physician, since the doctor-patient relation is derivative of the woman's position, and does not underlie or override the abortion right. Moreover, the physician's [First Amendment](#) rights not to speak are implicated only as part of the practice of medicine, which is licensed and regulated by the State. There is no evidence here that requiring a doctor to give the required information would amount to a substantial obstacle to a woman seeking an abortion. The premise behind *Akron I*'s invalidation of a waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion, [462 U.S. at 450](#), is also wrong. Although [§ 3205](#)'s 24-hour waiting period may make some abortions more expensive and less convenient, it cannot be said that it is invalid on the present record and in the context of this facial challenge. Pp. 881-887.

2. Section 3206's one-parent consent requirement and judicial bypass procedure are constitutional. See, e. g., [Ohio v. Akron Center for Reproductive Health](#), [497 U.S. 502, 510-519](#), [****16] [111 L. Ed. 2d 405, 110 S. Ct. 2972](#). Pp. 899-900.

JUSTICE BLACKMUN concluded that application of the strict scrutiny standard of review required by this Court's abortion precedents results in the invalidation of all the challenged provisions in the Pennsylvania statute, including the reporting requirements, and therefore concurred in the judgment that the requirement that a pregnant woman report her reasons for failing to provide spousal notice is unconstitutional. Pp. 930, 934-936.

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

1. Although [Roe v. Wade](#), [410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705](#), is not directly implicated by the Pennsylvania statute, which simply regulates and does not prohibit abortion, a reexamination of the "fundamental right" *Roe* accorded to a woman's decision to abort a fetus, with the concomitant requirement that any state regulation of abortion survive "strict scrutiny," [id.](#), [at 154-156](#), is warranted by the confusing and uncertain state of this Court's post-*Roe* decisional law. A review of post-*Roe* cases demonstrates both that they have expanded upon *Roe* in imposing increasingly greater restrictions [****17] on the States, see [Thornburgh v. American College of Obstetricians and Gynecologists](#), [476 U.S. 747, 783, 90 L. Ed. 2d 779, 106 S. Ct. 2169](#) (Burger, C. J., dissenting), and that the Court has become increasingly more divided, none of the last three such decisions having commanded a majority opinion, see [Ohio v. Akron Center for Reproductive Health](#), [497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972](#); [Hodgson v. Minnesota](#), [497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926](#); [Webster v. Reproductive Health Services](#), [492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040](#). This confusion and uncertainty complicated the task of the Court of Appeals, which concluded that the "undue burden" standard adopted by JUSTICE O'CONNOR in *Webster* and *Hodgson* governs the present cases. Pp. 944-951.

2. The *Roe* Court reached too far when it

analogized the right to abort a fetus to the rights involved in [Pierce v. Society of Sisters](#), 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571; [Meyer v. Nebraska](#), 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625; [Loving v. Virginia](#), 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817; and [Griswold v. Connecticut](#), 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678, [****18] and thereby deemed the right to abortion to be "fundamental." None of these decisions endorsed an all-encompassing "right of privacy," as [Roe, supra, at 152-153](#), claimed. Because abortion involves the purposeful termination of potential life, the abortion decision must be recognized as *sui generis*, different in kind from the rights protected in the earlier cases under the rubric of personal or family privacy and autonomy. And the historical traditions of the American people -- as evidenced by the English common law and by the American abortion statutes in existence both at the time of the [Fourteenth Amendment's](#) adoption and *Roe's* issuance -- do not support the view that the right to terminate one's pregnancy is "fundamental." Thus, enactments abridging that right need not be subjected to strict scrutiny. Pp. 951-953.

3. The undue burden standard adopted by the joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER has no basis in constitutional law and will not result in the sort of simple limitation, easily applied, which the opinion anticipates. To evaluate abortion regulations under that standard, judges will have to make the subjective, unguided [****19] determination whether the regulations place "substantial obstacles" in the path of a woman seeking an abortion, undoubtedly engendering a variety of conflicting views. The standard presents nothing more workable than the trimester framework the joint opinion discards, and will allow the Court, under the guise of the Constitution, to continue to impart its own preferences on the States in the form of a complex abortion code. Pp. 964-966.

4. The correct analysis is that set forth by the plurality opinion in [Webster, supra](#): A woman's interest in having an abortion is a form of liberty

protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. P. 966.

5. [Section 3205](#)'s requirements are rationally related to the State's legitimate interest in assuring that a woman's consent to an abortion be fully informed. The requirement that a physician disclose certain information about the abortion procedure and its risks and alternatives is not a large burden and is clearly related to maternal health and the State's interest in informed consent. In addition, a State may rationally decide [****20] that physicians are better qualified than counselors to impart this information and answer questions about the abortion alternatives' medical aspects. The requirement that information be provided about the availability of paternal child support and state-funded alternatives is also related to the State's informed consent interest and furthers the State's interest in preserving unborn life. That such information might create some uncertainty and persuade some women to forgo abortions only demonstrates that it might make a difference and is therefore relevant to a woman's informed choice. In light of this plurality's rejection of *Roe's* "fundamental right" approach to this subject, the Court's contrary holding in *Thornburgh* is not controlling here. For the same reason, this Court's previous holding invalidating a State's 24-hour mandatory waiting period should not be followed. The waiting period helps ensure that a woman's decision to abort is a well-considered one, and rationally furthers the State's legitimate interest in maternal health and in unborn life. It may delay, but does not prohibit, abortions; and both it and the informed consent provisions do not apply in medical [****21] emergencies. Pp. 966-970.

6. The statute's parental consent provision is entirely consistent with this Court's previous decisions involving such requirements. See, e. g., [Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft](#), 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517. It is reasonably designed to further the State's important and legitimate interest "in the

welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." [Hodgson, supra, at 444](#). Pp. 970-971.

7. [Section 3214\(a\)](#)'s requirement that abortion facilities file a report on each abortion is constitutional because it rationally furthers the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act, while keeping the reports completely confidential. Public disclosure of other reports made by facilities receiving public funds -- those identifying the facilities and any parent, subsidiary, or affiliated organizations, [****22] [§ 3207\(b\)](#), and those revealing the total number of abortions performed, broken down by trimester, [§ 3214\(f\)](#) -- are rationally related to the State's legitimate interest in informing taxpayers as to who is benefiting from public funds and what services the funds are supporting; and records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. Pp. 976-977.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS, concluded that a woman's decision to abort her unborn child is not a constitutionally protected "liberty" because (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. See, e. g., [Ohio v. Akron Center for Reproductive Health](#), 497 U.S. 502, 520, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (SCALIA, J., concurring). The Pennsylvania statute should be upheld in its entirety under the rational basis test. Pp. 979-981.

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

Wharton, and Carol E. Tracy.

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

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

⁺ Briefs of amici curiae were filed for the State of New York et al. by Robert Abrams, Attorney General of New York, Jerry Boone, Solicitor General, Mary Ellen Burns, Chief Assistant Attorney General, and Sanford M. Cohen, Donna I. Dennis, Marjorie Fujiki, and Shelley B. Mayer, Assistant Attorneys General, and John McKernan, Governor of Maine, and Michael E. Carpenter, Attorney General, Richard Blumenthal, Attorney General of Connecticut, Charles M. Oberly III, Attorney General of Delaware, Warren Price III, Attorney General of Hawaii, Roland W. Burris, Attorney General of Illinois, Bonnie J. Campbell, Attorney General of Iowa, J. Joseph Curran, Jr., Attorney General of Maryland, Scott Harshbarger, Attorney General of Massachusetts, Frankie Sue Del Papa, Attorney General of Nevada, Robert J. Del Tufo, Attorney General of New Jersey, Tom Udall, Attorney General of New Mexico, Lacy H. Thornburg, Attorney General of North Carolina, James E. O'Neil, Attorney General of Rhode Island, Dan Morales, Attorney General of Texas, Jeffrey L. Amestoy, Attorney General of Vermont, and John Payton, Corporation Counsel of District of Columbia; for the State of Utah by R. Paul Van Dam, Attorney General, and Mary Anne Q. Wood, Special Assistant Attorney General; for the City of New York et al. by O. Peter Sherwood, Conrad Harper, Janice Goodman, Leonard J. Koerner, Lorna Bade Goodman, Gail Rubin, and Julie Mertus; for 178 Organizations by Pamela S. Karlan and Sarah Weddington; for Agudath Israel of America by David Zwiebel; for the Alan Guttmacher Institute et al. by Colleen K. Connell and Dorothy B. Zimbrakos; for the American Academy of Medical Ethics by Joseph W. Dellapenna; for the American Association of Prolife Obstetricians and Gynecologists et al. by William Bentley Ball, Philip J. Murren, and Maura K. Quinlan; for the American College of Obstetricians and Gynecologists et al. by Carter G. Phillips, Ann E. Allen, Laurie R. Rockett, Joel I. Klein, Nadine Taub, and Sarah C. Carey; for the American Psychological Association by David W. Ogden; for Texas Black Americans for Life by Lawrence J. Joyce and Craig H. Greenwood; for Catholics United for Life et al. by Thomas Patrick Monaghan, Jay Alan Sekulow, Walter M. Weber, Thomas A. Glessner, Charles E. Rice, and Michael J. Laird; for the Elliot Institute for Social Sciences Research by Stephen R. Kaufmann; for Feminists for Life of

Judges: O'CONNOR, KENNEDY, and SOUTER, JJ., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, in which BLACKMUN and STEVENS, JJ., joined, an opinion with respect [****23] to Part V-E, in which STEVENS, J., joined, and an opinion with respect to Parts IV, V-B, and V-D. STEVENS, J., filed an opinion concurring in part and dissenting in part, post, p. 911. BLACKMUN, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, post, p. 922. REHNQUIST, C. J., filed an opinion concurring in the judgment in part and dissenting in part, in which WHITE, SCALIA, and THOMAS, JJ., joined, post, p. 944. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and THOMAS, JJ., joined, post, p. 979.

Opinion by: O'CONNOR; KENNEDY; SOUTER

Opinion

America et al. by Keith A. Fournier, John G. Stepanovich, Christine Smith Torre, Theodore H. Amshoff, Jr., and Mary Dice Grenen; for Focus on the Family et al. by Stephen H. Galebach, Gregory J. Granitto, Stephen W. Reed, David L. Llewellyn, Jr., Benjamin W. Bull, and Leonard J. Pranschke; for the Knights of Columbus by Carl A. Anderson; for the Life Issues Institute by James Bopp, Jr., and Richard E. Coleson; for the NAACP Legal Defense and Educational Fund, Inc., et al. by Julius L. Chambers, Ronald L. Ellis, and Alice L. Brown; for the National Legal Foundation by Robert K. Skolrood; for National Right to Life, Inc., by Messrs. Bopp and Coleson, Robert A. Destro, and A. Eric Johnston; for the Pennsylvania Coalition Against Domestic Violence et al. by Phyllis Gelman; for the Rutherford Institute et al. by Thomas W. Strahan, John W. Whitehead, Mr. Johnston, Stephen E. Hurst, Joseph Secola, Thomas S. Neuberger, J. Brian Heller, Amy Dougherty, Stanley R. Jones, David Melton, Robert R. Melnick, William Bonner, W. Charles Bundren, and James Knicely; for the Southern Center for Law & Ethics by Tony G. Miller; for the United States Catholic Conference et al. by Mark E. Chopko, Phillip H. Harris, Michael K. Whitehead, and Forest D. Montgomery; for University Faculty for Life by Clarke D. Forsythe and Victor G. Rosenblum; for Certain American State Legislators by Paul Benjamin Linton; for 19 Arizona Legislators by Ronald D. Maines; for Representative Henry J. Hyde et al. by Albert P. Blaustein and Kevin J. Todd; for Representative Don Edwards et al. by Walter Dellinger and Lloyd N. Cutler; and for 250 American Historians by Sylvia A. Law.

[*843] [***693] [**2803] JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, [*844] V-C, and VI, an opinion with respect to Part V-E, in which JUSTICE STEVENS joins, and an opinion with respect to Parts IV, V-B, and V-D.

I

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), that definition of liberty is still [****24] questioned. Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*. See Brief for Respondents 104-117; Brief for United States as *Amicus Curiae* 8.

[LEdHN\[1A\]](#) [1A][LEdHN\[2A\]](#) [2A][LEdHN\[3A\]](#) [3A][LEdHN\[4A\]](#) [4A][LEdHN\[5A\]](#) [5A][LEdHN\[6A\]](#) [6A]At issue in these cases are five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. *18 Pa. Cons. Stat. §§ 3203-3220* (1990). Relevant portions of the Act are set forth in the Appendix. *Infra*, *505 U.S. at 902*. The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed. *§ 3205*. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent. *§ 3206*. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. *§*

[3209](#). The Act exempts compliance with these three requirements [****25] in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the [***694] Act imposes certain reporting requirements on facilities that provide abortion services. [§§ 3207\(b\), 3214\(a\), 3214\(f\)](#).

[*845] Before any of these provisions took effect, the petitioners, who are five abortion clinics and one physician representing himself as well as a class of physicians who provide abortion services, brought this suit seeking declaratory and injunctive relief. Each provision was challenged as unconstitutional on its face. The District Court entered a preliminary injunction against the enforcement of the regulations, and, after a 3-day bench trial, held all the provisions at issue here unconstitutional, entering a permanent injunction against Pennsylvania's enforcement of them. [744 F. Supp. 1323 \(ED Pa. 1990\)](#). The Court of Appeals for the Third Circuit affirmed in part and reversed in part, upholding all of the regulations except for the husband notification requirement. [947 F.2d 682 \(1991\)](#). We granted certiorari. [****26] 502 U.S. 1056 (1992).

The Court of Appeals found it necessary to follow an elaborate course of reasoning even to identify the first premise to use to determine whether the statute enacted by Pennsylvania meets constitutional standards. See [947 F.2d at 687-698](#). And at oral argument in this Court, the attorney for the parties challenging the statute took the position that none of the enactments can be upheld without overruling *Roe v. Wade*. Tr. of Oral Arg. 5-6. We disagree with that analysis; but we acknowledge that our decisions after *Roe* cast doubt upon the meaning and reach of its holding. Further, THE CHIEF JUSTICE admits that he would overrule the central [**2804] holding of *Roe* and adopt the rational relationship test as the sole criterion of constitutionality. See *post*, 505 U.S. at 944, 966. State and federal courts as well as legislatures throughout the Union must have guidance as they

seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and [****27] the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.

[LEdHN\[7A\]](#) [7A] [LEdHN\[8\]](#) [8] [LEdHN\[9\]](#) [9] [LEdHN\[10\]](#) [10] After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, [*846] and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that [HN1](#) *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus [****28] that may become a child. These principles do not contradict one another; and we adhere to each.

[***695] II

[LEdHN\[11A\]](#) [11A] [HN2](#) Constitutional protection of the woman's decision to terminate her pregnancy derives from the [Due Process Clause of the Fourteenth Amendment](#). It declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The controlling word in the cases before us is "liberty." [HN3](#) Although a literal reading of the Clause might suggest that it governs only the procedures by

which a State may deprive persons of liberty, for at least 105 years, since [Mugler v. Kansas](#), 123 U.S. 623, 660-661, 31 L. Ed. 205, 8 S. Ct. 273 (1887), the Clause has been understood to contain a substantive component as well, one "barring certain government actions regardless of the fairness of the procedures used to implement them." [Daniels v. Williams](#), 474 U.S. 327, 331, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). As Justice Brandeis (joined by Justice Holmes) observed, "despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth [*847] Amendment applies to matters of substantive law as well as to matters [****29] of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." [Whitney v. California](#), 274 U.S. 357, 373, 71 L. Ed. 1095, 47 S. Ct. 641 (1927) (concurring opinion). "The guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" [Poe v. Ullman](#), 367 U.S. 497, 541, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting [Hurtado v. California](#), 110 U.S. 516, 532, 28 L. Ed. 232, 4 S. Ct. 111 (1884)).

The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that [HN4](#) the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. See, e. g., [Duncan v. Louisiana](#), 391 U.S. 145, 147-148, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968). It is tempting, as a means of curbing the discretion of federal judges, to suppose that [****30] liberty [**2805] encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. See [Adamson v. California](#), 332 U.S. 46, 68-92, 91 L. Ed. 1903, 67 S. Ct. 1672 (1947) (Black, J., dissenting). But of course this

Court has never accepted that view.

[LEdHN\[11B\]](#) [11B][LEdHN\[12\]](#) [12]It is also tempting, for the same reason, to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. See [Michael H. v. Gerald D.](#), 491 U.S. 110, 127-128, n.6, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (opinion of SCALIA, J.). But such a view would be inconsistent with our law. [HN5](#) It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial [***696] marriage was illegal [**848] in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference [****31] by the substantive component of the Due Process Clause in [Loving v. Virginia](#), 388 U.S. 1, 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) (relying, in an opinion for eight Justices, on the Due Process Clause). Similar examples may be found in [Turner v. Safley](#), 482 U.S. 78, 94-99, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987); in [Carey v. Population Services International](#), 431 U.S. 678, 684-686, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977); in [Griswold v. Connecticut](#), 381 U.S. 479, 481-482, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965), as well as in the separate opinions of a majority of the Members of the Court in that case, [id.](#), at 486-488 (Goldberg, J., joined by Warren, C.J., and Brennan, J., concurring) (expressly relying on due process), [id.](#), at 500-502 (Harlan, J., concurring in judgment) (same), [id.](#), at 502-507 (WHITE, J., concurring in judgment) (same); in [Pierce v. Society of Sisters](#), 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925); and in [Meyer v. Nebraska](#), 262 U.S. 390, 399-403, 67 L. Ed. 1042, 43 S. Ct. 625 (1923).

[LEdHN\[11C\]](#) [11C][HN6](#) Neither the Bill of Rights nor the specific practices of States [****32] at the time of the adoption of the Fourteenth Amendment

marks the outer limits of the substantive sphere of liberty which the [Fourteenth Amendment](#) protects. See [U.S. Const., Amdt. 9](#). As the second Justice Harlan recognized:

"The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." [Poe v. \[**849\] Ullman, supra, at 543](#) (opinion dissenting from dismissal on jurisdictional grounds).

Justice Harlan wrote these words in addressing an issue the full Court [****33] did not reach in *Poe v. Ullman*, but the Court adopted his position four Terms later in [Griswold v. Connecticut, supra](#). In *Griswold*, we held that the Constitution does not permit a State to forbid a married couple to use contraceptives. That same freedom was later guaranteed, under the [Equal Protection Clause](#), for unmarried couples. See [Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 \(1972\)](#). Constitutional protection was extended [**2806] to the sale and distribution of contraceptives in [Carey v. Population Services International, supra](#). It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that [HN7](#) the Constitution places limits on a State's right to interfere with a person's most basic decisions about family [***697] and parenthood, see [Carey v. Population Services International, supra](#); [Moore v. East Cleveland, 431 U.S. 494, 52 L. Ed. 2d 531, 97](#)

[S. Ct. 1932 \(1977\)](#); [Eisenstadt v. Baird, supra](#); [Loving v. Virginia, supra](#); [Griswold v. Connecticut, supra](#); [****34] [Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 \(1942\)](#); [Pierce v. Society of Sisters, supra](#); [Meyer v. Nebraska, supra](#), as well as bodily integrity, see, e. g., [Washington v. Harper, 494 U.S. 210, 221-222, 108 L. Ed. 2d 178, 110 S. Ct. 1028 \(1990\)](#); [Winston v. Lee, 470 U.S. 753, 84 L. Ed. 2d 662, 105 S. Ct. 1611 \(1985\)](#); [Rochin v. California, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 \(1952\)](#).

The inescapable fact is that [HN8](#) adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office. As Justice Harlan observed:

"Due process has not been reduced to any formula; its content cannot be determined by reference to any code. [**850] The best that can be said is that through the course of this Court's decisions it [****35] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area,

for judgment and restraint." [*Poe v. Ullman*, 367 U.S. at 542](#) (opinion dissenting from dismissal on jurisdictional grounds).

See also [*Rochin v. California*, supra, at 171-172](#) (Frankfurter, J., writing for the Court) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due [****36] process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges").

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these [***698] philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps [*851] in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

HN9 It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. See, e. g., [*Ferguson v. Skrupa*, 372 U.S. 726, 10 L. Ed. 2d 93, 83 S. Ct. 1028 \(1963\)](#); [**2807] [*Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 \(1955\)](#). [****37] That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other. See [*West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 \(1943\)](#); [*Texas v. Johnson*, 491 U.S. 397, 105 L. Ed. 2d 342, 109 S. Ct. 2533](#)

HN10 Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. [*Carey v. Population Services International*, 431 U.S. at 685](#). Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [*Eisenstadt v. Baird*, supra, at 453](#) (emphasis in original). Our precedents "have respected the private realm of family life which the state cannot enter." [****38] [*Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 \(1944\)](#). These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the [*Fourteenth Amendment*](#). At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

[*852] These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; [****39] and, depending on one's beliefs, for the life or potential life that is aborted. Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique

to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, [***699] to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception, to which [****40] *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Carey v. Population Services International* afford constitutional protection. We have no doubt as to the correctness of those decisions. They support [*853] the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it. As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of [**2808] creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.

[LEdHN\[7B\]](#) [7B]It was this dimension of personal liberty that [****41] *Roe* sought to protect, and its

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

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

[*854] III

A

[LEdHN\[13\]](#) [13]The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's [****42] work if it eyed each issue [***700] afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, *Stare Decisis and Judicial Restraint*, 1991 *Journal of Supreme Court History* 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

[HN11](#) Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually

foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case, see [Burnet v. Coronado Oil & Gas Co.](#), 285 U.S. 393, 405-411, 76 L. Ed. 815, 52 S. Ct. 443 (1932) (Brandeis, J., dissenting). See also [Payne v. Tennessee](#), 501 U.S. 808, 842, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) (SOUTER, J., joined by KENNEDY, J., concurring); [****43] [Arizona v. Rumsey](#), 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984). Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, [Swift & Co. v. Wickham](#), 382 U.S. 111, 116, 15 L. Ed. 2d 194, 86 S. Ct. 258 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, e. g., [United States v. Title Ins. & Trust](#) [*855] [Co.](#), 265 U.S. 472, 486 (1924); whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see [Patterson v. McLean Credit Union](#), 491 U.S. 164, 173-174, 105 L. Ed. 2d 132, [**2809] 109 S. Ct. 2363 (1989); or whether facts have so changed, or come to be seen so differently, as to have robbed [****44] the old rule of significant application or justification, e. g., [Burnet](#), *supra*, at 412 (Brandeis, J., dissenting).

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

its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed.

1

[LEdHN\[7C\]](#) [7C] Although *Roe* has engendered opposition, it has in no sense proven "unworkable," see [Garcia v. San Antonio Metropolitan Transit Authority](#), 469 U.S. 528, 546, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), representing as it does a simple limitation beyond which a state law is unenforceable. While *Roe* has, of course, [***701] required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, [****45] and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence.

2

[HN12](#) The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application. Since the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, see [Payne v. Tennessee](#), [*856] *supra*, at 828, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.

While neither respondents nor their *amici* in so many words deny that the abortion right invites some reliance prior to its actual exercise, one can readily imagine an argument stressing the dissimilarity of this case to one involving property or contract. Abortion is customarily chosen as an unplanned response to the consequence of unplanned activity or to the failure of conventional birth control, and except on the assumption that no intercourse would have occurred but for *Roe*'s holding, such behavior [****46] may appear to justify no reliance claim. Even if reliance could be claimed on that unrealistic assumption, the

argument might run, any reliance interest would be *de minimis*. This argument would be premised on the hypothesis that reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, e. g., R. Petchesky, *Abortion and Woman's Choice* 109, 133, n.7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither [****47] can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

[*857] [**2810] 3

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

It will be recognized, of course, that *Roe* stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The *Roe* Court itself placed its holding in the succession of cases most prominently [***702] exemplified by *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965). See *Roe*, 410 U.S. at 152-153. When it is so seen, *Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed,

nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. See, e. g., [****48] *Carey v. Population Services International*, 431 U.S. 678, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977).

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that *HN13* a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990); cf., e. g., *Riggins v. Nevada*, 504 U.S. 127, 135, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (1992); *Washington v. Harper*, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); see also, e. g., *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30, 49 L. Ed. 643, 25 S. Ct. 358 (1905).

Finally, one could classify *Roe* [****49] as *sui generis*. If the case is so viewed, then there clearly has been no erosion of its central determination. The original holding resting on the [*858] concurrence of seven Members of the Court in 1973 was expressly affirmed by a majority of six in 1983, see *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (*Akron I*), and by a majority of five in 1986, see *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169, expressing adherence to the constitutional ruling despite legislative efforts in some States to test its limits. More recently, in *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S.

[Ct. 3040 \(1989\)](#), although two of the present authors questioned the trimester framework in a way consistent with our judgment today, see [id., at 518](#) (REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); [id., at 529](#) (O'CONNOR, J., concurring in part and concurring in judgment), a majority of the Court either decided to reaffirm or declined to address the constitutional validity of [****50] the central holding of *Roe*. See [Webster, 492 U.S. at 521](#) (REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); [id., at 525-526](#) (O'CONNOR, J., concurring in part and concurring in judgment); [id., at 537, 553](#) (BLACKMUN, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part); [id., at 561-563](#) (STEVENS, J., concurring in part and dissenting in part).

Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central [***703] holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the [**2811] recognition afforded by the Constitution to the woman's liberty. The latter aspect of the decision fits comfortably within the framework of the Court's prior decisions, including [Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 \(1942\)](#); [Griswold, supra](#); [Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 \(1967\)](#); and [Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 \(1972\)](#), [****51] the holdings of which are "not a series of isolated points," but mark a "rational continuum." [Poe v. Ullman, 367 U.S. at 543](#) (Harlan, J., dissenting). As we described in [**859] [Carey v. Population Services International, supra](#), [HN14](#) the liberty which encompasses those decisions

"includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified

government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" [431 U.S. at 684-685](#) (citations omitted).

The soundness of this prong of the *Roe* analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state [****52] interests in population control, or eugenics, for example. Yet *Roe* has been sensibly relied upon to counter any such suggestions. E. g., [Arnold v. Board of Education of Escambia County, Ala., 880 F.2d 305, 311 \(CA11 1989\)](#) (relying upon *Roe* and concluding that government officials violate the Constitution by coercing a minor to have an abortion); [Avery v. County of Burke, 660 F.2d 111, 115 \(CA4 1981\)](#) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait); see also [In re Quinlan, 70 N.J. 10, 355 A.2d 647](#) (relying on *Roe* in finding a right to terminate medical treatment), cert. denied *sub nom. Garger v. New Jersey*, 429 U.S. 922, 50 L. Ed. 2d 289, 97 S. Ct. 319 (1976)). In any event, because *Roe*'s scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications [****53] in future cases.

[*860] 4

We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, see [Akron I, supra, at 429, n.11](#), and advances in neonatal care have advanced viability to a point somewhat earlier. Compare [Roe, 410 U.S. at 160](#), with

[Webster, supra, at 515-516](#) (opinion of REHNQUIST, C. J.); see [Akron I, 462 U.S. at 457, \[***704\]](#) and n.5 (O'CONNOR, J., dissenting). But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe's* central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, [****54] as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was [**2812] decided; which is to say that no change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

5

The sum of the precedential enquiry to this point shows *Roe's* underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant; [**861] *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal *stare* [****55] *decisis* analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming *Roe's* central holding, with whatever

degree of personal reluctance any of us may have, not for overruling it.

B

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

The first example is that line of cases identified with [Lochner v. New York, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 \(1905\)](#), which imposed substantive limitations on legislation limiting economic autonomy in favor of health and welfare regulation, adopting, in Justice Holmes's view, the theory of laissez-faire. [Id., at 75](#) (dissenting opinion). The *Lochner* decisions [****56] were exemplified by [Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 \(1923\)](#), in which this Court held it to be an infringement of constitutionally protected liberty of contract [***705] to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, [West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 \(1937\)](#), signaled the demise of *Lochner* by overruling *Adkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally [**862] false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See [West Coast Hotel Co., supra, at 399](#). As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: "The older world of *laissez faire* was

recognized everywhere outside the Court to be dead." The Struggle for Judicial Supremacy 85 (1941). The facts upon which the earlier case had premised a constitutional [****57] resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.

The second comparison that 20th century history invites is with the cases employing [**2813] the separate-but-equal rule for applying the [Fourteenth Amendment's](#) equal protection guarantee. They began with [Plessy v. Ferguson, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 \(1896\)](#), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. The *Plessy* Court considered "the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races [****58] stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." [Id., at 551](#). Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, see [id., at 557, 562](#) (Harlan, J., dissenting), this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of [**863] the facts and the rule it was stated to justify were repudiated in [Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 \(1954\)](#) (*Brown I*). As one commentator observed, the question before the Court in *Brown* was "whether discrimination inheres in that segregation which is

imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid." Black, *The Lawfulness of the Segregation Decisions*, 69 *Yale L. J.* 421, 427 (1960).

The Court in [****59] *Brown* addressed [***706] these facts of life by observing that whatever may have been the understanding in *Plessy's* time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. [347 U.S. at 494-495](#). Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, see [Plessy, supra, at 552-564](#) (Harlan, J., dissenting), we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each [****60] case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible [**864] they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional

adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of *Roe's* central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the **[**2814]** Court of **[****61]** 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that [HN15](#) a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. See, e. g., [Mitchell v. W. T. Grant Co.](#), 416 U.S. 600, 636, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve"); [Mapp v. Ohio](#), 367 U.S. 643, 677, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) (Harlan, J., dissenting).

C

The examination of the conditions justifying the repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by **[***707]** *Brown* is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did. In the present cases, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis **[*865]** would not be complete, **[****62]** however, without explaining why overruling *Roe's* central holding would not only reach an unjustifiable result under principles

of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.

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

The **[****63]** underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is **[*866]** obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled

character is sufficiently plausible to be accepted by the Nation.

The need for principled action to be perceived as such is implicated to some degree whenever this, or any [****64] other appellate court, overrules a prior case. This is not to say, of course, that this Court cannot give a perfectly satisfactory explanation in most cases. People understand that some of the Constitution's language is hard to fathom and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions. However upsetting it may be [**2815] to those most directly affected when one judicially derived rule replaces another, the country can accept some correction of error without necessarily questioning the legitimacy of the Court.

In two circumstances, however, [***708] the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly [****65] be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

That first circumstance can be described as hypothetical; the second is to the point here and now. Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its [*867] decision has a dimension that the

resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to [****66] overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, [HN16](#) only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. [Brown v. Board of Education](#), 349 U.S. 294, 300, 99 L. Ed. 1083, 75 S. Ct. 753 (1955) (*Brown II*) ("It should go without saying that the vitality of the constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them").

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for [****67] another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the

decision's results [*868] when viewed outside of constitutional [***709] terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance [**2816] with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly [****68] expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive [****69] issue of governmental power [*869] to limit personal choice to undergo abortion, for which it

provided a new resolution based on the due process guaranteed by the [Fourteenth Amendment](#). Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe's* original decision, and we do so today.

IV

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest [****70] in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

[***710] That brings us, of course, to the point where much criticism has been directed at *Roe*, a criticism that always inheres when the Court draws a specific rule from what in the Constitution is but a general standard. We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function. Liberty must not be extinguished for want of a line that is clear. And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.

[*870] We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we

have said, is the doctrine of *stare decisis*. Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. See [*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 759](#); [****71] [*Akron I*, 462 U.S. at 419-420](#). Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent [**2817] with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn, see *infra*, 505 U.S. at 882-883, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. It is that premise which we reaffirm today.

The second reason is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. See [*Roe v. Wade*, 410 U.S. at 163](#). Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. To be sure, as we have said, there [****72] may be some medical developments that affect the precise point of viability, see [supra](#), at 860, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

[*871] The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.

On the other side of the equation is the interest of the State in the protection of potential life. The *Roe* Court recognized the State's "important and legitimate interest in protecting the potentiality of human life." [Roe, supra, at 162](#). The weight to be [***711] given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe*. We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came [****73] before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.

Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." [Roe, supra, at 163](#). That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. See, e. g., [Akron I, supra, at 427](#). [****74] Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases.

[*872] *Roe* established a trimester framework to govern abortion regulations. Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy;

regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the **[**2818]** fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake. Roe, supra, at 163-166. Most of our cases since *Roe* have involved the application of rules derived from the trimester framework. See, e. g., Thornburgh v. American College of Obstetricians and Gynecologists, supra; Akron I, supra.

The trimester framework no doubt was erected to ensure that the woman's **[****75]** right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact. We do not agree, however, that the trimester approach is necessary to accomplish this objective. A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.

LEdHN[14A] [14A]LEdHN[15A] [15A] Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations **[***712]** designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." **[****76]** Webster v. Reproductive Health Services, 492 U.S. at 511 (opinion of **[*873]** the Court) (quoting Poelker v. Doe, 432 U.S. 519, 521, 53 L. Ed. 2d 528, 97 S. Ct. 2391 (1977)). It follows that States are free to enact laws

to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning. This, too, we find consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

LEdHN[16A] [16A] We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. See Webster v. Reproductive Health Services, 492 U.S. at 518 (opinion of REHNQUIST, C. J.); id., at 529 (O'CONNOR, J., concurring in part and concurring in judgment) (describing the trimester framework as "problematic"). Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced **[****77]** in that case. A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*.

As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they **[*874]** wish to vote. Anderson v. Celebrezze, 460 U.S. 780, 788, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983); Norman v. Reed, 502 U.S. 279, 116 L. Ed. 2d 711, 112 S. Ct.

[698 \(1992\)](#).

[****78] [**2819] The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where [***713] state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. See [Hodgson v. Minnesota](#), 497 U.S. 417, 458-459, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990) (O'CONNOR, J., concurring in part and concurring in judgment in part); [Ohio v. Akron Center for Reproductive Health](#), 497 U.S. 502, 519-520, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (Akron II) (opinion of KENNEDY, J.); [Webster v. Reproductive Health Services](#), *supra*, at 530 (O'CONNOR, J., concurring in part and concurring in judgment); [Thornburgh v. American College of Obstetricians and Gynecologists](#), 476 U.S. at 828 [****79] (O'CONNOR, J., dissenting); [Simopoulos v. Virginia](#), 462 U.S. 506, 520, 76 L. Ed. 2d 755, 103 S. Ct. 2532 (1983) (O'CONNOR, J., concurring in part and concurring in judgment); [Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft](#), 462 U.S. 476, 505, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983) (O'CONNOR, J., concurring in judgment in part and dissenting in part); [Akron I](#), 462 U.S. at 464 (O'CONNOR, J., joined by WHITE and REHNQUIST, JJ., dissenting); [Bellotti v. Baird](#), 428 U.S. 132, 147, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976) (*Bellotti I*).

For the most part, the Court's early abortion cases adhered to this view. In [Maher v. Roe](#), 432 U.S. 464, 473-474, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977), the Court explained: "Roe did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the

right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." See [**875] also [Doe v. Bolton](#), 410 U.S. 179, 198, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973) ("The interposition of the hospital abortion committee is unduly restrictive of the patient's rights"); [****80] [Bellotti I](#), *supra*, at 147 (State may not "impose undue burdens upon a minor capable of giving an informed consent"); [Harris v. McRae](#), 448 U.S. 297, 314, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980) (citing [Maher](#), *supra*). Cf. [Carey v. Population Services International](#), 431 U.S. at 688 ("The same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely").

These considerations of the nature of the abortion right illustrate that it is an overstatement to describe it as a right to decide whether to have an abortion "without interference from the State." [Planned Parenthood of Central Mo. v. Danforth](#), 428 U.S. 52, 61, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976). All abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy. It is, as a consequence, not surprising that despite the protestations contained in the original *Roe* opinion to the effect that the Court was not recognizing [****81] an absolute right, 410 U.S. at 154-155, the Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far [***714] because the right recognized by *Roe* is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [Eisenstadt v. Baird](#), 405 U.S. at 453. [**2820] Not all governmental intrusion is of necessity unwarranted; and that brings us to the other basic flaw in the trimester framework: even in *Roe*'s terms, in practice it undervalues the State's interest in the potential life within the woman.

Roe v. Wade was express in its recognition of the State's "important and legitimate interests in preserving and protecting [*876] the health of the pregnant woman [and] in protecting the potentiality of human life." [410 U.S. at 162](#). The trimester framework, however, does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or [****82] potential life. *Roe* began the contradiction by using the trimester framework to forbid any regulation of abortion designed to advance that interest before viability. [Id., at 163](#). Before viability, *Roe* and subsequent cases treat all governmental attempts to influence a woman's decision on behalf of the potential life within her as unwarranted. This treatment is, in our judgment, incompatible with the recognition that there is a substantial state interest in potential life throughout pregnancy. Cf. [Webster, 492 U.S. at 519](#) (opinion of REHNQUIST, C. J.); [Akron I, supra, at 461](#) (O'CONNOR, J., dissenting).

The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two [****83] of us, in ways that could be considered inconsistent. See, e. g., [Hodgson v. Minnesota, supra, at 459-461](#) (O'CONNOR, J., concurring in part and concurring in judgment); [Akron II, supra, at 519-520](#) (opinion of KENNEDY, J.); [Thornburgh v. American College of Obstetricians and Gynecologists, supra, at 828-829](#) (O'CONNOR, J., dissenting); [Akron I, supra, at 461-466](#) (O'CONNOR, J., dissenting); [Harris v. McRae, supra, at 314](#); [Maher v. Roe, supra, at 473](#); [Beal v. Doe, 432 U.S. 438, 446, 53 L. Ed. 2d 464, 97 S. Ct. 2366 \(1977\)](#); [Bellotti I, supra, at 147](#). Because we set forth a standard of general application to which we intend to adhere, it is

important to clarify what is meant by an undue burden.

[*877] A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid [***715] because the means chosen by the State to further the interest in potential [****84] life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends. To the extent that the opinions of the Court or of individual Justices use the undue burden standard in a manner that is inconsistent with this analysis, we set out what in our view should be the controlling standard. Cf. [McCleskey v. Zant, 499 U.S. 467, 489, 113 L. Ed. 2d 517, 111 S. Ct. 1454 \(1991\)](#) (attempting "to define the doctrine of abuse of the writ with more precision" after acknowledging tension among earlier cases). In our considered judgment, an undue burden is an unconstitutional burden. See [Akron II, 497 U.S. at 519-520](#) (opinion of KENNEDY, J.). Understood another way, we answer the question, left open in previous opinions discussing the undue burden formulation, whether a law designed [**2821] to further the State's interest in fetal life which imposes an undue burden on the [****85] woman's decision before fetal viability could be constitutional. See, e. g., [Akron I, 462 U.S. at 462-463](#) (O'CONNOR, J., dissenting). The answer is no.

Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to

the woman's exercise of the right to choose. See *infra*, 505 U.S. at 899-900 (addressing Pennsylvania's parental consent requirement). **[*878]** Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

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

[14B][LEdHN\[15B\]](#)

[15B][LEdHN\[16B\]](#) [16B]Even when jurists reason from shared premises, some disagreement is inevitable. Compare [Hodgson, 497 U.S. at 482-497](#) (KENNEDY, J., concurring in judgment in part and dissenting in part), with [id., at 458-460](#) (O'CONNOR, J., **[****86]** concurring in part and concurring in judgment in part). That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard. We give this summary:

(a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

(b) We reject the rigid trimester **[***716]** framework of *Roe v. Wade*. To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

(c) As with any medical procedure, the State may

enact regulations **[****87]** to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

[*879] (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade*, and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

(e) We also reaffirm *Roe's* holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." [Roe v. Wade, 410 U.S. at 164-165.](#)

These principles control our assessment of the Pennsylvania statute, and we now turn to the issue of the validity of its challenged provisions.

V

The Court of Appeals applied what it believed to be the undue burden standard and upheld each of the provisions **[****88]** except for the husband notification requirement. We agree generally with this conclusion, but refine the **[**2822]** undue burden analysis in accordance with the principles articulated above. We now consider the separate statutory sections at issue.

A

[LEdHN\[1B\]](#) [1B]Because it is central to the operation of various other requirements, we begin with the statute's definition of medical emergency. [HN17](#) Under the statute, a medical emergency is

"that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a

pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." [18 Pa. Cons. Stat. § 3203](#) (1990).

[*880] Petitioners argue that the definition is too narrow, contending that it forecloses the possibility of an immediate abortion despite some significant health risks. If the contention were correct, we would be required to invalidate the restrictive operation of the provision, for the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing **[****89]** her pregnancy would constitute a threat to her health. [410 U.S. at 164](#). See also [Harris v. \[***717\] McRae, 448 U.S. at 316](#).

[LEdHN\[1C\]](#) [1C][LEdHN\[17\]](#) [17]The District Court found that there were three serious conditions which would not be covered by the statute: pre-eclampsia, inevitable abortion, and premature ruptured membrane. [744 F. Supp. at 1378](#). Yet, as the Court of Appeals observed, [947 F.2d at 700-701](#), it is undisputed that under some circumstances each of these conditions could lead to an illness with substantial and irreversible consequences. While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase "serious risk" to include those circumstances. [Id., at 701](#). It stated: "We read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Ibid.* As we said in [Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 499-500, 86 L. Ed. 2d 394, 105 S. Ct. 2794 \(1985\)](#): **[****90]** "Normally, . . . [HN18](#) we defer to the construction of a state statute given it by the lower federal courts." Indeed, we have said that we will defer to lower court interpretations of state law unless they amount to "plain" error. [Palmer v. Hoffman, 318 U.S. 109,](#)

[118, 87 L. Ed. 645, 63 S. Ct. 477 \(1943\)](#). This "'reflects our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.'" [Frisby v. Schultz, 487 U.S. 474, 482, 101 L. Ed. 2d 420, 108 S. Ct. 2495 \(1988\)](#) (citation omitted). We adhere to that course today, and conclude that, as construed by the Court of Appeals, [HN19](#) the medical emergency definition imposes no undue burden on a woman's abortion right.

[*881] B

[LEdHN\[2B\]](#) [2B]We next consider the informed consent requirement. [18 Pa. Cons. Stat. § 3205](#) (1990). Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." The physician or a qualified nonphysician must inform the woman of the availability of printed materials **[****91]** published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has **[**2823]** been provided them if she chooses to view them.

Our prior decisions establish that as with any medical procedure, the State may require a woman to give her written informed consent to an abortion. See [Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 67](#). In this respect, the statute is unexceptional. Petitioners challenge the statute's definition of informed consent because it includes the provision of specific information by the doctor and the mandatory 24-hour waiting period. The conclusions reached by a majority of the Justices in the separate opinions filed today and the **[***718]** undue burden standard adopted in this opinion

require us to overrule in part some of the Court's past decisions, decisions driven by the trimester framework's [****92] prohibition of all previability regulations designed to further the State's interest in fetal life.

In [*Akron I*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 \(1983\)](#), we invalidated an ordinance which required that a woman seeking an abortion be provided by her physician with specific information "designed to influence the woman's informed choice between abortion or childbirth." *Id.*, at 444. As we later described [*882] the *Akron I* holding in [*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 762](#), there were two purported flaws in the Akron ordinance: the information was designed to dissuade the woman from having an abortion and the ordinance imposed "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient" *Ibid.*

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the [****93] fetus, those cases go too far, are inconsistent with *Roe's* acknowledgment of an important interest in potential life, and are overruled. This is clear even on the very terms of *Akron I* and *Thornburgh*. Those decisions, along with *Danforth*, recognize a substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth. *E. g.*, [*Danforth*, supra, at 66-67](#). It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to

discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.

We also see no reason why the State may not require doctors to inform a woman [****94] seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health. An example illustrates the point. We would think [*883] it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself. A requirement that the physician make available information similar to that mandated by the statute here was described in *Thornburgh* as "an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician." [476 U.S. at 762](#). [***719] We conclude, however, that informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant. As [**2824] we have made clear, we depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring [****95] a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion. In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.

Our prior cases also suggest that the "straitjacket,"

[Thornburgh, supra, at 762](#) (quoting [Danforth, supra, at 67, n.8](#)), of particular information which must be given in each case interferes with a constitutional right of privacy between a pregnant woman and her physician. As a preliminary matter, it is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions "if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely [*884] adverse effect on the [****96] physical or mental health of the patient." [18 Pa. Cons. Stat. § 3205](#) (1990). In this respect, the statute does not prevent the physician from exercising his or her medical judgment.

Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.

All that is left of petitioners' argument is an asserted [First Amendment](#) right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's [First Amendment](#) rights not to speak are implicated, see [Wooley v. Maynard, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 \(1977\)](#), [****97] but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. [Whalen v. Roe, 429 U.S. 589, 603, 51 L. Ed. 2d 64, 97 S. Ct. 869 \(1977\)](#). We see no constitutional infirmity in the requirement that the physician provide the

information mandated by the State here.

The Pennsylvania statute also requires us to reconsider the holding [***720] in *Akron I* that the State may not require that a physician, as opposed to a qualified assistant, provide information relevant to a woman's informed consent. [462 U.S. at 448](#). Since there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not [*885] an undue burden. Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others. See [Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 99 L. Ed. 563, 75 S. Ct. 461 \(1955\)](#). [****98] Thus, we uphold the provision [**2825] as a reasonable means to ensure that the woman's consent is informed.

Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement. In *Akron I* we said: "Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course." [462 U.S. at 450](#). We consider that conclusion to be wrong. The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision. The statute, as construed by the Court of Appeals, permits avoidance of the waiting period in the event of a medical emergency and the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk.

[****99] In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman's choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be [*886] a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. The District Court also found that in many instances this will increase the exposure of women seeking abortions to "the harassment and hostility of antiabortion protestors demonstrating outside a clinic." [744 F. Supp. at 1351](#). As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period [****100] will be "particularly burdensome." [Id., at 1352](#).

These findings are troubling in [***721] some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of "increasing the cost and risk of delay of abortions," [id., at 1378](#), but the District Court did not conclude that the increased costs and potential delays amount to substantial obstacles. Rather, applying the trimester framework's strict prohibition of all regulation designed to promote the State's interest in potential life before viability, see [id., at 1374](#), the District Court concluded that the waiting period does not further the state "interest in maternal health" and "infringes the physician's discretion to exercise sound medical judgment," [id., at 1378](#). Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures

which favor childbirth over abortion, even if those measures do not further a health interest. And while the waiting period does limit [****101] a physician's discretion, that is not, standing alone, a reason to invalidate it. In light of the construction given the statute's definition of medical emergency by the Court of Appeals, and the District Court's findings, we cannot say that the waiting period imposes a real health risk.

We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period [*887] on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period [**2826] is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

We are left with the argument that the various aspects of the informed consent requirement are unconstitutional because they place barriers in the way of abortion on demand. Even the broadest reading of *Roe*, however, has not suggested that there is [****102] a constitutional right to abortion on demand. See, e. g., [Doe v. Bolton, 410 U.S. at 189](#). Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State. Because the informed consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right *Roe* protects. The informed consent requirement is not an undue burden on that right.

C

[LEdHN\[3B\]](#) [3B][HN20](#) Section 3209 of Pennsylvania's abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without

receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone [***722] else to inflict bodily injury upon her. A physician who performs an abortion on [*888] a married [****103] woman without receiving the appropriate signed statement will have his or her license revoked, and is liable to the husband for damages.

The District Court heard the testimony of numerous expert witnesses, and made detailed findings of fact regarding the effect of this statute. These included:

"273. The vast majority of women consult their husbands prior to deciding to terminate their pregnancy. . . .

....

"279. The 'bodily injury' exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children. . . .

....

"281. Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because [****104] battering is usually not reported until it reaches

life-threatening proportions) the actual number of families affected by domestic violence. In fact, researchers estimate that one of every two women will be battered at some time in their life. . . .

"282. A wife may not elect to notify her husband of her intention to have an abortion for a variety of reasons, including the husband's illness, concern about her own health, the imminent failure of the marriage, or the husband's absolute opposition to the abortion. .

..

"283. The required filing of the spousal consent form would require plaintiff-clinics to change their counseling [*889] procedures and force women to reveal their most intimate decision-making on pain of criminal sanctions. The confidentiality of these revelations could not be guaranteed, since [**2827] the woman's records are not immune from subpoena. . . .

"284. Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered. . . .

"285. Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the battering can cover a broad range of actions and be gruesome and torturous. . . .

"286. Married women, [****105] victims of battering, have been killed in Pennsylvania and throughout the United States. . . .

"287. Battering can often involve a substantial amount of sexual abuse, including marital rape and sexual mutilation. . . .

"288. In a domestic abuse situation, it is common for the battering husband to also abuse the children in an attempt to coerce the wife. . . .

[***723] "289. Mere notification of pregnancy is frequently a flashpoint for

battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy. . . . The battering husband may deny parentage and use the pregnancy as an excuse for abuse. . . .

"290. Secrecy typically shrouds abusive families. Family members are instructed not to tell anyone, especially police or doctors, about the abuse and violence. Battering husbands often threaten their wives or her children with further abuse if she tells an outsider of the violence and tells her that nobody will believe her. A battered woman, therefore, is highly unlikely to disclose [*890] the violence against her for fear of retaliation by the abuser. . . .

"291. Even when confronted directly by medical [****106] personnel or other helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered. . . .

....

"294. A woman in a shelter or a safe house unknown to her husband is not 'reasonably likely' to have bodily harm inflicted upon her by her batterer, however her attempt to notify her husband pursuant to section 3209 could accidentally disclose her whereabouts to her husband. Her fear of future ramifications would be realistic under the circumstances.

"295. Marital rape is rarely discussed with others or reported to law enforcement authorities, and of those reported only few are prosecuted. . . .

"296. It is common for battered women to have sexual intercourse with their husbands to avoid being battered. While this type of coercive sexual activity would be spousal sexual assault as defined by the Act, many women may not

consider it to be so and others would fear disbelief. . . .

"297. The marital rape exception to section 3209 cannot be claimed by women who are victims of coercive sexual behavior other than penetration. The 90-day reporting requirement of the spousal sexual assault statute, 18 Pa. Con. Stat. Ann. § 3218(c) [****107], further narrows the class of sexually abused wives who can claim the exception, since many of these women may be psychologically unable to discuss or report the rape for several years after the incident. . . .

"298. Because of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions to section 3209 of the Act, regardless of [*891] whether the section applies to them." [744 F. Supp. at 1360-1362](#) (footnote omitted).

These findings are supported by studies of domestic violence. The American Medical Association (AMA) has published a summary of the recent research in this field, which indicates that in an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners. In a 1985 survey, women reported that nearly one of every eight husbands had assaulted [***724] their wives during [**2828] the past year. The AMA views these figures as "marked underestimates," because the nature of these incidents discourages women from reporting them, and because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions [****108] or hospitals when the survey is conducted. According to the AMA, "researchers on family violence agree that the true incidence of partner violence is probably *double* the above estimates; or four million severely assaulted women per year. Studies on prevalence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime." AMA Council on Scientific

Affairs, Violence Against Women 7 (1991) (emphasis in original). Thus on an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault. *Id.*, at 3-4; Shields & Hanneke, Battered Wives' Reactions to Marital Rape, in *The Dark Side of Families: Current Family Violence Research* 131, 144 (D. Finkelhor, R. Gelles, G. Hataling, & M. Straus eds. 1983). In families where wifebeating takes place, moreover, child abuse is often present as well. Violence Against Women, *supra*, at 12.

Other studies fill in the rest of this troubling picture. Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common. L. [****109] Walker, The Battered [**892] Woman Syndrome 27-28 (1984). Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Herbert, Silver, & Ellard, Coping with an Abusive Relationship: I. How and Why do Women Stay?, 53 J. Marriage & the Family 311 (1991). Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. Aguirre, Why Do They Return? Abused Wives in Shelters, 30 J. Nat. Assn. of Social Workers 350, 352 (1985). Returning to one's abuser can be dangerous. Recent Federal Bureau of Investigation statistics disclose that 8.8 percent of all homicide victims in the United States are killed by their spouses. Mercy & Saltzman, Fatal Violence Among Spouses in the United States, 1976-85, 79 Am. J. Public Health 595 (1989). Thirty percent of female homicide victims are killed by their male partners. Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess., 3 (1990).

The limited research that has been conducted with respect to notifying [****110] one's husband about an abortion, although involving samples too

small to be representative, also supports the District Court's findings of fact. The vast majority of women notify their male partners of their decision to obtain an abortion. In many cases in which married women do not notify their husbands, the pregnancy is the result of an extramarital affair. Where the husband is the father, the primary reason women do not notify their husbands is that the husband and wife are experiencing marital difficulties, often accompanied by incidents of violence. Ryan & Plutzer, When [***725] Married Women Have Abortions: Spousal Notification and Marital Interaction, 51 J. Marriage & the Family 41, 44 (1989).

This information and the District Court's findings reinforce what common sense would suggest. In well-functioning [*893] marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. [****111] Many may have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania. Many may have a reasonable [**2829] fear that notifying their husbands will provoke further instances of child abuse; these women are not exempt from § 3209's notification requirement. Many may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from § 3209's notification requirement. And many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of

the exception for spousal sexual assault, § 3209(b)(3), because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report [****112] once an investigation begins, § 3128(c). If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement imposed by § 3209.

[HN21](#) The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose [*894] a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Respondents attempt to avoid the conclusion that § 3209 is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions. They begin by noting that only about 20 percent of the women who obtain abortions are married. They then note that of these women about 95 percent notify their husbands of their own volition. Thus, respondents [****113] argue, the effects of § 3209 are felt by only one percent of the women who obtain abortions. Respondents argue that since some of these women will be able to notify their husbands without adverse consequences or will qualify for one of the exceptions, the statute affects [***726] fewer than one percent of women seeking abortions. For this reason, it is asserted, the statute cannot be invalid on its face. See Brief for Respondents 83-86. We disagree with respondents' basic method of analysis.

[LEdHN\[18\]](#) [18]The analysis does not end with

the one percent of women upon whom the statute operates; it begins there. [HN22](#) Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. See [Miami Herald Publishing Co. v. Tornillo](#), 418 U.S. 241, 41 L. Ed. 2d 730, 94 S. Ct. 2831 (1974). The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

[LEdHN\[3C\]](#) [3C]Respondents' argument itself gives [****114] implicit recognition to this principle, at one of its critical points. Respondents speak of the one percent of women seeking abortions who are married and would choose not to notify their husbands of their plans. By selecting as the controlling class women [*895] who wish to obtain abortions, rather than all women or all pregnant women, respondents in effect concede that § 3209 must be judged by reference to those for whom it is an actual rather than an irrelevant restriction. Of course, as we have said, § 3209's real target is narrower even than the class of women seeking abortions identified by the State: it is married women seeking abortions who do not wish to notify their husbands of their [***2830] intentions and who do not qualify for one of the statutory exceptions to the notice requirement. The unfortunate yet persisting conditions we document above will mean that [HN23](#) in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

This conclusion is in no way inconsistent with our decisions upholding parental notification or consent requirements. See, e. g., [Akron II](#), [****115] 497 U.S. at 510-519; [Bellotti v. Baird](#), 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979) (*Bellotti II*); [Planned Parenthood of Central Mo. v. Danforth](#),

[428 U.S. at 74](#). Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women.

We recognize that a husband has a "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying." [Danforth, supra, at 69](#). [HN24](#) With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody. [Stanley v. Illinois, 405 U.S. 645, 651-652, 31 L. Ed. 2d 551, 92 S. Ct. 1208 \(1972\)](#); see also [Quilloin v. Walcott, 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549 \(1978\)](#); [Caban v. Mohammed, 441 U.S. 380, 60 L. Ed. 2d 297, \[***727\] 99 S. Ct. 1760 \(1979\)](#); [Lehr v. Robertson, 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 \(1983\)](#). [\[****116\]](#) If these cases concerned a State's ability to require the mother to notify the father before taking some action with respect to a living [\[*896\]](#) child raised by both, therefore, it would be reasonable to conclude as a general matter that the father's interest in the welfare of the child and the mother's interest are equal.

Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman. Cf. [Cruzan v. Director, Mo. Dept. of Health, 497 U.S. at 281](#). The Court has held that [HN25](#) "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected

by the pregnancy, as between the two, [\[****117\]](#) the balance weighs in her favor." [Danforth, supra, at 71](#). This conclusion rests upon the basic nature of marriage and the nature of our Constitution: "The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [Eisenstadt v. Baird, 405 U.S. at 453](#) (emphasis in original). The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.

There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In [Bradwell v. State, 83 U.S. \(16 Wall.\) 130, 21 L. Ed. 442 \(1872\)](#), three Members of this [\[*897\]](#) Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, [\[****118\]](#) who was regarded as her head and [\[**2831\]](#) representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States." [Id., at 141](#) (Bradley, J., joined by Swayne and Field, JJ., concurring in judgment). Only one generation has passed since this Court observed that "woman is still regarded as the center of home and family life," with attendant "special responsibilities" that precluded full and independent legal status under the Constitution. [Hoyt v. Florida, 368 U.S. 57, 62, 7 L. Ed. 2d 118, 82 S. Ct. 159 \(1961\)](#). These views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution.

In keeping with our rejection of the common-law understanding of a [\[***728\]](#) woman's role within the family, the Court held in [Danforth](#) that the Constitution does not permit a State to require a

married woman to obtain her husband's consent before undergoing an abortion. [428 U.S. at 69](#). The principles that guided the Court in *Danforth* [****119] should be our guides today. For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife's decision. Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*. The women most affected by this law -- those who most reasonably fear the consequences of notifying their husbands that they are pregnant -- are in the gravest danger.

[*898] [LEdHN\[3D\]](#) [3D] [LEdHN\[19\]](#) [19]The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. If a husband's interest in the potential life of the child outweighs a wife's liberty, [****120] the State could require a married woman to notify her husband before she uses a postfertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking. Perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs. And if a husband's interest justifies notice in any of

these cases, one might reasonably argue that it justifies exactly what the *Danforth* Court held it did not justify -- a requirement of the husband's consent as well. A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

[LEdHN\[3E\]](#) [3E]Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the [****121] nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. [HN26](#) The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family. These considerations confirm our conclusion that [HN27](#) § 3209 is invalid.

[*899] [**2832] D

[LEdHN\[4B\]](#) [4B]We next consider the parental consent provision. Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and [***729] one of her parents (or guardian) provides informed consent as defined above. If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.

We have been over most of this ground before. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. [****122] See, e. g., [Akron II](#), [497 U.S. at 510-519](#); [Hodgson](#), [497 U.S. at 461](#) (O'CONNOR, J., concurring in part and concurring in judgment in part); [id.](#), [at 497-501](#) (KENNEDY, J., concurring in judgment in part and dissenting in part); [Akron I](#),

[462 U.S. at 440](#); [Bellotti II, 443 U.S. at 643-644](#) (plurality opinion). Under these precedents, in our view, the one-parent consent requirement and judicial bypass procedure are constitutional.

The only argument made by petitioners respecting this provision and to which our prior decisions do not speak is the contention that the parental consent requirement is invalid because it requires informed parental consent. For the most part, petitioners' argument is a reprise of their argument with respect to the informed consent requirement in general, and we reject it for the reasons given above. Indeed, some of the provisions regarding informed consent have particular force with respect to minors: the waiting period, for example, may provide the parent or parents of a pregnant young woman the opportunity to consult with her in private, and to discuss the consequences of her decision in [*900] the context of the values and moral or religious principles of their family. See [Hodgson, supra, at 448-449](#) (opinion of STEVENS, J.).

E

[LEdHN\[5B\]](#) [5B] Under the recordkeeping and reporting requirements of the statute, [****123] every facility which performs abortions is required to file a report stating its name and address as well as the name and address of any related entity, such as a controlling or subsidiary organization. In the case of state-funded institutions, the information becomes public.

For each abortion performed, a report must be filed identifying: the physician (and the second physician where required); the facility; the referring physician or agency; the woman's age; the number of prior pregnancies and prior abortions she has had; gestational age; the type of abortion procedure; the date of the abortion; whether there were any pre-existing medical conditions which would complicate pregnancy; medical complications with the abortion; where applicable, the basis for the determination that the abortion was medically necessary; the weight of the aborted fetus; and whether the woman was married, and if so, whether

notice was provided or the basis for the failure to give notice. Every abortion facility must also file quarterly reports showing the number of abortions performed broken down by trimester. See [18 Pa. Cons. Stat. §§ 3207, 3214](#) (1990). In all events, the identity of each woman who has [****124] had an abortion remains confidential.

In [Danforth, 428 U.S. at 80](#), we held [***730] that recordkeeping and reporting provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." We think that under this standard, all the provisions at issue here, except that relating to spousal notice, are constitutional. Although they do not relate to the State's interest in informing the woman's choice, they do relate to health. The collection of information with respect to actual patients [*901] is a vital element of medical research, and so it cannot be said that the [***2833] requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

[LEdHN\[6B\]](#) [6B] Subsection (12) of the reporting provision requires the reporting of, among other things, a married woman's "reason for failure to provide notice" to her [****125] husband. [§ 3214\(a\)\(12\)](#). This provision in effect requires women, as a condition of obtaining an abortion, to provide the Commonwealth with the precise information we have already recognized that many women have pressing reasons not to reveal. Like the spousal notice requirement itself, this provision places an undue burden on a woman's choice, and must be invalidated for that reason.

VI

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each

generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

* * *

[LEdHN\[20\]](#) [20]The judgment in No. 91-902 is affirmed. The judgment in No. 91-744 is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion, including consideration of the question of severability.

It is so ordered.

[*902] **[***731]** APPENDIX **[****126]** TO OPINION OF O'CONNOR, KENNEDY, AND SOUTER, JJ.

Selected Provisions of the 1988 and 1989 Amendments to the Pennsylvania Abortion Control Act of 1982

18 PA. CONS. STAT. (1990).

"§ 3203. Definitions.

....

"'Medical emergency.' That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function."

"§ 3205. Informed consent.

"(a) General rule. -- No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a

medical emergency, consent to an abortion is voluntary and informed if and only if:

"(1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:

"(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether **[****127]** or not to undergo the abortion.

"(ii) The probable gestational age of the unborn child at the time the abortion is to be performed.

"(iii) The medical risks associated with carrying her child to term.

"(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility **[*903]** has been delegated by **[**2834]** either physician, has informed the pregnant woman that:

"(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

"(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.

[*732]** "(iii) The father of the unborn child is liable to assist in the support of her

child, even in instances where he has offered to pay for the abortion. In the [****128] case of rape, this information may be omitted.

"(3) A copy of the printed materials has been provided to the woman if she chooses to view these materials.

"(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

"(b) Emergency. -- Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function.

"(c) Penalty. -- Any physician who violates the provisions of this section is guilty of 'unprofessional conduct' and his license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P. L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the [*904] act of December 20, 1985 (P. L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. Any physician who performs or induces an abortion without first [****129] obtaining the certification required by subsection (a)(4) or with knowledge or reason to know that the informed consent of the woman has not been obtained shall for the first offense be guilty of a summary offense and for each subsequent offense be guilty of a misdemeanor of the third degree. No physician shall be guilty of violating this section for failure to furnish the information required by subsection (a) if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on

the physical or mental health of the patient.

"(d) Limitation on civil liability. -- Any physician who complies with the provisions of this section may not be held civilly liable to his patient for failure to obtain informed consent to the abortion within the meaning of that term as defined by the act of October 15, 1975 (P. L. 390, No. 111), known as the Health Care Services Malpractice Act."

"§ 3206. Parental consent.

"(a) General rule. -- Except in the case of a medical emergency or except as provided in this section, if a pregnant woman is less than 18 years of age and not emancipated, or [****130] if she has been adjudged an incompetent under [20 Pa. C. S. § 5511](#) (relating to petition and hearing; examination by court-appointed physician), a physician shall not perform an abortion upon her unless, in the case of a woman who is less than 18 years of age, he first obtains the informed consent both of the pregnant woman and of one of her parents; or, in the case of a woman who is incompetent, he first obtains the informed consent of her guardian. In deciding whether to grant such consent, a pregnant woman's parent or guardian shall consider only their child's or ward's best interests. In the case of a pregnancy that is the result [***733] of incest, where [*905] the father is a party to the incestuous act, [**2835] the pregnant woman need only obtain the consent of her mother.

"(b) Unavailability of parent or guardian. -- If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If neither any parent nor a legal guardian is available to the physician within [****131] a reasonable time and in a reasonable manner, consent of any adult person standing in loco parentis shall be sufficient.

"(c) Petition to the court for consent. -- If both of the parents or guardians of the pregnant woman refuse to consent to the performance of an abortion or if she elects not to seek the consent of either of her parents or of her guardian, the court of common pleas of the judicial district in which the applicant resides or in which the abortion is sought shall, upon petition or motion, after an appropriate hearing, authorize a physician to perform the abortion if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion, and has, in fact, given such consent.

"(d) Court order. -- If the court determines that the pregnant woman is not mature and capable of giving informed consent or if the pregnant woman does not claim to be mature and capable of giving informed consent, the court shall determine whether the performance of an abortion upon her would be in her best interests. If the court determines that the performance of an abortion would be in the best interests of the woman, it shall authorize a physician [****132] to perform the abortion.

"(e) Representation in proceedings. -- The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem to assist her. The court shall, however, advise her that she has [*906] a right to court appointed counsel, and shall provide her with such counsel unless she wishes to appear with private counsel or has knowingly and intelligently waived representation by counsel."

["§ 3207.](#) Abortion facilities.

....

"(b) Reports. -- Within 30 days after the effective date of this chapter, every facility at which abortions are performed shall file, and update immediately upon any change, a report with the department, containing the following information:

"(1) Name and address of the facility.

"(2) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations.

"(3) Name and address of any parent, subsidiary or affiliated organizations, corporations or associations having contemporaneous commonality of ownership, beneficial interest, directorship or officership with any other facility.

The information contained in those reports which are filed pursuant to this [***734] [****133] subsection by facilities which receive State-appropriated funds during the 12-calendar-month period immediately preceding a request to inspect or copy such reports shall be deemed public information. Reports filed by facilities which do not receive State-appropriated funds shall only be available to law enforcement officials, the State Board of Medicine and the State Board of Osteopathic Medicine for use in the performance of their official duties. Any facility failing to comply with the provisions of this subsection shall be assessed by the department a fine of \$ 500 for each day it is in violation hereof."

"§ 3208. Printed information.

"(a) General rule. -- The department shall cause to be published in English, Spanish and Vietnamese, within 60 days after this chapter becomes law, and shall update on an annual basis, the following easily comprehensible printed materials:

[*907] [**2836] "(1) Geographically indexed materials designed to inform the woman of public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent, including adoption agencies, which shall include a comprehensive list of the agencies available, a description [****134] of the services they offer and a description of the manner, including telephone numbers, in which they might be contacted, or, at the option of the department, printed materials including a toll-

free 24-hour a day telephone number which may be called to obtain, orally, such a list and description of agencies in the locality of the caller and of the services they offer. The materials shall provide information on the availability of medical assistance benefits for prenatal care, childbirth and neonatal care, and state that it is unlawful for any individual to coerce a woman to undergo abortion, that any physician who performs an abortion upon a woman without obtaining her informed consent or without according her a private medical consultation may be liable to her for damages in a civil action at law, that the father of a child is liable to assist in the support of that child, even in instances where the father has offered to pay for an abortion and that the law permits adoptive parents to pay costs of prenatal care, childbirth and neonatal care.

"(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week [****135] gestational increments from fertilization to full term, including pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival; provided that any such pictures or drawings must contain the dimensions of the fetus and must be realistic and appropriate for the woman's stage of pregnancy. The materials shall be objective, non-judgmental and designed [*908] to convey only accurate scientific information about the unborn child at the various gestational ages. The material shall also contain objective information describing the methods of abortion [***735] procedures commonly employed, the medical risks commonly associated with each such procedure, the possible detrimental psychological effects of abortion and the medical risks commonly associated with each such procedure and the medical risks commonly associated with carrying a child to term.

"(b) Format. -- The materials shall be printed in a typeface large enough to be clearly legible.

"(c) Free distribution. -- The materials required under this section shall be available at no cost from the department upon request and in appropriate number to any person, facility or hospital."

"§ 3209. Spousal notice.

"(a) Spousal notice required. -- In order to further [****136] the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

"(b) Exceptions. -- The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:

"(1) Her spouse is not the father of the child.

[**2837] "(2) Her spouse, after diligent effort, could not be located.

[*909] "(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.

"(4) The woman has [****137] reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Such statement need not be notarized, but shall bear

a notice that any false statements made therein are punishable by law.

"(c) Medical emergency. -- The requirements of subsection (a) shall not apply in case of a medical emergency.

"(d) Forms. -- The department shall cause to be published, forms which may be utilized for purposes of providing the signed statements required by subsections (a) and (b). The department shall distribute an adequate supply of such forms to all abortion facilities in this Commonwealth.

"(e) Penalty; civil action. -- Any physician who violates the provisions of this section is guilty of 'unprofessional conduct,' and his or her license for the practice of medicine and surgery shall be subject to suspension or revocation in accordance with procedures provided under the act of October 5, 1978 (P. L. 1109, No. 261), known as the Osteopathic Medical Practice Act, [***736] the act of December 20, 1985 (P. L. 457, No. 112), known as the Medical Practice Act of 1985, or their successor acts. In [****138] addition, any physician who knowingly violates the provisions of this section shall be civilly liable to the spouse who is the father of the aborted child for any damages caused thereby and for punitive damages in the amount of \$ 5,000, and the court shall award a prevailing plaintiff a reasonable attorney fee as part of costs."

"§ 3214. Reporting.

"(a) General rule. -- For the purpose of promotion of maternal health and life by adding to the sum of medical and [*910] public health knowledge through the compilation of relevant data, and to promote the Commonwealth's interest in protection of the unborn child, a report of each abortion performed shall be made to the department on forms prescribed by it. The report forms shall not identify the individual patient by name and shall include the following information:

"(1) Identification of the physician who

performed the abortion, the concurring physician as required by section 3211(c)(2) (relating to abortion on unborn child of 24 or more weeks gestational age), the second physician as required by section 3211(c)(5) and the facility where the abortion was performed and of the referring physician, agency or service, if any.

"(2) The county [****139] and state in which the woman resides.

"(3) The woman's age.

"(4) The number of prior pregnancies and prior abortions of the woman.

"(5) The gestational age of the unborn child at the time of the abortion.

"(6) The type of procedure performed or prescribed and the date of the abortion.

"(7) Pre-existing medical conditions of the woman which would complicate pregnancy, if any, and if known, any medical complication which resulted from the abortion itself.

"(8) The basis for the medical judgment of the physician who performed the abortion that the abortion was necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman, where an abortion has been performed pursuant to section 3211(b)(1).

[**2838] "(9) The weight of the aborted child for any abortion performed pursuant to section 3211(b)(1).

"(10) Basis for any medical judgment that a medical emergency existed which excused the physician from compliance with any provision of this chapter.

[*911] "(11) The information required to be reported under section 3210(a) (relating to determination of gestational age).

"(12) Whether the abortion was performed [****140] upon a married woman and, if so, whether notice to her spouse was given. If no notice to her [***737] spouse was given, the report shall also indicate the reason for failure to provide notice.

....

"(f) Report by facility. -- Every facility in which an abortion is performed within this Commonwealth during any quarter year shall file with the department a report showing the total number of abortions performed within the hospital or other facility during that quarter year. This report shall also show the total abortions performed in each trimester of pregnancy. Any report shall be available for public inspection and copying only if the facility receives State-appropriated funds within the 12-calendar-month period immediately preceding the filing of the report. These reports shall be submitted on a form prescribed by the department which will enable a facility to indicate whether or not it is receiving State-appropriated funds. If the facility indicates on the form that it is not receiving State-appropriated funds, the department shall regard its report as confidential unless it receives other evidence which causes it to conclude that the facility receives [***738] State-appropriated [****141] funds."

Dissent by: STEVENS (In Part); BLACKMUN (In Part); REHNQUIST (In Part); SCALIA (In Part)

Dissent

JUSTICE STEVENS, concurring in part and dissenting in part.

The portions of the Court's opinion that I have joined are more important than those with which I disagree. I shall therefore first comment on significant areas of agreement, and then explain the limited character of my disagreement.

[*912] I

The Court is unquestionably correct in concluding that the doctrine of *stare decisis* has controlling significance in a case of this kind, notwithstanding an individual Justice's concerns about the merits.¹ The central holding of [Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 \(1973\)](#), has been a "part of our law" for almost two decades. [Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 101, 49 L. Ed. 2d 788, 96 S. Ct. 2831 \(1976\)](#) (STEVENS, J., concurring in part and dissenting in part). It was a natural sequel to the protection of individual liberty established in [Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 \(1965\)](#). See also [Carey v. Population Services International, 431 U.S. 678, 687, 702, 52 L. Ed. 2d 675, 97 S. Ct. 2010 \(1977\)](#) [****142] (WHITE, J., concurring in part and concurring in result). The societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.

Stare decisis also provides a sufficient basis for my agreement with the joint opinion's reaffirmation of *Roe's* post-viability analysis. Specifically, I accept the proposition that "if the State is interested in protecting fetal life after viability, it may go so far [****143] as to proscribe abortion during that period, except [**2839] when it is necessary to preserve the life or health of the mother." [410 U.S. at 163-164](#); see *ante*, 505 U.S. at 879.

I also accept what is implicit in the Court's analysis, namely, a reaffirmation of *Roe's* explanation of why the State's obligation to protect the life or health of the mother [*913] must take precedence over any duty to the unborn. The Court in *Roe* carefully

¹It is sometimes useful to view the issue of *stare decisis* from a historical perspective. In the last 19 years, 15 Justices have confronted the basic issue presented in [Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 \(1973\)](#). Of those, 11 have voted as the majority does today: Chief Justice Burger, Justices Douglas, Brennan, Stewart, Marshall, and Powell, and JUSTICES BLACKMUN, O'CONNOR, KENNEDY, SOUTER, and myself. Only four -- all of whom happen to be on the Court today -- have reached the opposite conclusion.

considered, and rejected, the State's argument "that the fetus is a 'person' within the language and meaning of the [Fourteenth Amendment](#)." [410 U.S. at 156](#). After analyzing the usage of "person" in the Constitution, the Court concluded that that word "has application only postnatally." [Id., at 157](#). Commenting on the contingent property interests of the unborn that are generally represented by guardians ad litem, the Court noted: "Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense." [Id., at 162](#). [***739] Accordingly, an [****144] abortion is not "the termination of life entitled to [Fourteenth Amendment](#) protection." [Id., at 159](#). From this holding, there was no dissent, see [id., at 173](#); indeed, no Member of the Court has ever questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life."² This has been and, by the Court's holding today, [*914] remains a fundamental premise of our constitutional law governing reproductive autonomy.

² Professor Dworkin has made this comment on the issue:

"The suggestion that states are free to declare a fetus a person. . . . assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others.

". . . If a state could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the [First Amendment's](#) guarantee of free speech, which could not be understood as a license to kill. . . . Once we understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women." Unenumerated Rights: Whether and How *Roe* Should be Overruled, [59 U. Chi. L. Rev. 381, 400-401 \(1992\)](#).

[****145] II

My disagreement with the joint opinion begins with its understanding of the trimester framework established in *Roe*. Contrary to the suggestion of the joint opinion, *ante*, 505 U.S. at 876, it is not a "contradiction" to recognize that the State may have a legitimate interest in potential human life and, at the same time, to conclude that that interest does not justify the regulation of abortion before viability (although other interests, such as maternal health, may). The fact that the State's interest is legitimate does not tell us when, if ever, that interest outweighs the pregnant woman's interest in personal liberty. It is appropriate, therefore, to consider more carefully the nature of the interests at stake.

First, it is clear that, in order to be legitimate, the State's interest must be secular; consistent with the [First Amendment](#) the State may not promote a theological or sectarian interest. See [Thornburgh v. American College of Obstetricians and Gynecologists](#), [476 U.S. 747, 778, 90 L. Ed. 2d 779, 106 S. Ct. 2169 \(1986\)](#) (STEVENS, J., concurring); see generally [Webster v. Reproductive Health Services](#), [492 U.S. 490, 563-572, 106 L. Ed. 2d 410, 109 S. Ct. 3040 \(1989\)](#) (STEVENS, [****146] J., concurring in part and dissenting in part). [**2840] Moreover, as discussed above, the state interest in potential human life is not an interest *in loco parentis*, for the fetus is not a person.

Identifying the State's interests -- which the States rarely articulate with any precision -- makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect [***740] interest supported by both humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more [*915] than a million abortions each year is intolerable; many find third-trimester abortions performed when the fetus is approaching personhood particularly offensive. The State has a legitimate interest in

minimizing such offense. The State may also have a broader interest in expanding the population,³ believing society would benefit from the services of additional productive citizens -- or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life.

[****147] In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person. See, e. g., [Rochin v. California](#), 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952); [Skinner v. Oklahoma ex rel. Williamson](#), 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942). This right is neutral on the question of abortion: The Constitution would be equally offended by an absolute requirement that all women undergo abortions as by an absolute prohibition on abortions. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." [Stanley v. Georgia](#), 394 U.S. 557, 565, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). The same holds true for the power to control women's bodies.

The woman's constitutional liberty interest also involves her freedom to decide matters of the highest privacy and the most personal nature. Cf. [Whalen v. Roe](#), 429 U.S. 589, 598-600, 51 L. Ed. 2d 64, 97 S. Ct. 869 [*916] (1977). A woman considering abortion faces "a difficult choice having serious and personal consequences of major importance to her own future -- perhaps to the

salvation of her own immortal soul." [Thornburgh](#), 476 U.S. at 781. [****148] The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.

[LEdHN\[14C\]](#) [14C][LEdHN\[15C\]](#) [15C]Weighing the State's interest in potential life and the woman's liberty interest, I agree with the joint opinion that the State may ""express a preference for normal childbirth,""" that the State may take steps to ensure that a woman's choice "is thoughtful and informed," and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Ante*, [***741] 505 U.S. at 872-873. Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." *Ante*, 505 U.S. at 878. Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to [**2841] abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments.

This theme runs [****149] throughout our decisions concerning reproductive freedom. In general, *Roe's* requirement that restrictions on abortions before viability be justified by the State's interest in *maternal* health has prevented States from interjecting regulations designed to influence a woman's decision. Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. We have, for example, upheld regulations requiring [*917] written informed consent, see [Planned Parenthood of Central Mo. v. Danforth](#), 428 U.S. 52, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976); limited recordkeeping and reporting, see

³The state interest in protecting potential life may be compared to the state interest in protecting those who seek to immigrate to this country. A contemporary example is provided by the Haitians who have risked the perils of the sea in a desperate attempt to become "persons" protected by our laws. Humanitarian and practical concerns would support a state policy allowing those persons unrestricted entry; countervailing interests in population control support a policy of limiting the entry of these potential citizens. While the state interest in population control might be sufficient to justify strict enforcement of the immigration laws, that interest would not be sufficient to overcome a woman's liberty interest. Thus, a state interest in population control could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions.

ibid.; and pathology reports, see [Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft](#), 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983); as well as various licensing and qualification provisions, see, e. g., [Roe](#), 410 U.S. at 150; [Simopoulos v. Virginia](#), 462 U.S. 506, 76 L. Ed. 2d 755, 103 S. Ct. 2532 (1983). Conversely, we have consistently rejected state efforts to prejudice a woman's [****150] choice, either by limiting the information available to her, see [Bigelow v. Virginia](#), 421 U.S. 809, 44 L. Ed. 2d 600, 95 S. Ct. 2222 (1975), or by "requiring the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" [Thornburgh](#), 476 U.S. at 760; see also [Akron v. Akron Center for Reproductive Health, Inc.](#), 462 U.S. 416, 442-449, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983).

In my opinion, the principles established in this long line of cases and the wisdom reflected in Justice Powell's opinion for the Court in *Akron* (and followed by the Court just six years ago in *Thornburgh*) should govern our decision today. Under these principles, Pa. Cons. Stat. §§ 3205(a)(2)(i)-(iii) (1990) of the Pennsylvania statute are unconstitutional. Those sections require a physician or counselor to provide the woman with a range of materials clearly designed to persuade her to choose not to undergo the abortion. While the Commonwealth is free, pursuant to § 3208 of the Pennsylvania law, to produce and disseminate such material, the Commonwealth may not inject such information into the woman's deliberations just as she is weighing such an important choice.

[****151] Under this same analysis, §§ 3205(a)(1)(i) and (iii) of the Pennsylvania statute are constitutional. Those sections, which require the physician to inform a woman of the nature and risks of the abortion procedure and the medical risks of carrying to term, are neutral requirements comparable to those imposed in other medical procedures. Those sections indicate no effort by the Commonwealth to influence the [*918] woman's [***742] choice in any way. If anything, such

requirements *enhance*, rather than skew, the woman's decisionmaking.

III

The 24-hour waiting period required by §§ 3205(a)(1)-(2) of the Pennsylvania statute raises even more serious concerns. Such a requirement arguably furthers the Commonwealth's interests in two ways, neither of which is constitutionally permissible.

First, it may be argued that the 24-hour delay is justified by the mere fact that it is likely to reduce the number of abortions, thus furthering the Commonwealth's interest in potential life. But such an argument would justify any form of coercion that placed an obstacle in the woman's path. The Commonwealth cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right.

Second, [****152] it can more reasonably be argued that the 24-hour delay furthers the Commonwealth's interest in ensuring that the woman's decision is informed and thoughtful. But there is no evidence that the mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the patient. The mandatory delay thus appears to rest on outmoded [**2842] and unacceptable assumptions about the decisionmaking capacity of women. While there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions, see [Hodgson v. Minnesota](#), 497 U.S. 417, 449, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990),⁴ none of those reasons applies to an [*919] adult woman's

⁴As we noted in that opinion, the State's "legitimate interest in protecting minor women from their own immaturity" distinguished that case from [Akron v. Akron Center for Reproductive Health, Inc.](#), 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983), which involved "a provision that required that mature women, capable of consenting to an abortion, wait 24 hours after giving consent before undergoing an abortion." [Hodgson](#), 497 U.S. at 449, n.35.

decisionmaking ability. Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, see *ante*, 505 U.S. at 895-898, so we must reject the notion that a woman is less capable of deciding matters of gravity. Cf. *Reed v. Reed*, 404 U.S. 71, 30 L. Ed. 2d 225, 92 S. Ct. 251 (1971).

[****153] In the alternative, the delay requirement may be premised on the belief that the decision to terminate a pregnancy is presumptively wrong. This premise is illegitimate. Those who disagree vehemently about the legality and morality of abortion agree about one thing: The decision to terminate a pregnancy is profound and difficult. No person undertakes such a decision lightly -- and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.⁵

⁵ The joint opinion's reliance on the indirect effects of the regulation of constitutionally protected activity, see *ante*, 505 U.S. at 873-874, is misplaced; what matters is not only the effect of a regulation but also the reason for the regulation. As I explained in *Hodgson*:

"In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the constitutionally protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders, *Shapiro v. Thompson*, 394 U.S. 618, 631, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), or deny prisoners the right to marry, *Turner v. Safley*, 482 U.S. 78, 94-99, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. Cf. *Turner v. Safley*, supra; *Loving v. Virginia*, 388 U.S. 1, 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. See, e. g., *Maier v. Roe*, 432 U.S. 464, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977); cf. *Webster v. Reproductive Health Services*, 492 U.S. 490, 508-511, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989); *id.*, at 523-524 (O'CONNOR, J., concurring in part and concurring in judgment). A State's value judgment favoring childbirth over abortion may provide adequate

[*920] [****154] [***743] Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

IV

In my opinion, a correct application of the "undue burden" standard leads to the same conclusion concerning the constitutionality of these requirements. A state-imposed burden on the exercise of a constitutional right is measured both by its effects and by its character: [**2843] A burden may be "undue" either because the burden is too severe or because it lacks a legitimate, rational justification.⁶

[****155] The 24-hour delay requirement fails both parts of this test. The findings of the District Court establish the severity of [*921] the burden that the 24-hour delay imposes on many pregnant women. Yet even in those cases in which the delay is not especially onerous, it is, in my opinion, "undue" because there is no evidence that such a

support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing 'obstacles -- absolute or otherwise -- in the pregnant woman's path to an abortion.'" 497 U.S. at 435.

⁶ The meaning of any legal standard can only be understood by reviewing the actual cases in which it is applied. For that reason, I discount both JUSTICE SCALIA's comments on past descriptions of the standard, see *post*, 505 U.S. at 988-990 (opinion concurring in judgment in part and dissenting in part), and the attempt to give it crystal clarity in the joint opinion. The several opinions supporting the judgment in *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965), are less illuminating than the central holding of the case, which appears to have passed the test of time. The future may also demonstrate that a standard that analyzes both the severity of a regulatory burden and the legitimacy of its justification will provide a fully adequate framework for the review of abortion legislation even if the contours of the standard are not authoritatively articulated in any single opinion.

delay serves a useful and legitimate purpose. As indicated above, there is no legitimate reason to require a woman who has agonized over her decision to leave the clinic or hospital and return again another day. While a general requirement that a physician notify her patients about the risks of a proposed medical procedure [***744] is appropriate, a rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, "undue" burden.

The counseling provisions are similarly infirm. Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate. In these cases, the Pennsylvania statute directs that counselors provide women seeking abortions [****156] with information concerning alternatives to abortion, the availability of medical assistance benefits, and the possibility of child-support payments. [§§ 3205\(a\)\(2\)\(i\)-\(iii\)](#). The statute requires that this information be given to *all* women seeking abortions, including those for whom such information is clearly useless, such as those who are married, those who have undergone the procedure in the past and are fully aware of the options, and those who are fully convinced that abortion is their only reasonable option. Moreover, the statute requires physicians to inform all of their patients of "the probable gestational age of the unborn child." [§ 3205\(a\)\(1\)\(ii\)](#). This information is of little decisional value in most cases, because 90% of all abortions are performed during the first trimester⁷ when fetal age has less relevance than when the fetus nears viability. Nor can the information [***922] required by the statute be justified as relevant to any "philosophic" or "social" argument, *ante*, 505 U.S. at 872, either favoring or disfavoring the abortion decision in a particular case. In light of all of these facts, I conclude that the information requirements in [§ 3205\(a\)\(1\)\(ii\)](#)

and [§§ 3205\(a\)\(2\)\(i\)-\(iii\)](#) [****157] do not serve a useful purpose and thus constitute an unnecessary - - and therefore undue -- burden on the woman's constitutional liberty to decide to terminate her pregnancy.

[LEdHN\[5C\]](#) [5C] [LEdHN\[6C\]](#) [6C] Accordingly, while I disagree with Parts IV, V-B, and V-D of the joint opinion,⁸ I join the remainder of the Court's opinion.

JUSTICE BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I, II, III, V-A, V-C, and VI of the joint opinion [****158] of JUSTICES O'CONNOR, KENNEDY, and SOUTER, *ante*.

[**2844] Three years ago, in [Webster v. Reproductive Health Services](#), 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989), four Members of this Court appeared poised to "cast into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. [Id.](#), at 557 (BLACKMUN, J., dissenting). See [id.](#), at 499 (plurality opinion of REHNQUIST, C. J., joined by WHITE and KENNEDY, JJ.); [id.](#), at 532 (SCALIA, J., concurring in part and concurring in judgment). All that remained between [***745] the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. See, e. g., [Ohio v. Akron Center for Reproductive Health](#), 497 U.S. 502, 524, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (BLACKMUN, J., dissenting). But now, just when so many expected the darkness to fall, the flame has grown bright.

⁷U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 71 (111th ed. 1991).

⁸Although I agree that a parental-consent requirement (with the appropriate bypass) is constitutional, I do not join Part V-D of the joint opinion because its approval of Pennsylvania's informed parental-consent requirement is based on the reasons given in Part V-B, with which I disagree.

[*923] I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to **[****159]** reproductive choice is entitled to the full protection afforded by this Court before *Webster*. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

I

Make no mistake, the joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER is an act of personal courage and constitutional principle. In contrast to previous decisions in which JUSTICES O'CONNOR and KENNEDY postponed reconsideration of [Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 \(1973\)](#), the authors of the joint opinion today join JUSTICE STEVENS and me in concluding that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Ante*, 505 U.S. at 846. In brief, five Members of this Court today recognize that "the Constitution protects a woman's right to terminate her pregnancy in its early stages." *Ante*, 505 U.S. at 844.

A fervent view of individual liberty and the force of *stare decisis* have led the Court to this conclusion. *Ante*, 505 U.S. at 853. Today a majority reaffirms that the [Due Process Clause of the Fourteenth Amendment](#) establishes "a realm of personal liberty which the government may not enter," *ante*, 505 U.S. at 847 -- a realm whose outer limits **[****160]** cannot be determined by interpretations of the Constitution that focus only on the specific practices of States at the time the [Fourteenth Amendment](#) was adopted. See *ante*, 505 U.S. at 848-849. Included within this realm of liberty is "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Ante*, 505 U.S. at 851, quoting [Eisenstadt v. Baird, 405 U.S. 438, 453, 31 L. Ed. 2d 349, 92 S. Ct. 1029 \(1972\)](#) (emphasis in original). "These matters, involving the most intimate and personal choices a

person may make in a lifetime, choices central to personal dignity and autonomy, are *central* to the **[*924]** liberty protected by the [Fourteenth Amendment](#)." *Ante*, 505 U.S. at 851 (emphasis added). Finally, the Court today recognizes that in the case of abortion, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Ante*, 505 U.S. at 852.

The Court's reaffirmation of *Roe*'s central holding is also based on the **[****161]** force of *stare decisis*. "No erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* **[***746]** portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips." *Ante*, 505 U.S. at 860-861. Indeed, the Court acknowledges that *Roe*'s limitation on state power could not be removed "without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by **[**2845]** it." *Ante*, 505 U.S. at 855. In the 19 years since *Roe* was decided, that case has shaped more than reproductive planning -- "an entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions." *Ante*, 505 U.S. at 860. The Court understands that, having "called the contending sides . . . to end their national division by accepting a common mandate rooted in the Constitution," *ante*, 505 U.S. at 867, a decision to overrule *Roe* "would seriously weaken the Court's capacity **[****162]** to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law." *Ante*, 505 U.S. at 865. What has happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch.

In striking down the Pennsylvania statute's spousal notification requirement, the Court has established a framework [*925] for evaluating abortion regulations that responds to the social context of women facing issues of reproductive choice.¹ In determining the burden imposed by the challenged regulation, the Court inquires whether the regulation's "*purpose or effect* is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Ante*, 505 U.S. at 878 (emphasis added). The Court reaffirms: "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Ante*, 505 U.S. at 894. Looking at this group, the Court inquires, based on expert testimony, empirical studies, and common sense, whether "in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial [****163] obstacle to a woman's choice to undergo an abortion." *Ante*, 505 U.S. at 895. "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Ante*, 505 U.S. at 877. And in applying its test, the Court remains sensitive to the unique role of women in the decisionmaking process. Whatever may have been the practice when the [Fourteenth Amendment](#) was adopted, the Court observes, "women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where [***747] that power is employed for the supposed benefit of a member of the individual's family." *Ante*, 505 U.S. at 898.²

¹As I shall explain, the joint opinion and I disagree on the appropriate standard of review for abortion regulations. I do agree, however, that the reasons advanced by the joint opinion suffice to invalidate the spousal notification requirement under a strict scrutiny standard.

²I also join the Court's decision to uphold the medical emergency provision. As the Court notes, its interpretation is consistent with the essential holding of *Roe* that "forbids a State to interfere with a

[*926] [****164] Lastly, while I believe that the joint opinion errs in failing to invalidate the other regulations, I am pleased that the joint opinion has not ruled out the possibility that these regulations may be shown to impose an unconstitutional burden. The joint opinion makes clear that its specific holdings are based on the insufficiency of the record before it. See, e. g., *ante*, 505 U.S. at 885-886. I am confident that in the future evidence will be produced to show that "in a large fraction of the cases in which [these regulations are] relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante*, 505 U.S. at 895.

II

[LEdHN\[6D\]](#) [6D]Today, no less than yesterday, the Constitution and decisions of this Court require that a State's abortion restrictions be subjected [**2846] to the strictest judicial scrutiny. Our precedents and the joint opinion's principles require us to subject all non-*de-minimis* abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

A

The Court today reaffirms the long [****165] recognized rights of privacy and bodily integrity. As early as 1891, the Court held, "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" [Union Pacific R. Co. v. Botsford](#), 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891). Throughout this century, this Court also has held that the fundamental right of privacy protects

woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Ante*, 505 U.S. at 880. As is apparent in my analysis below, however, this exception does not render constitutional the provisions which I conclude do not survive strict scrutiny.

citizens against governmental intrusion [*927] in such intimate family matters as procreation, child-rearing, marriage, and contraceptive choice. See *ante*, 505 U.S. at 847-849. These cases embody the principle that personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government. *Eisenstadt*, 405 U.S. at 453. In *Roe v. Wade*, this Court correctly applied these principles to a woman's right to choose abortion.

State restrictions on abortion violate a woman's right of privacy in two ways. First, compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical [****166] intrusions and significant risks of physical harm. During pregnancy, women experience dramatic physical changes and a wide range of health consequences. Labor and delivery pose additional health risks and [***748] physical demands. In short, restrictive abortion laws force women to endure physical invasions far more substantial than those this Court has held to violate the constitutional principle of bodily integrity in other contexts. See, e. g., *Winston v. Lee*, 470 U.S. 753, 84 L. Ed. 2d 662, 105 S. Ct. 1611 (1985) (invalidating surgical removal of bullet from murder suspect); *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 (1952) (invalidating stomach pumping).³

[****167] Further, when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and family planning -- critical life choices that this Court long has deemed central to the right to privacy. The decision to terminate or continue a pregnancy has no less an

impact on a woman's life than decisions about contraception or marriage. 410 U.S., [*928] at 153. Because motherhood has a dramatic impact on a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws deprive her of basic control over her life. For these reasons, "the decision whether or not to beget or bear a child" lies at "the very heart of this cluster of constitutionally protected choices." *Carey v. Population Services International*, 431 U.S. 678, 685, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977).

A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's [****168] bodies into its service, forcing women to continue their pregnancies, suffer the pains [**2847] of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption -- that women can simply be forced to accept the "natural" status and incidents of motherhood -- appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. See, e. g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-726, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982); *Craig v. Boren*, 429 U.S. 190, 198-199, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976).⁴ The joint opinion recognizes

³ As the joint opinion acknowledges, *ante*, 505 U.S. at 857, this Court has recognized the vital liberty interest of persons in refusing unwanted medical treatment. *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990). Just as the Due Process Clause protects the deeply personal decision of the individual to *refuse* medical treatment, it also must protect the deeply personal decision to *obtain* medical treatment, including a woman's decision to terminate a pregnancy.

⁴ A growing number of commentators are recognizing this point. See, e. g., L. Tribe, *American Constitutional Law* § 15-10, pp. 1353-1359 (2d ed. 1988); Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 350-380 (1992); Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 Colum. L. Rev. 1, 31-44 (1992); cf. Rubinfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 788-791 (1989) (similar analysis under the rubric of privacy); MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L. J. 1281, 1308-1324 (1991).

that these assumptions about women's place in society "are no longer consistent with our [*929] understanding of the family, the individual, [***749] or the Constitution." *Ante*, 505 U.S. at 897.

[****169] B

The Court has held that limitations on the right of privacy are permissible only if they survive "strict" constitutional scrutiny -- that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest. [*Griswold v. Connecticut*, 381 U.S. 479, 485, 14 L. Ed. 2d 510, 85 S. Ct. 1678 \(1965\)](#). We have applied this principle specifically in the context of abortion regulations. [*Roe v. Wade*, 410 U.S. at 155](#).⁵

[****170] *Roe* implemented these principles through a framework that was designed "to ensure that the woman's right to choose not become so subordinate to the State's interest in promoting fetal life that her choice exists in theory but not in fact," *ante*, 505 U.S. at 872. *Roe* identified two relevant state interests: "an interest in preserving and protecting the health of the pregnant woman" and an interest in "protecting the potentiality of human life." [*410 U.S. at 162*](#). With respect to the State's interest in the health of the mother, "the 'compelling' point . . . is at approximately the end of the first trimester," because it is at that point that the mortality rate in abortion approaches that in childbirth. [*Id.*, at 163](#). With respect to the State's interest in potential life, "the 'compelling' point is at

viability," because it is at that point that the [*930] fetus "presumably has the capability of meaningful life outside the mother's womb." *Ibid*. In order to fulfill the requirement of narrow tailoring, "the State is obligated to make a reasonable effort to limit the effect of its regulations to the period in the trimester [****171] during which its health interest will be furthered." [*Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 434, 76 L. Ed. 2d 687, 103 S. Ct. 2481 \(1983\)](#).

In my view, application of this analytical framework is no less warranted than when it was approved by seven Members of this Court in *Roe*. Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right [**2848] to make her own reproductive decisions, free from state coercion. No majority of this Court has ever agreed upon an alternative approach. The factual premises of the trimester framework have not been undermined, see [*Webster*, 492 U.S. at 553](#) (BLACKMUN, J., dissenting), and the *Roe* framework is far more administrable, and far less manipulable, than the "undue burden" standard adopted by the joint opinion.

Nonetheless, three criticisms of the trimester framework continue to [***750] be uttered. First, the trimester framework is attacked because its key elements do not appear in the text of the Constitution. My response to this attack remains the same as it was in *Webster*:

"Were this a true concern, we would have to abandon most of our constitutional jurisprudence. The 'critical [****172] elements' of countless constitutional doctrines nowhere appear in the Constitution's text The Constitution makes no mention, for example, of the [*First Amendment's*](#) 'actual malice' standard for proving certain libels, see [*New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 \(1964\)](#). . . . Similarly, the Constitution makes no mention of the rational-basis test, or the specific verbal

⁵ To say that restrictions on a right are subject to strict scrutiny is not to say that the right is absolute. Regulations can be upheld if they have no significant impact on the woman's exercise of her right and are justified by important state health objectives. See, e. g., [*Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 65-67, 79-81, 49 L. Ed. 2d 788, 96 S. Ct. 2831 \(1976\)](#) (upholding requirements of a woman's written consent and recordkeeping). But the Court today reaffirms the essential principle of *Roe* that a woman has the right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Ante*, 505 U.S. at 846. Under *Roe*, any more than *de minimis* interference is undue.

formulations of intermediate and strict scrutiny by which this Court evaluates claims under the [Equal Protection Clause](#). The reason is simple. Like the *Roe* framework, these [*931] tests or standards are not, and do not purport to be, rights protected by the Constitution. Rather, they are judge-made methods for evaluating and measuring the strength and scope of constitutional rights or for balancing the constitutional rights of individuals against the competing interests of government." [492 U.S. at 548](#).

The second criticism is that the framework more closely resembles a regulatory code than a body of constitutional doctrine. Again, my answer remains the same as in *Webster*:

"If this were a true and genuine concern, we would have to abandon [****173] vast areas of our constitutional jurisprudence. . . . Are [the distinctions entailed in the trimester framework] any finer, or more 'regulatory,' than the distinctions we have often drawn in our [First Amendment](#) jurisprudence, where, for example, we have held that a 'release time' program permitting public-school students to leave school grounds during school hours to receive religious instruction does not violate the [Establishment Clause](#), even though a release-time program permitting religious instruction on school grounds does violate the Clause? Compare [Zorach v. Clauson](#), 343 U.S. 306, 96 L. Ed. 954, 72 S. Ct. 679 (1952), with [Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County](#), 333 U.S. 203, 92 L. Ed. 649, 68 S. Ct. 461 (1948). . . . Similarly, in a [Sixth Amendment](#) case, the Court held that although an overnight ban on attorney-client communication violated the constitutionally guaranteed right to counsel, [Geders v. United States](#), 425 U.S. 80, 47 L. Ed. 2d 592, 96 S. Ct. 1330 (1976), that right was not violated when a trial judge separated a defendant from his lawyer during a 15-minute recess after the defendant's direct testimony.

[Perry v. Leeke](#), 488 U.S. 272, 102 L. Ed. 2d 624, 109 S. Ct. 594 (1989).

"[****174] That numerous constitutional doctrines result in narrow differentiations between similar circumstances does [*932] not mean that this Court has abandoned adjudication in favor of regulation." [492 U.S. at 549-550](#).

The final, and more genuine, criticism of the trimester framework is [****751] that it fails to find the State's interest in potential human life compelling throughout pregnancy. No Member of this Court -- nor for that matter, the Solicitor General, see Tr. of Oral Arg. 42 -- has ever questioned our holding in *Roe* that an abortion is not "the termination of life entitled to [Fourteenth Amendment](#) protection." [410 U.S. at 159](#). [**2849] Accordingly, a State's interest in protecting fetal life is not grounded in the Constitution. Nor, consistent with our [Establishment Clause](#), can it be a theological or sectarian interest. See [Thornburgh v. American College of Obstetricians and Gynecologists](#), 476 U.S. 747, 778, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (STEVENS, J., concurring). It is, instead, a legitimate interest grounded in humanitarian or pragmatic concerns. See *ante*, 505 U.S. at 914-915 (STEVENS, J., concurring in part and dissenting in part).

But while a State has "legitimate interests from the outset of the pregnancy in protecting the health of the woman and the [****175] life of the fetus that may become a child," *ante*, 505 U.S. at 846, legitimate interests are not enough. To overcome the burden of strict scrutiny, the interests must be compelling. The question then is how best to accommodate the State's interest in potential human life with the constitutional liberties of pregnant women. Again, I stand by the views I expressed in *Webster*:

"I remain convinced, as six other Members of this Court 16 years ago were convinced, that

the *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life. The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the [*933] woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence [****176] on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling. As a practical matter, because viability follows 'quickening' -- the point at which a woman feels movement in her womb -- and because viability occurs no earlier than 23 weeks gestational age, it establishes an easily applicable standard for regulating abortion while providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy." [492 U.S. at 553-554](#).⁶

[LEdHN\[14D\]](#) [14D][LEdHN\[15D\]](#) [15D]*Roe's* trimester framework does not ignore the State's interest in prenatal life. Like JUSTICE STEVENS, *ante*, 505 U.S. at 916, I agree that the State may take steps to ensure that a woman's choice "is thoughtful and informed," *ante*, 505 U.S. at 872, and that [****177] "States are free to enact [***752] laws to provide a reasonable framework

for a woman to make a decision that has such profound and lasting meaning." *Ante*, 505 U.S. at 873. But

"serious questions arise . . . when a State attempts to persuade the woman to choose childbirth over abortion. *Ante*, 505 U.S. at 878. Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect [*934] the individual's freedom to make such judgments." *Ante*, 505 U.S. at 916 (STEVENS, J., concurring in part and dissenting in part) (internal quotation marks omitted).

As the joint opinion recognizes, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Ante*, 505 U.S. at 877.

In sum, *Roe's* requirement of strict scrutiny as implemented through a trimester framework should not be disturbed. No other approach has gained a majority, and no other is more protective of the woman's fundamental right. Lastly, no other approach properly accommodates the woman's [***2850] constitutional right [****178] with the State's legitimate interests.

C

[LEdHN\[6E\]](#) [6E]Application of the strict scrutiny standard results in the invalidation of all the challenged provisions. Indeed, as this Court has invalidated virtually identical provisions in prior cases, *stare decisis* requires that we again strike them down.

This Court has upheld informed- and written-consent requirements only where the State has demonstrated that they genuinely further important health-related state concerns. See [Planned Parenthood of Central Mo. v. Danforth](#), 428 U.S.

⁶ The joint opinion agrees with *Roe's* conclusion that viability occurs at 23 or 24 weeks at the earliest. Compare *ante*, 505 U.S. at 860, with [Roe v. Wade](#), 410 U.S. 113, 160, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973).

[52, 65-67, 49 L. Ed. 2d 788, 96 S. Ct. 2831 \(1976\)](#). A State may not, under the guise of securing informed consent, "require the delivery of information 'designed to influence the woman's informed choice between abortion or childbirth.'" [Thornburgh, 476 U.S. at 760](#), quoting [Akron, 462 U.S. at 443-444](#). Rigid requirements that a specific body of information be imparted to a woman in all cases, regardless of the needs of the patient, improperly intrude upon the discretion of the pregnant woman's physician and thereby impose an "undesired and uncomfortable straitjacket." [Thornburgh, 476 U.S. at 762](#), [****179] quoting [Danforth, 428 U.S. at 67, n.8](#).

Measured against these principles, some aspects of the Pennsylvania informed-consent scheme are unconstitutional. [*935] While it is unobjectionable for the Commonwealth to require that the patient be informed of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child, compare [Pa. Cons. Stat. §§ 3205\(a\)\(i\)-\(iii\)](#) (1990) with [Akron, 462 U.S. at 446, n.37](#), I remain unconvinced that there is a vital state need for insisting that the information be provided by a physician rather than [***753] a counselor. [Id., at 448](#). The District Court found that the physician-only requirement necessarily would increase costs to the plaintiff clinics, costs that undoubtedly would be passed on to patients. And because trained women counselors are often more understanding than physicians, and generally have more time to spend with patients, see App. 366-387, the physician-only disclosure requirement is not narrowly tailored to serve the Commonwealth's interest in protecting maternal health.

[Sections 3205\(a\)\(2\)\(i\)-\(iii\)](#) of [****180] the Act further requires that the physician or a qualified nonphysician inform the woman that printed materials are available from the Commonwealth that describe the fetus and provide information about medical assistance for childbirth, information about child support from the father, and a list of agencies offering adoption and other services as

alternatives to abortion. *Thornburgh* invalidated biased patient-counseling requirements virtually identical to the one at issue here. What we said of those requirements fully applies in these cases:

"The listing of agencies in the printed Pennsylvania form presents serious problems; it contains names of agencies that well may be out of step with the needs of the particular woman and thus places the physician in an awkward position and infringes upon his or her professional responsibilities. Forcing the physician or counselor to present the materials and the list to the woman makes him or her in effect an agent of the State in treating the woman and places his or her imprimatur upon both the materials and the list. All this is, or [*936] comes close to being, state medicine imposed upon the woman, not the professional medical [****181] guidance she seeks, and it officially structures -- as it obviously was intended to do -- the dialogue between the woman and her physician.

"The requirements . . . that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly [**2851] disguised elements of discouragement for the abortion decision. Much of this . . . , for many patients, would be irrelevant and inappropriate. For a patient with a life-threatening pregnancy, the 'information' in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or other counselor knows, theoretical financial responsibility often does not equate with fulfillment Under the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest." [476 U.S. at 762-763](#) (citation omitted).

"This type of compelled information is the

antithesis of informed consent," *id.*, at 764, and goes far beyond merely describing the general subject [****182] matter relevant to the woman's decision. "That the Commonwealth does not, and surely would not, compel similar disclosure of every possible peril of necessary surgery or of simple vaccination, reveals the anti-abortion [***754] character of the statute and its real purpose." *Ibid.* ⁷

[*937] [****183] The 24-hour waiting period following the provision of the foregoing information is also clearly unconstitutional. The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks, and that it would require two visits to the abortion provider, thereby increasing travel time, exposure to further harassment, and financial cost. Finally, the District Court found that the requirement would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts. [744 F. Supp. 1323, 1378-1379 \(ED Pa. 1990\)](#). In *Akron* this Court invalidated a similarly arbitrary or inflexible

waiting period because, as here, it furthered no legitimate state interest. ⁸

[****184] As JUSTICE STEVENS insightfully concludes, the mandatory delay rests either on outmoded or unacceptable assumptions about the decisionmaking capacity of women or the belief that the decision to terminate the pregnancy is [*938] presumptively wrong. *Ante*, 505 U.S. at 918-919. The requirement that women consider this obvious and slanted information for an additional 24 hours contained in these provisions will only influence the woman's decision in improper ways. The vast majority of women will know this information -- of [**2852] the few that do not, it is less likely that their minds will be changed by this information than it will be either by the realization that the State opposes their choice or the need once again to endure abuse and harassment on return to the clinic. ⁹

[****185] [***755] Except in the case of a medical emergency, § 3206 requires a physician to obtain the informed consent of a parent or guardian before performing an abortion on an unemancipated minor or an incompetent woman. Based on evidence in the record, the District Court concluded that, in order to fulfill the informed-consent requirement, generally accepted medical principles would require an in-person visit by the parent to the facility. [744 F. Supp. at 1382](#). Although the Court "has recognized that the State has somewhat

⁷ While I do not agree with the joint opinion's conclusion that these provisions should be upheld, the joint opinion has remained faithful to principles this Court previously has announced in examining counseling provisions. For example, the joint opinion concludes that the "information the State requires to be made available to the woman" must be "truthful and not misleading." *Ante*, 505 U.S. at 882. Because the State's information must be "calculated to inform the woman's free choice, not hinder it," *ante*, 505 U.S. at 877, the measures must be designed to ensure that a woman's choice is "mature and informed," *ante*, 505 U.S. at 883, not intimidated, imposed, or impelled. To this end, when the State requires the provision of certain information, the State may not alter the *manner* of presentation in order to inflict "psychological abuse," *ante*, 505 U.S. at 893, designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation. Just as a visual preview of an operation to remove an appendix plays no part in a physician's securing informed consent to an appendectomy, a preview of scenes appurtenant to any major medical intrusion into the human body does not constructively inform the decision of a woman of the State's interest in the preservation of the woman's health or demonstrate the State's "profound respect for the life of the unborn." *Ante*, 505 U.S. at 877.

⁸ The Court's decision in [Hodgson v. Minnesota, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 \(1990\)](#), validating a 48-hour waiting period for minors seeking an abortion to permit parental involvement does not alter this conclusion. Here the 24-hour delay is imposed on an *adult* woman. See *id.*, at 449-450, n.35; [Ohio v. Akron Center for Reproductive Health, Inc., 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972 \(1990\)](#). Moreover, the statute in *Hodgson* did not require any delay once the minor obtained the affirmative consent of either a parent or the court.

⁹ Because this information is so widely known, I am confident that a developed record can be made to show that the 24-hour delay, "in a large fraction of the cases in which [the restriction] is relevant, . . . will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Ante*, 505 U.S. at 895.

broader authority to regulate the activities of children than of adults," the State nevertheless must demonstrate that there is a "*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult." [Danforth, 428 U.S. at 74-75](#) (emphasis added). The requirement of an in-person visit would carry with it the risk of a delay of several days or possibly weeks, even where the parent is willing to consent. While the State has an interest in encouraging parental involvement in the minor's abortion decision, [§ 3206](#) is not narrowly drawn to serve that interest.¹⁰

[*939] [****186] [LEdHN\[6F\]](#) [6F] Finally, the Pennsylvania statute requires every facility performing abortions to report its activities to the Commonwealth. Pennsylvania contends that this requirement is valid under *Danforth*, in which this Court held that record-keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality are permissible. [Id., at 79-81](#). The Commonwealth attempts to justify its required reports on the ground that the public has a right to know how its tax dollars are spent. A regulation designed to inform the public about public expenditures does not further the Commonwealth's interest in protecting maternal health. Accordingly, such a regulation cannot justify a legally significant burden on a woman's right to obtain an abortion.

The confidential reports concerning the identities and medical judgment of physicians involved in

abortions at first glance may seem valid, given the Commonwealth's interest in maternal health and enforcement of the Act. The District Court found, however, that, notwithstanding the confidentiality protections, many physicians, particularly those who [****187] have previously discontinued performing abortions because of harassment, would refuse to refer patients to abortion clinics if their names were to appear on these reports. [744 F. Supp. at 1392](#). The Commonwealth has failed to show that the name of the referring physician either adds to the pool of scientific knowledge concerning abortion or is reasonably related to the Commonwealth's interest [***756] in maternal health. I therefore agree with the District Court's conclusion that the confidential reporting requirements are unconstitutional [*940] insofar as they require the name of the referring physician and the basis for his or her medical judgment.

[**2853] In sum, I would affirm the judgment in No. 91-902 and reverse the judgment in No. 91-744 and remand the cases for further proceedings.

III

At long last, THE CHIEF JUSTICE and those who have joined him admit it. Gone are the contentions that the issue need not be (or has not been) considered. There, on the first page, for all to see, is what was expected: "We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases." *Post*, 505 U.S. at 944. If there is much reason to applaud the [****188] advances made by the joint opinion today, there is far more to fear from THE CHIEF JUSTICE's opinion.

THE CHIEF JUSTICE's criticism of *Roe* follows from his stunted conception of individual liberty. While recognizing that the Due Process Clause protects more than simple physical liberty, he then goes on to construe this Court's personal-liberty cases as establishing only a laundry list of particular rights, rather than a principled account of how these particular rights are grounded in a more

¹⁰ The judicial-bypass provision does not cure this violation. [Hodgson](#) is distinguishable, since these cases involve more than parental involvement or approval -- rather, the Pennsylvania law requires that the parent receive information designed to discourage abortion in a face-to-face meeting with the physician. The bypass procedure cannot ensure that the parent would obtain the information, since in many instances, the parent would not even attend the hearing. A State may not place any restriction on a young woman's right to an abortion, however irrational, simply because it has provided a judicial bypass.

general right of privacy. *Post*, 505 U.S. at 951. This constricted view is reinforced by THE CHIEF JUSTICE's exclusive reliance on tradition as a source of fundamental rights. He argues that the record in favor of a right to abortion is no stronger than the record in [Michael H. v. Gerald D.](#), 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989), where the plurality found no fundamental right to visitation privileges by an adulterous father, or in [Bowers v. Hardwick](#), 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986), where the Court found no fundamental right to engage in homosexual sodomy, or in a case involving the "'firing [of] a gun . . . into another person's body.'" *Post*, 505 U.S. at 951-952. In THE [****189] CHIEF JUSTICE's world, a woman considering whether to terminate a pregnancy is entitled to no more protection than adulterers, murderers, and so-called sexual [*941] deviates.¹¹ Given THE CHIEF JUSTICE's exclusive reliance on tradition, people using contraceptives seem the next likely candidate for his list of outcasts.

Even more shocking than THE CHIEF JUSTICE's cramped notion of individual liberty is his complete omission of any discussion of the effects that compelled childbirth and motherhood have on women's lives. The only expression of concern with women's health is purely instrumental -- for THE CHIEF JUSTICE, only women's *psychological* health is a concern, and only to the extent that he assumes that every woman who decides to have an abortion does so without serious consideration of the moral implications of her decision. [****190] *Post*, 505 U.S. at 967-968. In short, THE CHIEF JUSTICE's [***757] view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal.

Nor does THE CHIEF JUSTICE give any serious consideration to the doctrine of *stare decisis*. For

THE CHIEF JUSTICE, the facts that gave rise to *Roe* are surprisingly simple: "women become pregnant, there is a point somewhere, depending on medical technology, where a fetus becomes viable, and women give birth to children." *Post*, 505 U.S. at 955. This characterization of the issue thus allows THE CHIEF JUSTICE quickly to discard the joint opinion's reliance argument by asserting that "reproductive planning could take virtually immediate account of" a decision overruling *Roe*. *Post*, 505 U.S. at 956 (internal quotation marks omitted).

THE CHIEF JUSTICE's narrow conception of individual liberty and *stare decisis* leads him to propose the same standard of review proposed by the plurality in *Webster*. "States may regulate abortion procedures in ways rationally related to a legitimate state [**2854] interest. [Williamson v. Lee Optical of Oklahoma, Inc.](#), 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955); cf. [****191] [Stanley v. Illinois](#), 405 U.S. 645, 651-653, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)." *Post*, 505 U.S. at 966. THE [*942] CHIEF JUSTICE then further weakens the test by providing an insurmountable requirement for facial challenges: Petitioners must "show that no set of circumstances exists under which the [provision] would be valid." *Post*, 505 U.S. at 973, quoting [Ohio v. Akron Center for Reproductive Health](#), 497 U.S. at 514. In short, in his view, petitioners must prove that the statute cannot constitutionally be applied to *anyone*. Finally, in applying his standard to the spousal-notification provision, THE CHIEF JUSTICE contends that the record lacks any "hard evidence" to support the joint opinion's contention that a "large fraction" of women who prefer not to notify their husbands involve situations of battered women and unreported spousal assault. *Post*, 505 U.S. at 974, n.2. Yet throughout the explication of his standard, THE CHIEF JUSTICE never explains what hard evidence is, how large a fraction is required, or how a battered woman is supposed to pursue an as-applied challenge.

Under his standard, States can ban abortion if that

¹¹ Obviously, I do not share THE CHIEF JUSTICE's views of homosexuality as sexual deviance. See [Bowers](#), 478 U.S. at 202-203, n.2.

[****192] ban is rationally related to a legitimate state interest -- a standard which the United States calls "deferential, but not toothless." Yet when pressed at oral argument to describe the teeth, the best protection that the Solicitor General could offer to women was that a prohibition, enforced by criminal penalties, *with no exception for the life of the mother*, "could raise very serious questions." Tr. of Oral Arg. 48. Perhaps, the Solicitor General offered, the failure to include an exemption for the life of the mother would be "arbitrary and capricious." *Id.*, at 49. If, as THE CHIEF JUSTICE contends, the undue burden test is made out of whole cloth, the so-called "arbitrary and capricious" limit is the Solicitor General's "new clothes."

Even if it is somehow "irrational" for a State to require a woman to risk her life for her child, what protection is offered for women who become pregnant through rape or [***758] incest? Is there anything arbitrary or capricious about a [*943] State's prohibiting the sins of the father from being visited upon his offspring? ¹²

[****193] But, we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that

¹² JUSTICE SCALIA urges the Court to "get out of this area," *post*, 505 U.S. at 1002, and leave questions regarding abortion entirely to the States, *post*, 505 U.S. at 999-1000. Putting aside the fact that what he advocates is nothing short of an abdication by the Court of its constitutional responsibilities, JUSTICE SCALIA is uncharacteristically naive if he thinks that overruling *Roe* and holding that restrictions on a woman's right to an abortion are subject only to rational-basis review will enable the Court henceforth to avoid reviewing abortion-related issues. State efforts to regulate and prohibit abortion in a post-*Roe* world undoubtedly would raise a host of distinct and important constitutional questions meriting review by this Court. For example, does the [Eighth Amendment](#) impose any limits on the degree or kind of punishment a State can inflict upon physicians who perform, or women who undergo, abortions? What effect would differences among States in their approaches to abortion have on a woman's right to engage in interstate travel? Does the [First Amendment](#) permit States that choose not to criminalize abortion to ban all advertising providing information about where and how to obtain abortions?

there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.

IV

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two approaches is short -- the distance is but a single vote.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the [***2855] confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

[*944] CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE SCALIA, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

[LEdHN\[16C\]](#) [16C]The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of [Roe v. Wade](#), 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), [****194] but beats a wholesale retreat from the substance of that case. We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the plurality in [Webster v. Reproductive Health Services](#), 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989), and uphold the challenged provisions of the Pennsylvania statute in their entirety.

I

In ruling on this litigation below, the Court of Appeals for the Third Circuit first observed that "this appeal does not directly implicate *Roe*; this case involves the regulation of abortions rather than

their outright prohibition." [947 F.2d 682, 687 \(1991\)](#). Accordingly, the court directed its attention to the question of the standard of review for abortion regulations. **[***759]** In attempting to settle on the correct standard, however, the court confronted the confused state of this Court's abortion jurisprudence. After considering the several opinions in [Webster v. Reproductive Health Services, supra](#), and [Hodgson v. Minnesota, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 \(1990\)](#), **[****195]** the Court of Appeals concluded that JUSTICE O'CONNOR's "undue burden" test was controlling, as that was the narrowest ground on which we had upheld recent abortion regulations. [947 F.2d at 693-697](#) ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (quoting [Marks v. United States, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 \(1977\)](#) (internal quotation marks omitted))). Applying this standard, the Court of Appeals upheld all of the challenged regulations except the one **[*945]** requiring a woman to notify her spouse of an intended abortion.

In arguing that this Court should invalidate each of the provisions at issue, petitioners insist that we reaffirm our decision in [Roe v. Wade, supra](#), in which we held unconstitutional a Texas statute making it a crime to procure an abortion except to save the life of the mother.¹ We agree with the Court of Appeals that our decision in *Roe* is not directly implicated by the Pennsylvania **[****196]** statute, which does not prohibit, but simply

regulates, abortion. But, as the Court of Appeals found, the state of our post-*Roe* decisional law dealing with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that line of cases is in order. Unfortunately for those who must apply this Court's decisions, the reexamination undertaken today leaves the Court no less divided than beforehand. Although they reject the trimester framework that formed the underpinning of *Roe*, JUSTICES O'CONNOR, KENNEDY, and SOUTER adopt a revised undue burden standard to analyze the challenged regulations. We conclude, however, that such an outcome is an unjustified constitutional compromise, one which leaves the **[**2856]** Court in a position to closely scrutinize all types of abortion regulations despite the fact that it lacks the power to do so under the Constitution.

[**197]** In *Roe*, the Court opined that the State "does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . and that it has still another important and legitimate interest in protecting **[*946]** the potentiality of human life." [410 U.S. at 162](#) (emphasis omitted). In the companion case of [Doe v. Bolton, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 \(1973\)](#), the Court referred to its conclusion in *Roe* "that a pregnant woman does not have an absolute constitutional right to an abortion **[***760]** on her demand." [410 U.S. at 189](#). But while the language and holdings of these cases appeared to leave States free to regulate abortion procedures in a variety of ways, later decisions based on them have found considerably less latitude for such regulations than might have been expected.

For example, after *Roe*, many States have sought to protect their young citizens by requiring that a minor seeking an abortion involve her parents in the decision. Some States have simply required notification of the parents, while others have required a minor to obtain the consent of her parents. In a **[****198]** number of decisions, however, the Court has substantially limited the

¹Two years after *Roe*, the West German constitutional court, by contrast, struck down a law liberalizing access to abortion on the grounds that life developing within the womb is constitutionally protected. *Judgment of February 25, 1975*, 39 BVerfGE 1 (translated in Jonas & Gorby, West German Abortion Decision: A Contrast to *Roe v. Wade*, 9 John Marshall J. Prac. & Proc. 605 (1976)). In 1988, the Canadian Supreme Court followed reasoning similar to that of *Roe* in striking down a law that restricted abortion. *Morgentaler v. The Queen*, 1 S. C. R. 30, 44 D.L.R. 4th 385 (1988).

States in their ability to impose such requirements. With regard to parental notice requirements, we initially held that a State could require a minor to notify her parents before proceeding with an abortion. H. L. v. Matheson, 450 U.S. 398, 407-410, 67 L. Ed. 2d 388, 101 S. Ct. 1164 (1981). Recently, however, we indicated that a State's ability to impose a notice requirement actually depends on whether it requires notice of one or both parents. We concluded that although the Constitution might allow a State to demand that notice be given to one parent prior to an abortion, it may not require that similar notice be given to two parents, unless the State incorporates a judicial bypass procedure in that two-parent requirement. Hodgson v. Minnesota, *supra*.

We have treated parental consent provisions even more harshly. Three years after *Roe*, we invalidated a Missouri regulation requiring that an unmarried woman under the age of 18 obtain the consent of one of her parents before proceeding with an abortion. We held that our abortion jurisprudence prohibited the State from imposing such a "blanket [****199] provision . . . requiring the consent of a parent." Planned Parenthood [*947] of Central Mo. v. Danforth, 428 U.S. 52, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788 (1976). In Bellotti v. Baird, 443 U.S. 622, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979), the Court struck down a similar Massachusetts parental consent statute. A majority of the Court indicated, however, that a State could constitutionally require parental consent, if it alternatively allowed a pregnant minor to obtain an abortion without parental consent by showing either that she was mature enough to make her own decision, or that the abortion would be in her best interests. See *id.*, at 643-644 (plurality opinion); *id.*, at 656-657 (WHITE, J., dissenting). In light of *Bellotti*, we have upheld one parental consent regulation which incorporated a judicial bypass option we viewed as sufficient, see Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983), but have invalidated another because of our belief that the judicial procedure did not

satisfy the dictates of *Bellotti*, see Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 439-442, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983).

[****200] We have never had occasion, as we have in the parental notice context, to further parse our parental consent jurisprudence into one-parent and two-parent components.

In *Roe*, the Court observed that certain States recognized the right of the father to participate in the abortion decision in certain circumstances.

[***761] Because neither *Roe* nor *Doe* [***2857] involved the assertion of any paternal right, the Court expressly stated that the case did not disturb the validity of regulations that protected such a right. Roe v. Wade, *supra*, at 165, n.67. But three years later, in *Danforth*, the Court extended its abortion jurisprudence and held that a State could not require that a woman obtain the consent of her spouse before proceeding with an abortion. Planned Parenthood of Central Mo. v. Danforth, 428 U.S. at 69-71.

States have also regularly tried to ensure that a woman's decision to have an abortion is an informed and well-considered one. In *Danforth*, we upheld a requirement that a woman sign a consent form prior to her abortion, and observed that "it is desirable and imperative that [the decision] [*948] [****201] be made with full knowledge of its nature and consequences." *Id.*, at 67. Since that case, however, we have twice invalidated state statutes designed to impart such knowledge to a woman seeking an abortion. In *Akron*, we held unconstitutional a regulation requiring a physician to inform a woman seeking an abortion of the status of her pregnancy, the development of her fetus, the date of possible viability, the complications that could result from an abortion, and the availability of agencies providing assistance and information with respect to adoption and childbirth. Akron v. Akron Center for Reproductive Health, *supra*, at 442-445. More recently, in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986), we struck down a more limited

Pennsylvania regulation requiring that a woman be informed of the risks associated with the abortion procedure and the assistance available to her if she decided to proceed with her pregnancy, because we saw the compelled information as "the antithesis of informed consent." *Id.*, at 764. [****202] Even when a State has sought only to provide information that, in our view, was consistent with the *Roe* framework, we concluded that the State could not require that a physician furnish the information, but instead had to alternatively allow nonphysician counselors to provide it. *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 448-449. In *Akron* as well, we went further and held that a State may not require a physician to wait 24 hours to perform an abortion after receiving the consent of a woman. Although the State sought to ensure that the woman's decision was carefully considered, the Court concluded that the Constitution forbade the State to impose any sort of delay. *Id.*, at 449-451.

We have not allowed States much leeway to regulate even the actual abortion procedure. Although a State can require that second-trimester abortions be performed in outpatient clinics, see *Simopoulos v. Virginia*, 462 U.S. 506, 76 L. Ed. 2d 755, 103 S. Ct. 2532 (1983), we concluded in *Akron* and *Ashcroft* that a State could not [*949] require that such abortions be performed only in hospitals. See *Akron v. Akron Center for Reproductive Health*, *supra*, at 437-439; [****203] [***762] *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, *supra*, at 481-482. Despite the fact that *Roe* expressly allowed regulation after the first trimester in furtherance of maternal health, "present medical knowledge," in our view, could not justify such a hospitalization requirement under the trimester framework. *Akron v. Akron Center for Reproductive Health*, *supra*, at 437 (quoting *Roe v. Wade*, *supra*, at 163). And in *Danforth*, the Court held that Missouri could not outlaw the saline amniocentesis method of abortion, concluding that the Missouri Legislature had "failed to appreciate and to consider several significant facts" in making its decision. 428 U.S.

at 77.

Although *Roe* allowed state regulation after the point of viability to protect the potential [***2858] life of the fetus, the Court subsequently rejected attempts to regulate in this manner. In *Colautti v. Franklin*, 439 U.S. 379, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979), the Court struck down a statute that governed the determination of viability. *Id.*, at 390-397. [****204] In the process, we made clear that the trimester framework incorporated only one definition of viability -- ours -- as we forbade States to decide that a certain objective indicator -- "be it weeks of gestation or fetal weight or any other single factor" -- should govern the definition of viability. *Id.*, at 389. In that same case, we also invalidated a regulation requiring a physician to use the abortion technique offering the best chance for fetal survival when performing postviability abortions. See *id.*, at 397-401; see also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 768-769 (invalidating a similar regulation). In *Thornburgh*, the Court struck down Pennsylvania's requirement that a second physician be present at postviability abortions to help preserve the health of the unborn child, on the ground that it did not incorporate a sufficient medical emergency exception. *Id.*, at 769-771. Regulations governing the treatment of aborted fetuses have [*950] met a similar fate. In *Akron*, we invalidated a provision requiring physicians [****205] performing abortions to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner." 462 U.S. at 451 (internal quotation marks omitted).

Dissents in these cases expressed the view that the Court was expanding upon *Roe* in imposing ever greater restrictions on the States. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 783 (Burger, C. J., dissenting) ("The extent to which the Court has departed from the limitations expressed in *Roe* is readily apparent"); *id.*, at 814 (WHITE, J., dissenting) ("The majority indiscriminately strikes down statutory provisions that in no way

contravene the right recognized in *Roe*"). And, when confronted with state regulations of this type in past years, the Court has become increasingly more divided: The three most recent abortion cases have not commanded a Court opinion. See *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990); *Hodgson v. Minnesota*, 497 U.S. 417, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990); [****206] *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989).

The task of the Court of Appeals in the present cases was obviously complicated by this confusion and uncertainty. Following *Marks v. United States*, 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977), it concluded that in light of *Webster* and *Hodgson*, the strict scrutiny standard enunciated in *Roe* was no longer applicable, and that the "undue burden" standard adopted by JUSTICE O'CONNOR was the governing principle. This state of confusion and disagreement warrants reexamination of the "fundamental right" accorded to a woman's decision to abort a fetus in *Roe*, with its concomitant requirement that any state regulation of abortion survive "strict scrutiny." See *Payne v. Tennessee*, 501 U.S. 808, 827-828, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991) (observing that reexamination of constitutional decisions is appropriate when those decisions have generated uncertainty and failed to provide clear guidance, because "correction through legislative [*951] action is practically impossible" (internal quotation [****207] marks omitted)); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-547, 557, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985).

We have held that a liberty interest protected under the *Due Process Clause of the Fourteenth Amendment* will be deemed fundamental if it is "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149 [**2859] (1937). Three years earlier, in *Snyder v. Massachusetts*, 291 U.S. 97, 78 L. Ed. 674, 54 S. Ct. 330 (1934), we referred to a

"principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.*, at 105; see also *Michael H. v. Gerald D.*, 491 U.S. 110, 122, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (plurality opinion) (citing the language from *Snyder*). These expressions are admittedly not precise, but our decisions implementing this notion of "fundamental" rights do not afford any more elaborate basis on which to base such a classification.

In construing the phrase "liberty" incorporated in the *Due Process Clause of the Fourteenth Amendment*, we have recognized that its meaning extends beyond freedom from [****208] physical restraint. In *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), we held that it included a parent's right to send a child to private school; in *Meyer v. Nebraska*, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), we held that it included a right to teach a foreign language in a parochial school. Building on these cases, we have held that the term "liberty" includes a right to marry, *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); a right to procreate, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942); and a right to use contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972). But a reading of these opinions makes clear that they do not endorse any all-encompassing "right of privacy."

[***764] In *Roe v. Wade*, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 152-153. We are now of the view that, [****209] in terming this right fundamental, the Court in *Roe* read the earlier [*952] opinions upon which it based its decision much too broadly. Unlike marriage, procreation, and contraception, abortion "involves the purposeful termination of a potential life." *Harris v. McRae*, 448 U.S. 297, 325, 65 L. Ed.

[2d 784, 100 S. Ct. 2671 \(1980\)](#). The abortion decision must therefore "be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy." [Thornburgh v. American College of Obstetricians and Gynecologists, supra, at 792](#) (WHITE, J., dissenting). One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. See [Michael H. v. Gerald D., supra, at 124, n.4](#) (To look "at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body").

Nor do the historical [****210] traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental." The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the [Fourteenth Amendment](#), statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. J. Mohr, *Abortion in America* 200 (1978). By the turn of the century virtually every State had a law prohibiting or restricting abortion on its books. By the middle of the present century, a liberalization trend had set in. But 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother. [Roe v. Wade, 410 U.S. at 139-140; id., at 176-177, n.2](#) (REHNQUIST, J., dissenting). On this record, [**2860] it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history [*953] supported the classification of [****211] the right to abortion as "fundamental" under the [Due Process Clause of the Fourteenth Amendment](#).

We think, therefore, both in view of this history and

of our decided cases dealing with substantive liberty under the Due Process Clause, that the Court was mistaken in *Roe* when it classified a woman's decision to terminate her pregnancy as a "fundamental right" that could be abridged only in a manner which withstood "strict scrutiny." In so concluding, we repeat the observation made in [Bowers v. Hardwick, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 \(1986\)](#):

"Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due [***765] Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." [Id., at 194](#).

We believe that the sort of constitutionally imposed abortion code of the type illustrated by our decisions following *Roe* is inconsistent "with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general [****212] principles, as ours does." [Webster v. Reproductive Health Services, 492 U.S. at 518](#) (plurality opinion). The Court in *Roe* reached too far when it analogized the right to abort a fetus to the rights involved in *Pierce*, *Meyer*, *Loving*, and *Griswold*, and thereby deemed the right to abortion fundamental.

II

The joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding." *Ante*, 505 U.S. at 871. Instead of claiming that *Roe* [*954] was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta,

because the joint opinion does not apply that principle in dealing with *Roe*. *Roe* decided that a woman had a fundamental right to an abortion. The joint opinion rejects that view. *Roe* decided that abortion regulations were to [****213] be subjected to "strict scrutiny" and could be justified only in the light of "compelling state interests." The joint opinion rejects that view. *Ante*, 505 U.S. at 872-873; see *Roe v. Wade, supra*, at 162-164. *Roe* analyzed abortion regulation under a rigid trimester framework, a framework which has guided this Court's decisionmaking for 19 years. The joint opinion rejects that framework. *Ante*, 505 U.S. at 873.

Stare decisis is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality. Decisions following *Roe*, such as *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986), [****214] are frankly overruled in part under the "undue burden" standard expounded in the joint opinion. *Ante*, 505 U.S. at 881-884.

In our view, authentic principles of *stare decisis* do not require that any portion of the [**2861] reasoning in *Roe* be kept intact. "*Stare decisis* is not . . . a universal, inexorable command," [***766] especially in cases involving the interpretation of the Federal Constitution. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 76 L. Ed. 815, 52 S. Ct. 443 (1932) (Brandeis, J., dissenting). Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for [*955] constitutional amendment,

is impossible. It is therefore our duty to reconsider constitutional interpretations that "depart from a proper understanding" of the Constitution. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. at 557; see *United States v. Scott*, 437 U.S. 82, 101, 57 L. Ed. 2d 65, 98 S. Ct. 2187 (1978) ("In cases involving the Federal Constitution, . . . the Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, [****215] so fruitful in the physical sciences, is appropriate also in the judicial function" (quoting *Burnet v. Coronado Oil & Gas Co.*, *supra*, at 406-408 (Brandeis, J., dissenting))); *Smith v. Allwright*, 321 U.S. 649, 665, 88 L. Ed. 987, 64 S. Ct. 757 (1944). Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question. See, e. g., *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

The joint opinion discusses several *stare decisis* factors which, it asserts, point toward retaining a portion of *Roe*. Two of these factors are that the main "factual underpinning" of *Roe* has remained the same, and that its doctrinal foundation is no weaker now than it was in 1973. *Ante*, 505 U.S. at 857-860. Of course, what might be called the basic facts which gave rise to *Roe* have remained the same -- women become pregnant, there is a point somewhere, depending on medical [****216] technology, where a fetus becomes viable, and women give birth to children. But this is only to say that the same facts which gave rise to *Roe* will continue to give rise to similar cases. It is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question. And surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most

outlandish constitutional decision could survive [*956] forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.

Nor does the joint opinion faithfully follow this alleged requirement. The opinion frankly concludes that *Roe* and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. *Ante*, 505 U.S. at 871-873. But there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception.

The joint opinion also points to the reliance interests [****217] involved in this context in its effort to explain why precedent must be followed for [***767] precedent's sake. Certainly it is true that where reliance is truly at issue, as in the case of judicial decisions that have formed the basis for private decisions, "considerations in favor of *stare decisis* are at their acme." [Payne v. Tennessee, 501 U.S. at 828](#). But, as the joint opinion apparently agrees, *ante*, 505 U.S. at 855-856, any traditional notion of reliance is not applicable here. The Court today cuts back on the protection afforded by *Roe*, and no one claims that this action defeats any reliance interest in the disavowed trimester framework. Similarly, reliance interests would not be diminished were the Court to go further and acknowledge the full error of *Roe*, as "reproductive planning could take virtually [**2862] immediate account of" this action. *Ante*, 505 U.S. at 856.

The joint opinion thus turns to what can only be described as an unconventional -- and unconvincing -- notion of reliance, a view based on the surmise that the availability of abortion since *Roe* has led to [****218] "two decades of economic and social developments" that would be undercut if the error of *Roe* were recognized. *Ante*, 505 U.S. at 856. The joint opinion's assertion of this fact is undeveloped and totally conclusory. In fact, one cannot be sure to what economic and social developments the opinion is referring. Surely it is

dubious to suggest that women have reached their "places in society" in [*957] reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men. *Ante*, 505 U.S. at 856.

In the end, having failed to put forth any evidence to prove any true reliance, the joint opinion's argument is based solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the *Roe* decision over the last 19 years and have "ordered their thinking and living around" it. *Ante*, 505 U.S. at 856. As an initial matter, one might inquire how the joint opinion can view the "central holding" of *Roe* as so deeply rooted in our constitutional culture, when it so casually uproots [****219] and disposes of that same decision's trimester framework. Furthermore, at various points in the past, the same could have been said about this Court's erroneous decisions that the Constitution allowed "separate but equal" treatment of minorities, see [Plessy v. Ferguson, 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 \(1896\)](#), or that "liberty" under the Due Process Clause protected "freedom of contract," see [Adkins v. Children's Hospital of District of Columbia, 261 U.S. 525, 67 L. Ed. 785, 43 S. Ct. 394 \(1923\)](#); [Lochner v. New York, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 \(1905\)](#). The "separate but equal" doctrine lasted 58 years after *Plessy*, and *Lochner*'s protection of contractual freedom lasted 32 years. However, the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here. See [Brown v. Board of Education, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 \(1954\)](#) (rejecting the "separate but equal" doctrine); [West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 \(1937\)](#) (overruling [***768] [****220] [Adkins v. Children's Hospital, supra](#), in upholding

Washington's minimum wage law).

Apparently realizing that conventional *stare decisis* principles do not support its position, the joint opinion advances a belief that retaining a portion of *Roe* is necessary to protect [*958] the "legitimacy" of this Court. *Ante*, 505 U.S. at 861-869. Because the Court must take care to render decisions "grounded truly in principle," and not simply as political and social compromises, *ante*, 505 U.S. at 865, the joint opinion properly declares it to be this Court's duty to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement, although it may be doubted that Members of this Court, holding their tenure as they do during constitutional "good behavior," are at all likely to be intimidated by such public protests.

But the joint opinion goes on to state that when the Court "resolves the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases," its decision is exempt from reconsideration under established principles of *stare decisis* in constitutional cases. *Ante*, 505 U.S. at 866. This is so, the joint opinion [****221] contends, because in those "intensely divisive" cases the Court has "called the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," and must therefore take special care not to be perceived as "surrendering to political pressure" and continued opposition. *Ante*, 505 U.S. at 866, 867. This is a truly [**2863] novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away*.

The first difficulty with this principle lies in its assumption that cases that are "intensely divisive" can be readily distinguished from those that are not.

The question of whether a particular issue is "intensely divisive" enough to qualify for special protection is entirely subjective and dependent on the individual assumptions of the Members of this Court. In addition, because the Court's duty is to ignore public opinion and criticism [****222] on issues that come before it, its Members are [*959] in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection. Although many of the Court's decisions divide the populace to a large degree, we have not previously on that account shied away from applying normal rules of *stare decisis* when urged to reconsider earlier decisions. Over the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions. See [Payne v. Tennessee, supra, at 828-830](#), and n.1 (listing cases).

The joint opinion picks out and discusses two prior Court rulings that it believes are of the "intensely divisive" variety, and concludes that they are of comparable dimension to *Roe*. *Ante*, 505 U.S. at 861-864 (discussing [Lochner \[***769\] v. New York, supra](#), and [Plessy v. Ferguson, supra](#)). It appears to us very odd indeed that the joint opinion chooses as benchmarks two cases in which the Court chose *not* to adhere to erroneous constitutional precedent, but instead enhanced its stature [****223] by acknowledging and correcting its error, apparently in violation of the joint opinion's "legitimacy" principle. See [West Coast Hotel Co. v. Parrish, supra](#); [Brown v. Board of Education, supra](#). One might also wonder how it is that the joint opinion puts these, and not others, in the "intensely divisive" category, and how it assumes that these are the only two lines of cases of comparable dimension to *Roe*. There is no reason to think that either *Plessy* or *Lochner* produced the sort of public protest when they were decided that *Roe* did. There were undoubtedly large segments of the bench and bar who agreed with the dissenting views in those cases, but surely that cannot be what the Court means when it uses the term "intensely divisive," or many other cases would have to be

added to the list. In terms of public protest, however, *Roe*, so far as we know, was unique. But just as the Court should not respond to that sort of protest by retreating from the decision simply to allay the concerns of the protesters, it should likewise not respond by determining to adhere to the [*960] decision at all costs lest it *seem* to be retreating [****224] under fire. Public protests should not alter the normal application of *stare decisis*, lest perfectly lawful protest activity be penalized by the Court itself.

Taking the joint opinion on its own terms, we doubt that its distinction between *Roe*, on the one hand, and *Plessy* and *Lochner*, on the other, withstands analysis. The joint opinion acknowledges that the Court improved its stature by overruling *Plessy* in *Brown* on a deeply divisive issue. And our decision in *West Coast Hotel*, which overruled *Adkins v. Children's Hospital*, *supra*, and *Lochner*, was rendered at a time when Congress was considering President Franklin Roosevelt's proposal to "reorganize" this Court and enable him to name six additional Justices in the event that any Member of the Court over the age of 70 did not elect to retire. It is difficult to imagine a situation in which the Court would face more intense opposition to a prior ruling than it did at that time, and, under the general principle proclaimed in the joint opinion, the Court seemingly should have responded to this opposition [**2864] by stubbornly refusing to re-examine the *Lochner* rationale, [****225] lest it lose legitimacy by appearing to "overrule under fire." *Ante*, 505 U.S. at 867.

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

decisions.

For example, the opinion asserts that the Court could justifiably overrule its decision in *Lochner* only because the Depression had convinced "most people" that constitutional [***770] protection of contractual freedom contributed to an economy [*961] that failed to protect the welfare of all. *Ante*, 505 U.S. at 861. Surely the joint opinion does not mean to suggest that people saw this Court's failure to uphold minimum wage statutes as the cause of the Great Depression! In any event, the *Lochner* Court did not base its rule upon the policy judgment [****226] that an unregulated market was fundamental to a stable economy; it simply believed, erroneously, that "liberty" under the Due Process Clause protected the "right to make a contract." *Lochner v. New York*, 198 U.S. at 53. Nor is it the case that the people of this Nation only discovered the dangers of extreme laissez-faire economics because of the Depression. State laws regulating maximum hours and minimum wages were in existence well before that time. A Utah statute of that sort enacted in 1896 was involved in our decision in *Holden v. Hardy*, 169 U.S. 366, 42 L. Ed. 780, 18 S. Ct. 383 (1898), and other States followed suit shortly afterwards, see, e. g., *Muller v. Oregon*, 208 U.S. 412, 52 L. Ed. 551, 28 S. Ct. 324 (1908); *Bunting v. Oregon*, 243 U.S. 426, 61 L. Ed. 830, 37 S. Ct. 435 (1917). These statutes were indeed enacted because of a belief on the part of their sponsors that "freedom of contract" did not protect the welfare of workers, demonstrating that that belief manifested itself more than a generation before the Great Depression. Whether "most people" had come to share it in the hard times of the 1930's is, insofar as anything [****227] the joint opinion advances, entirely speculative. The crucial failing at that time was not that workers were not paid a fair wage, but that there was no work available at *any* wage.

When the Court finally recognized its error in *West Coast Hotel*, it did not engage in the *post hoc* rationalization that the joint opinion attributes to it today; it did not state that *Lochner* had been based

on an economic view that had fallen into disfavor, and that it therefore should be overruled. Chief Justice Hughes in his opinion for the Court simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that "the Constitution does not speak of freedom of contract." [*West Coast Hotel Co. v. Parrish*, 300 U.S. at 391](#); [*Lochner v. New York*, supra, at 75](#) (Holmes, [*962] J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*"). Although the Court did acknowledge in the last paragraph of its opinion the state of affairs during the then-current Depression, the theme [****228] of the opinion is that the Court had been mistaken as a matter of constitutional law when it embraced "freedom of contract" 32 years previously.

The joint opinion also agrees that the Court acted properly in rejecting the doctrine of "separate but equal" in *Brown*. In fact, the opinion lauds *Brown* in comparing it to *Roe*. *Ante*, 505 U.S. at 867. This is strange, in that under the opinion's "legitimacy" principle the Court would seemingly have been forced to adhere to its erroneous decision in *Plessy* because of its "intensely divisive" [**2865] character. To us, adherence to *Roe* today under the guise of "legitimacy" would seem to resemble more closely adherence to *Plessy* on the [****771] same ground. Fortunately, the Court did not choose that option in *Brown*, and instead frankly repudiated *Plessy*. The joint opinion concludes that such repudiation was justified only because of newly discovered evidence that segregation had the effect of treating one race as inferior to another. But it can hardly be argued that this was not urged upon those who decided *Plessy*, as Justice Harlan observed in his dissent that the law at issue "puts the brand of servitude and degradation [****229] upon a large class of our fellow-citizens, our equals before the law." [*Plessy v. Ferguson*, 163 U.S. at 562](#). It is clear that the same arguments made before the Court in *Brown* were made in *Plessy* as well. The Court in *Brown* simply recognized, as Justice

Harlan had recognized beforehand, that the [*Fourteenth Amendment*](#) does not permit racial segregation. The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the [*Equal Protection Clause*](#) does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground [*963] alone the Court was justified in properly concluding that the *Plessy* Court had erred.

There is also a suggestion in the joint opinion that the propriety of overruling a "divisive" decision depends in part on whether "most people" would now agree that it should be overruled. Either the demise of opposition or its progression to substantial popular agreement apparently is required to allow the Court to reconsider a divisive decision. How such agreement would be ascertained, short [****230] of a public opinion poll, the joint opinion does not say. But surely even the suggestion is totally at war with the idea of "legitimacy" in whose name it is invoked. The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution. The doctrine of *stare decisis* is an adjunct of this duty, and should be no more subject to the vagaries of public opinion than is the basic judicial task.

There are other reasons why the joint opinion's discussion of legitimacy is unconvincing as well. In assuming that the Court is perceived as "surrendering to political pressure" when it overrules a controversial decision, *ante*, 505 U.S. at 867, the joint opinion forgets that there are two sides to any controversy. The joint opinion asserts that, in order to protect its legitimacy, the Court must refrain from overruling a controversial decision lest it be viewed as favoring those who oppose the decision. But a decision to *adhere* to prior precedent is subject to the same criticism, for in such a case one can easily argue that the Court is responding to those [****231] who have

demonstrated in favor of the original decision. The decision in *Roe* has engendered large demonstrations, including repeated marches on this Court and on Congress, both in opposition to and in support of that opinion. A decision either way on *Roe* can therefore be perceived as favoring one group or the other. But this perceived dilemma arises only if one assumes, as the joint opinion does, that the Court [*964] should make its decisions with [***772] a view toward speculative public perceptions. If one assumes instead, as the Court surely did in both *Brown* and *West Coast Hotel*, that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side.

Roe is not this Court's only decision to generate conflict. Our decisions in some recent capital cases, and in [*Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 \(1986\)](#), have also engendered demonstrations in opposition. The joint opinion's message to such protesters appears to be that they must cease their activities in order to serve their cause, because their [**2866] protests will only cement in place [****232] a decision which by normal standards of *stare decisis* should be reconsidered. Nearly a century ago, Justice David J. Brewer of this Court, in an article discussing criticism of its decisions, observed that "many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all." Justice Brewer on "The Nation's Anchor," 57 Albany L. J. 166, 169 (1898). This was good advice to the Court then, as it is today. Strong and often misguided criticism of a decision should not render the decision immune from reconsideration, lest a fetish for legitimacy penalize freedom of expression.

The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion -- the "undue burden" standard. As indicated above, *Roe v. Wade* adopted a "fundamental right" standard under which state

regulations could survive only if they met the requirement of "strict scrutiny." While we disagree with that standard, it at least had a recognized basis in constitutional law at the time *Roe* was decided. The same cannot be [****233] said for the "undue burden" standard, which is created largely out of whole cloth by the authors of the joint opinion. It is a standard which even today does not command the support of a majority of this Court. And it will not, we believe, result [*965] in the sort of "simple limitation," easily applied, which the joint opinion anticipates. *Ante*, 505 U.S. at 855. In sum, it is a standard which is not built to last.

In evaluating abortion regulations under that standard, judges will have to decide whether they place a "substantial obstacle" in the path of a woman seeking an abortion. *Ante*, 505 U.S. at 877. In that this standard is based even more on a judge's subjective determinations than was the trimester framework, the standard will do nothing to prevent "judges from roaming at large in the constitutional field" guided only by their personal views. [*Griswold v. Connecticut*, 381 U.S. at 502](#) (Harlan, J., concurring in judgment). Because the undue burden standard is plucked from nowhere, the question of what is a "substantial obstacle" to abortion will undoubtedly engender a variety of conflicting views. For example, in the very matter before us now, the authors of the [****234] joint opinion would uphold Pennsylvania's 24-hour waiting period, concluding that a "particular burden" on some women is not a substantial obstacle. *Ante*, 505 U.S. at 887. But the authors would at the same time strike down Pennsylvania's [***773] spousal notice provision, after finding that in a "large fraction" of cases the provision will be a substantial obstacle. *Ante*, 505 U.S. at 895. And, while the authors conclude that the informed consent provisions do not constitute an "undue burden," JUSTICE STEVENS would hold that they do. *Ante*, 505 U.S. at 920-922.

Furthermore, while striking down the spousal notice regulation, the joint opinion would uphold a parental consent restriction that certainly places

very substantial obstacles in the path of a minor's abortion choice. The joint opinion is forthright in admitting that it draws this distinction based on a policy judgment that parents will have the best interests of their children at heart, while the same is not necessarily true of husbands as to their wives. *Ante*, 505 U.S. at 895. This may or may not be a correct judgment, but it is quintessentially a legislative one. The "undue burden" inquiry does not in any way supply the distinction between [****235] parental consent and [*966] spousal consent which the joint opinion adopts. Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.

The sum of the joint opinion's labors in the name of *stare decisis* and "legitimacy" is this: *Roe v. Wade* stands as a sort of judicial Potemkin Village, which may be pointed out [**2867] to passers-by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither *stare decisis* nor "legitimacy" are truly served by such an effort.

We have stated above our belief that the Constitution does not subject state abortion regulations to heightened scrutiny. Accordingly, we think that the correct analysis is that set forth by the plurality opinion in *Webster*. A woman's interest in having an abortion is a form of liberty protected by the Due Process [****236] Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491, 99 L. Ed. 563, 75 S. Ct. 461 (1955); cf. *Stanley v. Illinois*, 405 U.S. 645, 651-653, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972). With this rule in mind, we examine each of the challenged provisions.

III

A

Section 3205 of the Act imposes certain requirements related to the informed consent of a woman seeking an abortion. *18 Pa. Cons. Stat. § 3205* (1990). *Section 3205(a)(1)* requires that the referring or performing physician must inform a woman contemplating an abortion of (i) the nature of the procedure and the risks and alternatives that a reasonable patient would find material; (ii) the fetus' probable gestational [*967] age; and (iii) the medical risks involved in carrying her pregnancy to term. *Section 3205(a)(2)* requires a physician or a nonphysician counselor to inform the woman that (i) the state health department publishes free [***774] materials describing the fetus at different stages and listing abortion alternatives; (ii) medical assistance benefits may be available for prenatal, childbirth, and neonatal [****237] care; and (iii) the child's father is liable for child support. The Act also imposes a 24-hour waiting period between the time that the woman receives the required information and the time that the physician is allowed to perform the abortion. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, 505 U.S. at 902-904.

This Court has held that it is certainly within the province of the States to require a woman's voluntary and informed consent to an abortion. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 760. Here, Pennsylvania seeks to further its legitimate interest in obtaining informed consent by ensuring that each woman "is aware not only of the reasons for having an abortion, but also of the risks associated with an abortion and the availability of assistance that might make the alternative of normal childbirth more attractive than it might otherwise appear." *Id.*, at 798-799 (WHITE, J., dissenting).

LEdHN[2C] [2C]We conclude that this provision of the statute is rationally related to the State's

interest in assuring that a woman's consent to an abortion be a fully informed decision.

[Section 3205\(a\)\(1\)](#) requires a physician to disclose [****238] certain information about the abortion procedure and its risks and alternatives. This requirement is certainly no large burden, as the Court of Appeals found that "the record shows that the clinics, without exception, insist on providing this information to women before an abortion is performed." [947 F.2d at 703](#). We are of the view that this information "clearly is related to maternal health and to the State's legitimate purpose in requiring informed consent." [Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. at 446](#). An accurate description of the gestational age of the fetus and of the risks involved in carrying a child to term helps to further both those interests and the State's legitimate interest in unborn human life. See [id., at 445-446, n.37](#) (required disclosure of gestational age of the fetus "certainly is not objectionable"). Although petitioners contend that it is unreasonable for the State to require that a physician, as [**2868] opposed to a nonphysician counselor, disclose this information, we agree with the Court of Appeals that a State "may rationally decide that physicians [****239] are better qualified than counselors to impart this information and answer questions about the medical aspects of the available alternatives." [947 F.2d at 704](#).

[Section 3205\(a\)\(2\)](#) compels the disclosure, by a physician or a counselor, of information concerning the availability of paternal child support and state-funded alternatives if the woman decides to proceed with her pregnancy. Here again, the Court of Appeals observed that "the record indicates that most clinics already require that a counselor consult in person with the woman about alternatives to abortion before the abortion is performed." [Id., at 704-705](#). And petitioners do not claim that the information required to be disclosed by statute is in any way false [***775] or inaccurate; indeed, the Court of Appeals found it to be "relevant, accurate, and non-inflammatory." [Id., at 705](#). We conclude

that this required presentation of "balanced information" is rationally related to the State's legitimate interest in ensuring that the woman's consent is truly informed, [Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 830](#) [****240] (O'CONNOR, J., dissenting), and in addition furthers the State's interest in preserving unborn life. That the information might create some uncertainty and persuade some women to forgo abortions does not lead to the conclusion that the Constitution forbids the provision of such information. Indeed, it only demonstrates that this information might [*969] very well make a difference, and that it is therefore relevant to a woman's informed choice. Cf. [id., at 801](#) (WHITE, J., dissenting) ("The ostensible objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice"). We acknowledge that in *Thornburgh* this Court struck down informed consent requirements similar to the ones at issue here. See [id., at 760-764](#). It is clear, however, that while the detailed framework of *Roe* led to the Court's invalidation of those informational requirements, they "would have been sustained under any traditional standard of judicial review, . . . or for any other surgical procedure except abortion." [Webster v. Reproductive Health Services, 492 U.S. at 517](#) (plurality opinion) [****241] (citing [Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. at 802](#) (WHITE, J., dissenting); [id., at 783](#) (Burger, C. J., dissenting)). In light of our rejection of *Roe's* "fundamental right" approach to this subject, we do not regard *Thornburgh* as controlling.

For the same reason, we do not feel bound to follow this Court's previous holding that a State's 24-hour mandatory waiting period is unconstitutional. See [Akron v. Akron Center for Reproductive Health, Inc., supra, at 449-451](#). Petitioners are correct that such a provision will result in delays for some women that might not otherwise exist, therefore placing a burden on their liberty. But the provision in no way prohibits abortions, and the informed consent and waiting

period requirements do not apply in the case of a medical emergency. See [18 Pa. Cons. Stat. §§ 3205\(a\), \(b\)](#) (1990). We are of the view that, in providing time for reflection and reconsideration, the waiting period helps ensure that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest [****242] in maternal health and in the unborn life of the fetus. It "is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences [*970] on fetal life, and the possible effects on her own." [462 U.S. at 474](#) (O'CONNOR, J., dissenting).

B

[LEdHN\[4C\]](#) [4C]In addition to providing her own informed consent, before an unemancipated woman under the age of 18 may obtain an abortion she [**2869] must either furnish the consent of one of her parents, or must opt for [***776] the judicial procedure that allows her to bypass the consent requirement. Under the judicial bypass option, a minor can obtain an abortion if a state court finds that she is capable of giving her informed consent and has indeed given such consent, or determines that an abortion is in her best interests. Records of these court proceedings are kept confidential. The Act directs the state trial court to render a decision within three days of the woman's application, and the entire procedure, including appeal to Pennsylvania Superior Court, is to last no longer than eight business days. The parental consent requirement does not apply in the case of a medical [****243] emergency. [18 Pa. Cons. Stat. § 3206](#) (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, 505 U.S. at 904-906.

This provision is entirely consistent with this Court's previous decisions involving parental consent requirements. See [Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft](#), [462 U.S. 476](#), [76 L. Ed. 2d 733](#), [103 S. Ct. 2517](#) (1983) (upholding parental consent requirement with a

similar judicial bypass option); [Akron v. Akron Center for Reproductive Health, Inc.](#), *supra*, at [439-440](#) (approving of parental consent statutes that include a judicial bypass option allowing a pregnant minor to "demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests"); [Bellotti v. Baird](#), [443 U.S. 622](#), [61 L. Ed. 2d 797](#), [99 S. Ct. 3035](#) (1979).

We think it beyond dispute that a State "has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes [*971] impair their ability to exercise their rights wisely." [Hodgson v. Minnesota](#), [497 U.S. at 444](#) (opinion of STEVENS, J.). A requirement [****244] of parental consent to abortion, like myriad other restrictions placed upon minors in other contexts, is reasonably designed to further this important and legitimate state interest. In our view, it is entirely "rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature." [Ohio v. Akron Center for Reproductive Health](#), [497 U.S. at 520](#) (opinion of KENNEDY, J.); see also [Planned Parenthood of Central Mo. v. Danforth](#), [428 U.S. at 91](#) (Stewart, J., concurring) ("There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child"). We thus conclude that Pennsylvania's parental consent requirement should be upheld.

C

[Section 3209](#) of the Act contains the spousal notification provision. It requires that, before a physician may perform an abortion on a married woman, the woman must sign a statement indicating [****245] that she has notified her husband of her planned [***777] abortion. A woman is not required to notify her husband if (1)

her husband is not the father, (2) her husband, after diligent effort, cannot be located, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) the woman has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her by him or by another individual. In addition, a woman is exempted from the notification requirement in the case of a medical emergency. [18 Pa. Cons. Stat. § 3209](#) (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, 505 U.S. at 908-909.

[*972] We first emphasize that Pennsylvania has not imposed a spousal *consent* requirement of the type the Court struck down in [Planned Parenthood of Central Mo. v. Danforth](#), 428 U.S. at 67-72. Missouri's spousal consent provision was invalidated in that case because of the Court's view that it unconstitutionally **[**2870]** granted to the husband "a veto power exercisable for any reason whatsoever or for no reason at all." *Id.*, at 71. But the provision here involves a much less intrusive requirement of **[****246]** spousal *notification*, not consent. Such a law requiring only notice to the husband "does not give any third party the legal right to make the [woman's] decision for her, or to prevent her from obtaining an abortion should she choose to have one performed." [Hodgson v. Minnesota](#), *supra*, at 496 (KENNEDY, J., concurring in judgment in part and dissenting in part); see [H. L. v. Matheson](#), 450 U.S. at 411, n.17. *Danforth* thus does not control our analysis. Petitioners contend that it should, however; they argue that the real effect of such a notice requirement is to give the power to husbands to veto a woman's abortion choice. The District Court indeed found that the notification provision created a risk that some woman who would otherwise have an abortion will be prevented from having one. [947 F.2d at 712](#). For example, petitioners argue, many notified husbands will prevent abortions through physical force, psychological coercion, and other types of threats. But Pennsylvania has incorporated exceptions in the notice provision in an attempt to deal with these problems. For instance, **[****247]**

a woman need not notify her husband if the pregnancy is the result of a reported sexual assault, or if she has reason to believe that she would suffer bodily injury as a result of the notification. [18 Pa. Cons. Stat. § 3209\(b\)](#) (1990). Furthermore, because this is a facial challenge to the Act, it is insufficient for petitioners to show that the notification provision "might operate unconstitutionally under some conceivable set of circumstances." [United States v. Salerno](#), 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). Thus, it is not enough for petitioners **[*973]** to show that, in some "worst case" circumstances, the notice provision will operate as a grant of veto power to husbands. [Ohio v. Akron Center for Reproductive Health](#), 497 U.S. at 514. Because they are making a facial challenge to the provision, they must "show that no set of circumstances exists under which the [provision] would be valid." *Ibid.* (internal **[***778]** quotation marks omitted). This they have failed to do. ²

²The joint opinion of JUSTICES O'CONNOR, KENNEDY, and SOUTER appears to ignore this point in concluding that the spousal notice provision imposes an undue burden on the abortion decision. *Ante*, 505 U.S. at 887-898. In most instances the notification requirement operates without difficulty. As the District Court found, the vast majority of wives seeking abortions notify and consult with their husbands, and thus suffer no burden as a result of the provision. [744 F. Supp. 1323, 1360 \(ED Pa. 1990\)](#). In other instances where a woman does not want to notify her husband, the Act provides exceptions. For example, notification is not required if the husband is not the father, if the pregnancy is the result of a reported spousal sexual assault, or if the woman fears bodily injury as a result of notifying her husband. Thus, in these instances as well, the notification provision imposes no obstacle to the abortion decision.

The joint opinion puts to one side these situations where the regulation imposes no obstacle at all, and instead focuses on the group of married women who would not otherwise notify their husbands and who do not qualify for one of the exceptions. Having narrowed the focus, the joint opinion concludes that in a "large fraction" of those cases, the notification provision operates as a substantial obstacle, *ante*, 505 U.S. at 895, and that the provision is therefore invalid. There are certainly instances where a woman would prefer not to notify her husband, and yet does not qualify for an exception. For example, there are the situations of battered women who fear psychological abuse or injury to their children as a result of notification; because in these situations the women do not fear bodily injury, they do not qualify for an exception. And there are situations where a woman has become pregnant as a result of an unreported spousal sexual assault; when such an assault is

[*974] [****248] [**2871] The question before us is therefore whether the spousal notification requirement rationally furthers any legitimate state interests. We conclude that it does. First, a husband's interests in procreation within marriage and in the potential life of his unborn child are certainly substantial ones. See [*Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. at 69](#) ("We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying"); [*id.*, at 93](#) (WHITE, J., concurring in part and dissenting in part); [*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. at 541](#). The State itself has legitimate interests both in protecting these interests of the father and in protecting the potential life of the fetus, and the spousal notification requirement is reasonably related to advancing those state interests. By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding [****249] the fate of his unborn child, a possibility that might otherwise have [***779] been denied him. This participation might in some cases result in a decision to proceed with the pregnancy. As Judge Alito observed in his dissent below, "the Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived

unreported, no exception is available. But, as the District Court found, there are also instances where the woman prefers not to notify her husband for a variety of other reasons. See [*744 F. Supp. at 1360*](#). For example, a woman might desire to obtain an abortion without her husband's knowledge because of perceived economic constraints or her husband's previously expressed opposition to abortion. The joint opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a "large fraction" of those cases in which women prefer not to notify their husbands (and do not qualify for an exception). *Ante*, 505 U.S. at 895. This assumption is not based on any hard evidence, however. And were it helpful to an attempt to reach a desired result, one could just as easily assume that the battered women situations form 100 percent of the cases where women desire not to notify, or that they constitute only 20 percent of those cases. But reliance on such speculation is the necessary result of adopting the undue burden standard.

problems -- such as economic constraints, future plans, or the husbands' previously expressed [*975] opposition -- that may be obviated by discussion prior to the abortion." [*947 F.2d at 726*](#) (opinion concurring in part and dissenting in part).

The State also has a legitimate interest in promoting "the integrity of the marital relationship." [*18 Pa. Cons. Stat. § 3209\(a\)*](#) (1990). This Court has previously recognized "the importance of the marital relationship in our society." [*Planned Parenthood of Central Mo. v. Danforth*, *supra*, at 69](#). In our view, the spousal notice requirement is a rational attempt by the State to improve truthful communication between spouses and encourage collaborative decisionmaking, and thereby [****250] fosters marital integrity. See [*Labine v. Vincent*, 401 U.S. 532, 538, 28 L. Ed. 2d 288, 91 S. Ct. 1017 \(1971\)](#) ("The power to make rules to establish, protect, and strengthen family life" is committed to the state legislatures). Petitioners argue that the notification requirement does not further any such interest; they assert that the majority of wives already notify their husbands of their abortion decisions, and the remainder have excellent reasons for keeping their decisions a secret. In the first case, they argue, the law is unnecessary, and in the second case it will only serve to foster marital discord and threats of harm. Thus, petitioners see the law as a totally irrational means of furthering whatever legitimate interest the State might have. But, in our view, it is unrealistic to assume that every husband-wife relationship is either (1) so perfect that this type of truthful and important communication will take place as a matter of course, or (2) so imperfect that, upon notice, the husband will react selfishly, violently, or contrary to the best interests of his wife. See [*Planned Parenthood of Central Mo. v. Danforth*, *supra*, at 103-104](#) [****251] (STEVENS, J., concurring in part and dissenting in part) (making a similar point in the context of a parental consent statute). The spousal notice provision will admittedly be unnecessary in some circumstances, and possibly harmful in others, but "the existence of particular cases in which a feature of a statute

performs no function (or is even counterproductive) [***976**] [****2872**] ordinarily does not render the statute unconstitutional or even constitutionally suspect." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. at 800 (WHITE, J., dissenting). The Pennsylvania Legislature was in a position to weigh the likely benefits of the provision against its likely adverse effects, and presumably concluded, on balance, that the provision would be beneficial. Whether this was a wise decision or not, we cannot say that it was irrational. We therefore conclude that the spousal notice provision comports with the Constitution. See *Harris v. McRae*, 448 U.S. at 325-326 ("It is not the mission of this Court or any other to decide [*****780**] whether the balance of competing interests . . . is wise social policy").

D

[LEdHN\[5D\]](#) [5D]The [******252**] Act also imposes various reporting requirements. *Section 3214(a)* requires that abortion facilities file a report on each abortion performed. The reports do not include the identity of the women on whom abortions are performed, but they do contain a variety of information about the abortions. For example, each report must include the identities of the performing and referring physicians, the gestational age of the fetus at the time of abortion, and the basis for any medical judgment that a medical emergency existed. See *18 Pa. Cons. Stat. §§ 3214(a)(1), (5), (10)* (1990). See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, 505 U.S. at 909-911. The District Court found that these reports are kept completely confidential. *947 F.2d at 716*. We further conclude that these reporting requirements rationally further the State's legitimate interests in advancing the state of medical knowledge concerning maternal health and prenatal life, in gathering statistical information with respect to patients, and in ensuring compliance with other provisions of the Act.

Section 3207 of the Act requires each abortion

facility to file a report with its name and address, as well as the names [***977**] and addresses of any parent, [******253**] subsidiary, or affiliated organizations. *18 Pa. Cons. Stat. § 3207(b)* (1990). *Section 3214(f)* further requires each facility to file quarterly reports stating the total number of abortions performed, broken down by trimester. Both of these reports are available to the public only if the facility received state funds within the preceding 12 months. See Appendix to opinion of O'CONNOR, KENNEDY, and SOUTER, JJ., *ante*, 505 U.S. at 906, 911. Petitioners do not challenge the requirement that facilities provide this information. They contend, however, that the forced public disclosure of the information given by facilities receiving public funds serves no legitimate state interest. We disagree. Records relating to the expenditure of public funds are generally available to the public under Pennsylvania law. See *Pa. Stat. Ann., Tit. 65, §§ 66.1, 66.2* (Purdon 1959 and Supp. 1991-1992). As the Court of Appeals observed, "when a state provides money to a private commercial enterprise, there is a legitimate public interest in informing taxpayers who the funds are benefiting and what services the funds are supporting." *947 F.2d at 718*. These reporting requirements rationally further this legitimate state interest.

E

Finally, [******254**] petitioners challenge the medical emergency exception provided for by the Act. The existence of a medical emergency exempts compliance with the Act's informed consent, parental consent, and spousal notice requirements. See *18 Pa. Cons. Stat. §§ 3205(a), 3206(a), 3209(c)* (1990). The Act defines a "medical emergency" as

"that condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create

serious risk of substantial [*978] and irreversible [**2873] impairment of major bodily function." § 3203.

[***781] Petitioners argued before the District Court that the statutory definition was inadequate because it did not cover three serious conditions that pregnant women can suffer -- preeclampsia, inevitable abortion, and prematurely ruptured membrane. The District Court agreed with petitioners that the medical emergency exception was inadequate, but the Court of Appeals reversed this holding. In construing the medical emergency provision, the Court of Appeals first observed that all three conditions do indeed present the risk [****255] of serious injury or death when an abortion is not performed, and noted that the medical profession's uniformly prescribed treatment for each of the three conditions is an immediate abortion. See [947 F.2d at 700-701](#). Finding that "the Pennsylvania legislature did not choose the wording of its medical emergency exception in a vacuum," the court read the exception as intended "to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman." *Id.*, at 701. It thus concluded that the exception encompassed each of the three dangerous conditions pointed to by petitioners.

We observe that Pennsylvania's present definition of medical emergency is almost an exact copy of that State's definition at the time of this Court's ruling in *Thornburgh*, one which the Court made reference to with apparent approval. [476 U.S. at 771](#) ("It is clear that the Pennsylvania Legislature knows how to provide a medical-emergency exception when it chooses to do so").³ We find that the interpretation [*979] of the Court of Appeals

in these cases is eminently reasonable, [****256] and that the provision thus should be upheld. When a woman is faced with any condition that poses a "significant threat to [her] life or health," she is exempted from the Act's consent and notice requirements and may proceed immediately with her abortion.

IV

For the reasons stated, we therefore would hold that each of the challenged provisions of the Pennsylvania statute is consistent with the Constitution. It bears emphasis that our conclusion in this regard does not carry with it any necessary approval of these regulations. Our task is, as always, to decide only whether the challenged provisions [****257] of a law comport with the United States Constitution. If, as we believe, these do, their wisdom as a matter of public policy is for the people of Pennsylvania to decide.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

My views on this matter are unchanged from those I set forth in my separate opinions in [Webster v. Reproductive \[***782\] Health Services](#), [492 U.S. 490, 532, 106 L. Ed. 2d 410, 109 S. Ct. 3040 \(1989\)](#) (opinion concurring in part and concurring in judgment), and [Ohio v. Akron Center for Reproductive Health](#), [497 U.S. 502, 520, 111 L. Ed. 2d 405, 110 S. Ct. 2972 \(1990\)](#) (*Akron II*) (concurring opinion). The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, "where reasonable people disagree the government can adopt one position or the other." *Ante*, 505 U.S. at 851. The [****258] Court is correct in adding the qualification that this "assumes a state of [**2874] affairs in which the

³ The definition in use at that time provided as follows:

"'Medical emergency.' That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function." Pa. Stat. Ann., Tit. 18, § 3203 (Purdon 1983).

choice does not intrude upon a protected liberty," *ibid.* -- but the crucial part of that qualification [*980] is the penultimate word. A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example -- with which entire societies of reasonable people disagree -- intrude upon men and women's liberty to marry and live with one another. But bigamy happens not to be a liberty specially "protected" by the Constitution.

That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is a "liberty" in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the "concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid.* Rather, [****259] I reach it for the same reason I reach the conclusion that bigamy is not constitutionally protected -- because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed. ¹ [Akron II, supra, at 520](#) (SCALIA, J.,

concurring).

[*981] [****260] [****783] The Court destroys the proposition, evidently meant to represent my position, that "liberty" includes "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the [Fourteenth Amendment](#) was ratified," *ante*, 505 U.S. at 847 (citing [Michael H. v. Gerald D.](#), 491 U.S. 110, 127, n.6, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) (opinion of SCALIA, J.)). That is not, however, what *Michael H.* says; it merely observes that, in defining "liberty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," *ibid.* But the Court does not wish to be fettered by any such limitations on its preferences. The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "curb the discretion of federal judges," *ante*, 505 U.S. at 847, is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction -- [****261] towards systematically eliminating checks upon its own power; and it succumbs.

[LEdHN\[2D\]](#) [2D][LEdHN\[4D\]](#) [4D][LEdHN\[5E\]](#) [5E] Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have [**2875] said before; and applying the rational basis test, I would uphold the Pennsylvania statute in its entirety. I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered. I shall discuss each of them under a

¹ The Court's suggestion, *ante*, 505 U.S. at 847-848, that adherence to tradition would require us to uphold laws against interracial marriage is entirely wrong. Any tradition in that case was contradicted by a text -- an [Equal Protection Clause](#) that explicitly establishes racial equality as a constitutional value. See [Loving v. Virginia](#), 388 U.S. 1, 9, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) ("In the case at bar, . . . we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the [Fourteenth Amendment](#) has traditionally required of state statutes drawn according to race"); see also *id.*, at 13 (Stewart, J., concurring in judgment). The enterprise launched in [Roe v. Wade](#), 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973), by contrast, sought to establish -- in the teeth of a clear, contrary tradition -- a value found nowhere in the constitutional text.

There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state

efforts to kill it. For that reason, it does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention, *ante*, 505 U.S. at 859, that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

quotation from the Court's opinion to which they pertain.

"The inescapable fact is that adjudication of substantive due process claims may call upon the Court [*982] in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment." Ante, 505 U.S. at 849.

Assuming that the question before us is to be resolved at such a level of philosophical abstraction, in such isolation from the traditions of American society, as by simply applying "reasoned judgment," I do not see how that could possibly have produced the answer the Court arrived at in [Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 \(1973\)](#). Today's opinion describes the methodology [****262] of *Roe*, quite accurately, as weighing against the woman's interest the State's "important and legitimate interest in protecting the potentiality of human life." *Ante*, 505 U.S. at 871 (quoting [Roe, supra, at 162](#)). But "reasoned judgment" does not begin by begging the question, as *Roe* and subsequent cases unquestionably did by assuming that what the State is protecting is the mere "potentiality of human life." See, e.g., [Roe, supra, at 162](#); [Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 61, 49 L. Ed. 2d 788, 96 S. Ct. 2831 \(1976\)](#); [Colautti v. Franklin, 439 U.S. 379, 386, 58 L. Ed. 2d 596, 99 S. Ct. 675 \(1979\)](#); [Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 428, 76 L. Ed. 2d 687, 103 S. Ct. 2481 \(1983\)](#) [***784] (*Akron I*); [Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 482, 76 L. Ed. 2d 733, 103 S. Ct. 2517 \(1983\)](#). The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child is a human life. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus [****263] is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some

societies have considered newborn children not yet human, or the incompetent elderly no longer so.

[LEdHN\[16D\]](#) [16D]The authors of the joint opinion, of course, do not squarely contend that *Roe v. Wade* was a *correct* application of "reasoned judgment"; merely that it must be followed, because of *stare decisis*. *Ante*, 505 U.S. at 853, 861, 871. But in their exhaustive discussion of all the factors that go into the determination [*983] of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "the Court's power lies . . . in its legitimacy, a product of substance and perception," *ante*, 505 U.S. at 865, the "substance" part of the equation demands that plain error be acknowledged and eliminated. *Roe* was plainly wrong -- even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after [****264] more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of *amicus* briefs submitted in these and other cases, the best the Court can do to explain how it is that the word "liberty" *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice. The right to abort, we are told, inheres in "liberty" because it is among "a person's most basic decisions," *ante*, 505 U.S. at 849; it involves a "most intimate and personal choice," *ante*, 505 U.S. at 851; it is "central to personal dignity and [**2876] autonomy," *ibid.*; it "originates within the zone of conscience and belief," *ante*, 505 U.S. at 852; it is "too intimate and personal" for state interference, *ibid.*; it reflects "intimate views" of a "deep, personal character," *ante*, 505 U.S. at 853; it involves "intimate relationships" and notions of "personal autonomy

and bodily integrity," *ante*, 505 U.S. at 857; and it concerns a particularly "important decision," *ante*, 505 U.S. at 859 (citation omitted).² But it [***785] [****265] is [*984] obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court (including one of the Justices in today's majority, see [Bowers v. Hardwick](#), 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986)) has held are *not* entitled to constitutional protection -- because, like abortion, they are forms of conduct that have long been criminalized in American society. Those adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deeply personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is our unquestionable constitutional tradition that they are proscribable. It is not reasoned judgment that supports the Court's decision; only personal predilection. Justice Curtis's warning is as timely today as it was 135 years ago:

"When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; [****266] we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." [Dred Scott v. Sandford](#),

² JUSTICE BLACKMUN's parade of adjectives is similarly empty: Abortion is among "the most intimate and personal choices," *ante*, 505 U.S. at 923; it is a matter "central to personal dignity and autonomy," *ibid.*; and it involves "personal decisions that profoundly affect bodily integrity, identity, and destiny," *ante*, 505 U.S. at 927. JUSTICE STEVENS is not much less conclusory: The decision to choose abortion is a matter of "the highest privacy and the most personal nature," *ante*, 505 U.S. at 915; it involves a "difficult choice having serious and personal consequences of major importance to [a woman's] future," *ante*, 505 U.S. at 916; the authority to make this "traumatic and yet empowering decision" is "an element of basic human dignity," *ibid.*; and it is "nothing less than a matter of conscience," *ibid.*

[60 U.S. \(19 How.\) 393, 621, 15 L. Ed. 691 \(1857\)](#) (dissenting opinion).

[****267] "**Liberty finds no refuge in a jurisprudence of doubt.**" *Ante*, 505 U.S. at 844.

One might have feared to encounter this august and sonorous phrase in an opinion defending the real *Roe v. Wade*, rather than the revised version fabricated today by the authors [*985] of the joint opinion. The shortcomings of *Roe* did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion -- which calls upon federal district judges to apply an "undue burden" standard as doubtful in application as it is unprincipled in origin -- is really more than one should have to bear.

The joint opinion frankly concedes that the amorphous concept of "undue burden" has been inconsistently applied by the Members of this Court in the few brief years since that "test" was first explicitly propounded by JUSTICE O'CONNOR in her dissent in [Akron I](#), 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983). See *ante*, 505 U.S. at 876.³ Because [***786] the three Justices now

³ The joint opinion is clearly wrong in asserting, *ante*, 505 U.S. at 874, that "the Court's early abortion cases adhered to" the "undue burden" standard. The passing use of that phrase in JUSTICE BLACKMUN's opinion for the Court in [Bellotti v. Baird](#), 428 U.S. 132, 147, 49 L. Ed. 2d 844, 96 S. Ct. 2857 (1976) (*Bellotti I*), was not by way of setting forth the *standard* of unconstitutionality, as JUSTICE O'CONNOR's later opinions did, but by way of expressing the *conclusion* of unconstitutionality. Justice Powell for a time appeared to employ a variant of "undue burden" analysis in several nonmajority opinions, see, e. g., [Bellotti v. Baird](#), 443 U.S. 622, 647, 61 L. Ed. 2d 797, 99 S. Ct. 3035 (1979) (*Bellotti II*); [Carey v. Population Services International](#), 431 U.S. 678, 705, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1977) (opinion concurring in part and concurring in judgment), but he too ultimately rejected that standard in his opinion for the Court in [Akron v. Akron Center for Reproductive Health, Inc.](#), 462 U.S. 416, 420, n.1, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983) (*Akron I*). The joint opinion's reliance on [Maher v. Roe](#), 432 U.S. 464, 473, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977), and [Harris v. McRae](#), 448 U.S. 297, 314, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980), is entirely misplaced, since those cases did not involve regulation of abortion, but mere refusal to fund it. In any

wish to "set forth a standard [****2877**] of general application," the joint opinion announces that "it is important to clarify what is meant by an undue burden." *Ibid.* I certainly agree with that, but I do not [******268**] agree that the joint opinion succeeds in the announced endeavor. To the contrary, its efforts at clarification [***986**] make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.

[******269**] The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ante*, 505 U.S. at 877; see also *ante*, 505 U.S. at 877-879. An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." *Ante*, 505 U.S. at 877. ⁴ This latter statement

event, JUSTICE O'CONNOR's earlier formulations have apparently now proved unsatisfactory to the three Justices, who -- in the name of *stare decisis* no less -- today find it necessary to devise an entirely new version of "undue burden" analysis. See *ante*, 505 U.S. at 877-879.

⁴The joint opinion further asserts that a law imposing an undue burden on abortion decisions is not a "permissible" means of serving "legitimate" state interests. *Ante*, 505 U.S. at 877. This description of the undue burden standard in terms more commonly associated with the rational-basis test will come as a surprise even to those who have followed closely our wanderings in this forsaken wilderness. See, e. g., *Akron I*, *supra*, at 463 (O'CONNOR, J., dissenting) ("The 'undue burden' . . . represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard"); see also *Hodgson v. Minnesota*, 497 U.S. 417, 458-460, 111 L. Ed. 2d 344, 110 S. Ct. 2926 (1990) (O'CONNOR, J., concurring in part and concurring in judgment in part); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (O'CONNOR, J., dissenting). This confusing equation of the two standards is apparently designed to explain how one of the Justices who joined the plurality opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (1989), which adopted the rational-basis test, could join an opinion expressly adopting the undue burden test. See *id.*, at 520 (rejecting the view that abortion is a "fundamental right," instead inquiring whether a law regulating the woman's "liberty interest" in abortion is "reasonably designed" to further "legitimate" state ends). The same motive also apparently underlies the joint opinion's erroneous

cannot [***987**] [*****787**] possibly mean what it says. Any regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion. It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not *unduly* hinder the woman's decision. That, of course, brings us right back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the [****2878**] test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

[******270**] The ultimately standardless nature of the "undue burden" inquiry is a reflection of the underlying fact that the concept has no principled or coherent legal basis. As THE CHIEF JUSTICE points out, *Roe*'s strict-scrutiny standard "at least had a recognized basis in constitutional law at the time *Roe* was decided," *ante*, 505 U.S. at 964, while "the same cannot be said for the 'undue burden' standard, which is created largely out of whole cloth by the authors of the joint opinion," *ibid.* The joint opinion is flatly wrong in asserting that "our jurisprudence relating to all liberties save perhaps abortion has recognized" the permissibility

citation of the plurality opinion in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 506, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (*Akron II*) (opinion of KENNEDY, J.), as applying the undue burden test. See *ante*, 505 U.S. at 876 (using this citation to support the proposition that "two of us" -- i. e., two of the authors of the joint opinion -- have previously applied this test). In fact, *Akron II* does not mention the undue burden standard until the conclusion of the opinion, when it states that the statute at issue "does not impose an undue, or otherwise unconstitutional, burden." 497 U.S. at 519 (emphasis added). I fail to see how anyone can think that saying a statute does not impose an unconstitutional burden under *any* standard, including the undue burden test, amounts to adopting the undue burden test as the *exclusive* standard. The Court's citation of *Hodgson* as reflecting JUSTICE KENNEDY's and JUSTICE O'CONNOR's "shared premises," *ante*, 505 U.S. at 878, is similarly inexplicable, since the word "undue" was never even used in the former's opinion in that case. I joined JUSTICE KENNEDY's opinions in both *Hodgson* and *Akron II*; I should be grateful, I suppose, that the joint opinion does not claim that I, too, have adopted the undue burden test.

of laws that do not impose an "undue burden." *Ante*, 505 U.S. at 873. It argues that the abortion right is similar to other rights in that a law "not designed to strike at the right itself, [but which] has the incidental effect of making it more difficult or more expensive to [exercise the right,]" is not invalid. *Ante*, 505 U.S. at 874. I agree, indeed I have [*988] forcefully urged, that a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right, see *R. A. V. v. St. Paul*, 505 U.S. 377, 389-390, [****271] 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992); *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-882, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), but that principle does not establish the quite different (and quite dangerous) proposition that a law which directly regulates a fundamental right will not be found to violate the Constitution unless it imposes an "undue burden." It is that, of course, which is at issue here: Pennsylvania has *consciously and directly* regulated conduct that our cases have held is constitutionally protected. The appropriate analogy, therefore, is that of a state law requiring purchasers of religious books to endure a 24-hour waiting period, or to pay a nominal additional tax of 1 [cent]. The joint opinion cannot possibly be correct in suggesting that we would uphold such legislation on the ground that it does not impose a "substantial obstacle" to the exercise of *First Amendment* rights. The "undue burden" standard is not at all the generally applicable principle the joint opinion pretends it to be; rather, it is a unique concept created specially for these [****272] cases, to preserve some judicial foothold in this ill-gotten territory. In claiming otherwise, the three Justices show their willingness [***788] to place all constitutional rights at risk in an effort to preserve what they deem the "central holding in *Roe*." *Ante*, 505 U.S. at 873.

The rootless nature of the "undue burden" standard, a phrase plucked out of context from our earlier abortion decisions, see n.3, *supra*, is further reflected in the fact that the joint opinion finds it necessary expressly to repudiate the more narrow

formulations used in JUSTICE O'CONNOR's earlier opinions. *Ante*, 505 U.S. at 876-877. Those opinions stated that a statute imposes an "undue burden" if it imposes "*absolute* obstacles or *severe* limitations on the abortion decision," *Akron I*, 462 U.S. at 464 (dissenting opinion) (emphasis added); see also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (dissenting [*989] opinion). Those strong adjectives are conspicuously missing from the joint opinion, whose authors have for some unexplained reason now determined that a burden is "undue" if it merely [****273] imposes a "substantial" obstacle to abortion decisions. See, e. g., *ante*, 505 U.S. at 895, 901. JUSTICE O'CONNOR has also abandoned (again without explanation) the view she expressed in *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 76 L. Ed. 2d 733, 103 S. Ct. 2517 (1983) (dissenting opinion), that a medical regulation which imposes an "undue burden" could nevertheless be upheld if it "reasonably relates to the preservation and protection of maternal health," *id.*, at 505 (citation and internal quotation marks omitted). In today's version, [**2879] even health measures will be upheld only "*if they do not constitute an undue burden*," *ante*, 505 U.S. at 878 (emphasis added). Gone too is JUSTICE O'CONNOR's statement that "the State possesses *compelling* interests in the protection of potential human life . . . throughout pregnancy," *Akron I, supra*, at 461 (dissenting opinion) (emphasis added); see also *Ashcroft, supra*, at 505 (O'CONNOR, J., concurring in judgment in part and dissenting in part); *Thornburgh, supra*, at 828 (O'CONNOR, J., dissenting); instead, the State's interest in unborn human life is stealthily downgraded to a merely [****274] "substantial" or "profound" interest, *ante*, 505 U.S. at 876, 878. (That had to be done, of course, since designating the interest as "compelling" throughout pregnancy would have been, shall we say, a "substantial obstacle" to the joint opinion's determined effort to reaffirm what it views as the "central holding" of *Roe*. See *Akron I*,

[462 U.S. at 420, n.1.](#)) And "viability" is no longer the "arbitrary" dividing line previously decreed by JUSTICE O'CONNOR in *Akron I*, [id., at 461](#); the Court now announces that "the attainment of viability may continue to serve as the critical fact," *ante*, 505 U.S. at 860. ⁵ It is difficult to **[*990]** **[***789]** maintain the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

[**275]** Because the portion of the joint opinion adopting and describing the undue burden test provides no more useful guidance than the empty phrases discussed above, one must turn to the 23 pages applying that standard to the present facts for further guidance. In evaluating Pennsylvania's abortion law, the joint opinion relies extensively on the factual findings of the District Court, and repeatedly qualifies its conclusions by noting that they are contingent upon the record developed in these cases. Thus, the joint opinion would uphold the 24-hour waiting period contained in the Pennsylvania statute's informed consent provision, [18 Pa. Cons. Stat. § 3205](#) (1990), because "the record evidence shows that in the vast majority of cases, a 24-hour delay does not create any appreciable health risk," *ante*, 505 U.S. at 885. The three Justices therefore conclude that "on the record before us, . . . we are not convinced that the 24-hour waiting period constitutes an undue burden." *Ante*, 505 U.S. at 887. The requirement that a doctor provide the information pertinent to informed consent would also be upheld because "there is no evidence on this record that [this

requirement] would amount in practical terms **[****276]** to a substantial obstacle to a woman seeking an abortion." *Ante*, 505 U.S. at 884. Similarly, the joint opinion would uphold the reporting requirements of the Act, [§§ 3207, 3214](#), because "there is no . . . showing on the record before us" that these requirements constitute a "substantial obstacle" **[*991]** to abortion decisions. *Ante*, 505 U.S. at 901. But at the same time the opinion pointedly observes that these reporting requirements may increase the costs of abortions and that "at some point [that fact] could become a substantial obstacle." *Ibid.* Most significantly, the joint opinion's conclusion that the spousal notice requirement of the Act, see [§ 3209](#), imposes an "undue burden" is based in large measure on the District Court's "detailed findings of fact," which the joint opinion sets out at great length, *ante*, 505 U.S. at 888-891.

[2880]** I do not, of course, have any objection to the notion that, in applying legal principles, one should rely only upon the facts that are contained in the record or that are properly subject to judicial notice. ⁶ But what is remarkable about the joint opinion's **[***790]** fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. **[****277]** Rather, the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly significant in establishing (or refuting) the existence of an undue burden; after describing these facts, the opinion then simply announces that

⁵Of course JUSTICE O'CONNOR was correct in her former view. The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother. *Ante*, 505 U.S. at 870. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That makes no more sense than according infants legal protection only after the point when they can feed themselves.

⁶The joint opinion is not entirely faithful to this principle, however. In approving the District Court's factual findings with respect to the spousal notice provision, it relies extensively on nonrecord materials, and in reliance upon them adds a number of factual conclusions of its own. *Ante*, 505 U.S. at 891-893. Because this additional factfinding pertains to matters that surely are "subject to reasonable dispute," [Fed. Rule Evid. 201\(b\)](#), the joint opinion must be operating on the premise that these are "legislative" rather than "adjudicative" facts, see [Rule 201\(a\)](#). But if a court can find an undue burden simply by selectively string-citing the right social science articles, I do not see the point of emphasizing or requiring "detailed factual findings" in the District Court.

the provision either does or does not impose a "substantial obstacle" or an "undue burden." See, e. g., *ante*, 505 U.S. at 880, 884-885, 887, 893-894, 895, 901. We do not know whether the same conclusions could have been reached on a different record, or in what respects the record would have had to differ before an opposite conclusion would have been [*992] appropriate. The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as "undue" -- subject, of course, to the possibility of being reversed by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

[****278] To the extent I can discern *any* meaningful content in the "undue burden" standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence. The joint opinion repeatedly emphasizes that an important factor in the "undue burden" analysis is whether the regulation "prevents a significant number of women from obtaining an abortion," *ante*, 505 U.S. at 893; whether a "significant number of women . . . are likely to be deterred from procuring an abortion," *ante*, 505 U.S. at 894; and whether the regulation often "deters" women from seeking abortions, *ante*, 505 U.S. at 897. We are not told, however, what forms of "deterrence" are impermissible or what degree of success in deterrence is too much to be tolerated. If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to "deter" a "significant number of women" from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State's "substantial" and [****279] "profound" interest in "potential human life," and criticism of *Roe* for undervaluing that interest, the joint opinion permits

the State to pursue that interest only so long as it is not too successful. As JUSTICE BLACKMUN recognizes (with evident hope), *ante*, 505 U.S. at 926, the "undue burden" standard may ultimately require the invalidation of each provision upheld today if it can be shown, on a better record, that the State is too effectively "expressing a preference [*993] for childbirth over abortion," *ante*, 505 U.S. at 883. Reason finds no refuge in this jurisprudence of confusion.

"While we appreciate the weight of the arguments . . . that [*791] *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* [**2881] are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*." *Ante*, 505 U.S. at 853.**

The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess [****280] never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. I wonder whether, as applied to [*Marbury v. Madison*, 5 U.S. \(1 Cranch\) 137, 2 L. Ed. 60 \(1803\)](#), for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts.

I am certainly not in a good position to dispute that the Court *has saved* the "central holding" of *Roe*, since to do that effectively I would have to know what the Court has saved, which in turn would require me to understand (as I do not) what the "undue burden" test means. I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today

retains. It seems particularly ungrateful to carve the trimester framework out of the core of *Roe*, since its very rigidity (in sharp contrast to the utter indeterminability of the "undue burden" test) is probably the only reason [****281] the Court is able to say, in urging *stare decisis*, that *Roe* "has in no sense proven 'unworkable,'" *ante*, 505 U.S. at 855. I suppose the [*994] Court is entitled to call a "central holding" whatever it wants to call a "central holding" -- which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis*. I thought I might note, however, that the following portions of *Roe* have not been saved:

. Under *Roe*, requiring that a woman seeking an abortion be provided truthful information about abortion before giving informed written consent is unconstitutional, if the information is designed to influence her choice. [Thornburgh, 476 U.S. at 759-765](#); [Akron I, 462 U.S. at 442-445](#). Under the joint opinion's "undue burden" regime (as applied today, at least) such a requirement is constitutional. *Ante*, 505 U.S. at 881-885.

. Under *Roe*, requiring that information be provided by a doctor, rather than by nonphysician counselors, is unconstitutional. [Akron I, supra, at 446-449](#). Under the "undue burden" regime (as applied today, at least) it is not. *Ante*, 505 U.S. at 884-885.

. Under *Roe*, requiring [****282] a 24-hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional. [Akron I, supra, at 449-451](#). Under the "undue burden" regime (as applied today, at least) it is not. *Ante*, 505 U.S. at 885-887.

. [***792] Under *Roe*, requiring detailed reports that include demographic data about each woman who seeks an abortion and various information about each abortion is unconstitutional. [Thornburgh, supra, at 765-768](#). Under the "undue burden" regime (as applied today, at least) it generally is not. *Ante*, 505 U.S. at 900-901.

"Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . ., its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a [*995] national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante*, 505 U.S. at 866-867.

[**2882] The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. [****283] Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. National politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided. Profound disagreement existed among our citizens over the issue -- as it does over other issues, such as the death penalty -- but that disagreement was being worked out at the state level. As with many other issues, the division of sentiment within each State was not as closely balanced as it was among the population of the Nation as a whole, meaning not only that more people would be satisfied with the results of state-by-state resolution, but also that those results would be more stable. Pre-*Roe*, moreover, political compromise was possible.

Roe's mandate for abortion on demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class [****284] of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution *guarantees* abortion, how can it be bad?" -- not an accurate line of thought, but a natural one.) Many

favor all of those developments, and it is not for me to say that they are wrong. But to portray *Roe* as the statesmanlike "settlement" of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court [*996] in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees.

"To overrule under fire . . . would subvert the Court's legitimacy

". . . To all those who will be . . . tested by following, the Court implicitly undertakes to remain stead-fast The promise of constancy, [*793] once given, binds its maker for as long as the power to stand by the decision survives and . . . the commitment [is not] obsolete. . . .**

[**285] "[The American people's] belief in themselves as . . . a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals." Ante, 505 U.S. at 867-868.**

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

"The judiciary . . . has . . . no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment" The Federalist No. 78, pp. 393-394 (G. Wills ed. 1982).

Or, again, to compare [****286] this ecstasy of a Supreme Court in which there is, especially on controversial matters, no [*997] shadow of change or hint of alteration ("There is a limit to the amount of error that can plausibly be imputed to prior Courts," *ante*, 505 U.S. at 866), with [**2883] the more democratic views of a more humble man:

"The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in *Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101-10, p. 139 (1989).

It is particularly difficult, in the circumstances of the present decision, to sit still for the Court's lengthy lecture upon the virtues of "constancy," *ante*, 505 U.S. at 868, of "remaining steadfast," *ibid.*, and adhering to "principle," *ante, passim*. Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence (the joint [****287] opinion's "undue burden" standard) -- and that principle is inconsistent with *Roe*. See [410 U.S. at 154-156](#).⁷ To make matters worse, two of the three,

⁷ JUSTICE BLACKMUN's effort to preserve as much of *Roe* as possible leads him to read the joint opinion as more "constant" and "steadfast" than can be believed. He contends that the joint opinion's "undue burden" standard requires the application of strict scrutiny to "all non-*de-minimis*" abortion regulations, *ante*, 505 U.S. at 926, but that could only be true if a "substantial obstacle," *ante*, 505 U.S. at 877 (joint opinion), were the same thing as a non-*de-minimis* obstacle -- which it plainly is not.

in [***794] order thus to remain steadfast, had to abandon previously stated positions. See n.4, *supra*; see *supra*, at 988-990. It is beyond me how the Court expects these accommodations to be accepted "as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." *Ante*, 505 U.S. at 865-866. The only principle the Court "adheres" [*998] to, it seems to me, is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik* -- and a wrong one at that.

[****288] I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced -- *against* overruling, no less -- by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would "subvert the Court's legitimacy" must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe*. In my history book, the Court was covered with dishonor and deprived of legitimacy by [*Dred Scott v. Sandford*, 60 U.S. \(19 How.\) 393, 15 L. Ed. 691 \(1857\)](#), an erroneous (and widely opposed) opinion that it did not abandon, rather than by [*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578 \(1937\)](#), which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal. (Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of "substantive due process" that the Court praises and employs today. Indeed, *Dred Scott* was "very possibly the first application [****289] of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*." D. Currie, *The Constitution in the Supreme Court* 271 (1985) (footnotes omitted).)

But whether it would "subvert the Court's legitimacy" or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. It is a bad enough idea, even in the head of someone like me, who believes that the text of the Constitution, and our traditions, say what they say and there is no fiddling with them. But when it is in the mind of a Court that believes the Constitution [*999] has an evolving meaning, see [**2884] *ante*, 505 U.S. at 848; that the [*Ninth Amendment's*](#) reference to "other" rights is not a disclaimer, but a charter for action, *ibid.*; and that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition -- then the notion that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance. [****290] We are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has [***795] never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change -- to show how little they intimidate us.

Of course, as THE CHIEF JUSTICE points out, we have been subjected to what the Court calls "'political pressure'" by *both* sides of this issue. *Ante*, 505 U.S. at 963. Maybe today's decision *not* to overrule *Roe* will be seen as buckling to pressure from *that* direction. Instead of engaging in the hopeless task of predicting public perception -- a job not for lawyers but for political campaign managers -- the Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.

In truth, I am as distressed as the Court is -- and expressed my distress [****291] several years ago, see [Webster, 492 U.S. at 535](#) -- about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account [*1000] their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," *ante*, 505 U.S. at 849, which turns out to be nothing but philosophical predilection and moral intuition. All manner of "liberties," the Court tells us, inhere in the Constitution and are enforceable by this Court -- not just those mentioned in the text or established in the traditions [****292] of our society. *Ante*, 505 U.S. at 847-849. Why even the [Ninth Amendment](#) -- which says only that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" -- is, despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at "rights," definable and enforceable by us, through "reasoned judgment." *Ante*, 505 U.S. at 848-849.

What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here -- reading text and discerning our society's traditional understanding of that text -- the public pretty much left us alone.

Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily [***796] of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring [****293] unconstitutional invocations and benedictions at public high school graduation [**2885] ceremonies, [Lee v. Weisman, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 \(1992\)](#); if, as I say, our pronouncement of constitutional law rests primarily on value [*1001] judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school -- maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, [****294] at least we can have a sort of plebiscite each time a new nominee to that body is put forward. JUSTICE BLACKMUN not only regards this prospect with equanimity, he solicits it. *Ante*, 505 U.S. at 943.

* * *

There is a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court. "It is the dimension" of authority, they say, to "call the contending sides of national controversy to end their national division by accepting a common mandate rooted in the

Constitution." *Ante*, 505 U.S. at 867.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There [*1002] seems to be on his face, and in his deep-set eyes, an expression of profound sadness [****295] and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case -- its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation -- burning on his mind. I expect that two years earlier he, too, had thought himself "calling the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."

It is no more realistic for us in this litigation, than it was for him in that, to think that an issue of the [***797] sort they both involved -- an issue involving life and death, freedom and subjugation - - can be "speedily and finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. See Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, p. 126 (1989). Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the [****296] political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.

References

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2 Federal Procedural Forms, L Ed, Appeal, Certiorari, and Review 3:977

1 Am Jur Pl & Pr Forms (Rev), Abortion, Forms 1-3, 5, 6; 19A Am Jur Pl & Pr Forms (Rev), Physicians, Surgeons, and Other Healers, Form 327

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L Ed Digest, Abortion 7, 8, 15, 16

L Ed Index, Abortion; Emancipation of Minors; Medical Care or Treatment

Index to Annotations, Abortion; Children; Medical Care and Treatment; Notice and Knowledge

[****297] 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.

Validity, under Federal Constitution, of abortion laws. [35 L Ed 2d 775](#).

Requisites and conditions of judicial consent to minor's abortion. [23 ALR4th 1061](#).

Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women. [20 ALR4th 1166](#).

Woman's right to have abortion without consent of, or against objections of, child's father. [62 ALR3d 1097](#).

Right of minor to have abortion performed without parental consent. [42 ALR3d 1406](#).

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts. [16 ALR2d 949](#).



Positive

As of: October 18, 2026 7:14 AM Z

Preston v. Municipal Court of San Francisco

Court of Appeal of California, First Appellate District, Division One

January 9, 1961

Civ. No. 18864

Reporter

188 Cal. App. 2d 76 *; 10 Cal. Rptr. 301 **; 1961 Cal. App. LEXIS 2394 ***

VIOLA A. PRESTON, Appellant, v. MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Respondents

superior court denied the writ.

Overview

Subsequent History: [***1] A Petition for a Rehearing was Denied February 8, 1961, and Respondents' Petition for a Hearing by the Supreme Court was Denied March 9, 1961. Schauer, J., McComb, J., and White, J., were of the Opinion that the Petition Should be Granted.

Prior History: APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order sustaining a demurrer without leave to amend. Orla St. Clair, Judge.

Proceeding in mandamus to compel the Municipal Court of the City and County of San Francisco, and Charles S. Peery, Judge thereof, to furnish a reporter's transcript of a criminal trial.

Disposition: Reversed. Judgment denying writ, reversed.

Case Summary

Procedural Posture

Defendant sought review of a decision of the Superior Court of the City and County of San Francisco (California), which sustained the demurrer of respondent municipal court, in defendant's proceeding in mandamus to compel the municipal court to furnish a transcript of defendant's criminal trial without cost for use in the appeal from her conviction for petty theft. The

Defendant's conviction for petty theft was a misdemeanor, and she filed an affidavit of defendant in forma pauperis with her notice to the municipal court to prepare a transcript of her trial at the expense of the city and county under [Cal. Code Civ. Proc. § 274c](#), [Cal. Gov't Code § 69952](#). The municipal court denied defendant's motion for preparation of the transcript. The superior court rejected defendant's claim that she was entitled to a transcript of the trial proceedings without cost even if the transcript was necessary to defendant's appeal from her conviction. On appeal, the court reversed the decision of the superior court to sustain the municipal's court's demurrer and its denial of defendant's application for a writ of mandamus. Defendant's writ application recited allegations to establish the insufficiency of a settled statement as an alternative to a transcript for the purposes of appeal. The proceedings in the municipal court were too complex and a transcript of those proceedings was necessary to defendant's appeal. Defendant's right to a transcript, without cost, was not limited by the classification of her crime as a misdemeanor as opposed to a felony.

Outcome

The court reversed the superior court's decision to deny defendant's application for a writ of mandamus, reversed the superior court's order to sustain the municipal court's demurrer, and ruled that the municipal court should have been permitted to answer defendant's complaint.

LexisNexis® Headnotes

Civil Procedure > Judicial
Officers > Judges > General Overview

Criminal Law & Procedure > Trials > Judicial
Discretion

Criminal Law & Procedure > Appeals > Procedural
Matters > Costs & Attorney Fees

Criminal Law & Procedure > Appeals > Procedural
Matters > Records on Appeal

Governments > Courts > Justice Courts

Governments > Local Governments > Finance

HN1 The statutory provisions which grant a publicly supplied transcript to criminal defendants in a superior court do not apply to such defendants in the municipal court. [Cal. Code Civ. Proc. § 274c](#) in effect provides, as to municipal courts, that the presence of the reporter is dependent upon the discretion of the judge. If the judge orders a reporter, the matter of transcription depends upon the parties. [Cal. Gov't Code § 69952](#) indicates a legislative intent to make such payment a charge against a county only in cases where the court specifically so directs.

Criminal Law & Procedure > Counsel > Costs &
Attorney Fees

Criminal Law & Procedure > Appeals > Procedural
Matters > Costs & Attorney Fees

Criminal Law & Procedure > Appeals > Procedural
Matters > Records on Appeal

HN2 The generalized language of [Cal. Penal Code § 690](#), providing that criminal actions and proceedings in all courts be the same, does not refer to transcripts or provide for payment for them.

Criminal Law & Procedure > Appeals > Procedural
Matters > Costs & Attorney Fees

Criminal Law & Procedure > Appeals > Procedural
Matters > Records on Appeal

Governments > Local Governments > Finance

HN3 [Cal. Gov't Code § 74514](#) provides: In all cases where by law, the court may direct the payment of transcription fees out of the city and county treasury, such fees shall, upon order of the court, be paid from the general fund including fees for transcription of testimony and proceedings in criminal cases as provided in [Cal. Gov't Code §§ 69947 to 69953](#), inclusive, which shall be paid from the city and county treasury. [Cal. Gov't Code § 69952](#) provides that the furnishing of free transcripts is entirely discretionary.

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

Criminal Law &
Procedure > ... > Reviewability > Preservation for
Review > General Overview

HN4 A party questioning the constitutionality of a statute, or its application, must raise the constitutional issue at the earliest opportunity.

Constitutional Law > Equal Protection > Poverty

Criminal Law &
Procedure > ... > Reviewability > Preservation for
Review > General Overview

HN5 A constitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before.

Constitutional Law > Equal Protection > Poverty

Constitutional Law > Equal Protection > Nature &
Scope of Protection

Criminal Law & Procedure > Appeals > Procedural
Matters > Costs & Attorney Fees

Criminal Law & Procedure > Appeals > Procedural
Matters > Records on Appeal

HN6 At all stages of criminal proceedings the Due Process and Equal Protection Clauses protect persons indigent defendants from invidious discriminations. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

Criminal Law & Procedure > Appeals > Procedural
Matters > Costs & Attorney Fees

Criminal Law & Procedure > Appeals > Procedural
Matters > Records on Appeal

HN7 The requirement that defendant be provided with a transcript of the criminal proceedings below for the purposes on an appeal if he cannot afford one does not apply if defendant can pursue the appeal by way of a bill of exceptions without the need of a transcript.

Criminal Law & Procedure > Counsel > Costs &
Attorney Fees

Criminal Law & Procedure > Appeals > General
Overview

Criminal Law & Procedure > Appeals > Procedural
Matters > Costs & Attorney Fees

Criminal Law & Procedure > Appeals > Procedural
Matters > Records on Appeal

HN8 The court does not believe the principle that indigent criminal defendants are entitled to a copy of the proceedings in the trial court without cost for use in an appeal applies only to felony convictions. The court does not believe the difference between felonies and misdemeanors justifies the mutilation of the right of appeal by deprivation of the

transcript.

Criminal Law & Procedure > Appeals > Procedural
Matters > Records on Appeal

Governments > Courts > Justice Courts

HN9 The determination of whether a settled statement affords an adequate method of appeal must rest with the municipal court in the exercise of its discretion.

Criminal Law & Procedure > Trials > Defendant's
Rights > Right to Due Process

Criminal Law & Procedure > Postconviction
Proceedings > Coram Nobis

Criminal Law & Procedure > Appeals > Procedural
Matters > Costs & Attorney Fees

Criminal Law & Procedure > Appeals > Procedural
Matters > Records on Appeal

HN10 A deprivation of due process may occur in the inability of the indigent to appeal by reason of poverty.

Constitutional Law > Equal Protection > Nature &
Scope of Protection

Criminal Law & Procedure > Appeals > Procedural
Matters > Costs & Attorney Fees

HN11 Defendant must, as an indigent, enjoy an equal protection in access to the full resources of the courts as that of the affluent. The right to be heard in the highest appellate court should not be lost because the law conditions it upon legal paraphernalia, in the form of a written record, which an accused person lacks the means to buy. The judicial process must make itself available to the indigent.

Headnotes/Summary

Headnotes
CALIFORNIA OFFICIAL REPORTS
HEADNOTES

[CA\(1\)](#) (1)

**Criminal Law — Proceedings in Municipal Courts
— Appeal — Record.**

--The statutory provisions that grant a publicly-supplied transcript to criminal defendants in superior court do not apply to such defendants in municipal court.

[CA\(2a\)](#) (2a) [CA\(2b\)](#) (2b) [CA\(2c\)](#) (2c)

**Id.—Proceedings in Municipal Courts—Appeal—
Record.**

--In a proceeding by an indigent criminal defendant seeking a county-supplied transcript of the testimony in a municipal court prosecution against her, the constitutional question involved was properly raised where the issue was submitted at the time of defendant's petition for writ of mandate, her first opportunity after denial of her request for a transcript at county expense, and the issue appeared on the face of the record in defendant's allegations of poverty and the need for a transcript in order to obtain an adequate appeal.

[CA\(3\)](#) (3)

**Constitutional Law — Constitutionality of Statutes
— Raising Constitutional Question.**

--A party questioning the constitutionality of a statute, or its application, must raise the constitutional issue at the earliest opportunity.

[CA\(4\)](#) (4)

**Id. — Constitutionality of Statutes — Raising
Constitutional Question.**

--A constitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before.

[CA\(5\)](#) (5)

**Criminal Law — Proceedings in Municipal Courts
— Appeal — Record.**

--It was a violation of a criminal defendant's constitutional rights to deny her request for a transcript of the proceedings against her in the municipal court to be prepared at public expense where defendant filed an affidavit *in forma pauperis* and the superior court, while denying her application for writ of mandate, accepted her claim that she could not safely prosecute her appeal without the transcript, and it made no difference that the conviction involved a misdemeanor rather than a felony.

[CA\(6\)](#) (6)

**Id.—Proceedings in Municipal Courts—Appeal—
Record.**

--The fact that an indigent defendant convicted of a misdemeanor in municipal court could have appealed from such conviction by means of a settled statement did not make it any the less unconstitutional to deny her request for a transcript of the proceedings in her case to be supplied at public expense where her allegation that the testimony at the trial was too complex to be compiled at a later date from memory and notation and that she could not safely proceed with her appeal on that basis was uncontradicted.

Counsel: A. Don Duncan for Appellant.

Stanley Mosk, Attorney General, Arlo E. Smith and Albert W. Harris, Jr., Deputy Attorneys General, for Respondent.

Judges: Tobriner, J. Bray, P. J., and Duniway, J.,

concurred.

Opinion by: TOBRINER

Opinion

[*78] [301]** We face the single question, here, whether an appellant is entitled to a reporter's transcript at the expense of the City and County of San Francisco on an appeal from a judgment of conviction for a misdemeanor in the municipal court. As we shall explain, we do not concur in appellant's **[***2]** contention that the statutes and decisions require that transcripts be furnished in all misdemeanor cases. On the other hand, since appellant has filed an affidavit *in forma pauperis* and the superior court apparently has accepted her contention that she could not safely prosecute the appeal without the transcript, we believe that under these special circumstances she would, upon proof of such facts, be entitled to the transcript at the expense of the City and County of San Francisco.

Upon conviction for petty theft in a criminal action in the Municipal Court of the City and County of San Francisco, appellant was granted probation upon condition of a suspended sentence to the county jail for six months, restitution of \$ 200 and payment of a fine of \$ 100. Appellant appealed, giving notice in her statement on appeal that she intended to **[**302]** file a reporter's transcript of the proceedings, "to be prepared at the expense of the City and County of San Francisco." She filed a "Notice of Motion for Order to Reporter to Prepare Transcript at Expense of City and County of San Francisco, supported by Affidavit of Defendant in Forma Pauperis." Respondent municipal court denied **[***3]** the motion.

Appellant then petitioned the Superior Court of the City and County of San Francisco for a writ of mandate commanding the municipal court, the judge, and the clerk, to furnish to appellant, for use on appeal, a reporter's transcript of the trial and related proceedings, "at the expense of the City and

County of San Francisco, and without expense to appellant. . . ." The petition alleged that the evidence at the trial involved testimony by various witnesses about many checks and receipts; that it would be impossible for appellant's counsel to compose a statement on appeal based on his memory or notes; that appellant could not safely proceed with her appeal without the assistance of a reporter's transcript; that appellant was wholly without funds to pay for a transcript.

The superior court sustained, without leave to amend, respondents' demurrer to the petition, and denied the writ of peremptory mandate. In its judgment the superior court stated that it found appellant's allegations in the petition to be true, but that "it is not true" that appellant "is entitled **[*79]** to the preparation of a Reporter's Transcript to implement her said appeal . . . at the expense **[***4]** of the City and County of San Francisco. . . ."

We shall first consider appellant's contention that she is entitled to the transcript under the statutes of California; thereafter we shall analyze her claim to it as a pauper and as afforded under the state and federal Constitutions.

CA(1) (1) HN1 The statutory provisions which grant a publicly supplied transcript to criminal defendants in the superior court do not apply to such defendants in the municipal court. The opinion of Justice White in *Hidalgo v. Municipal Court* (1954), 129 Cal.App.2d 244 [277 P.2d 36], disposes of the exact issue before us, explaining that while "there is no doubt" of the right of one convicted of a felony "to a transcript of the evidence at the expense of the state" (p. 245), *section 274c of the Code of Civil Procedure* in effect provides, as to municipal courts, that the presence of the reporter "is dependent upon the discretion of the judge. . . ." (P. 246.) If the judge orders a reporter, the matter of transcription depends upon the parties. *Government Code section 69952* indicates "a legislative intent to make such payment a charge against the county only in

cases where the court specifically so directs. [***5] . . ." (P. 246.)

People v. Smith (1949), 34 Cal.2d 449 [211 P.2d 561], sets out the statutory history of the sections. As of the date of that case section 274 of the Code of Civil Procedure (now the above mentioned Gov. Code, § 69952) provided: "In criminal cases in which the court *specifically so directs* the fee for reporting and for a transcript ordered by the court to be made must be paid out of the county treasury on the order of the court. . . ." (Emphasis added.) In 1909 the Legislature added section 1247 to the Penal Code providing: "Upon any appeal being taken from any judgment or order of the *superior court* . . . in any criminal proceedings, . . . the defendant or the district attorney when the people appeal, may within two days . . . designate what portion of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon, and ask the court to make an order for the transcription thereof. . . . If the court fails to make the order within one day after the application is presented, an order *shall be deemed to be given and made* for the portion of the notes requested in the application." (Stats. [***6] 1909, ch. 710, p. 1084; emphasis added.) The Legislature in [*80] 1911 amended section 1247 (Stats. 1911, ch. 382, p. 692) which, again referring to "an appeal being taken from any judgment [**303] or order of the *superior court*, . . . in any criminal action or proceeding" (p. 692; emphasis added) provided: "If the court fails to make the order within two days after the application is filed, the notes requested in the application shall be transcribed without such order" (p. 693). Smith held that Penal Code section 1247 and the amendments setting out "the requirement for a court order within the specified time and in the absence thereof the mandate that the reporter make the transcription as requested, operated to provide a transcript at state expense pursuant to section 274 of the Code of Civil Procedure." (People v. Smith, supra, 34 Cal.2d 449, 452.)

Respondents properly point out that "[no]

comparable legislation has been enacted with respect to municipal courts." As a consequence, the decisions in People v. Smith, supra, 34 Cal.2d 449; In re Paiva (1948), 31 Cal.2d 503 [190 P.2d 604]; and Gross v. Superior Court (1954), 42 Cal.2d 816 [***7] [270 P.2d 1025], which involve superior courts, do not control.

To overcome Hidalgo and the statutory history appellant apparently urges three positions which we now discuss. As we shall point out, we do not find them meritorious.

Appellant first presents a labored argument that Hidalgo was wrongly decided because the language of section 274c of the Code of Civil Procedure and section 69952 of the Government Code, the successor of section 274, Code of Civil Procedure, were substantially similar and must be treated *in pari materia*; that, when Smith was decided, section 274, Code of Civil Procedure, relating to superior courts, provided that in criminal cases "'in which the court specifically so directs'" the fee "'must be paid out of the county treasury"; that the language of Government Code section 69952, as of the date of Hidalgo, and upon which it rests, makes the same provision. Hidalgo, then, on the basis of Smith should have treated the problem in the same manner and allowed the transcript free to the defendant.

The argument overlooks the qualifying language of the amendments to section 1247 of the Penal Code, set out *supra*, which applied specifically to superior [***8] courts. The purpose of the amendments, according to Smith, was probably to correct the situation discussed in Richards v. Superior Court (1904), 145 Cal. 38 [78 P. 244], a case which held that section 274, Code of Civil Procedure, unadorned by section 1247 of the Penal Code, did not provide for furnishing transcripts at [*81] public expense. Hence the presence of section 1247 of the Penal Code, plus the additional and clarifying enactments, destroys appellant's attempt to demolish Hidalgo because it did not follow Smith.

Pointing out that [Code of Civil Procedure section 274c](#) was amended in 1953 (Stats. 1953, ch. 206, § 6, p. 1340) to include a reference to [section 69952 of the Government Code](#), appellant argues, as a second position, that the former section *thereby includes* the language of [Code of Civil Procedure section 274](#) upon which the cases of Paiva, Smith and Gross rested. Whatever significance the argument may have, it disintegrates in the *removal* of the reference to [Government Code section 69952](#) by Statutes 1955, chapter 1424, section 1, page 2592. Appellant's argument that the Legislature dropped the reference to [Government Code section 69952](#) because, [***9] in 1951, it had enacted language in [Penal Code section 690](#) which covered the subject, cannot stand. [HN2](#) The generalized language of the Penal Code section, providing that "criminal actions and proceedings in all courts" be the same, does not refer to transcripts or provide for payment for them.

Thirdly, appellant relies upon [Government Code section 74514](#) because it in turn refers back to [Government Code section 69952](#). Thus [Government Code section 74514 HN3](#) provides: "In all cases where by law, the court may direct the payment of transcription fees out of the city and county treasury, such fees shall, upon order of [**304] the court, be paid from the general fund including fees for transcription of testimony and proceedings in criminal cases as provided in [Sections 69947 to 69953](#), inclusive, which shall be paid from the city and county treasury." [Government Code section 69952](#) provides that the furnishing of free transcripts is entirely discretionary; hence the argument does no more than again present the same proposition which we have discussed *supra*.

We conclude that the ruling of Hidalgo disposes of appellant's contention that defendants in criminal cases in municipal courts are [***10] automatically entitled to free transcripts on appeal. On the other hand, appellant presents a different case from that adjudicated in Hidalgo in that she has filed her affidavit *in forma pauperis* and the

trial court has accepted her allegation that she cannot prosecute her appeal without the use of the transcript. Since, if she had possessed adequate funds, appellant could have purchased the transcript, [*82] which was actually taken at her trial, we believe, she would, upon proof of these special circumstances, be entitled to the transcript at the county's expense under the principle of the United States Supreme Court decision of [Griffin v. Illinois \(1956\), 351 U.S. 12 \[76 S.Ct. 585, 100 L.Ed. 891, 55 A.L.R.2d 1055\]](#), a case decided after the ruling in Hidalgo.

[CA\(2a\) \(2a\)](#) Initially we must discuss the question whether appellant has properly raised the constitutional point. She did not refer to Griffin until after the attorney general commendably called attention to that case in his brief. In her petition for a writ of mandate, however, appellant alleges her "clear legal right" to the transcript "for use in connection with her pending appeals . . . under the laws of this [***11] State, and the Rules on Appeal. . . ." Then in her "Points and Authorities Supporting Petition for Writ" she states: "It is to be noted that the aforesaid three rulings of the Supreme Court [Paiva, Smith, Gross] are *general*, as to be applied to *all* defendants, in criminal cases, misdemeanors or felonies. Any other construction would be denying the equal protection of the laws, in direct violation of the Federal and State Constitutions."

Appellant thus raises a constitutional issue regarding the construction of the statutes and more especially the application of equal protection to all defendants. She contends that *all* defendants, whether convicted of felonies or misdemeanors, are entitled to transcripts. Necessarily within the group of all defendants there must be included the more restricted class of all indigent defendants. Consequently, appellant indirectly raises the problem involved in Griffin. [CA\(2b\) \(2b\) CA\(3\) \(3\) HN4](#) A party questioning the constitutionality of a statute, or its application, must raise the constitutional issue at the earliest opportunity ([Jenner v. City Council \(1958\), 164 Cal.App.2d 490](#),

[498 \[331 P.2d 176\]](#)); appellant, here, submitted the issue at the **[***12]** time of her petition for a writ of mandate, her first opportunity after the denial of her request for a transcript at county expense.

CA(4) (4) Furthermore, as [Egan v. Teets \(9th Cir., 1957\), 251 F.2d 571](#), states, ". . . **HN5** a constitutional question may be raised at any time if the matter appears on the face of the record, or if it is of such nature that it could not have been raised before." (P. 576.) **CA(2c) (2c)** In the instant case the constitutional issue appears on the face of the record, specifically in appellant's allegations of poverty and the need for a transcript in order to obtain an adequate appeal.

[*83] We now turn to the application of Griffin. In that case defendant and his codefendant, Crenshaw, convicted and sentenced for armed robbery, moved in the Criminal Court of Cook County, Illinois, for a free stenographic transcript of their trial upon the ground they were "poor persons with no means of paying the necessary fees to acquire the Transcript and Court Records needed to prosecute an appeal. . . ." (P. 13.) Although Illinois provides that writs of error in all criminal cases are writs of right (Ill. Rev. Stat., 1955, ch. 38, § 769.1), an appellant, to review errors at **[***13]** the trial, must **[**305]** provide a transcript for the basis of his bill of exceptions (Ill. Rev. Stat., 1955, ch. 110, § 101.65 [Supreme Court Rule 65]). Appellant must pay for the transcript unless he falls within one of three exceptions: (1) a sentence to death (Ill. Rev. Stat., 1955, ch. 38, § 769a); (2) an application for a writ of error to correct an error appearing in the common law "mandatory record" (consisting merely of indictment, arraignment, plea, verdict, and sentence); or (3) an application to correct a constitutional error (federal or state) in the proceedings which resulted in his conviction (Post-Conviction Hearing Act of 1949, Ill. Rev. Stat. 1955, ch. 38, §§ 826-832). The criminal court denied Griffin's motion for a free transcript.

Griffin's next attempt to obtain a review of the lower court's ruling under the Illinois Post-

Conviction Hearing Act met with similar defeat, as, indeed, did his appeal to the Illinois Supreme Court. His application for certiorari to the United States Supreme Court, however, procured a vacation of the Illinois judgment by a five to four majority. Justice Black wrote the majority opinion; Justice Frankfurter, concurring in **[***14]** the judgment, wrote a separate opinion.

Justice Black points out: "Counsel for Illinois concedes that these petitioners needed a transcript in order to get adequate appellate review of their alleged trial errors. . . . We must therefore assume for purposes of this decision that errors were committed in the trial which would merit reversal, but that the petitioners could not get appellate review of those errors solely because they were too poor to buy a stenographic transcript." (P. 16.) Such discrimination against an indigent cannot withstand the force of the due process and equal protection clauses. "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e. g., [McKane v. Durston, 153 U.S. 684, 687-688 \[**84\] \[14 S.Ct. 913, 38 L.Ed. 867\]](#). But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. . . . Consequently **HN6** at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." (P. 18.) Succinctly **[***15]** the justice sums up: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (P. 19.)

CA(5) (5) Griffin's general impact upon our situation is clear. We need not concern ourselves with the debated issue as to whether the Supreme Court invoked the due process as well as the equal protection clause in that case (see the excellent discussion in Willcox and Bloustein, *The Griffin Case -- Poverty and the Fourteenth Amendment*

(1957), 43 Cornell L. Q. 1); the requirement for equal protection in the federal Constitution and the prohibition against special privileges in the state [Constitution \(art. I, § 21\)](#) are sufficient. We recognize, however, two differences between the instant situation and the Griffin case that might serve to negate the application of the latter decision: first, that the instant conviction involved a misdemeanor and not a felony, and, second, that [HN7](#) the ruling does not apply if appellant could have pursued the appeal by way of a bill of exceptions without the need of a transcript. We turn to a discussion [\[***16\]](#) of each of these points.

[HN8](#) We do not believe the principle of Griffin applies only to felony convictions. The principle cannot be cut to the Procrustean bed of the penalty. It is true that Justice Harlan, to illustrate the claimed horrendous sweep of the decision, poses the question, "Thus if requiring defendants in felony cases to pay for a transcript constitutes a discriminatory denial to indigents of the right of appeal available to others, why is it [\[**306\]](#) not a similar denial in misdemeanor cases or, for that matter, civil cases?" (P. 35.) But we do not touch civil cases here, and we may properly differentiate between loss of property in civil actions and loss of liberty by incarceration for the commission of crime. And the argument that we should distinguish between felonies and misdemeanors dissolves in the common formula of the penalty: both types of crime carry the sanction of fine and imprisonment. That the imprisonment may be longer for the felony than for the misdemeanor does [\[*85\]](#) not detract from the fact that both sanctions involve loss of liberty. While there are many obvious differences between the misdemeanor and the felony, and the former, of course, [\[***17\]](#) imposes a lighter penalty, we do not believe the difference justifies the mutilation of the right of appeal by deprivation of the transcript.

[CA\(6\)](#) (6) Nor do we believe the force of Griffin can be avoided upon the ground that it recognizes a bystander's bill of exceptions as constitutionally

adequate and that California law provides a substantially equivalent procedure. In this respect respondents rely upon this language of Griffin: "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. [Footnote omitted.]" (P. 20.) Recognizing that California does provide for free transcripts in felony cases but does not do so in misdemeanor cases, respondents argue California provides for an alternative appeal procedure from municipal courts by way of a settled statement. And, say respondents, "When an exceptional case arises in the municipal court, the trial judge may order preparation [\[***18\]](#) of the transcript at the expense of the county." Hence, say respondents, California has evolved a procedure for this situation which, according to its lights, affords "fair and equal appellate review."

But the thrust of appellant's plea of inadequacy is not met by the proffered settled statement. As we have pointed out, appellant's petition alleges that the testimony at the trial as to checks and receipts was too complex to be compiled at a later date from memory and notation, and that she could not "safely proceed" with her appeal on that basis. Respondents' demurrer admits the truth of those allegations for the purposes of this proceeding. ([City Council v. Superior Court \(1960\), 179 Cal.App.2d 389, 392 \[3 Cal.Rptr. 796\]](#).) Appellant alleges that if she cannot obtain a transcript "she will be irreparably and irretrievably injured in her rights to justice"; the superior court sustained a demurrer which assumed the truth of this allegation; we cannot nevertheless hold that California affords "fair and equal appellate review." Just as the superior court must have accepted the truth of [\[*86\]](#) appellant's allegations as to inability to proceed by settled statement, so [\[***19\]](#) must we. Upon this record we are required to assume

that a settled statement would not afford an adequate method of appeal.

We do not mean to say, however, [HN9](#) that the settled statement may not in most cases suffice for that purpose; the determination must rest with the municipal court in the exercise of its discretion. In the instant case, however, the charges of the petition that "it would be impossible for defendant's counsel to remember" the testimony of various witnesses as to the many checks and receipts involved; that appellant cannot "safely proceed with her appeal without the assistance of the official Reporter's Transcript"; that without such transcript "she will be irreparably and irretrievably injured"; that she "has duly taken each and every step required of her under the law and the Rules on Appeal . . . to be entitled to obtain an Order" for a free transcript; that "the duty of defendants and respondents herein to order and furnish to petitioner said transcript is an act which the law especially enjoins upon said defendants and respondents herein . . . as a duty resulting from their official positions," allege facts which, if true, are incompatible with the exercise [***20] of due discretion by the municipal court in denying the transcript.

The superior court sustained a general demurrer to this petition. This was error; the recited allegations certainly establish the insufficiency of the settled statement for purposes of appeal.

We conclude that respondents' attempted distinctions as to Griffin must fail. We [**307] note, too, that on two recent occasions the United States Supreme Court has reaffirmed the Griffin doctrine.

[Eskridge v. Washington State Board of Prison Terms & Paroles \(1957\), 357 U.S. 214 \[78 S.Ct. 1061, 2 L.Ed.2d 1269\]](#), involved a denial by the State of Washington of a free transcript to a petitioner, sentenced to life imprisonment, who set forth his poverty, the substantiality of trial errors, and the necessity of the transcript to prosecute the appeal. Rejecting Washington's defense that

"petitioner might have utilized notes compiled by someone other than the official court reporter," since there was "nothing in this record to show" that such notes "were available" to petitioner (p. 215), the court holds upon the authority of Griffin that Washington had denied "a constitutional right guaranteed by the Fourteenth [***21] Amendment." (P. 216.) And in the recent case of [**87] [Burns v. Ohio \(1958\), 360 U.S. 252 \[79 S.Ct. 1164, 3 L.Ed.2d 1209\]](#), Chief Justice Warren, speaking for the majority of the court held that under Griffin an indigent defendant in a criminal case could not be required to pay a filing fee before he was permitted to file a motion for leave to appeal to the highest appellate court.

The California courts have recognized that [HN10](#) a deprivation of due process may occur in the inability of the indigent to appeal by reason of poverty. In holding that a defendant in a criminal case appealing from the denial of a writ of error *coram nobis* is entitled to be furnished a record, the majority opinion in [In re Paiva, supra, 31 Cal.2d 503](#), pointed out: "(See also [State v. Criminal Court \(1942\), 220 Ind. 4 \[40 N.E.2d 971\]](#), in which . . . an application for a record at the expense of the state upon a showing that the defendant-petitioner 'is a poor person, without means of paying for a record which he wishes to use in perfecting an appeal from the judgment of the respondent court denying his petition for a writ of error *coram nobis*,' was denied. Such denial, it has [***22] been suggested, may amount to a deprival of due process. [Ex parte Davis \(1942\), 318 U.S. 412 \[63 S.Ct. 679, 87 L.Ed 868\]](#); [Barton v. Smith \(C.C.A. 9, 1947\), 162 F.2d 330](#).)" (P. 508.) The minority opinion likewise states: "There is nothing in the record to indicate that Paiva does not have ample funds to pay for a transcript, and he made no application to proceed *in forma pauperis*. In the absence of such a showing, he has not been deprived of due process of law." (P. 513.) Likewise, we call attention to the illuminating discussion of this issue as pointed up by the Griffin case in the recent concurring opinion of Justice Traynor in [People v. Brown \(1960\) 55 Cal.2d 64 \[9](#)

[*Cal.Rptr. 836, 357 P.2d 1072*](#)].

The United States Supreme Court has held that in such circumstances as those of the instant case, the indigent is entitled to the free transcript. [*HN11*](#) He must, as an indigent, enjoy an equal protection in access to the full resources of our courts as that of the affluent. The right to be heard in the highest appellate court should not be lost because the law conditions it upon legal paraphernalia, in the form of a written record, which an accused person lacks [***23] the means to buy. The right of appeal cannot lie in that discriminatory morass in which it is accessible to the rich and denied to the poor. Whatever hardship poverty may cause in the society generally, the judicial process must make itself available to the indigent; it [*88] must free itself of sanctions born of financial inability. The core of a free and democratic society lies in full and equal access to its courts.

The demurrer should be overruled and respondents permitted to answer. We reverse the order and the judgment.



Positive

As of: October 18, 2026 7:14 AM Z

Reichardt v. Hoffman

Court of Appeal of California, Sixth Appellate District

February 6, 1997, Decided

No. H013548.

Reporter

52 Cal. App. 4th 754 *; 60 Cal. Rptr. 2d 770 **; 1997 Cal. App. LEXIS 86 ***; 97 Cal. Daily Op. Service 909; 97 Daily Journal DAR 1303

WILLIAM REICHARDT et al., Plaintiffs and Respondents, v. GEORGE HOFFMAN, Defendant and Appellant.

Notice: [***1] Opinion certified for partial publication. *

Subsequent History: As Modified on Denial of Rehearing of March 5, 1997, Reported at: [1997 Cal. App. LEXIS 175](#).

Prior History: Monterey County Superior Court. Super. Ct. No. M 27959. Honorable Robert M. Hinrichs.

Disposition: The trial court's order extinguishing defendant's easement is hereby stricken, and the trial court is ordered to modify the judgment to so reflect. As so modified, the judgment is affirmed. Plaintiffs shall recover their costs.

Case Summary

Procedural Posture

Defendant easement holder sought review of a decision of the Monterey County Superior Court (California), which extinguished defendant's easement over plaintiff landowners' property and awarded plaintiffs compensatory and punitive damages.

Overview

Plaintiff landowners owned a house adjacent to a vacant lot owned by defendant easement holder. Defendant's lot was benefitted by a nonexclusive easement by deed over plaintiffs' property for access purposes. After years of dispute over the easement, plaintiffs filed an action to extinguish the easement and obtain damages. The trial court extinguished defendant's easement, enjoined him from interfering with plaintiffs' property, and awarded compensatory and punitive damages. On appeal, the court struck the trial court's order extinguishing defendant's easement and, as modified, affirmed the judgment. The court refused to consider new issues that defendant raised in his reply brief because he failed to demonstrate good cause for his lateness in raising them. The court struck the extinguishment of defendant's easement from the judgment because there was no evidence that defendant performed or authorized some act which resulted in a physical change that permanently and materially prevented defendant from using the easement or made his use of the easement severely burdensome to plaintiffs.

Outcome

The court struck the trial court's order extinguishing the easement of defendant easement holder and, as modified, affirmed the judgment because there was no evidence that defendant performed some act which resulted in a physical change that permanently prevented him from using the easement or made the easement severely burdensome to plaintiff landowners.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts B.2. through B.5., C. and D.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN1 Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration deprives the respondent of an opportunity to counter the argument.

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN2 The rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN3 An appellant should make the points on which he relies in his opening brief, and not reserve them for his reply, and the court may properly consider them as waived unless so made. This should undoubtedly be the rule where no good reason appears for the omission to make the point in the opening brief, and it does not appear that the appellant would be unjustly affected by a refusal to consider it.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN4 When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether there

is any substantial evidence contradicted or uncontradicted which will support the finding of fact.

Civil Procedure > Trials > Bench Trials

HN5 The court has no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.

Civil Procedure > Trials > Bench Trials

HN6 The court's role is limited to determining whether the evidence before the trier of fact supports its findings.

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN7 See [Cal. Civ. Proc. Code § 803](#).

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN8 See [Cal. Civ. Proc. Code § 806](#).

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN9 When an easement is non-exclusive, the common users must accommodate each other.

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Limited Use Rights > Easements > Interference With Easements

Real Property Law > ... > Limited Use
Rights > Easements > Public Easements

HN10 The owner of the servient tenement may use the burdened land in any way which does not interfere unreasonably with the easement.

Real Property Law > Encumbrances > Limited Use
Rights > General Overview

Real Property Law > ... > Limited Use
Rights > Easements > General Overview

Real Property Law > ... > Limited Use
Rights > Easements > Termination of Easements

HN11 Extinguishment of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible.

Real Property Law > ... > Limited Use
Rights > Easements > General Overview

Real Property Law > Encumbrances > Restrictive
Covenants > Creation of Restrictive Covenants

HN12 See [Cal. Civ. Code § 811](#).

Real Property Law > Encumbrances > Limited Use
Rights > General Overview

Real Property Law > ... > Limited Use
Rights > Easements > General Overview

Real Property Law > ... > Limited Use
Rights > Easements > Termination of Easements

HN13 If the owner of a dominant estate do acts thereon which permanently prevent his enjoying an easement, the same is extinguished, or if he authorize the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it.

Real Property Law > Encumbrances > Limited Use
Rights > General Overview

Real Property Law > ... > Limited Use
Rights > Easements > General Overview

Real Property Law > ... > Limited Use
Rights > Easements > Interference With Easements

Real Property Law > ... > Limited Use
Rights > Easements > Public Easements

Real Property Law > ... > Limited Use
Rights > Easements > Termination of Easements

Real Property Law > ... > Transfer Not By
Deed > Dedication > Elements

HN14 In order to justify extinguishment of an easement, the acts of the owner of the dominant tenement must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement. The interference with use of the easement must be material and permanent rather than occasional and temporary in order to justify extinguishment.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Property owners brought an action against the owner of an adjacent lot to resolve a dispute over a nonexclusive easement over plaintiffs' property for driveway purposes, which was held by defendant. The trial court issued a judgment extinguishing defendant's easement, enjoining defendant from interfering with plaintiffs' enjoyment of their property, and awarding plaintiffs compensatory and punitive damages based on causes of action for nuisance; violation of conditions, covenants, and restrictions applicable to defendant's property; and interference with contract or prospective economic advantage. (Superior Court of Monterey County, No. M27959, Robert M. Hinrichs, Judge.)

The Court of Appeal ordered that the trial court's

order extinguishing defendant's easement be stricken. As so modified, the judgment was affirmed. The court initially held that it would not consider issues raised in defendant's reply brief that were not raised in his opening brief, since defendant failed to show good cause for not raising the issues earlier. Although defendant asserted he retained a new attorney after the opening brief was filed, he had no right to raise new issues in a reply brief filed eight months after his opening brief, six months after he obtained new counsel, and three months after plaintiffs filed their brief. He should have sought an extension of time to obtain new counsel prior to the filing of the opening brief. The court further held that the trial court erred in extinguishing the easement. Absent evidence that defendant performed or authorized some act resulting in a physical change that permanently and materially prevented defendant from using the easement or made his use of the easement severely burdensome on the servient tenement, the trial court was not authorized to extinguish the easement. Under [Civ. Code, § 811](#), a servitude is extinguished by the performance of any act upon either tenement, by the owner of the servitude, or with his or her assent, that is incompatible with its nature or exercise. The trial court found that by treating the easement as exclusive, defendant had surcharged its nonexclusive nature, used the easement to harass and intimidate plaintiffs and their guests, and prevented plaintiffs from making any use of the easement area. However, under [§ 811](#), the easement could only be extinguished if defendant's conduct interfered with his own use of the easement. An injunction requiring defendant to accommodate the servient tenement's use of the easement area was the appropriate remedy. (Opinion by Mihara, J., with Cottle, P. J., and Bamattre-Manoukian, J., concurring.)

Headnotes

[CA\(1a\)](#) (1a) [CA\(1b\)](#) (1b)

Appellate Review § 111—Briefs—Form and

Requisites—Reply Brief—Introduction of New Issues—Appellate Court's Refusal to Consider New Issues Absent Good Cause.

--On appeal from an action in which property owners obtained a judgment extinguishing an easement over their property held by an adjacent lot owner, the appellate court refused to consider issues raised in defendant's reply brief that were not raised in his opening brief, where defendant failed to show good cause for not raising the issues earlier. While his opening brief raised seven issues, the reply brief raised approximately twenty issues. Since the opening brief only challenged sufficiency of the evidence to support extinguishment of the easement, liability for interference with contract or prospective economic advantage, nuisance liability, damages for violation of the conditions, covenants, and restrictions, and emotional distress damages, defendant's other challenges to the liability findings and compensatory damage awards were raised for the first time in his reply brief. The reply brief challenge to the sufficiency of the evidence to support punitive damages was also new. The new issues were not merely elaboration of issues raised in the opening brief or rebuttals to plaintiffs' briefing. Although defendant asserted he retained a new attorney after the opening brief was filed, he had no right to raise new issues in a reply brief filed eight months after his opening brief, six months after he obtained new counsel, and three months after plaintiffs filed their brief. He should have sought an extension of time to obtain new counsel prior to the filing of the opening brief.

[CA\(2\)](#) (2)

Appellate Review § 111—Briefs—Form and Requisites—Reply Brief—Introduction of New Issues.

--Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument. Obvious reasons of fairness militate against consideration of

an issue raised initially in the reply brief of an appellant. Obvious considerations of fairness in argument demand that the appellant present all of his or her points in the opening brief. To withhold a point until the closing brief would deprive the respondent of the opportunity to answer it or require the effort and delay of an additional brief by permission. Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.

CA(3) (3)

Appellate Review § 149—Scope of Review—Sufficiency of Evidence—Power of Court.

--When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted that will support the finding of fact. The appellate court has no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. The appellate court's role is limited to determining whether the evidence before the trier of fact supports its findings.

CA(4a) (4a) CA(4b) (4b)

Easements and Licenses in Real Property § 10—Easements—Extinguishment—Act by Dominant Tenement Owner to Permanently and Materially Prevent Use of Easement.

--In an action by property owners to extinguish a nonexclusive easement for driveway purposes over their property held by an adjacent lot owner, the trial court erred in extinguishing the easement. Absent evidence that defendant performed or authorized some act resulting in a physical change that permanently and materially prevented

defendant from using the easement or made his use of the easement severely burdensome on the servient tenement, the trial court was not authorized to extinguish the easement. Under Civ. Code, § 811, a servitude is extinguished by the performance of any act upon either tenement, by the owner of the servitude, or with his or her assent, that is incompatible with its nature or exercise. Acts of the owner of the dominant tenement must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement. The trial court found that by treating the easement as exclusive, defendant had surcharged its nonexclusive nature, used the easement to harass and intimidate plaintiffs and their guests, and prevented plaintiffs from making any use of the easement area. However, under § 811, the easement could only be extinguished if defendant's conduct interfered with his own use of the easement. An injunction requiring defendant to accommodate the servient tenement's use of the easement area was the appropriate remedy.

[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 478.]

CA(5) (5)

Easements and Licenses in Real Property § 2—Easements—Definitions and Distinctions—"Nonexclusive" Easement.

--When an easement is "nonexclusive," the common users must accommodate each other. The owner of a dominant tenement must use his or her easement and rights in such a way as to impose as slight a burden as possible on the servient tenement. The owner of the servient tenement may use the burdened land in any way that does not interfere unreasonably with the easement.

Counsel: C. Michael McClure, Jackson, Tufts, Cole & Black, Gerald Z. Marer and Amy E. Margolin for Defendant and Appellant.

Joel Franklin, Spiering, Swartz & Kennedy and

Andrew H. Swartz for Plaintiffs and Respondents.

Judges: Opinion by Mihara, J., with Cottle, P. J., and Bamattre-Manoukian, J., concurring.

Opinion by: MIHARA

Opinion

[*757] [**771] **MIHARA, J.**

Plaintiffs own a house in Monterey County adjacent to a vacant lot owned by defendant. Defendant's lot is benefited by a deeded nonexclusive [**772] easement over plaintiffs' property [***2] for access purposes. Plaintiffs are required to keep the easement "clear" in order to ensure "proper access" for defendant. After years of dispute about the easement, plaintiffs obtained a judgment extinguishing defendant's easement, enjoining defendant from interfering with plaintiffs' enjoyment of their property and awarding plaintiffs compensatory and punitive damages based on causes of action for nuisance, violation of conditions, covenants and restrictions (hereafter CC&R's) applicable to defendant's property and interference with contract or prospective economic advantage. Defendant's appeal challenges the sufficiency of the evidence to support (1) the extinguishment of his easement, (2) the court's finding that he was liable to plaintiffs for interference with contract or prospective economic advantage, (3) nuisance liability, (4) damages for violation of the CC&R's and (5) damages for emotional distress. [*758] Defendant also claims that the punitive damages award was improper because plaintiffs failed to adduce evidence of his financial condition. Finally, defendant claims that the judgment must be reversed because the trial court conducted a "view" of the property while [***3] court was not in session without notifying the parties. We conclude that the evidence does not support the trial court's extinguishment of defendant's easement. Accordingly, we modify the judgment by striking the order extinguishing

defendant's easement and affirm the modified judgment.

FACTS

In 1977, defendant paid \$ 21,000 for a one-acre lot adjacent to the property now owned by plaintiffs. Plaintiffs' property already had a home on it at that time. The only use that defendant has ever made of his vacant lot has been as a place to store old trucks, a boat and other debris including roofing tile, beams, concrete blocks and fragments, a cement mixer, saw horses and lumber. Defendant's neighbors and the health department asked him to remove this debris, but he did not respond to these requests. Defendant kept a nonfunctional pickup truck on his lot for a decade even though he was cited in both 1987 and 1989 by the Monterey County Department of Health for storing this vehicle on his property and directed to remove this "health and safety" hazard immediately. In 1989, defendant was cited by the California Department of Forestry for maintaining a fire hazard on his lot. Defendant has [***4] also been cited for illegally grading his lot without a permit. Less than a month before trial, defendant removed the nonfunctional pickup truck from his lot.

Defendant's grant deed states that he has a "non-exclusive easement for driveway purposes" over a strip of land 25 feet wide and 80 feet long across the front of plaintiffs' property. Defendant's lot is not landlocked. It fronts on a public street. The front porch of plaintiffs' home encroaches a few feet into defendant's easement. Defendant became aware of this encroachment in the 1970's. In 1980, a variance was granted to previous owners of plaintiffs' property which permitted the house to violate the setback requirement ¹ on the condition that "the right-of-way be kept clear to provide proper access" to defendant's lot.

Plaintiffs purchased their property in June 1987.

¹ The setback requirement specified that the structure be set back 30 feet from the easement. In fact, the front porch of the house actually encroached a few feet on the easement.

[***5] In August 1987, defendant first encountered plaintiffs when he found vehicles parked in the easement blocking his access to his lot on the day of plaintiffs' wedding. He knocked on plaintiffs' door, complained about the cars parked in front of [*759] plaintiffs' house and told plaintiff Judith Reichardt (hereafter Judith) that "they weren't supposed to park" in the easement. Judith had just gotten out of the shower and was wet and in her robe. She explained that this was their wedding day, and they were going to have a number of guests. She asked defendant if he was going to require access to his property again that day. Defendant told her "it doesn't matter whether I will be back later today or not. No cars are ever to be parked there." Defendant insisted upon talking to "the groom," but he was not permitted to do so.

Through the years, defendant has consistently insisted that no cars are allowed to [***773] park anywhere in the easement area. He claims that there is not adequate room for a vehicle to pass if another vehicle is parked in the easement. However, he concedes that the easement area is at least 20 feet wide. Everyone other than defendant has concluded that there [***6] is plenty of room for two cars to pass one another in the easement area. A few days after the August 1987 encounter, while plaintiffs were away on their honeymoon, defendant returned and removed much of the vegetation and part of a tree that were growing on plaintiffs' property along the edge of the easement. He did not contact plaintiffs before doing so. Plaintiffs' friend, who was housesitting for them while they were away, saw defendant doing this and asked defendant to stop, but defendant refused. Defendant's mutilation of this vegetation left a "mud wall" bare of vegetation in front of plaintiffs' house. The tree later died, and the vegetation never grew back.

In late 1987, plaintiff William Reichardt (hereafter William) first met defendant. Defendant told William that "this was his easement and we were to treat that easement area, the paved area, as if it were a street with no parking signs on it" William asked defendant if it would be

advantageous for defendant to have direct access to his property from the street. Defendant asked whether William had \$ 50,000 "to contribute to the possibility of putting in a new driveway." William replied that he did not. Around Christmas [***7] of 1987, defendant pounded on plaintiffs' front door very early on a Saturday morning and demanded that a car parked on the easement be moved. William moved the car so that defendant could get by, but he did not move the car off the easement. Defendant became irate and demanded that the car be removed entirely from the easement area. William did so, but defendant insisted that the car was still on the easement and became even more angry. He said "you just can't park in front [of your house] at all. This is my easement, you are never to park on it." William removed his car from the front of his house. William had a similar encounter with defendant in March 1988. These incidents were "ongoing" through early 1991 although William could not remember the dates of any other specific incidents.

Plaintiffs had not been apprised of the existence of defendant's easement when they purchased their property. After learning of its existence, they [*760] made a claim against their title insurer, the seller and the seller's real estate agent. This claim was settled in 1990. In 1991, plaintiffs tried to contact defendant in an attempt to convince him to sell them his easement. In May 1991, [***8] defendant told them that he had received their communications and "he was sure we could work something out." A month later, defendant told them that he "was still thinking about it" but "had been too busy to get to it." In the fall of 1991, Judith met with defendant and showed him plans that plaintiffs had had prepared for an alternative driveway access for defendant's property. Defendant orally agreed to accept a sum of money to cover the cost of an alternative driveway in exchange for giving up his easement. Based on this apparent agreement, Judith expended \$ 1,750 for plans for the alternate driveway. However, defendant never agreed to a specific sum nor did he ever sign a written agreement to exchange his easement for a sum of

money.

Plaintiffs moved to Oregon in January 1992 and rented out their property. In February 1992, Judith traveled to Monterey for the sole purpose of finalizing her agreement with defendant regarding the easement. The alternative driveway was estimated to cost about \$ 23,000 so Judith borrowed \$ 30,000 and placed this sum in escrow for defendant. After defendant failed to close the escrow, Judith contacted him and asked why he had not completed the transaction. [***9] Defendant said "what's it worth to you." The transaction was never completed, and this was the last contact Judith had with defendant.

Defendant subsequently had heated encounters with plaintiffs' tenants in which he demanded that they move vehicles parked in the easement area. He also took a photograph of one of these tenants as he went to move his vehicle in his bathrobe. Defendant even called the police about one of plaintiffs' tenants on one occasion. When plaintiffs listed their property for sale, defendant attended [**774] several open houses held at plaintiffs' property. Defendant parked his truck with a garbage can in the back of it along the property line between his lot and plaintiffs' property. He took a camera with him, handed out fliers, posted a sign and wrote down the license numbers of the vehicles parked outside plaintiffs' home during these open houses. The sign and fliers said "take notice that there exists a recorded driveway easement . . . [which] might be subject to vehicular traffic at any time day or night seven days a week, 24 hours a day." Defendant also spoke with potential purchasers and potential renters attending these open houses. Plaintiffs' [***10] real estate agent observed this conduct and concluded that defendant was "intimidating potential tenants or buyers." The agent herself felt intimidated by defendant.

Eventually, in October 1993, plaintiffs received an offer to purchase their property from Mark Porter. At this point, plaintiffs were in serious financial [**761] difficulty and needed to sell their property

to alleviate this financial crisis. "Our whole lives were occupied with trying to sell that house." Porter's offer was contingent on Porter meeting with defendant to discuss the possibility of removing the easement.² Porter contacted defendant to discuss the easement. He hoped that he would be able to "establish a comfort level" with defendant by either putting in an alternative driveway for defendant or "somehow working things out with the two owners . . ." They arranged a meeting. Defendant was aware at this time that plaintiffs were experiencing serious financial difficulties and were desperate to sell their property and that Porter had offered to buy the property. Defendant met with Porter at the property. When defendant arrived at the property, defendant immediately became upset when he discovered that [***11] one of plaintiffs' tenants' guests had parked his car in the easement area. Defendant parked his truck so that the guest could not drive his vehicle away while defendant met with Porter. Porter observed this encounter.

Porter then spoke with defendant. Defendant told Porter that his easement "was the entire front yard" of plaintiffs' property. He said that plaintiffs' front porch was "the first thing that's going to be torn off there the minute you buy the place." Porter told defendant that he hoped that they "could sit down and somehow work out a situation where we can be comfortable living next to you and sharing this easement or possibly just putting [in] a new driveway." Porter mentioned that he had children and a dog and he hoped to possibly [***12] put a dog run in front of the house. Defendant said, "there will be nothing in the easement. If there is anything in the easement I will run it over." Porter asked if he meant children, and defendant said "anything." Defendant refused to even discuss an alternative driveway unless Porter had "eighty to a

² Porter had a less than accurate understanding of the nature of the easement. He believed that the fact that the easement was nonexclusive meant that there were two physical halves of the easement, one half belonging to defendant and the other half to plaintiffs.

hundred thousand dollars" to contribute.

Defendant also told Porter that Porter was paying too much for plaintiffs' property and that plaintiffs' house had "several structural problems." Defendant informed Porter that plaintiffs had received \$ 100,000 in compensation in their action involving their lack of notice of the easement. Defendant said that "it was his money, not their money, it was his money. And that's why he has been fighting them for all these years because he felt all along it was his money." Porter decided not to buy plaintiffs' property because defendant "is a complete basket case" and "I can't even reason with him." "[T]he biggest thing is the fact that he mentioned that he would run over our kids or anything that was in the driveway, dogs, kids, bikes, anything." "I couldn't live next to a man like that. He was too off the wall. I really felt very threatened."

*****13** **[*762]** After Porter decided not to purchase the property, plaintiffs' real estate agent concluded that the property was unmarketable because defendant intimidated people and interfered with attempts to market the property. Plaintiffs received no other viable offers to purchase their property. Had Porter completed the purchase, plaintiffs would have ****775** realized a net gain of \$ 88,000. The loss of this potential sale was a "devastating" blow to plaintiffs because it left them with "no money," and a negative cash flow which placed them "up against the wall." William "collapsed in tears" and "[i]t was very difficult" for him to deal with this situation. Judith's emotional condition was also detrimentally affected. "It kind of meant the end for us."

Plaintiffs filed an action against defendant in November 1993 seeking to extinguish his easement, obtain declaratory and injunctive relief and obtain compensatory and punitive damages for interference with contract or prospective economic advantage, nuisance and violation of the CC&R's. After a court trial, the court issued a judgment extinguishing defendant's easement, enjoining him from interfering with plaintiffs' property *****14**

and from violating a number of the CC&R's and awarding plaintiffs \$ 150,000 in compensatory damages and \$ 50,000 in punitive damages. The trial court issued an extensive statement of decision in support of its judgment.

The court made the following findings. The court concluded that defendant had created a nuisance and violated the CC&R's. His conduct prevented plaintiffs from having "free use" of their property and interfered with their "comfortable enjoyment" of their property. Defendant's easement was "subject to" the CC&R's. The various citations that defendant had received as a result of his use of his lot violated the CC&R's. Defendant's demands that the easement be kept "completely clear" for his "exclusive use" were reflective of his belief that the easement was his exclusive property and his conduct was consistent with this belief. However, the easement area was wide enough to allow defendant access to his property even with another vehicle parked in the easement area. The agreement that the easement would "be kept clear to provide proper access" did not convert the easement from a nonexclusive one to an exclusive easement. The purpose of this agreement was simply to ensure *****15** that defendant had "adequate passage" to his property. Defendant's conduct in connection with the easement was "incompatible with both the nature and exercise" of the easement. By treating the easement as exclusive, defendant had "surcharg[ed] the non-exclusive nature of it" and used the easement to "harass and intimidate" plaintiffs and their guests. Defendant's conduct prevented plaintiffs from "making any use" of the easement. Defendant had "harassed and frightened" plaintiffs' tenants and their real estate agent in connection with the easement, and his conduct had caused Porter to decide not to purchase plaintiffs' property.

[*763] Since reasonable access to defendant's property could be obtained from the public street adjoining the lot rather than by way of the easement, the court concluded that it was appropriate to extinguish defendant's easement. The

court awarded \$ 88,000 in damages for defendant's interference with plaintiffs' economic relationship with Porter, \$ 22,000 for defendant's creation of a nuisance and violation of the CC&R's and \$ 40,000 for plaintiffs' emotional distress arising from defendant's interference, his creation of a nuisance and his violation [***16] of the CC&R's. In addition, the court awarded \$ 50,000 in punitive damages based on defendant's conduct in connection with the Porter offer. Defendant's motion for a new trial was denied, and he filed a timely notice of appeal.

DISCUSSION

A. New Issues Raised in Reply Brief

[CA\(1a\)](#) (1a) In his reply brief, defendant makes a number of new contentions which he acknowledges he did not raise in his opening brief. Taken as a whole, defendant's reply brief reads like an entirely new opening brief rather than as a response to plaintiffs' brief.³ [***776] The parties disagree as to exactly how many of the issues raised in the reply brief are "new," but even defendant concedes that at least five issues are "new." Plaintiffs claim that there are 16 new issues. The truth is somewhere in between.

[***17] Defendant's opening brief raised seven issues. His reply brief appears to raise approximately 20 issues. Defendant concedes that his assertion that "the entire judgment is infected by the lower court's consideration of constitutionally impermissible factors and must be reversed" is an entirely new issue which was not raised in his opening brief. Since defendant's opening brief simply challenged the sufficiency of the evidence

to support (1) the extinguishment of defendant's easement, (2) liability for interference with contract or prospective economic advantage, (3) nuisance liability, (4) damages for violation of the CC&R's and (5) emotional distress damages, defendant's other challenges to the court's liability findings and compensatory damage awards are "new" issues raised for the first time in his reply brief. Defendant's reply brief challenge to the sufficiency of the evidence to support an award of punitive damages is also new because his only challenge [***764] to this award in his opening brief was on the ground that it was invalid because plaintiffs had failed to introduce evidence of his financial condition.

The many new issues raised by defendant in his reply brief [***18] are not merely elaboration of issues raised in his opening brief or rebuttals to plaintiffs' briefing. For instance, defendant's reply brief assertion that the court erred in awarding *both* an injunction and damages for violation of the CC&Rs was never even suggested in his opening brief. Defendant's reply brief challenge to the excessiveness of the compensatory damages award is also new. In his opening brief, defendant challenged the *emotional distress award* as unsupported by the evidence, and he claimed that the CC&R violations did not cause plaintiffs any damage, but he did not pose a challenge to the excessiveness of the compensatory damages award as a whole. Similarly, defendant's reply brief challenge to the propriety of a *separate award* for emotional distress is also new because his opening brief challenge was simply to the sufficiency of the evidence to support any damages for emotional distress.

We refuse to consider the new issues raised by defendant in his reply brief. [CA\(2\)](#) (2) "[HN1](#) Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." ([American \[***19\] Drug Stores, Inc. v. Stroh \(1992\) 10 Cal. App. 4th 1446, 1453 \[13 Cal. Rptr. 2d 432\].](#))

³ Defendant's opening brief is only 39 pages long including 17 pages of facts and no footnotes. In contrast, his reply brief is 50 pages long including less than 9 pages of facts. The reply brief contains 48 footnotes and each page of his reply brief contains more than 10 percent more text than the pages of his opening brief. While plaintiffs' brief was similarly lengthy at 54 pages and had 28 footnotes, plaintiffs' brief included 17 pages of facts. In all, defendant's reply brief contains about twice as much appellate argument as his opening brief.

"Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant." (*Varjabedian v. City of Madera* (1977) 20 Cal. 3d 285, 295, fn. 11 [142 Cal. Rptr. 429, 572 P.2d 43].) " 'Obvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission. HN2 Hence the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 335, fn. 8 [265 Cal. Rptr. 788].)

The California Supreme Court long ago expressed its hostility to the practice of raising new issues in an appellate reply brief. "Some additional points are made for the first time in their closing brief. We are not disposed to look with favor upon a point so made, unless good reason appears for the [***20] failure to make it in the opening brief. This practice is not fair to a respondent, and tends to delay the final disposition of appeals. This court has heretofore said, that while it is undoubtedly at liberty to decide a case upon any points that its proper disposition may seem to require, whether taken by counsel or not, HN3 an appellant should, under the rules, make the points on [*765] which he relies in his opening brief, and not reserve them for his reply, and that the court may properly consider them as waived unless so made. [Citations.] This should undoubtedly be the rule where no good reason appears for the omission [**777] to make the point in the opening brief, and it does not appear that the appellant would be unjustly affected by a refusal to consider it." (*Hibernia Sav. and Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584 [96 P. 9].) "We do not mean to say that an appellant might not be allowed in exceptional cases to discuss new questions in his final brief. He might be allowed to do so upon an application showing meritorious reasons why the points were not made in the opening brief. Such

application might be based upon sickness, inadvertence, or other excusable [***21] neglect. But in the case at bar no reason whatever is given for this departure from the ordinary method of presenting a case in this court. If the practice were allowed without any substantial reason, it would lead to great irregularity and delay. In such event the respondent, of course, could justly demand the right to file an additional brief, and the course of the argument by brief would be radically changed." (*Kahn v. Wilson* (1898) 120 Cal. 643, 644 [53 P. 24].)

CA(1b) (1b) Defendant filed his opening brief in October 1995. Plaintiffs filed their brief in March 1996. Defendant filed his reply brief on June 10, 1996. On June 21, 1996, plaintiffs filed a motion to strike defendant's reply brief or portions thereof. On June 27, 1996, defendant filed a reply to plaintiffs' motion in which he claimed that there was no impropriety in raising new issues in the reply brief since the appellate court "may and should" address these issues. Defendant made no showing of good cause in his reply to plaintiffs' motion. Plaintiffs responded to this reply by arguing that defendant was "abusing the appellate process" and noting that "it would be oppressive and burdensome" for plaintiffs to have to respond [***22] to what amounted to essentially a new opening brief.

Defendant filed an eight-page response to plaintiff's response to his reply to their motion. In this response, defendant for the first time attempted to demonstrate good cause for his failure to raise the new issues earlier. He stated that he had retained a new attorney after the opening brief had already been prepared and filed. This new attorney substituted in on December 5, 1995. Because the new attorney was allegedly busy familiarizing himself with the trial record and doing legal research, he was not able to take any action in this case before the filing of plaintiffs' brief in March 1996. This statement constitutes defendant's entire justification for his failure to raise these new issues prior to June 1996. In their reply to this statement,

plaintiffs pointed out that they had limited means and "should not be saddled with the onerous burden of having to file additional briefing simply because Appellant retained new counsel after filing the Opening Brief." Plaintiffs asserted [*766] that "they should not be required to continually increase the resources devoted to defending this appeal every time Appellant briefs this [***23] matter."

We agree with plaintiffs that fairness supports their challenge to defendant's assertion that he has the right to continue to raise new issues in a reply brief filed eight months after his opening brief, six months after he obtained new counsel and three months after plaintiffs filed their brief. Defendant has singularly failed to demonstrate good cause for his failure to brief these issues earlier. Defendant, as the appealing party, had the opportunity to frame the issues in this appeal at the time he filed his opening brief. If he was dissatisfied with his counsel at that time, he should have sought an extension of time so that he could obtain new counsel prior to the filing of the opening brief. In addition, we are skeptical of defendant's counsel's claim that the three-and-a-half-month period between his substitution in as defendant's attorney and the filing of plaintiffs' brief did not permit him enough time to review the record and the opening brief and discover that new issues would need to be addressed. The record in this case is not voluminous and the opening brief was not particularly lengthy. Had defendant's new counsel sought permission to file a supplemental [***24] opening brief in December or January, he might have been able to demonstrate good cause therefor. The mere fact that an appellant chooses to obtain new counsel two months after filing his opening brief cannot justify his contention that it is proper to raise new issues in a reply brief filed six months later. We refuse to consider the issues raised by defendant in his reply brief which were not raised in his opening brief.

[**778] B. *Sufficiency of the Evidence*

CA(3) (3) " HN4 'When a finding of fact is

attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' " (Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 881 [92 Cal. Rptr. 162, 479 P.2d 362], italics in original; accord, Gray v. Don Miller & Associates, Inc. (1984) 35 Cal. 3d 498, 503 [198 Cal. Rptr. 551, 674 P.2d 253, 44 A.L.R.4th 763].) " HN5 '[W]e have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve [***25] conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.' " (Leff v. Gunter (1983) 33 Cal. 3d 508, 518 [189 Cal. Rptr. 377, 658 P.2d 740], quoting Overton v. Vita-Food Corp. (1949) 94 Cal. App. 2d 367, 370 [210 P.2d 757].) HN6 Our role is limited to determining whether the evidence before the trier of fact supports its findings. (Reddy v. Gonzalez (1992) 8 Cal. App. 4th 118, 123 [10 Cal. Rptr. 2d 55].) [*767]

1. *Extinguishment of the Easement*

CA(4a) (4a) Defendant challenges the sufficiency of the evidence to support the trial court's extinguishment of his easement. He claims that his conduct was not "incompatible" with the "nature or exercise" of his easement. We conclude that the trial court's extinguishment of defendant's easement cannot be upheld.

"HN7 The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement." (Civ. Code, § 803.) In this case, defendant's land was the dominant tenement and plaintiffs' land was the servient tenement. HN8 "The extent of a servitude is determined by the terms of the grant" (Civ. Code, § 806.) The extent [***26] of the servitude benefiting defendant's land was described in the grant deed by which defendant obtained title as a "non-exclusive

easement for driveway purposes." [CA\(5\) \(5\) HN9](#) When an easement is "non-exclusive," the common users must accommodate each other. ([Scruby v. Vintage Grapevine, Inc. \(1995\) 37 Cal. App. 4th 697, 703 \[43 Cal. Rptr. 2d 810\]](#).) "[T]he owner of a dominant tenement must use his easement and rights in such a way as to impose as slight a burden as possible on the servient tenement." ([Baker v. Pierce \(1950\) 100 Cal. App. 2d 224, 226 \[223 P.2d 286\]](#).) [HN10](#) The owner of the servient tenement may use the burdened land in any way which does not "interfere unreasonably" with the easement. ([Camp Meeker Water System, Inc. v. Public Utilities Com. \(1990\) 51 Cal. 3d 845, 867 \[274 Cal. Rptr. 678, 799 P.2d 758\]](#).)

[CA\(4b\) \(4b\) HN11](#) Extinguishment of an easement is an extreme and powerful remedy which is utilized only when use of the easement has been rendered essentially impossible. "[HN12](#) A servitude is extinguished . . . [b]y the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise." ([Civ. Code, \[***27\] § 811](#).) The California Supreme Court construed this statute more than a century ago as authorizing extinguishment of an easement only where the easement owner performs or authorizes an act which *permanently prevents* use of the easement. [HN13](#) "This seems to be a recognition and statutory declaration of the rule . . . that if the owner of a dominant estate do acts thereon which *permanently prevent* his enjoying an easement, the same is extinguished, or if he authorize the owner of the servient estate to do upon the same that which prevents the dominant estate from any longer enjoying the easement, the effect will be to extinguish it." ([Lux v. Haggin \(1886\) 69 Cal. 255, 292-293 \[10 P. 674\]](#), italics added.) "The courts have interpreted this incompatibility as necessitating a *permanent interference* or an act of a nature such that thereafter exercise of the easement cannot be made without [[*768](#)] *severe* burden upon the servient tenement." ([Buechner v. Jonas \(1964\) 228 Cal. App. 2d 127, 132 \[39 Cal. Rptr. 298\]](#), italics added.)

We have not located any case in which an easement was extinguished in the absence of evidence that the owner of the dominant tenement had [[***28](#)] performed or authorized an act which resulted in a *physical* [[**779](#)] *change* which prevented continued use of the easement without imposing a severe burden on the servient tenement. ([Buechner v. Jonas, supra, 228 Cal. App. 2d 127](#) [planting and maintenance of hedge across easement did not merit extinguishment of easement]; [McCarty v. Walton \(1963\) 212 Cal. App. 2d 39, 45 \[27 Cal. Rptr. 792\]](#) [building of rock wall with gate in it did not merit extinguishment of easement]; [Crimmins v. Gould \(1957\) 149 Cal. App. 2d 383, 390 \[308 P.2d 786\]](#) [easement owner's dedication of land for construction of public street leading to easement causing the easement to be used by the general public did justify extinguishment of the easement].) [HN14](#) In order to justify extinguishment of an easement, "[t]he acts of the owner of the dominant tenement . . . must be of a character so decisive and conclusive as to indicate a clear intent to abandon the easement." ([Smith v. Worn \(1892\) 93 Cal. 206, 213 \[28 P. 944\]](#).) The interference with use of the easement must be material and permanent rather than occasional and temporary in order to justify extinguishment. ([People v. \[***29\] Ocean Shore Railroad \(1948\) 32 Cal. 2d 406, 418 \[196 P.2d 570, 6 A.L.R.2d 1179\]](#).)

The record does not contain any evidence of a physical change which created a *permanent* and material interference which was *incompatible* with use of the easement. The trial court found that defendant's *conduct* in connection with the easement was "incompatible with both the nature and exercise" of the easement because, by treating the easement as exclusive, defendant had "surcharg[ed] the non-exclusive nature of it" and used the easement to "harass and intimidate" plaintiffs and their guests. The court concluded that defendant's conduct prevented *plaintiffs* from "making any use" of the easement area.

However, the critical question in determining whether extinguishment of defendant's easement

was justified was whether defendant had performed or authorized an act which permanently and materially interfered with *his* continued use of the easement. The absence of any physical change was indicative of an absence of justification for extinguishment. While defendant's outrageous *conduct* prevented *plaintiffs* from making reasonable use of the easement area, such conduct simply *****30** cannot justify extinguishment of the easement. Preventing plaintiffs from using the easement area did not prevent *defendant* from using the easement. If anything, defendant's threatening conduct probably facilitated defendant's use of his easement. While plaintiffs were legally entitled to make reasonable use of their land even though it **[*769]** was burdened by defendant's easement, and defendant's unjustified interference with plaintiff's use of their land was a legal nuisance, this conduct could not justify extinguishing defendant's easement under [Civil Code section 811](#) because the easement could only be extinguished if defendant's conduct interfered with his own use of the easement.

There was no evidence that defendant's actions in connection with the easement materially or permanently prevented defendant from using the easement "without severe burden" on plaintiffs. While defendant's insistence that he had the right to exclusive use of the easement area was unwarranted and incorrect, his assertions did not result in any physical change which permanently burdened defendant's use of the easement and prevented its continued use. Evidence that defendant had threatened *****31** to run over anything in the easement area including children and animals also did not support the court's extinguishment of the easement. This threat did not *permanently* prevent defendant from using the easement or establish that defendant's continued use of the easement would put a *permanent and severe burden* on the servient tenement. An injunction requiring defendant to accommodate the servient tenement's use of the easement area would have been the appropriate remedy to eliminate the basis for such threats.

In the absence of evidence that defendant performed or authorized some act which resulted in a physical change that permanently and materially prevented defendant from using the easement or made his use of the easement severely burdensome on the servient tenement, the trial court was not authorized under [Civil Code section 811](#) to extinguish defendant's easement. As the record *****780** contains no evidence of such an act, the extinguishment of defendant's easement cannot be upheld and must be stricken from the judgment.

2.-5. *

*****32** C., D. *

CONCLUSION

The trial court's order extinguishing defendant's easement is hereby stricken, and the trial court is ordered to modify the judgment to so **[*770]** reflect. As so modified, the judgment is affirmed. Plaintiffs shall recover their costs.

Cottle, P. J., and Bamattre-Manoukian, J., concurred.

A petition for a rehearing was denied March 5, 1997, and the opinion was modified to read as printed above.

End of Document

* See footnote, *ante*, page 754.

* See footnote, *ante*, page 754.



Caution

As of: October 18, 2026 7:14 AM Z

Rivera v. Minnich

Supreme Court of the United States

March 25, 1987, Argued ; June 25, 1987, Decided

No. 86-98

Reporter

483 U.S. 574 *; 107 S. Ct. 3001 **; 97 L. Ed. 2d 473 ***; 1987 U.S. LEXIS 2891 ****; 55 U.S.L.W. 5075

RIVERA v. MINNICH

Prior History: [****1] APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

Disposition: [509 Pa. 588, 506 A. 2d 879](#), affirmed.

Core Terms

paternity, terminate, paternity proceeding, standard of proof, preponderance standard, parental relationship, putative father, preponderance, parent-child, convincing

Case Summary

Procedural Posture

Appellant father sought review of the judgment of the Supreme Court of Pennsylvania, which held in favor of appellee mother that the proper burden of proof in an action to establish paternity was a preponderance of the evidence.

Overview

The mother, unwed, filed a complaint in state court against the father to establish paternity and her right to child support. The trial judge denied the father's trial motion requesting a jury instruction stating that paternity must be established by clear and convincing evidence. Pursuant to Pa. Stat. Ann. Tit. 42, § 6704g (1982), the jury applied the preponderance of the evidence standard and rendered a verdict in favor of the mother. The state supreme court affirmed. On direct appeal, the court affirmed and held that the preponderance standard

was the proper standard to be applied in paternity actions. The court found that the majority of the states adhered to this standard. The court also rejected the father's contention that because the clear and convincing standard was required to terminate a parent-child relationship, then it must be required to create it, as well. The permanent destruction of the parent-child relationship in a termination proceeding required that a higher standard be applied. So too did the fact that a paternity action takes place between private individuals, as do most civil actions, whereas the termination action is one between the parent and the state.

Outcome

The court affirmed the judgment of the state supreme court holding that the proper burden of proof to be applied in an action to establish paternity is a preponderance of the evidence.

LexisNexis® Headnotes

Family Law > Paternity & Surrogacy > General Overview

[HN1](#) **Family Law, Paternity & Surrogacy**

See Pa. Stat. Ann. Tit. 42, § 6704(g) (1982).

Constitutional Law > ... > Case or

Controversy > Constitutionality of
Legislation > General Overview

Family Law > Paternity & Surrogacy > General
Overview

HN2 Case or Controversy, Constitutionality of Legislation

A legislative judgment that is not only consistent with the dominant opinion throughout the country but is also in accord with the traditions of our people and our law is entitled to a powerful presumption of validity when it is challenged under the [Due Process Clause of the Fourteenth Amendment](#).

Family Law > Paternity &
Surrogacy > Establishing Paternity > General
Overview

Family Law > Parental Duties &
Rights > Duties > Support of Children

Family Law > Paternity & Surrogacy > General
Overview

HN3 Paternity & Surrogacy, Establishing Paternity

The putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law.

Constitutional Law > Substantive Due
Process > Scope

Family Law > Parental Duties &
Rights > Duties > Care & Control of Children

HN4 Constitutional Law, Substantive Due Process

When an unwed father demonstrates a full

commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.

Family Law > Parental Duties &
Rights > Termination of Rights > General
Overview

Family Law > Paternity & Surrogacy > General
Overview

HN5 Parental Duties & Rights, Termination of Rights

Even when the parents have attained the level of fitness required by the State, they have no means similar to the double jeopardy defense by which they can forestall future termination efforts.

Lawyers' Edition Display

Decision

Pennsylvania statute requiring determination by preponderance of evidence of paternity of child born out of wedlock held to comply with [due process clause of Fourteenth Amendment](#).

Summary

An unmarried woman filed a complaint for child support in the Common Pleas Court of Lancaster County, Pennsylvania, alleging that the defendant was the father of her son. Before trial, the defendant requested the court (1) to rule that a Pennsylvania statute--which governs proceedings brought against a defendant to establish his paternity of a child born out of wedlock and which specifies that the burden of proof shall be by a preponderance of the evidence--violated the [due](#)

[process clause of the Fourteenth Amendment to the Federal Constitution](#), and (2) to instruct the jury that paternity must be established by clear and convincing evidence. The trial court denied the motion, and the jury, applying the preponderance standard, unanimously found that the defendant was the father of the child. The trial judge then reconsidered his ruling on the burden of proof issue and granted the defendant's motion for a new trial. The woman appealed to the Pennsylvania Supreme Court, which held that the statute was constitutional and reinstated the jury's verdict, pointing out that the standard (1) was entitled to the presumption that legislative enactments are valid, and (2) was the same as that approved by a majority of the jurisdictions which regard paternity suits as civil proceedings ([509 Pa 588](#), [506 A2d 879](#)).

On appeal, the United States Supreme Court affirmed. In an opinion by Stevens, J., joined by Rehnquist, Ch. J., and White, Marshall, Blackmun, Powell, and Scalia, JJ., it was held that (1) a determination of paternity by the preponderance of the evidence standard complies with the [due process clause of the Fourteenth Amendment](#), because (a) the standard is the one applied most frequently in litigation between private parties in every state and, more specifically, is the same standard that is applied in paternity litigation in the majority of American jurisdictions that regard such proceedings as civil in nature, and (b) such a legislative judgment is entitled to a powerful presumption of validity when it is challenged under the [due process clause of the Fourteenth Amendment](#); and (2) the holding in [Santosky v Kramer \(1982\) 455 US 745, 71 L Ed 2d 599, 102 S Ct 1388](#)--that the Federal Constitution requires clear and convincing evidence before the state may terminate a parent-child relationship--is not controlling in a proceeding to determine paternity, since the collective judgment of the many state legislatures which adhere to a preponderance standard for paternity proceedings rests on legitimate and significant distinctions between termination and paternity proceedings, in that (a) there is an important difference between the

ultimate results of a judgment in the two proceedings, (b) there is an important distinction between the parties' relationship to each other in the two proceedings, and (c) there is an important difference in the finality of judgment in favor of the defendant in a termination proceeding and in a paternity proceeding.

O'Connor, J., concurred in the judgment, expressing the view that (1) in light of the special solicitude for state interests in the field of family and family-property arrangements, the flexible concept of due process does not bar Pennsylvania from providing that the litigants to a civil paternity suit are to bear the risk of factual error in roughly equal fashion, and (2) in reaching this conclusion, it is not necessary to rely upon the fact that a majority of American jurisdictions apply the same rule as Pennsylvania does.

Brennan, J., dissented, expressing the view that a determination of paternity is more significant than a resolution of a monetary dispute between private parties, since what is at stake for the defendant in a paternity proceeding is not merely the prospect of a discrete payment in satisfaction of a limited obligation, but the imposition of a lifelong relationship with significant financial, legal, and moral dimensions.

Headnotes

CONSTITUTIONAL LAW §830.7 > EVIDENCE §99.5 > due process -- determination of paternity -- preponderance of evidence -- presumption of validity -- > Headnote:

[LEdHN\[1A\]](#) [1A][LEdHN\[1B\]](#) [1B][LEdHN\[1C\]](#) [1C]

A determination of paternity in an action for child support--under a state statute specifying that the burden of proof in proceedings against a defendant to establish his paternity of a child born out of wedlock shall be by a preponderance of the

evidence--complies with the [due process clause of the Fourteenth Amendment to the Federal Constitution](#), because (1) the standard is the one applied most frequently in litigation between private parties in every state and, more specifically, is the same standard that is applied in paternity litigation in the majority of American jurisdictions that regard such proceedings as civil in nature, and (2) such a legislative judgment is entitled to a powerful presumption of validity when it is challenged under the [due process clause of the Fourteenth Amendment](#); the holding in [Santosky v Kramer \(1982\) 455 US 745, 71 L Ed 2d 599, 102 S Ct 1388](#)--that the Federal Constitution requires clear and convincing evidence before the state may terminate a parent-child relationship--is not controlling in a proceeding to determine paternity, since the collective judgment of the many state legislatures which adhere to a preponderance standard for paternity proceedings rests on legitimate and significant distinctions between termination and paternity proceedings, in that (1) there is an important difference between the ultimate results of a judgment in the two proceedings, (2) there is an important distinction between the parties' relationship to each other in the two proceedings, and (3) there is an important difference in the finality of judgment in favor of the defendant in a termination proceeding and in a paternity proceeding. (Brennan, J., dissented from this holding.)

CONSTITUTIONAL LAW §528.5 > PARENT AND CHILD §1 > due process -- unwed father --

> Headnote:

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

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the [due process clause of the Fourteenth Amendment to the](#)

[Federal Constitution](#), but the mere existence of a biological link does not merit equivalent constitutional protection.

Syllabus

Appellee, an unmarried mother, filed a child-support suit in a Pennsylvania court against appellant, alleging that he was the child's father. The judge denied appellant's pretrial motion seeking a ruling that the [Due Process Clause of the Fourteenth Amendment](#) was violated by a state statute providing that the burden of proving paternity "shall be by a preponderance of the evidence," and requesting a jury instruction that paternity must be established by clear and convincing evidence. Applying the preponderance standard, the jury found that appellant was the father, but the judge later reconsidered his ruling on the burden of proof issue and granted appellant's motion for a new trial. The Pennsylvania Supreme Court held that the statute was constitutional and reinstated the jury's verdict.

Held: Pennsylvania's preponderance standard for determining paternity is constitutionally permissible. The preponderance standard is applied most frequently in litigation between private parties in every State and, more specifically, is the standard that is applied in paternity [****2] litigation in the majority of American jurisdictions that regard such proceedings as civil in nature (as does Pennsylvania). Such a legislative judgment is entitled to a powerful presumption of validity when challenged under the Due Process Clause. This case is not controlled by the holding in [Santosky v. Kramer, 455 U.S. 745](#), that the Constitution requires clear and convincing evidence before a State may terminate the parental relationship. Appellant's contention to the contrary rests on the erroneous tacit assumption of an equivalence between the State's imposition of the legal obligations accompanying a biological relationship between parent and child and the State's

termination of a fully existing parent-child relationship. The collective judgment of the many state legislatures that adhere to a preponderance standard for paternity proceedings rests on legitimate and significant distinctions between termination and paternity proceedings. Pp. 577-582.

Counsel: William Watt Campbell argued the cause for appellant. With him on the brief was James R. Adams.

Mary Louise Barton argued the cause and filed a brief for appellee. *

[****3]

Judges: Stevens, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Marshall, Blackmun, Powell, and Scalia, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment, post, p. 582. Brennan, J., filed a dissenting opinion, post, p. 583.

Opinion by: STEVENS

Opinion

[*575] [***477] [**3002] JUSTICE STEVENS delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A]The Pennsylvania statute governing proceedings brought against a defendant

* Briefs of amici curiae urging affirmance were filed for the State of California et al. by John K. Van de Kamp, Attorney General of California, Steve White, Chief Assistant Attorney General, Jay Bloom, Supervising Deputy Attorney General, M. Howard Wayne, Deputy Attorney General, John S. Higgins, Jr., Joseph I. Lieberman, Attorney General of Connecticut, Jim Jones, Attorney General of Idaho, Neil F. Hartigan, Attorney General of Illinois, Frank J. Kelley, Attorney General of Michigan, Brian McKay, Attorney General of Nevada, Roger A. Tellinghuisen, Attorney General of South Dakota, and W. J. Michael Cody, Attorney General of Tennessee; and for the State of Oregon by Dave Frohnmayer, Attorney General, William F. Gary, Deputy Attorney General, Virginia L. Linder, Solicitor General, Michael D. Reynolds, Assistant Solicitor General, and Robert M. Atkinson, Assistant Attorney General.

to establish his paternity of a child born out of wedlock specifies that the "burden of proof shall be by a preponderance of the evidence."¹ This appeal presents the question whether a determination of paternity by that evidentiary standard complies with the [Due Process Clause of the Fourteenth Amendment](#). We agree with the Supreme Court of Pennsylvania's conclusion that applying the preponderance standard to this determination is constitutionally permissible.

[****4] [*576] I

On May 28, 1983, appellee Jean Marie Minnich, an unmarried woman, gave birth to Cory Michael Minnich. Three weeks later, appellee filed a complaint for child support in the Common Pleas Court of Lancaster County, Pennsylvania, against appellant Gregory Rivera, alleging that he was the father of her son. In advance of trial appellant requested the court to rule that the statutory burden of proof of paternity violated the [Due Process Clause of the Fourteenth Amendment](#) and to instruct the jury that paternity must be established by clear and convincing evidence. The trial judge denied the motion. Applying the preponderance standard, the jury unanimously found that appellant is the father of the child. On appellant's post-trial motions, the trial judge reconsidered his ruling on the burden of proof issue and granted appellant's motion for a new trial. Appellee appealed directly to the Pennsylvania Supreme Court, which held that the statute is constitutional and reinstated the jury's verdict. [509 Pa. 588, 506 A. 2d 879 \(1986\)](#).

¹ [HN1](#) Pennsylvania Stat. Ann., Tit. 42, § 6704(g) (Purdon 1982):

"Trial of Paternity -- Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not a trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. The burden of proof shall be by a preponderance of the evidence." (Emphasis supplied.)

The statute was repealed on October 30, 1985; its successor also provides that the burden of proof in a paternity action "shall be by a preponderance of the evidence." [23 Pa. Cons. Stat. § 4343\(a\)](#) (1985).

The State Supreme Court noted that the standard was entitled to the presumption that legislative enactments are valid, [****5] and is the same as [***478] that approved by a majority of the jurisdictions that regard paternity suits as civil proceedings. Then, after reviewing [**3003] the respective interests of the putative father, the mother, and the child, ² [****6] as well as "the interest of [*577] the Commonwealth in seeing that fathers support their children who are born out of wedlock so that those children do not become public charges," the court concluded that the preponderance standard is one that "does not unduly risk the erroneous deprivation of any of them." ³ The Chief Justice of that court dissented. Relying on our holding in [Santosky v. Kramer](#), 455

[U.S. 745 \(1982\)](#), that the Constitution requires clear and convincing evidence before the State may terminate the parental relationship, he reasoned that the same degree of proof should be required to create the relationship. ⁴ We noted probable jurisdiction, 479 U.S. 960 (1986), and now affirm.

II

[LEdHN\[1B\]](#) [1B]The preponderance of the evidence standard that the Pennsylvania Legislature has prescribed for paternity cases is the standard that is applied most frequently in litigation between private parties in every State. ⁵ More [****7] specifically, it is the [*578] same standard that is applied in paternity litigation in the majority of American jurisdictions that regard such proceedings as civil in nature. ⁶ [HN2](#) A legislative judgment that [***479] is not only consistent with the "dominant opinion" throughout the country but is also in accord with "the traditions of our people and our law," see [Lochner v. New York](#), 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), is entitled to a powerful presumption of validity when it is challenged under the [Due Process Clause of the Fourteenth Amendment](#).

²"The person alleged to be father has a legitimate interest in not being declared the father of a child he had no hand in bringing into the world. It is important to him that he not be required to provide support and direct financial assistance to one not his child. There is a legitimate concern on his part with not having a stranger declared his legal heir thereby giving that stranger potential interests, inter alia, in his estate, and Social Security Benefits. He has an interest in not being responsible for the health, welfare and education of a child not his own.

"The child born out of wedlock, on the other hand, has an interest in knowing his father and in having two parents to provide and care for him. The child's concerns include a known belonging to a certain line of descent with knowledge of any benefits or detriments inheritable from that line. Further, the child is entitled to financial assistance from each parent able to provide such support.

"The mother has an interest in receiving from the child's natural father help, financial and otherwise, in raising and caring for the child born out of wedlock. She has an interest in seeing that her child has two responsible parents." [509 Pa., at 593-594, 506 A. 2d, at 882](#).

³[Id., at 596-597, 506 A. 2d, at 883](#). Earlier the court had described the public interest more fully:

"The Commonwealth has an interest in its infant citizens having two parents to provide and care for them. There is a legitimate interest in not furnishing financial assistance for children who have a father capable of support. The Commonwealth is concerned in having a father responsible for a child born out of wedlock. This not only tends to reduce the welfare burden by keeping minor children, who have a financially able parent, off the rolls, but it also provides an identifiable father from whom potential recovery may be had of welfare payments which are paid to support the child born out of wedlock." [Id., at 594, 506 A. 2d, at 882](#).

⁴See [id., at 600, 506 A. 2d, at 885](#).

⁵"The typical civil case involv[es] a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion." [Addington v. Texas](#), 441 U.S. 418, 423 (1979). See also E. Cleary, McCormick on Evidence 956 (3d ed. 1984) (preponderance standard applies to "the general run of issues in civil cases").

⁶See 10 Am. Jur. 2d, Bastards 837, 922 (1983); National Conference of State Legislatures, In the Best Interest of the Child: A Guide to State Child Support and Paternity Laws 102-103 (1982). A few States apply a more stringent standard of proof to a civil paternity action. See, e. g., [In re Wayne County Dept. of Social Services v. Williams](#), 63 N. Y. 2d 658, 660, 468 N. E. 2d 705 (1984); [E. E. v. F. F.](#), 106 App. Div. 2d 694, 483 N. Y. S. 2d 748 (1984) (clear and convincing evidence); [Va. Code § 20-61.1](#) (Supp. 1986); [Jones v. Robinson](#), 229 Va. 276, 287, 329 S. E. 2d 794, 800 (1985) (proof beyond a reasonable doubt).

[****8] [**3004] The converse of this proposition is that a principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions. In each of the three cases in which we have held that a standard of proof prescribed by a state legislature was unconstitutional, our judgment was consistent with the standard imposed by most jurisdictions. Thus, in explaining our conclusion that proof of a criminal charge beyond a reasonable doubt is constitutionally required, we stated:

"Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment [*579] about the way in which law should be enforced and justice administered.' *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)." *In re Winship*, 397 U.S. 358, 361-362 (1970).

Similarly, in *Addington v. Texas*, 441 U.S. 418 (1979), our rejection of Texas' argument that a preponderance standard of proof was sufficient in a civil [****9] proceeding to commit an individual to a state mental hospital involuntarily was supported by the fact that a majority of the States had chosen to apply either a clear and convincing standard, *id.*, at 431-432, nn. 6, 7, and 8, or the even more demanding criminal law standard, *id.*, at 430-431, and n. 5. And in *Santosky v. Kramer*, which presented the question whether New York could extinguish a pre-existing parent-child relationship without requiring greater factual certainty than a fair preponderance of the evidence, we began our analysis by noting that 38 jurisdictions required a higher standard of proof in proceedings to terminate parental rights. 455 U.S., at 749-750.

Appellant's principal argument is that the standard

of proof required by our holding in *Santosky* to terminate the parent-child relationship is also constitutionally required to create it. This view of *Santosky* rests on the tacit assumption of an equivalence between the State's imposition of the legal obligations accompanying a biological relationship between parent and child and the State's [***480] termination of a fully existing parent-child [****10] relationship. We are unable to accept this assumption. The collective judgment of the many state legislatures which adhere to a preponderance standard for paternity proceedings rests on legitimate and significant distinctions between termination and paternity proceedings.

[LEdHN\[1C\]](#) [1C][LEdHN\[2A\]](#) [2A]First, there is an important difference between the ultimate results of a judgment in the two proceedings. Resolving the question whether there is a causal connection between an alleged physical act of a putative father and the subsequent birth of the plaintiff's child sufficient to impose financial liability on the father will not trammel any pre-existing [*580] rights; [HN3](#) the putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law. In the typical contested paternity proceeding, the defendant's nonadmission of paternity represents a disavowal of any interest in providing the training, nurture, and loving protection that are at the heart of the parental relationship protected by the Constitution. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).⁷

[**3005] Rather, the primary [****11] interest of the defendant is in avoiding the serious economic consequences that flow from a court order that

⁷ [HN4](#) "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' *Caban* [v. *Mohammed*, 441 U.S. 380, 392 (1979)], his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' *Id.*, at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds." 463 U.S., at 261.

establishes paternity and its correlative obligation to provide support for the child. In contrast, in a termination proceeding the State is seeking to destroy permanently all legal recognition of the parental relationship. In *Santosky*, we described the parent's desire for, and right to, the companionship, care, and custody of his or her children as "an interest far more precious than any property right." [455 U.S., at 758-759](#). The State's determination that the relationship between a parent and his or her child ought to be stripped of legal recognition abrogates many aspects of this precious interest. The difference between the two types of proceedings is thus a difference that is directly related to the degree of proof that is appropriately required. For, as we have said in explanation of the need for clear and convincing evidence in certain proceedings, "rights once confirmed should not be lightly revoked." [Schneiderman v. United States, 320 U.S. 118, 125 \(1943\)](#).

[LEdHN/2B](#) [2B]

[****12] Second, there is an important distinction between the parties' relationship to each other in the two proceedings. As is [*581] true of the other types of proceedings in which the Court has concluded that the Constitution demands a higher standard of proof than a mere preponderance of the evidence, the contestants in a termination proceeding are the State and an individual. Because the State has superior resources, see [Santosky, 455 U.S., at 763](#), and because an adverse [***481] ruling in a criminal, civil commitment, or termination proceeding has especially severe consequences for the individuals affected, it is appropriate for society to impose upon itself a disproportionate share of the risk of error in such proceedings. See [In re Winship, 397 U.S., at 370-372](#) (Harlan, J., concurring); [Addington, 441 U.S., at 427](#); [Santosky, 455 U.S., at 766](#). Unlike those proceedings, in a paternity suit the principal adversaries are the mother and the putative father, each of whom has an extremely important, but nevertheless relatively equal, interest in the outcome. Each would suffer in a similar way the

consequences [****13] of an adverse ruling; thus, it is appropriate that each share roughly equally the risk of an inaccurate factual determination. Nor does the child's interest in the proceeding favor placing a disproportionate share of the risk of error on either party. Surely, from the child's point of view, a lower standard of proof increases the possibility of an erroneous determination that the defendant is his or her father, while a higher standard of proof increases the risk of a mistaken finding that the defendant is not his or her true father and thus may not be required to assume responsibility for his or her support. The equipoise of the private interests that are at stake in a paternity proceeding supports the conclusion that the standard of proof normally applied in private litigation is also appropriate for these cases.⁸

[****14] [*582] Finally, there is an important difference in the finality of judgment in favor of the defendant in a termination proceeding and in a paternity proceeding. As we pointed out in *Santosky*, "natural parents have no 'double jeopardy' defense" against the State's repeated efforts to terminate parental rights. [455 U.S., at 764](#). [**3006] If the State initially fails to win termination, as New York did in that case, see [id., at 751, n. 4](#), it always can try once again as family circumstances change or as it gathers more or better evidence. [HN5](#) "Even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts." [Id., at 764](#). The imposition of a higher standard of proof protects the parents, and to some degree the child, from renewed efforts to sever their familial ties. In

⁸ Unlike the State Supreme Court, we place no reliance on the State's interest in avoiding financial responsibility for children born out of wedlock. If it were relevant, the State's financial interest in the outcome of the case would weigh in favor of imposing a disproportionate share of the risk of error upon it by requiring a higher standard of proof. In our view, however, the State's legitimate interest is in the fair and impartial adjudication of all civil disputes, including paternity proceedings. This interest is served by the State's independent judiciary, which presumably resolves these disputes unaffected by the State's interest in minimizing its welfare expenditures.

contrast, a paternity suit terminates with the entry of a final judgment that bars repeated litigation of the same issue under normal principles of civil litigation. There is no "striking asymmetry in [the parties'] litigation options." *Ibid.*

The judgment [****15] of the Supreme Court of Pennsylvania is therefore

Affirmed.

Concur by: O'CONNOR

Concur

JUSTICE [***482] O'CONNOR, concurring in the judgment.

I believe that the judgment of the Pennsylvania Supreme Court should be affirmed for the reasons set forth by JUSTICE REHNQUIST in dissent in [Santosky v. Kramer, 455 U.S. 745, 770-791 \(1982\)](#). "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements." [United States v. Yazell, 382 U.S. 341, 352 \(1966\)](#). Particularly [*583] in light of that special solicitude, I cannot find that the flexible concept of due process, [Santosky v. Kramer, supra, at 774-776](#) (REHNQUIST, J., dissenting), bars Pennsylvania from providing that the litigants to a civil paternity suit are to bear the risk of factual error in roughly equal fashion. I do not find it necessary to this conclusion to rely upon the fact that the majority of American jurisdictions apply the same rule as Pennsylvania does. Cf. *ante*, at 577-578. Nor do I agree that the differences between termination and paternity proceedings are [****16] substantial enough to justify the different conclusion reached in *Santosky*. Accordingly, I concur in the Court's judgment but not its opinion.

Dissent by: BRENNAN

Dissent

JUSTICE BRENNAN, dissenting.

I cannot agree with the Court that a determination of paternity is no more significant than the resolution of "'a monetary dispute between private parties.'" *Ante*, at 577-578, n. 5, quoting [Addington v. Texas, 441 U.S. 418, 423 \(1979\)](#). What is at stake for a defendant in such a proceeding is not merely the prospect of a discrete payment in satisfaction of a limited obligation. Rather, it is the imposition of a lifelong relationship with significant financial, legal, and moral dimensions.

Financially, a paternity determination results in ongoing, open-ended support responsibility. A parent is responsible for supporting a child at least until the child is 18, see, e. g., [23 Pa. Cons. Stat. § 4321\(2\)](#) (1985), and perhaps longer. [§ 4321\(3\)](#). The father cannot be certain of the amount of support that will be necessary, for this will depend on the needs of the particular child over the years. [§ 4322](#). See also Uniform Marriage and Divorce Act, 9A U. L. A. [§ 309](#) (1979 and [****17] Supp. 1987). If his child receives any form of public assistance, all the father's real and personal property are deemed available to the State for reimbursement. Pa. Stat. Ann., Tit. 62, [§ 1974](#) (1968 and Supp. 1987). The financial commitment imposed upon a losing defendant in a paternity [***584] suit is thus far more onerous and unpredictable than the liability borne by the loser in a typical civil suit.

The obligation created by a determination of paternity is enforced by significant legal sanctions. Failure to comply with a support obligation may result in the attachment of income, [23 Pa. Cons. Stat. § 4348](#) (1985), and a 10% penalty may be imposed for any amount in arrears for more than 30 days if the failure to pay is deemed willful. [***3007] [§ 4348\(c\)](#). In addition, a father's state and federal income tax refunds may be confiscated to pay alleged arrearages. [42 U. S. C. § 664 \(1982 ed., Supp. III\)](#); [23 Pa. Cons. Stat. § 4307](#) (1985). Furthermore, failure to satisfy the [***483] support obligation may result in incarceration. A

delinquent father may be declared in contempt of court and imprisoned for up to six months, § 4345, and may also be found guilty of a misdemeanor [****18] punishable by imprisonment for up to two years. [18 Pa. Cons. Stat. §§ 4304, 1104](#) (1982). A paternity determination therefore establishes a legal duty whose assumption exposes the father to the potential loss of both property and liberty.

"Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship." [Little v. Streater, 452 U.S. 1, 13 \(1981\)](#). The judgment that a defendant is the father of a particular child is the pronouncement of more than mere financial responsibility. It is also a declaration that a defendant assumes a cultural role with distinct moral expectations. Most of us see parenthood as a lifelong status whose responsibilities flow from a wellspring far more profound than legal decree. Some men may find no emotional resonance in fatherhood. Many, however, will come to see themselves far differently, and will necessarily expand the boundaries of their moral sensibility to encompass the child that has been found to be their own. The establishment of a parental relationship [****19] may at the outset have fewer emotional consequences than the termination of one. It has, [*585] however, the potential to set in motion a process of engagement that is powerful and cumulative, and whose duration spans a lifetime. In this respect, a paternity determination is far more akin to the proceeding involved in [Santosky v. Kramer, 455 U.S. 745 \(1982\)](#), than to a suit for breach of contract.¹

¹ Its consequences are also at least as serious as those resulting from other proceedings in which Pennsylvania demands proof by clear and convincing evidence, such as proof of a change of domicile, [McKenna v. McKenna, 282 Pa. Super. 45, 422 A. 2d 668 \(1980\)](#); reformation of contract on grounds of mistake, [Boyertown National Bank v. Hartman, 147 Pa. 558, 23 A. 842 \(1892\)](#); proof of adverse possession, [Stevenson v. Stein, 412 Pa. 478, 195 A. 2d 268 \(1963\)](#);

[****20] Finally, the losing defendant in a paternity suit is subject to characterization by others as a father who sought to shirk responsibility for his actions. See, e. g., [County of Hennepin v. Brinkman, 378 N. W. 2d 790, 794](#), (Minn. 1985) ("The social stigma resulting from an adjudication of paternity cannot be ignored") (citation omitted); [Tennessee Dept. of Human Services v. Vaughn, 595 S. W. 2d 62, 67 \(Tenn. 1980\)](#) (losing defendant in paternity proceeding "branded as the bearer of a bastard child"); [Commonwealth v. Jacobs, 220 Pa. Super. 31, 37, 279 A. 2d 251, 254 \(1971\)](#) ("Inevitably, paternity proceedings, whether labeled civil or criminal, result in a certain community stigma following a judicial acknowledgment of the parents' impropriety"). He is seen as a parent apparently impervious to the moral demands of that role, who must instead be coerced by law to fulfill his obligation. Regardless of whether a satisfying parent-child relationship ultimately develops, the father will be seen as a person whose initial participation in it was involuntary. By contrast, the losing party in a [***484] [****21] civil suit is rarely the target of such social opprobrium.²

[*586] [**3008] A paternity proceeding thus implicates significant property and liberty interests of the defendant. These can be protected without significantly burdening the interests of the mother, the child, or the State. Modern blood-grouping tests, such as the human leukocyte antigen (HLA) test used in this case, provide an extremely reliable means of determining paternity in most cases. [****22] See generally L. Sussman, *Paternity Testing By Blood Grouping* (2d ed. 1976). The probability of paternity in this case, for instance,

and a claim for wages for personal services rendered to a decedent, [Mooney's Estate, 328 Pa. 273, 194 A. 893 \(1937\)](#).

² Of course, a child also has an interest in not being stigmatized as illegitimate. As we have stressed, however, an illegitimate child cannot be held responsible for his or her status. See [Trimble v. Gordon, 430 U.S. 762 \(1977\)](#). By contrast, the stigma that attaches to the father of such a child reflects a judgment regarding moral culpability. In addition, as I discuss in text this page, I believe that the child's interest in legitimation would not be significantly burdened by the employment of a "clear and convincing" standard.

was calculated at 94.6%, Brief for Appellee 2, a level of certainty achieved quite frequently through the use of such tests. See, e. g., [Jones v. Robinson](#), 229 Va. 276, 282, 329 S. E. 2d 794, 798 (1985) (probability of paternity calculated at 99.97% and "at least" 99% in two consolidated appeals).

It is likely that the requirement that paternity be proved by clear and convincing evidence would make a practical difference only in cases in which blood test results were not introduced as evidence. In such cases, what I wrote over 35 years ago is still true: "in the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity." [Cortese v. Cortese](#), 10 N. J. Super. 152, 156, 76 A. 2d 717, 719 (1950). Recognition of this fact, as well as of the gravity of imposing a parental relationship upon a defendant, should lead us to require a more demanding standard of proof than a mere preponderance [****23] of the evidence.

I respectfully dissent.

References

10 Am Jur 2d, Bastards 107; 16A Am Jur 2d, Constitutional Law 851; 59 Am Jur 2d, Parent and Child 5

USCS, [Constitution, Amendment 14](#)

US L Ed Digest, Constitutional Law 830.7

Index to Annotations, Custody and Support of Children; Degree and Standard of Proof; Due Process; Legitimacy of Children; Preponderance of Evidence; Presumptions and Burden of Proof

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.

Validity of state statute providing for termination of parental rights. [22 ALR4th 774](#).

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Caution

As of: October 18, 2026 7:14 AM Z

Romo v. Y-3 Holdings, Inc.

Court of Appeal of California, Second Appellate District, Division Four

March 20, 2001, Decided

No. B136617.

Reporter

87 Cal. App. 4th 1153 *; 105 Cal. Rptr. 2d 208 **; 2001 Cal. App. LEXIS 213 ***; 17 I.E.R. Cas. (BNA) 694; 2001 Daily Journal DAR 2867

LUPE S. ROMO, Plaintiff and Respondent, v. Y-3 HOLDINGS, INC., et al., Defendants and Appellants.

Prior History: [***1] APPEAL from a judgment of the Superior Court of Los Angeles County. Super. Ct. No. TC012328. Rose Hom, Judge.

Disposition: Affirmed.

Case Summary

Procedural Posture

Respondent employee filed a lawsuit against appellants alleging, inter alia, wrongful termination. Appellants filed a motion to compel arbitration, as outlined in an agreement contained within an employee handbook. The Superior Court, Los Angeles County (California), denied the motion with prejudice because the respondent's complaint alleged that her signature on the handbook's acknowledgement was fraudulently induced.

Overview

On appeal, the appellants reprised their argument that respondent's signature following the employee acknowledgment of the handbook bound her to the arbitration provision of the handbook. The court disagreed. Based on the disparate language between the arbitration portion and the remaining portion of the handbook, the court concluded that the portions were separate and severable agreements. The employee acknowledgment did not refer to the agreement to arbitrate. Additionally, the language

within the arbitration section suggested it was a complete stand alone agreement. The fact that the arbitration section contemplated a signature from the respondent separate from that required in the employee acknowledgement also suggested a separate and severable agreement. Since the respondent never signed the arbitration section of the handbook, the court held that the parties did not agree to binding arbitration and affirmed the denial of the motion.

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN1 See [Cal. Civ. Proc. Code § 1281.2](#).

Civil Procedure > Pretrial Matters > Alternative Dispute Resolution > General Overview

Civil Procedure > ... > Alternative Dispute Resolution > Arbitration > General Overview

Business & Corporate Compliance > Alternative Dispute Resolution > Mandatory ADR

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Mandatory ADR

Business & Corporate Compliance > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Pretrial Matters > Alternative
Dispute Resolution > Validity of ADR Methods

Civil Procedure > Appeals > Reviewability of Lower
Court Decisions > Timing of Appeals

Contracts Law > Remedies > Specific Performance

Labor & Employment Law > Collective Bargaining &
Labor Relations > Labor Arbitration > Enforcement

HN2 The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. There is no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate. It follows that when presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute. Courts apply general California contract law to determine whether the parties formed a valid agreement to arbitrate.

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Contracts Law > Contract Interpretation > General
Overview

HN3 Interpretation of a written document where extrinsic evidence is unnecessary is a question of law for independent review by the court of appeal.

Contracts Law > Contract Interpretation > General
Overview

HN4 In interpreting contracts, the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. [*Cal. Civ. Code, § 1641.*](#)

Contracts Law > Contract Interpretation > General
Overview

HN5 In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. [*Cal. Civ. Proc. Code § 1858.*](#)

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court denied an employer's motion to compel arbitration of a former employee's cause of action arising out of her termination, concluding that no agreement to arbitrate resulted from plaintiff's signature at the end of the employee's handbook, which contained an arbitration provision. (Superior Court of Los Angeles County, No. TC012328, Rose Hom, Judge.)

The Court of Appeal affirmed. The court held that no agreement to arbitrate existed. The employee handbook contained two separate and severable agreements: (1) the agreement to arbitrate which was the subject of one section; and (2) an agreement to be bound by the "benefits," "policies," "rules" and "procedures" contained within the remaining sections of the employee handbook. Plaintiff did not sign the arbitration section, but did sign an acknowledgement at the end the other sections. The fact that the arbitration section contemplated a signature from the employee separate from that required after the heading "employee acknowledgement" at the end of the handbook, as well as a signature by the employer, suggested a separate and severable agreement. Read as a whole, the arbitration agreement within

the employment handbook contemplated that the arbitration provision would be effective only if both parties assented to that provision. Since the parties did not assent to that provision, they did not agree to binding arbitration. (Opinion by Hastings, J., with Vogel (C. S.), P. J., and Epstein, J., concurring.)

Headnotes

CA(1) (1)

Arbitration and Award § 5—Arbitration Agreements—Construction and Effect.

--Under Code Civ. Proc., § 1281.2, the right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. There is no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate. Thus, when presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute. Courts apply general California contract law to determine whether the parties formed a valid agreement to arbitrate.

CA(2a) (2a) CA(2b) (2b)

Arbitration and Award § 5.5—Arbitration Agreements—Construction and Effect—Unsigned Provision in Employee's Handbook.

--The trial court properly denied an employer's motion to compel arbitration of a former employee's cause of action arising out of her termination, concluding that no agreement to arbitrate resulted from plaintiff's signature at the end of the employee's handbook, which contained an arbitration provision. The employee handbook contained two separate and severable agreements: (1) the agreement to arbitrate which was the subject of one section; and (2) an agreement to be bound by the "benefits," "policies," "rules" and "procedures"

contained within the remaining sections of the employee handbook. Plaintiff did not sign the arbitration section, but did sign an acknowledgement at the end the other sections. The fact that the arbitration section contemplated a signature from the employee separate from that required after the heading "employee acknowledgment" at the end of the handbook, as well as a signature by the employer, suggested a separate and severable agreement. Read as a whole, the arbitration agreement within the employment handbook contemplated that the arbitration provision would be effective only if both parties assented to that provision. Since the parties did not assent to that provision, they did not agree to binding arbitration.

[See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 494.]

CA(3) (3)

Contracts § 25—Interpretation—Question of Law.

--The interpretation of a written document, where extrinsic evidence is unnecessary, is a question of law for independent review by the appellate court.

Counsel: Lewis, D'Amato, Brisbois & Bisgaard, Daniel Parker Jett and John L. Barber for Defendants and Appellants.

Gail C. Kaplan; Pine & Pine and Norman Pine for Plaintiff and Respondent.

Judges: Opinion by Hastings, J., with Vogel (C.S.), P. J., and Epstein, J., concurring.

Opinion by: HASTINGS

Opinion

[*1155] [**209] HASTINGS, J.

Appellants Y-3 Holdings, Inc., and Merv York appeal from an order denying arbitration of a

lawsuit filed by respondent, ex-employee Lupe S. Romo, arising from termination of her employment. We conclude that the trial court did not err in concluding no agreement to arbitrate existed between the parties, and we affirm.

STATEMENT OF FACTS

Respondent was continuously employed by appellants from April 3, 1980, through her firing on May 15, 1998.

On May 13, 1999, respondent filed a complaint alleging the following causes of action: breach of implied in fact contract; violation of [California Constitution, article I, section 1](#) and [article I, section 3](#); wrongful termination in violation of public policy; fraud; and breach [***2] of the covenant of good faith and fair dealing. A first amended complaint alleging the same basic claims was filed on June 3, 1999.

On July 27, 1999, appellants filed a "Notice of Motion and Motion . . . to Dismiss or Stay Action and Compel Arbitration." The motion alleged an agreement to arbitrate contained within an employee handbook distributed to respondent in January 1998. A copy of the 44-page employee handbook was attached as an exhibit to the motion.

The handbook is divided into nine sections headed by Roman numerals. Section No. VIII is contained at pages 39-41 and is titled "Mutual Agreement to Arbitrate Claims." At page 39, under the subheading "Agreement to Arbitrate," THE FOLLOWING IS CONTAINED: "Except as otherwise provided in this Agreement [not relevant to our discussion], the company and the employee hereby consent to the resolution by arbitration of all claims or controversies for which a court otherwise would be authorized by law to grant relief, in any way arising out of, relating to or associated with the employee's employment with the company, or its termination ('claims'), that the company may have against the employee or that the employee may have against [***3] the company or against its officers, directors, employees or agents in their

capacity as such or otherwise. The claims covered by this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination, including but not [**210] limited to discrimination based on race, sex, religion, national origin, age, marital status, handicap, disability or medical condition; claims for benefits, except as excluded in the [*1156] following paragraph [not relevant]; and claims for violation of any federal, state or other governmental constitution, statute, ordinance or regulation."

The final page of section VIII, page 41, contains lines for dates and signatures of the employee and the employer, neither of which is signed or dated.

At pages 43-44, after section IX of the employee handbook, titled "Arbitration Procedure," is an unnumbered heading titled "Employee Acknowledgment" which has a place for date and signature by the employee. Page 44 contains the date "3-30-98" and is signed by respondent. The acknowledgment states as follows:

"I acknowledge receipt [***4] of my copy of the handbook entitled 'Y-3 Holdings, Inc. Employee Handbook.' I have read and understood its contents, including company policies and rules governing my conduct, wages and working conditions as an employee. I understand that this Handbook supersedes and replaces any prior company Handbook. I agree to abide by these policies and rules during my employment, and understand the consequences if I do not.

"I hereby acknowledge that my employment is 'at-will,' that because I may resign at any time for any reason, the company may terminate my employment at any time with or without cause; I understand that no employee or other representative of the company can modify this policy in any manner or enter into any agreement that is contrary to this policy unless it is in writing and signed by the President of the company.

"I understand that any and all benefits, policies and procedures set forth herein are statements of general company policy and shall, in no manner, be construed to imply a contract or a guarantee of continuing employment with the company or employment for any specific length of time.

"I understand that the company reserves the right to eliminate, modify and [***5] improve any an[d] all of its wages, hours and working conditions, including the benefits, policies and rules explained herein at any time with or without notice.

"I understand that all representations by any manager or other employee of the company that conflict in any respect with any matter set forth in this handbook are invalid unless specifically acknowledged in writing by the President of the company."

Appellants' motion was set for hearing on September 14, 1999.

[*1157] On August 6, 1999, in response to service of appellants' motion, counsel for respondent filed an ex parte application to shorten time to file a motion for relief to file a second amended complaint. In support of the application, counsel for respondent advised the court that she was unaware of the arbitration agreement contained within the employee handbook and desired to file a second amended complaint adding a claim for fraud in connection with respondent's signature at the end of the handbook. The application was granted, respondent filed the motion for leave to file a second amended complaint which was granted, and a second amended complaint was deemed filed on September 2, 1999. The second amended [***6] complaint added a cause of action alleging that respondent's signature obtained by appellants after the heading titled "Employee Acknowledgment" was obtained by fraud.

Respondent filed opposition to appellants' motion to compel arbitration raising a number of arguments. First, she argued that respondent and appellants never entered into the arbitration

agreement contained within the employee handbook. "The arbitration provision in the Employee Handbook is unenforceable because no [**211] contract was formed. [Respondent] did not intend to arbitrate her disputes with [appellants] and did not physically sign an arbitration agreement. She, however, did sign an ambiguous document drafted by [appellants] which does not include the arbitration provision." ALTERNATIVELY, SHE ARGUED: "Even if a contract is found to have been formed, it is void because it was fraudulently executed and because it is both procedurally and subjectively unconscionable."

Respondent's declaration was filed in support of her opposition. She declared that she did not date and sign that portion of the employee handbook providing for arbitration, section VIII, but that she did sign that portion of the handbook [***7] titled "Employee Acknowledgment" after being told it would not trigger the arbitration provisions of section VIII.

Appellants filed a reply in which they did not contest respondent's declaration that she did not sign under section VIII. Instead, they argued that respondent's signature of the "Employee Acknowledgment" at the end of the employee agreement bound her to "all matters included within the employee handbook." They also contested her position that her signature was obtained by fraud and argued any evidence offered by her on the issue was barred by the parol evidence doctrine.

The trial court denied the motion in a minute order: "Motion is denied with prejudice. The Court finds that since the Second Amended Complaint alleges that plaintiff was fraudulently induced into signing the Employee Handbook acknowledgment (pages 44 and 44A of the Employee Handbook), [*1158] and that the acknowledgment which immediately follows the section entitled 'Mutual Agreement to Arbitrate Claims' (pages 41 and 41A of the Employee Handbook) was never apparently signed, the arbitration provisions of the employee

handbook may not be enforceable."

A timely notice of appeal was filed by appellants. [***8] [HN1 HN2](#)

DISCUSSION

[CA\(1\)](#) (1) "[Code of Civil Procedure section 1281.2](#) provides in material part: 'On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy . . . , the court shall order the petitioner and the respondent to arbitrate the controversy *if it determines that an agreement to arbitrate the controversy exists . . .*'. . . Thus, 'the right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.]' . . . There is no public policy in favor of forcing arbitration of issues the parties have not agreed to arbitrate. [Citation.] It follows that when presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute. [P] We apply general California contract law to determine whether the parties formed a valid agreement [***9] to arbitrate. [Citations.]" ([Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co. \(1998\) 68 Cal. App. 4th 83, 88-89 \[80 Cal. Rptr. 2d 147\]](#), italics added by *Marcus & Millichap.*)

[CA\(2a\)](#) (2a) On appeal, appellants reprise their argument that respondent's signature following the "Employee Acknowledgment" heading of the employee handbook binds her to the terms of arbitration contained within section VIII of the employee handbook. We disagree.

[CA\(3\)](#) (3) First, we do agree with appellants that [HN3](#) "interpretation of a written document where extrinsic evidence is unnecessary is a question of law for independent review by the Court of Appeal. ([Parsons v. Bristol Development Co. \(1965\) 62 Cal. 2d 861, 865-866 \[44 Cal. Rptr. 767, 402 P.2d 839\]](#); [Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. \(1992\) 4 Cal. App. 4th 1538, 1559 \[6 Cal. Rptr. 2d 698\]](#).)"

[HN4](#) In interpreting contracts, "the whole of a contract is to be taken [***10] together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." ([Civ. Code, § 1641.](#)) Additionally: [HN5](#) "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not [***1159] to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." ([Code Civ. Proc., § 1858.](#))

[CA\(2b\)](#) (2b) Utilizing these principles, we conclude that the employee handbook contains two separate and severable agreements: (1) the agreement to arbitrate which is the subject of section VIII; and (2) an agreement to be bound by the "benefits," "policies," "rules" and "procedures" contained within the remaining sections of the employee handbook. Our conclusion is based upon the disparate language between section VIII and the remaining portions of the employee handbook.

The preamble to section [***11] VIII begins by identifying "this Mutual Agreement to Arbitrate" as "'the Agreement.'" Thereafter, the terms of section VIII consistently refer to "this Agreement" or to "this Agreement to Arbitrate." Nowhere within that portion of the employee agreement titled "Employee Acknowledgment" (pp. 43-44), the portion signed by respondent, is there any reference to "the Mutual Agreement to Arbitrate" or to "the Agreement" or to an "Agreement to Arbitrate." In fact, the words "arbitrate" and "arbitration" are not found within this portion of the employee handbook. Rather, the terms used are "benefits," "rules," "policies" and "procedures." These terms appear to be explained within paragraph 3 at page 44: "I understand that any and all *benefits, policies and procedures* set forth herein are statements of general company *policy* and shall, in no manner, *be construed to imply a contract.* . . ." (Italics added.) We cannot construe this language to include reference to "the Agreement" from section VIII.

Additionally, the language within section VIII suggests that it is intended as a complete stand-alone agreement. Under the subheading titled "Sole and Entire Agreement," *****12]** THE FOLLOWING IS FOUND: "This is the complete agreement of the parties *on the subject of arbitration of disputes*, except for any arbitration provision contained in any pension or benefit plan.

¹ This Agreement supersedes any prior or contemporaneous oral or written agreement or understanding on the subject. In executing this Agreement, neither party is relying on any representation, oral or written, on the subject of the effect, enforceability or meaning of this Agreement, except as specifically set forth in this Agreement." (Italics added.)

The fact that section VIII contemplates a signature from the employee separate from that required after the heading "Employee Acknowledgment," as well as a signature by the employer, suggests a separate and severable agreement.

[*1160] Finally, that this is meant to be a completely stand-alone agreement is confirmed by the following language immediately preceding the signature lines of section VIII: "Employee Acknowledges *****13]** That He or She Has Carefully Read This Agreement, That He or She Understands Its Terms, that All Understandings Between the Employee and the Company Relating to the Subjects Covered in This Agreement Are Contained in It. . . ." (Capitals in original.)

We borrow language from [*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.*, supra, 68 Cal. App. 4th at page 91](#):

"In sum, we conclude that, read as a whole, the [arbitration agreement within the employment handbook] in this case contemplated that the arbitration of disputes provision would be effective only if both [parties] assented to that [particular] provision. Since the [parties] did not assent to this [particular] provision the parties did not agree to

binding arbitration."

DISPOSITION

The order denying arbitration is affirmed. Costs are awarded to respondent.

Vogel (C.S.), P. J., and Epstein, J., concurred.

End of Document

¹ Not argued by appellants to be at issue.



Caution

As of: October 18, 2026 7:14 AM Z

Sail'er Inn, Inc. v. Kirby

Supreme Court of California

May 27, 1971

L.A. No. 29811

Reporter

5 Cal. 3d 1 *; 485 P.2d 529 **; 95 Cal. Rptr. 329 ***; 1971 Cal. LEXIS 230 ****; 3 Fair Empl. Prac. Cas. (BNA) 550; 46 A.L.R.3d 351; 3 Empl. Prac. Dec. (CCH) P8222

SAIL'ER INN, INC., et al., Petitioners, v.
EDWARD J. KIRBY, as Director, etc., et al.,
Respondents

Disposition: [****1] For the reasons stated, we find [section 25656](#) invalid. Let the peremptory writ of mandate issue compelling the Director of the Department of Alcoholic Beverage Control to cease license revocation proceedings based upon [section 25656 of the Business and Professions Code](#) and to cease enforcement of the section.

Core Terms

classification, bartender, sex, commerce clause, alcoholic beverage, civil rights, liquor, bona fide occupational qualification, occupation, female, male, equal protection clause, licensee, intoxicating liquor, inferior, license, evil, right to work, state power, state law, guideline, liquor license, interstate, commerce, customer, vocation, hire, void

Case Summary

Procedural Posture

Petitioners, liquor license holders, sought a writ of mandate to prevent respondent, the department of alcoholic beverage control, from revoking their licenses because they hired women bartenders, in violation of [Cal. Bus. & Prof. Code § 25656](#). The court took jurisdiction, not requiring exhaustion of administrative remedies, even though petitioners were not charged but wished to employ female

bartenders and feared enforcement.

Overview

[Cal. Bus. & Prof. Code § 25656](#) banned women who were not the licensee or the wife of the licensee, from tending bar. Petitioners, liquor license holders, claimed that it violated [Cal. Const. art. XX, § 18](#), [42 U.S.C.S. § 2000e-2](#), and the [equal protection clauses of U.S. Const. amend. XIV](#) and [Cal. Const. art. I, §§ 11, 21](#). The court found that [Cal. Bus. & Prof. Code § 25656](#) violated [Cal. Const. art. XX, § 18](#). The desire to protect women from occupational hazards was not a reason to exclude them. The court held that the statute violated the Civil Rights Act of 1964. It was not a bona fide occupational qualification exception because bartending was neither dangerous nor required strength, unpossessed by women, to maintain order. The court held that the statute violated the equal protection clauses of United States and California Constitutions. It limited the fundamental right of women to pursue a lawful vocation. Courts were divided on whether classifications based on sex should be treated as suspect. The court held them suspect because sex was immutable and had a stigma of inferiority. The court applied strict scrutiny and held that the state had no compelling interest.

Outcome

A peremptory writ of mandate was issued in favor of petitioners, liquor license holders, compelling respondent, director of the department of alcoholic beverage control, to cease enforcement and license

revocation proceedings based upon an person. [Cal. Civ. Proc. § 1085](#).
unconstitutional ban on women bartenders. The ban
violated the Civil Rights Act of 1964, the Equal
Protection Clauses of federal and state
Constitutions, and the California Constitution.

LexisNexis® Headnotes

Administrative Law > Judicial
Review > Remedies > Mandamus

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

Administrative Law > Judicial
Review > Reviewability > Exhaustion of
Remedies

Administrative Law > Separation of
Powers > Constitutional Controls > General
Overview

Civil Procedure > Remedies > Writs > General
Overview

Civil Procedure > Appeals > Appellate
Jurisdiction > State Court Review

HN1 Remedies, Mandamus

Mandamus, like certiorari, is an appropriate writ for the review of the exercise of quasi-judicial power by constitutionally authorized statewide agencies. While ordinarily mandamus will issue only after final order or decision of the administrative agency, a limited number of exceptions to the exhaustion doctrine have long been recognized in this state. The writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or

Constitutional Law > Equal
Protection > Gender & Sex

Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > General Overview

HN2 Equal Protection, Gender & Sex

[Cal. Const. art. XX, § 18](#) provides that a person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation, or profession.

Governments > Legislation > Interpretation

HN3 Legislation, Interpretation

Provisions of the Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise. [Cal. Const. art. I, § 22](#).

Business & Corporate Compliance > Labor &
Employment > Discrimination > Statutory
Prohibition of Gender & Sex Based
Discrimination
Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > Federal & State
Interrelationships

Constitutional Law > Equal
Protection > Gender & Sex

Governments > State & Territorial
Governments > Legislatures

Constitutional Law > State Constitutional
Operation

HN4 Discrimination, Statutory Prohibition of Gender & Sex Based Discrimination

[Cal. Const. art. XX, § 18](#) constitutes a restraint upon the law-making power of the state, and legislative enactments contrary to its provisions are void.

Constitutional Law > Equal
Protection > Gender & Sex

Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > General Overview

HN5 Equal Protection, Gender & Sex

[Ex parte Hayes, 33 P. 337, 98 Cal. 555 \(1893\)](#), is overruled, which took the patently untenable position that [Cal. Const. art. XX, § 18](#) does not limit the power of the state to regulate the manner in which retail liquor businesses are conducted. [Cal. Const. art. XX, § 22](#), which provides for alcoholic beverage control, states that constitutional provisions inconsistent with [Cal. Const. art. XX, § 22](#) are repealed. § 18 is in no way inconsistent with [Cal. Const. art. XX, § 22](#).

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Constitutional Law > Supremacy
Clause > General Overview

HN6 Governments, Civil Rights Act of 1964

A state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law is void under the [Supremacy Clause of the United States Constitution](#). U.S. Const. art. VI, [cl. 2](#).

Constitutional Law > Prohibition

Criminal Law & Procedure > ... > Alcohol
Related Offenses > Distribution &
Sale > Elements

Transportation Law > Interstate
Commerce > Federal Powers

Criminal Law & Procedure > Criminal
Offenses > Alcohol Related Offenses > General
Overview

Criminal Law & Procedure > ... > Alcohol
Related Offenses > Distribution &
Sale > General Overview

HN7 Constitutional Law, Prohibition

U.S. Const. amend. XXI, § 2 provides that the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Constitutional Law > Congressional Duties &
Powers > Commerce Clause > General
Overview

Constitutional Law > Prohibition

HN8 Congressional Duties & Powers, Commerce Clause

When national prohibition was terminated by U.S. Const. amend. XXI, § 1, U.S. Const. amend. XXI, § 2 was added as a "saving clause" to protect the laws of states which chose to retain prohibition against a possible conflict with the commerce clause.

Constitutional Law > Prohibition

Criminal Law & Procedure > Criminal
Offenses > Alcohol Related Offenses > General
Overview

Transportation Law > Interstate
Commerce > Federal Powers

Constitutional Law > Congressional Duties &
Powers > Commerce Clause > General
Overview

Criminal Law & Procedure > ... > Alcohol
Related Offenses > Transportation > General
Overview

HN9 Constitutional Law, Prohibition

Since [U.S. Const. amend. XXI](#), the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause.

Constitutional Law > Congressional Duties &
Powers > Commerce Clause > General
Overview

Governments > Legislation > Interpretation

Constitutional Law > Prohibition

HN10 Congressional Duties & Powers, Commerce Clause

Both [U.S. Const. amend XXI](#) and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Constitutional Law > Equal
Protection > Gender & Sex

Business & Corporate Compliance > Labor &
Employment > Discrimination > Statutory
Prohibition of Gender & Sex Based
Discrimination
Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > Federal & State
Interrelationships

HN11 Governments, Civil Rights Act of 1964

Section 2000e-2(a) of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000e-2\(a\)](#) makes it unlawful to hire or to limit, segregate, or classify employees in any way which would tend to deprive an employee of employment opportunities on the basis of sex. [Section 2000e-2\(e\)](#) permits an exception only where there is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Constitutional Law > Equal
Protection > Gender & Sex

Business & Corporate Compliance > Labor &
Employment > Discrimination > Statutory
Prohibition of Gender & Sex Based
Discrimination
Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > Federal & State
Interrelationships

HN12 Governments, Civil Rights Act of 1964

See [42 U.S.C.S. § 2000e-2\(a\)](#).

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Constitutional Law > Equal
Protection > Gender & Sex

Business & Corporate Compliance > Labor &
Employment > Discrimination > Statutory
Prohibition of Gender & Sex Based
Discrimination
Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > Federal & State
Interrelationships

HN13 Governments, Civil Rights Act of 1964

See [42 U.S.C.S. § 2000e-2\(e\)](#).

Administrative Law > Judicial
Review > Standards of Review

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > General Overview

Labor & Employment Law > Regulators > US
Equal Employment Opportunity
Commission > General Overview

HN14 Judicial Review, Standards of Review

Guidelines promulgated by the Equal Employment
Opportunity Commission ([29 C.F.R. § 1604.1](#)) are
entitled to great deference.

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Constitutional Law > Equal
Protection > Gender & Sex

Labor & Employment Law > Regulators > US
Equal Employment Opportunity
Commission > General Overview

Business & Corporate Compliance > Labor &
Employment > Discrimination > Statutory
Prohibition of Gender & Sex Based
Discrimination
Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > Federal & State
Interrelationships

HN15 Governments, Civil Rights Act of 1964

Assumptions of the comparative employment
characteristics of women in general and stereotyped
characterizations of the sexes do not warrant the
application of the bona fide occupational
qualification exception. [29 C.F.R. § 1604.1\(a\)\(1\)](#).

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Constitutional Law > Equal
Protection > Gender & Sex

Business & Corporate Compliance > Labor &
Employment > Discrimination > Statutory
Prohibition of Gender & Sex Based

Discrimination
Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > Federal & State
Interrelationships

Labor & Employment Law > Regulators > US
Equal Employment Opportunity
Commission > General Overview

HN16 Governments, Civil Rights Act of 1964

See [29 C.F.R. § 1604.1\(b\)\(2\)](#).

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Constitutional Law > Equal
Protection > Gender & Sex

Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > General Overview

Labor & Employment Law > Regulators > US
Equal Employment Opportunity
Commission > General Overview

HN17 Governments, Civil Rights Act of 1964

The test of a bona fide occupational qualification is whether all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.

Civil Rights Law > Protection of
Rights > Federally Assisted Programs > Civil
Rights Act of 1964
Business & Corporate
Compliance > Governments > Civil Rights Act
of 1964

Constitutional Law > Equal
Protection > Gender & Sex

Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > General Overview

Labor & Employment Law > Regulators > US
Equal Employment Opportunity
Commission > General Overview

HN18 Governments, Civil Rights Act of 1964

Whether a condition constitutes a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise is a matter of evidence.

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN19 Judicial Review, Standards of Review

The California and federal tests for equal protection are substantially the same.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Criminal Law & Procedure > Criminal
Offenses > Alcohol Related Offenses > General
Overview

HN20 Equal Protection, Nature & Scope of Protection

The power of the state to regulate alcoholic beverages is necessarily subject to the demands of the [equal protection clause of U.S. Const. amend. XIV](#).

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN21 Equal Protection, Nature & Scope of Protection

The Supreme Court of California follows the two-level test employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause. In the area of economic regulation, the United States Supreme Court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. On the other hand, in cases involving "suspect classifications" or touching on "fundamental interests," the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Constitutional Law > Substantive Due
Process > Scope

HN22 Equal Protection, Nature & Scope of Protection

The state may not arbitrarily foreclose any person's right to pursue an otherwise lawful occupation. The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the

Fourteenth Amendment to secure.

Business & Corporate Compliance > Labor &
Employment > Discrimination > Statutory
Prohibition of Gender & Sex Based
Discrimination
Labor & Employment
Law > Discrimination > Gender & Sex
Discrimination > Federal & State
Interrelationships

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN23 Discrimination, Statutory Prohibition of Gender & Sex Based Discrimination

The California legislature accords statutory recognition to the right to work by declaring the opportunity to seek, obtain and hold employment without discrimination a civil right. *Cal. Lab. Code §1411*. Limitations on this right may be sustained only after the most careful scrutiny.

Constitutional Law > Equal
Protection > Gender & Sex

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN24 Equal Protection, Gender & Sex

[*Hargens v. Alcoholic Bev. etc. App. Bd.*, 69 Cal. Rptr. 868, 263 Cal.App.2d 601 \(1968\)](#), and [*People v. Jemnez*, 121 P.2d 543, 49 Cal.App.2d Supp. 739 \(1942\)](#), are disapproved.

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

Constitutional Law > Equal Protection > Nature

& Scope of Protection

Constitutional Law > Equal
Protection > Gender & Sex

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN25 Common Law Writs, Mandamus

[Cal. Bus. & Prof. Code § 25656](#) is unconstitutional under the equal protection clauses of the state and federal Constitutions.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an original proceeding in mandamus in the Supreme Court, petitioners challenged the constitutionality of [Bus. & Prof. Code, § 25656](#), prohibiting females from tending bar except in certain situations.

The Supreme Court held that the statute was unconstitutional as violative of [Cal. Const., art. XX, § 18](#), declaring that a person may not be disqualified because of sex from entering or pursuing a lawful business, vocation, or profession, and also as violative of the equal protection clauses of the federal and state Constitutions. The court held, further, that the state statute under attack was invalid as to certain licensees as being in conflict with [42 U.S.C. § 2000e-2](#), a part of the Civil Rights Act of 1964, and ordered the issuance of a peremptory writ of mandate compelling the Director of the Department of Alcoholic Beverage Control to cease license revocation proceedings based on [Bus. & Prof. Code, § 25656](#), and to cease enforcement of that statute. (Opinion by Peters, J., expressing the unanimous view of the court.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to McKinney's Digest

CA(1) (1)

Administrative Law § 125 — Judicial Review and Control — Exhaustion of Administrative Remedies.

-- Where a person is placed in the untenable situation of having to choose whether to obey possibly conflicting federal and state laws and face a penalty under the one he chooses to disobey, it would be improper to require him to exhaust his administrative remedies as a prerequisite to an application for judicial relief.

CA(2) (2)

Administrative Law § 134 — Judicial Review and Control — Mandamus.

-- Mandamus is an appropriate writ for the review of the exercise of quasi-judicial power by constitutionally authorized statewide agencies, such as the Department of Alcoholic Beverage Control.

CA(3) (3)

Administrative Law § 132 — Judicial Review and Control — Certiorari.

-- Certiorari is an appropriate writ for the review of the exercise of quasi-judicial power by constitutionally authorized statewide agencies, such as the Department of Alcoholic Beverage Control.

CA(4) (4)

Administrative Law § 126 — Judicial Review and Control — Exhaustion of Administrative Remedies — Exceptions to Doctrine.

-- The general rule that mandamus will issue only after final order or decision of the administrative agency which is involved is subject to a limited number of exceptions.

CA(5) (5)

Intoxicating Liquors § 30 — Licenses and Permits — Mandamus.

-- Mandate to prevent revocation of liquor licenses by the Department of Alcoholic Beverage Control for hiring female bartenders in violation of [Bus. & Prof. Code, § 25656](#), is available to petitioners charged with violating that statute, and is also available to petitioners not yet charged, but who wish to employ female bartenders and fear enforcement of the statute by the department.

CA(6) (6)

Mandamus § 6 — Conditions Affecting Issuance — Inadequacy of Legal Remedy.

-- The issuance of an alternative writ of mandate by the Supreme Court constitutes a determination that the legal remedy is inadequate in the particular case, and that the court's exercise of its jurisdiction in the case is proper.

CA(7) (7)

Constitutional Law § 162 — Equal Protection of Laws, Class Legislation and Uniformity of Operation — Bases of Classification.

-- Pursuant to [Cal. Const., art. XX, § 18](#), sex alone may not be used to exclude a person from a vocation, profession or business.

[See **Cal.Jur.2d**, Constitutional Law, § 283.]

CA(8) (8)

Constitutional Law § 162 — Equal Protection of Laws, Class Legislation and Uniformity of Operation — Bases of Classification.

-- [Cal. Const., art. XX, § 18](#), constitutes a restraint upon the law-making power of the state, and renders legislative enactments contrary to its provisions void.

CA(9) (9)

Constitutional Law § 162 — Equal Protection of Laws, Class Legislation and Uniformity of Operation — Bases of Classification.

-- [Cal. Const., art. XX, § 18](#), does not admit of exceptions based on popular notions of what is a proper, fitting, or moral occupation for persons of either sex.

CA(10) (10)

Constitutional Law § 162 — Equal Protection of Laws, Class Legislation and Uniformity of Operation — Bases of Classification.

-- [Cal. Const., art. XX, § 18](#), in no way prevents the Legislature from dealing effectively with the evils and dangers inherent in selling and serving alcoholic beverages, but merely precludes resort to legislation against women, rather than against the particular evil sought to be curbed. (Overruling [Ex Parte Hayes, 98 Cal. 555 \[33 P. 337\]](#).)

CA(11) (11)

Intoxicating Liquors § 9.26 — Alcoholic Beverage Control Act — Offenses — Female Bartenders — Validity of Statute.

-- [Bus. & Prof. Code, § 25656](#), prohibiting females from tending bar except in certain situations, is repugnant to [Cal. Const., art. XX, § 18](#), declaring that a person may not be disqualified because of sex from entering or pursuing a lawful business,

vocation, or profession, and is, therefore, void.

CA(12) (12)

Constitutional Law § 13 — Operation and Effect of Constitutions — Supremacy.

-- A state law that interferes with, or is contrary to, federal law is void under the [supremacy clause of the United States Constitution](#).

CA(13) (13)

Intoxicating Liquors § 5 — Federal Constitution and Statutes.

-- U.S. Const., Amend. XXI, § 2, relating to transportation of intoxicating liquors in violation of state laws, does not reach all alcoholic beverage situations that would otherwise fall within Congress' commerce clause powers and, furthermore, some balancing and accommodation must take place even in those situations covered by the express language of the amendment.

CA(14) (14)

Labor § 1.1 — Fair Employment Practices — Equal Employment Opportunities.

-- Title VII of the Civil Rights Act of 1964 ([42 U.S.C. §§ 2000e through 2000e-15](#)), relating to equal employment opportunities, was passed to prevent the impact of racial and sexual discrimination in employment on interstate commerce, was not enacted to regulate the flow of alcohol as a commodity in interstate commerce, and does not conflict with U.S. Const., Amend. XXI, § 2.

CA(15) (15)

Labor § 1.1 — Fair Employment Practices — Equal Employment Opportunities — Weight of

Guidelines Promulgated by Administrative Agency.

-- Guidelines promulgated by the federal Equal Employment Opportunity Commission are entitled to great deference.

CA(16) (16)

Intoxicating Liquors § 9.26 — Alcoholic Beverage Control Act — Offenses — Female Bartenders — Validity of Statute.

-- [Bus. & Prof. Code, § 25656](#), prohibiting females from tending bar except in certain situations, is not based on a bona fide occupational qualification necessary to the operation of a bar, and is, therefore, in direct conflict with [42 U.S.C. § 2000e-2](#), a part of the Civil Rights Act of 1964, prohibiting certain employment practices.

CA(17) (17)

Labor § 1.1 — Fair Employment Practices — Equal Employment Opportunities.

-- Whether a condition constitutes a "bona fide occupational qualification reasonably necessary to the normal operation of" a particular business or enterprise, within contemplation of [42 U.S.C. § 2000e-2](#), is a matter of evidence.

CA(18) (18)

Intoxicating Liquors § 9.26 — Alcoholic Beverage Control Act — Offenses — Female Bartenders — Validity of Statute.

-- [Bus. & Prof. Code, § 25656](#), prohibiting females from tending bar except in certain situations, conflicts with [42 U.S.C. § 2000e-2](#), a part of the Civil Rights Act of 1964, and, as to those liquor licensees who employ the requisite 25 employees and otherwise come within the prohibition of the federal statute, the state statute is invalid and must

fall.

CA(19) (19)

Intoxicating Liquors § 9 — Regulation — State Statutes — Constitutional Restrictions — Equal Protection.

-- The power of the state to regulate alcoholic beverages is necessarily subject to the demands of the equal protection clause of the Fourteenth Amendment.

CA(20) (20)

Constitutional Law § 120 — Fundamental Rights, Privileges and Immunities — Right to Engage in Occupations.

-- Limitations on the right to work may be sustained only after the most careful scrutiny.

CA(21) (21)

Constitutional Law § 120 — Fundamental Rights, Privileges and Immunities — Right to Engage in Occupation — Bartending as Lawful Occupation.

-- Bartending and related jobs, although carefully regulated, are lawful occupations.

CA(22) (22)

Constitutional Law § 162 — Equal Protection of Laws, Class Legislation and Uniformity of Operation — Classification — Sex as Basis.

-- With respect to constitutional equal protection provisions, sexual classifications are properly treated as suspect, particularly where made with respect to a fundamental interest, such as employment.

CA(23) (23)

Intoxicating Liquors § 2 — Regulation — Control of Improprieties.

-- The Legislature may pass laws to prevent improprieties in connection with the sale of alcoholic beverages.

CA(24) (24)

Constitutional Law § 156(4) — Equal Protection of Laws, Class Legislation and Uniformity of Operation — Reasonableness of Classification — Relation to Object and Purpose of Statute.

-- Where the class singled out by the Legislature in a statute has no necessary connection with the evil sought to be prevented, and where that evil can be directly prevented through nondiscriminatory legislation, the statute must be struck down as an invidious discrimination against that class.

CA(25) (25)

Intoxicating Liquors § 9.26 — Alcoholic Beverage Control Act — Offenses — Female Bartenders — Validity of Statute.

-- A compelling state interest in support of the classification set forth in [Bus. & Prof. Code, § 25656](#), cannot be established on the rationale that female bartenders would be an unwholesome influence on the public. (Disapproving [Hargens v. Alcoholic Beverage etc. App. Bd.](#), 263 Cal.App.2d 601 [69 Cal.Rptr. 868], and [People v. Jemnez](#), 49 Cal.App.2d Supp. 739 [121 P.2d 543], to the extent that they conflict with the views stated herein.)

CA(26) (26)

Intoxicating Liquors § 9.26 — Alcoholic Beverage Control Act — Offenses — Female Bartenders — Validity of Statute.

-- The classification created by [Bus. & Prof. Code, § 25656](#), prohibiting females from tending bar

except in certain situations, is invidious, wholly arbitrary, and unconstitutional under the equal protection clauses of the state and federal Constitutions.

Counsel: Manuel H. Miller and Julius A. Dix for Petitioners.

Richard Gladstein, Gladstein, Leonard, Patsey & Andersen, and Herma Hill Kay as Amici Curiae on behalf of Petitioners.

Thomas C. Lynch and Evelle J. Younger, Attorneys General, and Henry G. Ullerich, Deputy Attorney General, for Respondents.

Judges: In Bank. Opinion by Peters, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.

Opinion by: PETERS

Opinion

[*6] [****531**] [*****331**] Petitioners, holders of on-sale liquor licenses, seek a writ of mandate to prevent the Department of Alcoholic Beverage Control from revoking their licenses because they hired women bartenders, contrary to the prohibition contained in [section 25656 of the Business and Professions Code](#).¹ [Section \[******2**\] 25656](#) prohibits women from tending bar except when they are licensees, wives of licensees or are, singly or with their husbands, the sole shareholders of a corporation holding the license.² [******3**]

¹ Petitioners have standing to raise the constitutional rights of those women excluded from bartending because they are also criminally liable under that statute for hiring women bartenders, and face possible license revocation as well. (See [Griswold v. Connecticut \(1965\) 381 U.S. 479, 481 \[14 L.Ed.2d 510, 512-513, 85 S.Ct. 1678\]](#).)

² [Section 25656 of the Business and Professions Code](#) provides: "Every person who uses the services of a female in dispensing wine or distilled spirits from behind any permanently affixed fixture which is used for the preparation or concoction of alcoholic beverages, or in mixing alcoholic beverages containing distilled

Petitioners and amicus curiae contend that the code section violates [article XX, section 18 of the California Constitution](#), the 1964 Federal Civil Rights Act ([42 U.S.C.A. § 2000e-2](#)), and the equal protection clauses of the United States and California Constitutions.³

[****532**] [*****332**] Petitioners challenge the constitutionality of the statute on its face; no material facts are disputed.⁴ They raise important legal issues of statewide [***7**] significance. [CA\(1\) \(1\)](#) Two of them are placed in the untenable situation of having to choose whether to obey possibly conflicting federal and state laws and face a penalty under the one they choose to disobey. [******4**] In light of these extraordinary

spirits, on any premises used for the sale of alcoholic beverages for consumption on the premises, or any female who renders such services on such premises, is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than one hundred dollars (\$ 100) or by imprisonment in the county jail for not more than three months, or by both such fine and imprisonment.

"The provisions of this section do not apply to the dispensing of wine or distilled spirits or to the mixing of alcoholic beverages containing distilled spirits by any on-sale licensee, or to the dispensing of wine or distilled spirits or to the mixing of such beverages by the wife of any licensee on the premises for which her husband holds an on-sale license, or to the dispensing of wine or distilled spirits or to the mixing of such spirits by a female, when she is the sole shareholder or when she and her husband are the sole shareholders of the corporation which holds the on-sale license for the premises."

³ After the petition was filed in this case, the Fair Employment Practices Act ([Lab. Code, § 1410 et seq.](#)) barring discrimination in employment, was amended to include discrimination on the basis of sex. (Stats. 1970, ch. 1508, p. 40.) The Fair Employment Practices Act makes it an unlawful employment practice to discriminate on the basis of sex except where such discrimination is based on a bona fide occupational qualification, as does the 1964 Federal Civil Rights Act ([42 U.S.C.A. § 2000e-2](#), see section II, *infra*). Because we find [section 25656](#) invalid on other grounds, we need not reach the question whether the amendment impliedly repeals [section 25656](#).

⁴ The Attorney General concedes that petitioners Sail'er Inn, Inc. and Walter Robson each have 25 employees, thereby bringing them under the 1964 Civil Rights Act. Petitioners Angelo E. Gianone and Josephine Van Epps apparently do not have the requisite 25 employees nor does it appear that the Alcoholic Beverage Control Department has begun or threatened proceedings against them for violation of [section 25656](#).

circumstances, it would be improper to require them to exhaust their administrative remedies.

CA(2) (2) CA(3) (3) HN1 Mandamus, like certiorari, is an appropriate writ for the review of the exercise of quasi-judicial power by constitutionally authorized statewide agencies such as the Department of Alcoholic Beverage Control (*Cal. Const., art. XX, § 22*; *People v. County of Tulare*, 45 Cal.2d 317, 319 [289 P.2d 11]; *Boren v. State Personnel Board*, 37 Cal.2d 634, 637 [234 P.2d 981]; see also Kleps, *Certiorarified Mandamus Reviewed: The Courts and* [****5] *California Administrative Decisions -- 1949-1959*, 12 Stan.L.Rev. 554, 555, 563, fn. 35.) CA(4) (4) While ordinarily mandamus will issue only after final order or decision of the administrative agency, a limited number of exceptions to the exhaustion doctrine have long been recognized in this state. (See, e.g., *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787 [322 P.2d 449]; *United States v. Superior Court* (1941) 19 Cal.2d 189 [120 P.2d 26]; *Diaz v. Quitariano*, 268 Cal.App.2d 807, 812 [74 Cal.Rptr. 358].)

The writ of mandate "may be issued by any court . . . to any inferior tribunal, corporation, board, or person . . . to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person." (Italics added.) (*Code Civ. Proc., § 1085*.) In a number of cases, mandamus has been held to issue to prohibit official conduct where prohibition would not lie because the threatened official act was not judicial but ministerial in nature. (*Miller v. Greiner*, 60 Cal.2d 827, 830 [36 Cal.Rptr. 737, 389 P.2d 129]; [****6] *Perry v. Jordan*, 34 Cal.2d 87 [207 P.2d 47]; *Evans v. Superior Court*, 20 Cal.2d 186 [124 P.2d 820]; see 3 Witkin, *Cal. Procedure* (1954) § 77, pp. 2575-2577.)

CA(5) (5) Accordingly, although the remedy of certiorari, might be appropriate as to the petitioners who have been charged with violations of section

25656, mandate is also appropriate, and mandate is an appropriate remedy for those petitioners not yet charged but who wish to employ female bartenders and fear enforcement of the section by defendant.

CA(6) (6) By issuing the alternative writ, we have determined that the legal remedy is inadequate, and the exercise of our jurisdiction in this case is proper. (*San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 945 [92 Cal.Rptr. 309, 479 P.2d 669]; *Westbrook v. Mihaly* [*8] (1970) 2 Cal.3d 765, 773 [87 Cal.Rptr. 839, 471 P.2d 487]; *Hagan v. Superior Court* (1960) 53 Cal.2d 498 [2 Cal.Rptr. 288, 348 P.2d 896].)

[**533] [***333] I. Section 18 of Article XX of the State Constitution

HN2 Article XX, section 18 of the California Constitution provides that "[a] [****7] person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation, or profession." ⁵

CA(7) (7) In explicit and unqualified language, this section makes it clear that sex alone may not be used to bar a person from a vocation, profession or business. (See, e.g., *Carter v. City of Los Angeles* (1948) 31 Cal.2d 341, 346 [188 P.2d 465]; *Matter of Maguire* (1881) 57 Cal. 604.) HN3 Provisions of the Constitution are "mandatory and prohibitory, unless by express words they are declared to be otherwise." (*Cal. Const., art I, § 22*.) CA(8) (8) HN4 Section 18 constitutes a restraint upon the law-making power of the state, and legislative enactments contrary to its provisions are void.

Well before the turn of the century this [****8] court enunciated the meaning and effect to be given this section of the Constitution in a case quite similar to the instant one. *Matter of Maguire, supra*, 57 Cal. 604, held that a San Francisco

⁵ Section 18 was amended slightly by general election of November 3, 1970. Prior to that, the section read as follows: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

ordinance which prohibited women from waiting on customers between 6 p.m. and 6 a.m. in a place where liquor was sold conflicted with section 18.

Justice Thornton, expressing the opinion of three of the four justices in the majority, said: "As we understand the section, it does establish, as the permanent and settled rule and policy of this State, that *there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession* permitted by law to be entered on and pursued by those sometimes designated as the stronger sex. . . . [There] are no exceptions in this section, and neither we nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground. All these are considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; and their final [****9] and conclusive judgment has been expressed and entered in the clear and unmistakable language of the Constitution itself, . . ." (Italics added.) (*Matter of Maguire, supra*, 57 Cal. at p. 608.)⁶

[*9] *CA(9) (9)* As *Maguire* made clear, section 18 does not admit of exceptions based on popular notions of what is a proper, fitting or moral occupation for persons of either sex. Although an inability to perform the tasks required by a particular occupation, sex-linked or not, may be a justification for discrimination against job applicants, under section 18, mere prejudice, however ancient, common or socially [****10] acceptable, is not.

If section 18 is to be endowed with any force and meaning it must invalidate [section 25656](#). It is clear that bartending is a lawful vocation, that

women are as capable of mixing drinks as men, and that [section 25656](#) nonetheless disqualifies the vast majority of women from entering the bartending occupation.

The Attorney General makes two arguments based on the notion that women are incapable of tending bar. First, he suggests that the Legislature may have concluded that a male bartender or owner must be present in a liquor establishment to preserve order and protect patrons, a function which he contends a woman could not perform. This argument ignores modern day reality. Today most bars, unlike the saloons [**534] [***334] of the Old West, are relatively quiet, orderly and respectable places patronized by both men and women. Even if they were not, many bars employ bouncers whose sole job is to keep order in the establishment. Furthermore, the experience in the states which permit women to tend bar indicates that the dire moral and social problems predicted by the Attorney General do not arise. (See, e.g., *Paterson Tavern & G. O. A. v. Borough of Hawthorne* (1970) 57 N.J. 180, 186 [270 A.2d 628, 631]; [****11] *Anderson v. City of St. Paul* (1948) 226 Minn. 186, 209 [32 N.W.2d 538, 550-551] (dissenting opinion by Loring, C.J.).)

Second, the Attorney General argues that the statute was designed to protect women since fewer women can be injured by inebriated customers if they are not permitted to work behind a bar. It is difficult to believe that women working behind the bar would be more subject to such dangers than the cocktail waitresses who are now permitted to work among the customers.

But even if we assume that bartending is more dangerous than waiting on tables, there is no evidence that women bartenders are more likely than male bartenders to suffer injury at the hands of customers. The desire to protect women from the general hazards inherent in many occupations cannot be a valid ground for excluding them from those occupations under [*10] section 18. Women must be permitted to take their chances along with

⁶The fourth member of the majority, in his concurring opinion, took the position that, while sentimentality or prejudice cannot be grounds for prohibiting women from entering or pursuing a particular business or profession, the Legislature may require that the sexes pursue their chosen occupation separately where the "conjoint pursuit" of that occupation leads to indecency and immorality.

men when they are otherwise qualified and capable of meeting the requirements of their employment. (See Kanowitz, *Women and The Law* (1969) pp. 33-34.) We can no more justify denial of the means of earning a livelihood on such a basis than we could [****12] deny all women drivers' licenses to protect them from the risk of injury by drunk drivers. Such tender and chivalrous concern for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women.

CA(10) (10) A third contention raised by the Attorney General is that [section 25656](#) was intended to prevent improprieties and immoral acts. Section 18 in no way prevents the Legislature from dealing effectively with the evils and dangers inherent in selling and serving alcoholic beverages; it merely precludes resort to legislation against women rather than against the particular evil sought to be curbed.⁷

[****13] We reiterate what Justice Thornton said so long ago in *Maguire* in response to the contention that permitting women to serve drinks leads to immorality: "[The] law-making power of the State is ample to make laws affecting both sexes alike, and not inhibited by the Constitution, which will accomplish the object so much desired - to prevent practices hurtful to public morality. The Constitution was not framed with a disregard of the important considerations urged upon us in this regard. It merely directs that a law which is framed to accomplish this object by affecting or operating upon lawful callings, shall affect both sexes alike." ([Matter of Maguire, supra, 57 Cal. at p. 609.](#))

⁷ **HN5** We overrule [Ex parte Hayes \(1893\) 98 Cal. 555 \[33 P. 337\]](#), which took the patently untenable position that article XX, section 18, does not limit the power of the state to regulate the manner in which retail liquor businesses are conducted. Article XX, section 22, which provides for alcoholic beverage control, states that constitutional provisions inconsistent with section 22 are repealed. Section 18 is in no way inconsistent with section 22.

CA(11) (11) [Section 25656](#) is repugnant to [article XX, section 18, of the California Constitution](#) and is therefore void.

II. The 1964 Civil Rights Act

Petitioners urge that [section 25656](#) conflicts with the nondiscriminatory hiring provision contained in title VII of the federal Civil Rights Act of 1964 ([42 U.S.C.A. § 2000e-2 \(a\)](#)). **CA(12) (12)** **HN6** A state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law is void under the [****14] [supremacy \[**535\] \[***335\] clause of the United States Constitution](#) (U.S. Const., art. VI, *cl. 2*; [Free v. Bland \(1962\) 369 U.S. 663, 666 \[*11\] \[8 L.Ed.2d 180, 183, 82 S.Ct. 1089\]](#); [Gibbons v. Ogden \(1824\) 22 U.S. \(9 Wheat.\) 1, 11 \[6 L.Ed. 23, 25\]](#); [Richards v. Griffith Rubber Mills \(D.Ore. 1969\) 300 F.Supp. 338, 340](#); [Rosenfeld v. Southern Pacific Company \(C.D.Cal. 1968\) 293 F.Supp. 1219, 1224](#)).

The Attorney General urges, however, that the federal Civil Rights Act does not apply because section 2 of the Twenty-first Amendment to the United States Constitution precludes federal interference with state regulation of alcoholic beverages. **HN7** Section 2 provides that "[the] transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." (Italics added.) The Attorney General contends that this amendment "cedes vast plenary powers" to the states to regulate alcoholic beverages "unfettered" by the commerce clause. Since the 1964 Civil Rights Act was [****15] passed pursuant to Congress' commerce clause power, it is contended that a state's power to regulate liquor is also unfettered by the 1964 Civil Rights Act.

This argument must fail. The Twenty-first Amendment clearly was not intended to work such a wholesale "repeal" of the commerce clause in the area of alcoholic beverage control. **HN8** When national prohibition was terminated by section 1 of the Twenty-first Amendment, section 2 was added

as a "saving clause" to protect the laws of states which chose to retain prohibition against a possible conflict with the commerce clause. (See [*United States v. Colorado Wholesale W. & Liq. Deal. Ass'n.* \(D.Colo. 1942\) 47 F.Supp. 160, 162](#), revd. [*144 F.2d 824*](#), revd. [*324 U.S. 293 \[89 L.Ed. 951, 65 S.Ct. 661\]*](#); [*Joseph Triner Corporation v. Arundel* \(D.Minn. 1935\) 11 F.Supp. 145, 146-147.](#)) The language of the amendment clearly reflects the purpose, since it prohibits the importation or transporting of liquor only into states where such importation will be in violation of the laws thereof.

Section 2 represents the incorporation of a somewhat narrowed version of the Webb-Kenyon Act (37 [****16] Stats. 699, [*27 U.S.C.A. § 122 \(1913\)*](#)) into the Constitution. ([*Washington Brewers Institute v. United States* \(9th Cir. 1943\) *137 F.2d 964, 967*](#), cert. den. [*320 U.S. 776 \[88 L.Ed. 465, 64 S.Ct. 89\]*](#); Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause* (1946) 55 Yale L.J. 815, 816-818.) The Webb-Kenyon Act was passed in 1913 under the title "[an] Act divesting intoxicating liquors of their interstate character in certain cases." Its purpose was to "'prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught.'" ([*Seaboard Air Line Ry. \[*12\] v. North Carolina* \(1917\) *245 U.S. 298, 303 \[62 L.Ed. 299, 303, 38 S.Ct. 96\]*](#).)

Although some early cases painted state powers under section 2 of the Twenty-first Amendment with a broad brush, later decisions have taken a position more in keeping with the original intent of the amendment. (See, e.g., [*Seagram & Sons v. Hostetter* \(1966\) *384 U.S. 35, 42 \[16 L.Ed.2d 336, 342, 86 S.Ct. 1254\]*](#); [****17] [*Hostetter v. Idlewild Liquor Corp.* \(1964\) *377 U.S. 324 \[12 L.Ed.2d 350, 84 S.Ct. 1293\]*](#).) In [*Hostetter v. Idlewild Liquor Corp., supra*](#), the Supreme Court restated the effect of the Twenty-first Amendment: "[*HN9*](#) 'Since the Twenty-first Amendment . . . the right of a state to

prohibit or regulate the *importation* of intoxicating liquor is not limited by the commerce clause.'" (Italics added.) ([*Id., at p. 330 \[12 L.Ed.2d at p. 355\]*](#).) The court rejected the argument that the Twenty-first Amendment gave the states plenary power over alcoholic beverages: "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors [**536] [***336] is concerned would . . . be an absurd over-simplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." ([*Id., at pp. 331-332 \[12 L.Ed.2d at p. 356\]*](#).)

The court then went on to declare [****18] that [*HN10*](#) "[both] the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." ([*Id., at p. 332 \[12 L.Ed.2d at p. 356\]*](#).)⁸

[*CA\(13\) \(13\)*](#) Thus it is apparent that the Twenty-first Amendment not only does not reach all alcoholic beverage cases which would otherwise fall within Congress' commerce clause powers, but even in those situations covered by the express language of the amendment, some balancing and accommodation must take place.

[*Section 25656*](#) is not even tangentially [****19] related to "transportation or importation" of liquor into California, and therefore does not fall within the literal language of the Twenty-first Amendment. The statute merely [*13] regulates

⁸See Note, *The Supreme Court, 1963 Term: State Taxation and Regulation* (1964) 78 Harv.L.Rev. 143, 237, 240, which concludes that the recognition of an accommodation between the Twenty-first Amendment and the commerce clause "casts doubt on cases holding that the amendment frees the states completely from commerce clause limitations."

employment at the retail level, and has nothing to do with the flow of alcoholic beverages into the state.

But even if the amendment were broadly construed to cover all state laws regulating the liquor business, the interests and issues at stake in employment discrimination cases present no conflict with the intent and purposes of the Twenty-first Amendment. [CA\(14\)](#) (14) Title VII of the Civil Rights Act was passed to prevent the impact of racial and sexual discrimination in employment on interstate commerce. It was not enacted to regulate the flow of alcohol as a commodity in interstate commerce. Since the aim of the Civil Rights Act is so wholly different from that of the Twenty-first Amendment, the two provisions in no way clash with each other. This is an appropriate case for the accommodation suggested in [Hostetter v. Idlewild Liquor Corp., supra](#).

We turn to the question whether [section 25656](#) is in direct conflict with section 2000e-2 of the Civil Rights Act of 1964. [****20] ([42 U.S.C.A. § 2000e-2](#).)

[HN11 Section 2000e-2\(a\)](#) makes it unlawful to hire or to "limit, segregate, or classify" employees in any way which would tend to deprive an employee of employment opportunities on the basis of sex.⁹ [Section 2000e-2\(e\)](#) permits an exception only where there is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . ." ¹⁰

⁹ [HN12 Section 2000e-2\(a\)](#) provides: "It shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

¹⁰ [HN13 Section 2000e-2\(e\)](#) states in relevant part: "Notwithstanding

[****21] [**537] [***337] In determining whether prohibiting women from tending bar falls within the bona fide occupational qualification exception to the federal statute, we are necessarily influenced by the [HN14](#) guidelines promulgated by the Equal Employment Opportunity Commission. ([29 C.F.R. § 1604.1](#).) [CA\(15\)](#) (15) These guidelines, which are entitled to "great deference" ([Udall v. Tallman \(1965\) 380 U.S. 1, 16 \[13 L.Ed.2d 616, 625, 85 S.Ct. 792\]](#)), state that "[HN15](#) assumptions of the comparative employment characteristics" [*14] of women in general ([29 C.F.R. § 1604.1\(a\)\(1\)\(i\)](#)) and "stereotyped characterizations" of the sexes ([29 C.F.R. § 1604.1\(a\)\(1\)\(ii\)](#)) do not warrant the application of the bona fide occupational qualification exception. Thus, under the guidelines only an individual inquiry into a particular woman applicant's qualifications, or, at most, a clearly justifiable general classification with respect to a particular job category meets the requirements of [section 2000e-2](#).¹¹

[****22] [CA\(16\)](#) (16) Applying the Equal Employment Opportunity Commission's guidelines, one court has stated [HN17](#) the test of a bona fide occupational qualification is whether "all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." ([Weeks v. Southern Bell Telephone & Telegraph Company \(5th Cir. 1969\) 408 F.2d 228, 235](#).)

any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, . . ."

¹¹ " [HN16](#) The Commission believes that [protective] State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. . . ." ([29 C.F.R. § 1604.1\(b\)\(2\)](#).)

Courts, following the guidelines, have invalidated weight-lifting restrictions for women ([Bowe v. Colgate-Palmolive Company](#) (7th Cir. 1969) 416 F.2d 711; [Richards v. Griffith Rubber Mills](#), *supra*, 300 F.Supp. 338; [Rosenfeld v. Southern Pacific Company](#), *supra*, 293 F.Supp. 1219), hours limitations ([Caterpillar Tractor Co. v. Grabiec](#) (S.D.Ill. 1970) 317 F.Supp. 1304) and exclusionary job categories ([Weeks v. Southern Bell Telephone & Telegraph Company](#), *supra*, 408 F.2d 228 (switchman); [McCrimmon v. Daley](#) (E.D.Ill. 1970) 2 F.E.P. Cases 971 (barmaid ordinance)). [McCrimmon](#) specifically held that a Chicago ordinance permitting only women liquor licensees, or the wives, daughters, sisters or mothers [****23] of licensees to tend bar conflicts with title VII of the Civil Rights Act.

Applying these standards to [section 25656](#), we must hold that that statute is not based upon a bona fide occupational qualification necessary to the operation of a bar and is therefore in direct conflict with section 2000e-2 of the Civil Rights Act.

Certainly, as we state above, women as a class are as capable as men of mixing drinks and are permitted to do so in many states. The technical capabilities of women are not, however, at issue here. The Legislature concedes this point when it exempts women licensees and wives of male licensees from the general prohibition without regard to their capacity to prepare spirits for consumption by patrons of liquor establishments.

[*15] The more serious contention that a bartender must be physically strong enough to protect himself against inebriated customers and to maintain order in the bar, and that women as a class are unable to do so, must also be rejected. [CA\(17\) \(17\) HN18](#) Whether a condition constitutes "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" is a matter of evidence. ([Phillips v. Martin Marietta Corp.](#) (1971) 400 U.S. 542 [27 L.Ed.2d 613, 91 S.Ct. 496].) [****24] The state has made no showing whatever that bartenders are

endangered by their work and require physical strength, not possessed by women, for self defense and to maintain order.

The reason for the lack of such a showing is apparent. As we have pointed out, [**538] [***338] the saloon days of the Wild West are long gone. Nowadays the typical bar does not provide a setting for violence and danger, if in fact it ever did. At most, the dangers feared by the Attorney General may justify discrimination only in a particular establishment where, first, the employer can prove that such problems arise, and, second, that "substantially all women" lack the requisite strength to deal with such problems. ([Weeks v. Southern Bell Telephone & Telegraph Co.](#), *supra*, 408 F.2d 228, 235.) Such perils cannot serve as the basis for a blanket statewide statutory prohibition against the employment of women bartenders.

[CA\(18\) \(18\)](#) We conclude that [section 25656](#) conflicts with section 2000e-2 of the Civil Rights Act. As to those liquor licensees who employ the requisite 25 employees and otherwise come within the prohibition of [section 2000e-2](#), [section 25656](#) is invalid and must fall. ¹² [****25]

III. Equal Protection

Finally, it is contended that [section 25656](#) violates the [equal protection clause of the Fourteenth Amendment to the United States Constitution](#) and [article I, sections 11 and 21, of the California Constitution](#) ¹³ in that it prohibits women from tending bar unless they or their husbands hold the liquor license; but does not impose a comparable

¹² We cannot agree with the contrary reasoning in [Krauss v. Sacramento Inn](#) (E.D.Cal. 1970) 314 F.Supp. 171, nor are we bound by its holding; see, e.g., [People v. Luros](#) (1971) 4 Cal.3d 84, 91, fn. 8 [92 Cal.Rptr. 833, 480 P.2d 633]; [In re Whitehorn](#) (1969) 1 Cal.3d 504, 511, fn. 2 [82 Cal.Rptr. 609, 462 P.2d 361], holding that state Supreme Courts are not bound by lower federal court rulings on constitutional questions.

¹³ [HN19](#) The California and federal tests for equal protection are substantially the same. ([County of L.A. v. Southern Cal. Tel. Co.](#) (1948) 32 Cal.2d 378, 389 [196 P.2d 773].)

limitation on men.

[****26] We recognize that the state has particularly broad powers with respect to the manufacture of and traffic in alcoholic beverages because of the [*16] dangers to the public health and safety inherent in their sale and use. (See Allied Properties v. Dept. of Alcoholic Beverage Control (1959) 53 Cal.2d 141, 147 [346 P.2d 737].) CA(19) (19) Nonetheless, HN20 the power of the state to regulate alcoholic beverages is necessarily subject to the demands of the equal protection clause of the Fourteenth Amendment. (See, e.g., Seagram & Sons v. Hostetter, *supra*, 384 U.S. 35, 50 [16 L.Ed.2d 336, 347]; Parks v. Allen (5th Cir. 1970) 426 F.2d 610, 613; Hornsby v. Allen (5th Cir. 1964) 326 F.2d 605, 609.)¹⁴

[****27] Before deciding whether the statute violates the equal protection clauses of the state and federal Constitutions we must determine the proper standards for reviewing the classification which the statute creates.

HN21 We have followed the two-level test employed by the United States Supreme Court in reviewing legislative classifications under the equal protection clause. (In re Antazo (1970) 3 Cal.3d 100, 110-111 [89 Cal.Rptr. 255, 473 P.2d 999]; Westbrook v. Mihaly, *supra*, 2 Cal.3d 765, 784-785; Purdy & [**539] [***339] Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 578-579

¹⁴ State Board v. Young's Market Co. (1936) 299 U.S. 59, 64 [81 L.Ed. 38, 41, 57 S.Ct. 77], cited in the Attorney General's brief, is not to the contrary. In that case, the Supreme Court upheld California's license fee on imported beer against an equal protection attack, stating that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth." The case stands for the proposition that the power given the states under the Twenty-first Amendment to forbid or regulate importation of alcoholic beverages creates two classes of beverage, those imported from out of state and domestic beverages. (See, Hornsby v. Allen, *supra*, 326 F.2d 605, 609.) Since the Twenty-first Amendment creates this particular classification, and the Fourteenth and Twenty-first Amendments are of equal dignity, the classification created by the Twenty-first Amendment cannot be invalidated by the Fourteenth. The instant case does not involve the classification created by the Twenty-first Amendment.

[79 Cal.Rptr. 77, 456 P.2d 645]; see also, Note: *Developments in the Law -- Equal Protection* (1969) 82 Harv.L.Rev. 1065, 1076-1077, 1088.)

"In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. [Citations.] [para.] On the other hand, in cases involving 'suspect classifications' or touching [****28] on 'fundamental interests,' the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. [Citations.] Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* [*17] to further its purpose." (Westbrook v. Mihaly, *supra*, 2 Cal.3d 765, 784-785.)

The instant case compels the application of the strict scrutiny standard of review, first, because the statute limits the fundamental right of one class of persons to pursue a lawful profession, and, second, because classifications based upon sex should be treated as suspect.

We have held that HN22 the state may not arbitrarily foreclose any person's right to pursue an otherwise lawful occupation. (Purdy & Fitzpatrick v. State of California, *supra*, 71 Cal.2d 566, 579.) The right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness. As early as 1915, the United States Supreme Court declared [****29] that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure." (Truax v. Raich (1915) 239 U.S. 33, 41 [60 L.Ed. 131, 135, 36 S.Ct. 7].) HN23 The California Legislature accords statutory recognition to the right to work by

declaring the opportunity to seek, obtain and hold employment without discrimination a civil right. (*Lab. Code*, § 1411.) **CA(20) (20)** Limitations on this right may be sustained only after the most careful scrutiny. (*Purdy & Fitzpatrick v. State of California*, *supra*, 71 Cal.2d 566, 579; cf. *Allgeyer v. Louisiana* (1897) 165 U.S. 578, 589-590 [41 L.Ed. 832, 835-836, 17 S.Ct. 427]; *Truax v. Raich*, *supra*, 239 U.S. 33, 41; *Endler v. Schutzbank* (1968) 68 Cal.2d 162, 169, fn. 4, 169-170 [65 Cal.Rptr. 297, 436 P.2d 297]; *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 235 [18 Cal.Rptr. 501, 368 P.2d 101].) **CA(21) (21)** Bartending and related jobs, though carefully regulated, are lawful [****30] occupations and the strict standard of review is therefore justified on this ground.

We find that strict review is also required because of the characteristic upon which the classification in the statute is based. The United States Supreme Court has not designated classifications based on sex "suspect classifications" requiring close scrutiny and a compelling state justification for their constitutionality. ¹⁵ Nonetheless, [**540] [***340] courts have begun to treat [*18] sex classifications as at least marginally suspect (see, e.g., *Commonwealth v. Daniel* (1968) 430 Pa. 642 [243 A.2d 400, 402-403]; Note: *Longer Sentence*

for Females . . . (1969) 82 Harv.L.Rev. 921, 923), and one federal district court has explicitly recognized these classifications as such. (*United States v. York* (D.Conn. 1968) 281 F.Supp. 8, 14.)

[****31] An analysis of classifications which the Supreme Court has previously designated as suspect reveals why sex is properly placed among them. ¹⁶ Such characteristics include race (see, e.g., *Loving v. Virginia* (1967) 388 U.S. 1, 9 [18 L.Ed.2d 1010, 1016, 87 S.Ct. 1817]; *McLaughlin v. Florida* (1964) 379 U.S. 184, 191-192 [13 L.Ed.2d 222, 227-229, 85 S.Ct. 283]), lineage or national origin (see, e.g., *Korematsu v. United States* (1944) 323 U.S. 214, 216 [89 L.Ed. 194, 198-199, 65 S.Ct. 193]; see also *Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 730 [242 P.2d 617]), alienage (*Takahashi v. Fish Comm.* (1948) 334 U.S. 410, 420 [92 L.Ed. 1478, 1487-1488, 68 S.Ct. 1138]; *Truax v. Raich*, *supra*, 239 U.S. 33; *Purdy & Fitzpatrick v. State of California*, *supra*, 71 Cal.2d 566, 579), and poverty, especially in conjunction with criminal procedures (see, e.g., *Douglas v. California* (1963) 372 U.S. 353, 356-357 [9 L.Ed.2d 811, 814-815, 83 S.Ct. 814]; *Griffin v. Illinois* (1956) 351 U.S. 12, 17 [100 L.Ed. 891, 898, 76 S.Ct. 585]; [****32] see also, *In re Antazo*, *supra*, 3 Cal.3d 100).

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. (See Note: *Developments in the Law -- Equal Protection*, *supra*, 82 Harv.L.Rev. 1065, 1173-1174.) The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual

¹⁵ See, e.g., *Goesaert v. Cleary* (1948) 335 U.S. 464 [93 L.Ed. 163, 69 S.Ct. 198], and *Muller v. Oregon* (1908) 208 U.S. 412 [52 L.Ed. 551, 28 S.Ct. 324], both of which were decided well before the recent and major growth of public concern about and opposition to sex discrimination. No judge today would justify classification based on sex by resort to such openly biased and wholly chauvinistic statements as this one made by Justice Brewer in *Muller*: "[History] discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Doubtless there are individual exceptions . . . but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality." (*Id.*, at pp. 421-422 [52 L.Ed. at p. 556].)

¹⁶ See also Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?* (1971) 84 Harv.L.Rev. 1499, 1506-1516, for a recent and excellent analysis of the proper standard of review of classifications based on sex.

members. (See [Karczewski v. Baltimore and Ohio Railroad Company \(N.D.Ill. 1967\) 274 F.Supp. 169, 179.](#)) [****33] Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

[*19] Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. (See Note: *Developments in the Law -- Equal Protection*, *supra*, 82 Harv.L.Rev. 1065, 1125-1127.) Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote¹⁷ [****34] and, until recently, the right to serve on juries in many states.¹⁸ They are excluded from or discriminated against in employment and educational opportunities.¹⁹ [****35] [**541]

¹⁷The Nineteenth Amendment which gave women the right to vote in national elections was not passed until 1920. Women remain underrepresented in federal and state legislative bodies and in political party leadership. (See, e.g., American Women: Report of the President's Commission on the Status of Women, *supra*, pp. 46-52; [Calderon v. City of Los Angeles \(1971\) 4 Cal.3d 251, 258, fn. 6 \[93 Cal.Rptr. 361, 481 P.2d 489\].](#))

¹⁸Women became eligible to serve on all federal juries only by virtue of the Civil Rights Act of 1957. It now appears that women may not be denied the right to serve on a jury ([White v. Crook \(M.D.Ala. 1966\) 251 F.Supp. 401, 408.](#)), but the United States Supreme Court has held that a state may relieve women from jury service unless they seek it out. ([Hoyt v. Florida \(1961\) 368 U.S. 57 \[7 L.Ed.2d 118, 82 S.Ct. 159\].](#))

¹⁹The President's Task Force on Women, relying on figures provided by the Bureau of the Census and the Bureau of Labor Statistics, reported the following: "Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full-time is \$ 7,396, of Negro men \$ 4,777, of white women, \$ 4,279, of Negro women \$ 3,194. Women with some college education, both white and Negro, earn less than Negro men with 8 years of education. [para.] Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty. [para.] The unemployment rate is higher among

[****341] Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.²⁰

[*20] Laws which disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. [CA\(22\) \(22\)](#) We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment.

We now consider whether the state has established a compelling state interest. A number of state interests have been urged [****36] for the classification created by the statute. Two Court of

women than men, among girls than boys. More Negro women are unemployed than Negro men, and almost as many white women as white men are unemployed (most women on welfare are not included in the unemployment figures -- only those actually seeking employment.)" (A Matter of Simple Justice: The Report of The President's Task Force on Women's Rights and Responsibilities (1970) p. 18; see also, Kanowitz, Women and The Law, *supra*, pp. 100-101; Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII* (1965) 34 Geo.Wash.L.Rev. 232, 234.)

The President's Commission on Women reports that "substantial discrimination [in education] does exist." It cites higher admission standards for women than men not only in graduate school but in undergraduate schools as well. It states that "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image." (A Matter of Simple Justice: The Report of The President's Task Force on Women's Rights and Responsibilities, *supra*, p. 7; see also American Women: Report of the President's Commission on the Status of Women, *supra*, p. 11.)

²⁰See, e.g., Kanowitz, Women and The Law, *supra*, pp. 35-99; American Women: Report of the President's Task Force on Women's Rights and Responsibilities, *supra*, p. 47; cf., The California Sole Trader Statute, [Code of Civil Procedure sections 1811- 1821](#), which requires court approval before a wife may engage in an independent business.

Appeal cases which uphold [section 25656](#) against equal protection challenge ([Hargens v. Alcoholic Bev. etc. App. Bd. \(1968\) 263 Cal.App.2d 601 \[69 Cal.Rptr. 868\]](#); [People v. Jemnez \(1942\) 49 Cal.App.2d Supp. 739 \[121 P.2d 543\]](#)) suggest two interests served by the statute; first that women who do not have an interest by way of ownership or marriage in the liquor license will not be sufficiently restrained from committing "improprieties," and, second, that women bartenders would be an "unwholesome influence" on young people and the general public.

[542] [***342]** The first rationale rests upon the peculiar and wholly unacceptable generalization that women in bars, unrestrained by husbands or the risk of losing a liquor license, will commit improper acts. This rationale fails as a compelling state interest because it is wholly arbitrary and without support in logic or experience.

There is no reason to believe that women bartenders would have any less incentive than male bartenders to obey the laws governing the sale of alcoholic beverages and the rules set down by their **[****37]** employers in order to retain their jobs and promote their own well-being. Nor is there any basis for presuming that male licensees, charged with overseeing their establishments and carrying out their responsibilities under the law, would be less able to carry out these responsibilities with respect to women bartenders than to the male bartenders or female cocktail waitresses the law permits them to hire.

[CA\(23\) \(23\)](#) The Legislature may, of course, pass laws to prevent "improprieties" in connection with the sale of alcoholic beverages. It has, in fact, passed laws aimed at the very evils which [section 25656](#) allegedly prevents. (See, e.g., [Bus. & Prof. Code, § 25657](#), which makes it a misdemeanor **[*21]** to employ anyone to encourage the purchase of alcoholic beverages; § 24200 which permits license revocation when continuation of the license would be contrary to public welfare or morals; and § 25601 which makes it a misdemeanor to keep a

disorderly house.) [CA\(24\) \(24\)](#) Where the evil which the Legislature seeks to prevent can be directly prevented through nondiscriminatory legislation, and where the class singled out by the Legislature has no necessary connection with the **[****38]** evil to be prevented, the statute must be struck down as an invidious discrimination against that class.

[CA\(25\) \(25\)](#) The second rationale -- that women bartenders would be an "unwholesome influence" on the public -- is even weaker than the first. The claim of unwholesomeness is contradicted by statutes which permit women to work as cocktail waitresses, serve beer and wine from behind a bar ([Bus. & Prof. Code, § 25655](#)), or tend bar if they or their husbands hold a liquor license. The objection appears to be based upon notions of what is a "ladylike" or proper pursuit for a woman in our society rather than any ascertainable evil effects of permitting women to labor behind those "permanently affixed fixtures" known as bars. Such notions cannot justify discrimination against women in employment.

[HN24 Hargens v. Alcoholic Bev. etc. App. Bd., supra, 263 Cal.App.2d 601](#) and [People v. Jemnez, supra, 49 Cal.App.2d Supp. 739](#), to the extent that they conflict with the views stated herein, are disapproved.

Finally, the Attorney General argues that this case is governed by [Goesaert v. Cleary, supra, 335 U.S. 464, \[****39\]](#) which held constitutional a Michigan statute forbidding any female to act as bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment. The rationale for the classification in that case was that the "oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight." ([Id., at p. 466 \[93 L.Ed. at p. 166\]](#).) This holding ignores the obvious objection, raised in the dissent, that a male owner, although he is always absent from his bar, may employ his wife and daughter while a female owner may not work

in a bar or employ her daughter even though a man is always present to keep the order.

Although *Goesaert* has not been overruled, its holding has been the subject of academic criticism (Kanowitz, *Women and The Law*, *supra*, pp. 33-34; Oldham, *Sex Discrimination and State Protective Laws* (1967) 44 *Denver L.J.* 344, 373-374); and its sweeping statement that the states are not constitutionally precluded from "drawing a sharp line between the sexes" (*Goesaert v. Cleary*, *supra*, 335 U.S. at p. 466 [****543**] [93 L.Ed. [*****343**] at p. 165]) [******40**] has come under increasing limitation. (See *Paterson Tavern & G. O. A. [*22] v. Borough of Hawthorne*, *supra*, 57 *N.J.* 180, 186 [270 A.2d 628, 630-631]; *Seidenberg v. McSorleys' Old Ale House, Inc.* (S.D.N.Y. 1969) 308 *F.Supp.* 1253, 1260; *United States v. York*, *supra*, 281 *F.Supp.* 8, 16; *White v. Crook*, *supra*, 251 *F.Supp.* 401, 408.)

We need not, however, speculate as to the continuing validity of *Goesaert*. The rationale for upholding the statute in that case cannot sustain our statute. [Section 25656](#) does not preclude all women from being bartenders or prohibit them from bartending except where they are under the supervision of a male relative. It permits a female owner or sole shareholder to tend bar. The classification made by the section thus cannot be justified on the basis of the protection of female bartenders by their male relatives and we can think of no other legitimate state purpose to which it is rationally related. (See *McCrimmon v. Daley* (7th Cir. 1969) 418 *F.2d* 366, 369-370, which distinguishes *Goesaert* where a Chicago ordinance permitted a female [******41**] licensee and her female employee to tend bar.)

CA(26) (26) We conclude that the classification created by [section 25656](#) is invidious and wholly arbitrary. The state has not only failed to establish a compelling interest served by it, but it has failed to establish any interest at all. [Section 25656 HN25](#) is unconstitutional under the equal protection clauses of the state and federal Constitutions.

For the reasons stated, we find [section 25656](#) invalid. Let the peremptory writ of mandate issue compelling the Director of the Department of Alcoholic Beverage Control to cease license revocation proceedings based upon [section 25656 of the Business and Professions Code](#) and to cease enforcement of the section.

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Schmeer v. County of Los Angeles

Court of Appeal of California, Second Appellate District, Division Three

February 21, 2013, Opinion Filed

B240592

Reporter

213 Cal. App. 4th 1310 *; 153 Cal. Rptr. 3d 352 **; 2013 Cal. App. LEXIS 130 ***; 43 ELR 20049; 2013 WL 635254

LEE SCHMEER et al., Plaintiffs and Appellants, v.
COUNTY OF LOS ANGELES et al., Defendants
and Respondents.

Subsequent History: Modified by [Schmeer v. County of Los Angeles, 2013 Cal. App. LEXIS 188 \(Cal. App. 2d Dist., Mar. 11, 2013\)](#)

Review denied by [Schmeer v. County of L.A., 2013 Cal. LEXIS 4326 \(Cal., May 15, 2013\)](#)

Prior History: [***1] APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC470705, James C. Chalfant, Judge.

Disposition: Affirmed.

Case Summary

Procedural Posture

Petitioners, California taxpayers and a manufacturer of plastic bags, appealed a judgment of the Superior Court of Los Angeles County, California, denying them any relief on their combined petition for writ of mandate and complaint that challenged a Los Angeles County, California, ordinance that prohibited retail stores from providing plastic carryout bags and required stores to charge customers 10 cents for each paper carryout bag provided.

Overview

The court held that the language "any levy, charge,

or exaction of any kind imposed by a local government" in the first paragraph of Cal. Const., art. XIII C, § 1, subd. (e), was limited to charges payable to, or for the benefit of, a local government. The amendment to [Cal. Const., art. XIII A, § 3](#), by Proposition 26 did not indicate an intent to eliminate the prior requirement that a charge had to produce revenue for the government to be considered a tax. Rather, the purpose of the amendment was to end the legislature's practice of approving by a simple majority vote so-called revenue-neutral laws that increased taxes for some taxpayers but decreased taxes for others. The court observed that the paper carryout bag charge was payable to, and retained by, the retail store providing the bag, which was required to use the funds for specified purposes. The charge was not remitted to the county. Because the charge was not remitted to the county and raised no revenue for the county, the court concluded that the charge was not a "tax" for purposes of Cal. Const., art. XIII C. The voter approval requirements of Cal. Const., art. XIII C, § 2, therefore, were inapplicable.

Outcome

The court affirmed the judgment.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > General Overview

HN1 An appellate court reviews a ruling de novo to the extent that a trial court decided questions of law concerning the construction of constitutional provisions and not turning on any disputed facts. The appellate court reviews the trial court's factual findings under the substantial evidence standard.

Constitutional Law > State Constitutional Operation

Governments > Legislation > Initiative & Referendum

Governments > Legislation > Interpretation

HN2 A court construes provisions added to the state constitution by a voter initiative by applying the same principles governing the construction of a statute. The court's task is to ascertain the intent of the electorate so as to effectuate the purpose of the law. The court first examines the language of the initiative as the best indicator of the voters' intent. The court gives the words of the initiative their ordinary and usual meaning and construes them in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect. If the language is unambiguous and a literal construction would not result in absurd consequences, the court presumes that the voters intended the meaning on the face of the initiative and the plain meaning governs. If the language is ambiguous, the court may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Governments > Legislation > Initiative & Referendum

Governments > Legislation > Interpretation

HN3 The construction of statute or an initiative, including the resolution of any ambiguity, is a question of law that an appellate court reviews de novo.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > State & Territorial Governments > Finance

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN4 Proposition 26 has expanded the definition of taxes so as to include fees and charges, with specified exceptions. Proposition 26 also requires a two-thirds vote of the legislature to approve laws increasing taxes on any taxpayers, and it shifts to the state or local government the burden of demonstrating that any charge, levy, or assessment is not a tax. Proposition 26 amends [Cal. Const., art. XIII A, § 3](#), and Cal. Const., art. XIII C, § 1.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > State & Territorial Governments > Finance

Tax Law > State & Local Taxes > Administration & Procedure > General Overview

HN5 See [Cal. Const., art. XIII A, § 3](#).

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Governments > State & Territorial Governments > Finance

Tax Law > State & Local Taxes > Administration &
Procedure > General Overview

[HN6](#) See Cal. Const., art. XIII C, § 1.

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > Administration &
Procedure > General Overview

[HN7](#) The term "tax" in ordinary usage refers to a compulsory payment made to the government or remitted to the government. Taxes ordinarily are imposed to raise revenue for the government.

Constitutional Law > Congressional Duties &
Powers > Spending & Taxation

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > Administration &
Procedure > General Overview

[HN8](#) The definition of a "tax" in Cal. Const., art. XIII C, § 1, subd. (e), does not explicitly state that the levy, charge, or exaction must be payable to a local government, but does state that it must be imposed by a local government. In light of the ordinary meaning of a "tax" as a compulsory payment made to the government or remitted to the government, art. XIII C, § 1, subd. (e), is ambiguous as to whether a levy, charge, or exaction must be payable to a local government in order to constitute a tax.

Constitutional Law > Congressional Duties &
Powers > Spending & Taxation

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > Administration &
Procedure > General Overview

[HN9](#) Cal. Const., art. XIII C, § 1, subd. (e), lists

seven exceptions to the rule that "tax" means any levy, charge, or exaction of any kind imposed by a local government. The exceptions all relate to charges ordinarily payable to the government, including charges imposed in connection with governmental activities or use of government property, fines imposed by the government for a violation of law, development fees, and real property assessments. The first three exceptions, in particular, state that a charge imposed by a local government is not a tax if the charge does not exceed the reasonable costs to the local government of conferring a specific benefit or privilege directly to the payor or providing a specific service or product directly to the payor, and also except from the definition of a tax a charge for the reasonable regulatory costs to a local government for issuing licenses and permits and related activities. Cal. Const., art. XIII C, § 1, subd. (e)(1), (2) & (3). These exceptions, generally speaking, except from the definition of a "tax" charges not exceeding the reasonable costs to the local government of providing specific benefits or regulatory services. These exceptions do not contemplate the situation where a charge is paid to an entity or person other than a local government, or where such an entity or person incurs reasonable costs.

Constitutional Law > Congressional Duties &
Powers > Spending & Taxation

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > Administration &
Procedure > General Overview

[HN10](#) The language "any levy, charge, or exaction of any kind imposed by a local government" in the first paragraph of Cal. Const., art. XIII C, § 1, subd. (e), is limited to charges payable to, or for the benefit of, a local government.

Constitutional Law > Congressional Duties &
Powers > Spending & Taxation

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > Administration &
Procedure > General Overview

HN11 Proposition 26 deleted the language "any change in state taxes enacted for the purpose of increasing revenues collected pursuant thereto" in [Cal. Const., art. XIII A, § 3](#), and replaced it with "any change in state statute which results in any taxpayer paying a higher tax." This amendment does not indicate an intent to eliminate the prior requirement that a charge must produce revenue for the government to be considered a tax. The amendment was to the provision requiring approval by two-thirds of the legislature for any increase in state taxes. The provisions requiring voter approval for increases in local taxes ([Cal. Const., art. XIII A, § 4](#), art. XIII C, § 2), in contrast, never included the language "for the purpose of increasing revenues" or any similar limiting language. The purpose of this amendment to [Cal. Const., art. XIII A, § 3](#) was to end the legislature's practice of approving by a simple majority vote so-called revenue-neutral laws that increased taxes for some taxpayers but decreased taxes for others.

Constitutional Law > Congressional Duties &
Powers > Spending & Taxation

Governments > Legislation > Initiative &
Referendum

Governments > State & Territorial
Governments > Finance

Tax Law > State & Local Taxes > Administration &
Procedure > General Overview

HN12 The paper carryout bag charge imposed under L.A. County Ord. No. 2010-0059 is payable to and retained by the retail store providing the bag, which is required to use the funds for specified purposes. The charge is not remitted to the county. Because the charge is not remitted to the county and raises no revenue for the county, the charge is not a "tax" for purposes of *Cal. Const., art. XIII C*.

The voter approval requirements of *Cal. Const., art. XIII C, § 2*, are therefore inapplicable.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

Petitioners, California taxpayers and a manufacturer of plastic bags, contended that a Los Angeles County ordinance that prohibited retail stores from providing plastic carryout bags and required stores to charge customers 10 cents for each paper carryout bag provided violated *Cal. Const., art. XIII C*, as amended by Prop. 26, because the 10-cent charge was a tax and was not approved by county voters. The trial court denied petitioners any relief on their combined petition for writ of mandate and complaint that challenged the ordinance. (Superior Court of Los Angeles County, No. BC470705, James C. Chalfant, Judge.)

The Court of Appeal affirmed the judgment. The court held that the language "any levy, charge, or exaction of any kind imposed by a local government" in the first paragraph of *Cal. Const., art. XIII C, § 1, subd. (e)*, is limited to charges payable to, or for the benefit of, a local government. The amendment to [Cal. Const., art. XIII A, § 3](#), by Prop. 26 did not indicate an intent to eliminate the prior requirement that a charge must produce revenue for the government to be considered a tax. Rather, the purpose of the amendment was to end the Legislature's practice of approving by a simple majority vote so-called revenue-neutral laws that increased taxes for some taxpayers but decreased taxes for others. The court observed that the paper carryout bag charge is payable to, and retained by, the retail store providing the bag, which is required to use the funds for specified purposes. The charge is not remitted to the county. Because the charge is not remitted to the county and raises no revenue for the

county, the court concluded that the charge is not a “tax” for purposes of *Cal. Const., art. XIII C*. The voter approval requirements of *Cal. Const., art. XIII C, § 2*, therefore, are inapplicable. (Opinion by Croskey, Acting P. J., with Kitching and Aldrich, JJ., concurring.) [*1311]

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)

Initiative § 3—Constitutional Provisions— Construction—Voters' Intent—Language.

A court construes provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute. The court's task is to ascertain the intent of the electorate so as to effectuate the purpose of the law. The court first examines the language of the initiative as the best indicator of the voters' intent. The court gives the words of the initiative their ordinary and usual meaning and construes them in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect. If the language is unambiguous and a literal construction would not result in absurd consequences, the court presumes that the voters intended the meaning on the face of the initiative and the plain meaning governs. If the language is ambiguous, the court may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative.

CA(2) (2)

Taxation § 1—Definition of Taxes—Vote Required to Increase Taxes.

Prop. 26 has expanded the definition of taxes so as to include fees and charges, with specified

exceptions. Prop. 26 also requires a two-thirds vote of the Legislature to approve laws increasing taxes on any taxpayers, and it shifts to the state or local government the burden of demonstrating that any charge, levy, or assessment is not a tax. Prop. 26 amends *Cal. Const., art. XIII A, § 3*, and *Cal. Const., art. XIII C, § 1*.

CA(3) (3)

Taxation § 3—Voter Approval for Local Tax Levies—Definition of Tax.

The term “tax” in ordinary usage refers to a compulsory payment made to the government or remitted to the government. Taxes ordinarily are imposed to raise revenue for the government. The definition of a “tax” in *Cal. Const., art. XIII C, § 1, subd. (e)*, does not explicitly state that the levy, charge, or exaction must be payable to a local government, but does state that it must be imposed by a local government. In light of the ordinary meaning of a “tax” as a compulsory payment made to the government or remitted to the government, *art. XIII C, § 1, subd. (e)*, is ambiguous as to whether a levy, charge, or exaction must be payable to a local government in order to constitute a tax. Other language may be considered, to resolve the ambiguity.

CA(4) (4)

Taxation § 3—Voter Approval for Local Tax Levies—Definition of Tax—Exceptions.

Cal. Const., art. XIII C, § 1, subd. (e), lists seven exceptions to the rule that “tax” means any levy, charge, or exaction of any kind imposed by a local government. The exceptions all relate to charges ordinarily payable to the government, including charges imposed [*1312] in connection with governmental activities or use of government property, fines imposed by the government for a violation of law, development fees, and real property assessments. The first three exceptions, in

particular, state that a charge imposed by a local government is not a tax if the charge does not exceed the reasonable costs to the local government of conferring a specific benefit or privilege directly to the payor or providing a specific service or product directly to the payor, and also except from the definition of a tax a charge for the reasonable regulatory costs to a local government for issuing licenses and permits and related activities (Cal. Const., art. XIII C, § 1, subd. (e)(1), (2) & (3)). These exceptions, generally speaking, except from the definition of a “tax” charges not exceeding the reasonable costs to the local government of providing specific benefits or regulatory services. These exceptions do not contemplate the situation where a charge is paid to an entity or person other than a local government, or where such an entity or person incurs reasonable costs.

CA(5) (5)

Taxation § 3—Voter Approval for Local Tax Levies.

The language “any levy, charge, or exaction of any kind imposed by a local government” in the first paragraph of Cal. Const., art. XIII C, § 1, subd. (e), is limited to charges payable to, or for the benefit of, a local government.

CA(6) (6)

Taxation § 3—Tax Limitation Initiative—Vote Required to Increase State Taxes—Construction of Amendment.

Prop. 26 deleted the language “any change in state taxes enacted for the purpose of increasing revenues collected pursuant thereto” in [Cal. Const., art. XIII A, § 3](#), and replaced it with “any change in state statute which results in any taxpayer paying a higher tax.” This amendment does not indicate an intent to eliminate the prior requirement that a charge must produce revenue for the government to be considered a tax. The amendment was to the

provision requiring approval by two-thirds of the Legislature for any increase in state taxes. The provisions requiring voter approval for increases in local taxes ([Cal. Const., arts. XIII A, § 4](#), XIII C, § 2), in contrast, never included the language “for the purpose of increasing revenues” or any similar limiting language. The purpose of this amendment to [Cal. Const., art. XIII A, § 3](#) was to end the Legislature's practice of approving by a simple majority vote so-called revenue-neutral laws that increased taxes for some taxpayers but decreased taxes for others.

CA(7) (7)

Counties § 10—Ordinances—Imposition of Paper Carryout Bag Charge—Tax Determination—Applicability of Voter Approval Requirements.

The paper carryout bag charge imposed under L.A. County Ord. No. 2010-0059 is payable to, and retained by, the retail store providing the bag, which is required to use the funds for specified [*1313] purposes. The charge is not remitted to the county. Because the charge is not remitted to the county and raises no revenue for the county, the charge is not a “tax” for purposes of *Cal. Const., art. XIII C*. The voter approval requirements of Cal. Const., art. XIII C, § 2, are therefore inapplicable.

[[Cal. Forms of Pleading and Practice \(2012\) ch. 126A, Constitutional Law, § 126A.33](#); 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 136.]

Counsel: Nielsen Merksamer Parrinello Gross & Leoni, James R. Parrinello, Eric J. Miethke, Arthur G. Scotland, Sean P. Welch and Kurt R. Oneto for Plaintiffs and Appellants.

Wm. Gregory Turner for Council on State Taxation and California Taxpayers Association as Amici Curiae on behalf of Plaintiffs and Appellants.

John F. Krattli, County Counsel, Albert Ramseyer, Principal Deputy County Counsel, and Truc L. Moore, Deputy County Counsel, for Defendants

and Respondents.

Colantuono & Levin, Michael G. Colantuono and Jon R. di Cristina for League of California Cities and California State Association of Counties as Amici Curiae on behalf of Defendants and Respondents.

Frank G. Wells Environmental Law Clinic, Sean B. Hecht and Xiao Y. Zhang for Surfrider Foundation, Heal the Bay, The 5 Gyres Institute, Environment California Research and Policy Center, and Seventh Generation Advisors as Amici Curiae on behalf of Defendants and Respondents.

Judges: Opinion by Croskey, Acting P. J., with Kitching and Aldrich, JJ., concurring.

Opinion by: Croskey, Acting P. J.

Opinion

[354] CROSKEY, Acting P. J.**—A Los Angeles County ordinance **[***2]** prohibits retail stores from providing plastic carryout bags and requires stores to charge customers 10 cents for each paper carryout bag provided. Lee Schmeer and others (Petitioners) filed a combined petition for writ of mandate and complaint challenging the ordinance. Petitioners contend the ordinance violates article XIII C of the California Constitution, as amended by Proposition 26, because the 10-cent charge is a tax and was not approved by county voters. We conclude that the paper carryout bag charge is not a tax for purposes of article XIII C because the charge is payable to and retained by **[*1314]** the retail store and is not remitted to the county. We therefore will affirm the judgment in favor of the county and other respondents.

FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Background

The Los Angeles County Board of Supervisors enacted ordinance No. 2010-0059 on November 23, 2010. The ordinance prohibits retail stores within unincorporated areas of Los Angeles County from providing plastic carryout bags to customers. The ordinance states that retail stores may provide, for the purpose of carrying goods away from the store, only recyclable paper carryout bags or reusable carryout bags **[***3]** meeting certain requirements (including plastic bags satisfying those requirements). The ordinance also states that retail stores must provide reusable bags to customers, either for sale or free of charge, and encourages retail stores to educate their employees to promote reusable bags and post signs encouraging customers to use reusable bags.

The ordinance further states that retail stores must charge the customer 10 cents for each recyclable paper carryout bag provided and must indicate on the receipt the number of recyclable paper carryout bags provided and the total amount charged for the bags. It states that customers participating in the California Special Supplemental Nutrition Program for Women, Infants, and Children ([Health & Saf. Code, § 123275](#)) or the supplemental food program ([Welf. & Inst. Code, § 15500 et seq.](#)) are exempt from the charge and must be provided free of charge either reusable bags or recyclable paper carryout bags. The ordinance states that the money received for recyclable paper bags must be retained by the store and used only for (1) the costs of compliance with the ordinance; **[**355]** (2) the actual costs of providing recyclable paper bags; or (3) the costs of educational materials **[***4]** or other costs of promoting the use of reusable bags, if any.

The ordinance includes a severability provision stating: “If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision will not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance

and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid.”

The ordinance became effective on July 1, 2011. The ordinance was not submitted to the county electorate for its approval.

[*1315]

2. Trial Court Proceedings

Lee Schmeer, Salim Bana, Jeff Wheeler, Chris Wheeler and Hilex Poly Co. LLC (Hilex) filed a combined petition for writ of mandate and complaint in October 2011 against the County of Los Angeles and three county officials. Petitioners allege that the individual petitioners are California taxpayers who have been required to pay the paper carryout bag charge and that Hilex is a manufacturer of plastic **[***5]** bags prohibited by the ordinance.

Petitioners allege that the paper carryout bag charge required under the ordinance is a “tax” as defined in article XIII C of the California Constitution, as amended by Proposition 26. They allege that the charge was imposed by the county in violation of section 2 of article XIII C, which prohibits any new general or special tax imposed by local government without prior approval by the voters. Petitioners allege counts for (1) a writ of mandate to prevent the county from implementing and enforcing the ordinance and (2) a judicial declaration that the paper carryout bag charge violates article XIII C.

The trial court conducted a hearing on the merits of the petition for writ of mandate in March 2012. The court adopted its written tentative decision denying the petition as its final ruling. The court concluded that the paper carryout bag charge is not a general or special tax because the money is retained by the retail stores and is not remitted to the county. The court also concluded that even if the charge fell within the general definition of a tax under Proposition 26, the charge would satisfy an

exception to that definition for “[a] charge imposed **[***6]** for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege” (Cal. Const., art. XIII C, § 1, subd. (e)(1)). The court stated that the county, through retail stores, conferred the benefit of a paper carryout bag only on customers paying the charge, satisfying the first prong of the exception. The court stated that Petitioners waived the argument that the charge did not satisfy the second prong of the exception by failing to assert that argument in their opening brief on the petition. The court stated further that, in any event, substantial evidence shows that the money received by the stores for recyclable paper bags will be used for the purposes required under the ordinance. The court therefore concluded that Petitioners were not entitled to a writ of mandate.

Petitioners' counsel acknowledged that the trial court's ruling on the petition for writ of mandate effectively adjudicated the count for declaratory relief as well. The court entered a judgment in April 2012 denying Petitioners any relief on their **[**356]** combined **[***7]** petition for writ of mandate and complaint. Petitioners timely appealed the judgment.

[*1316]

CONTENTIONS

Petitioners contend (1) the paper carryout bag charge is a special tax imposed by the county without the voters' prior approval and therefore violates article XIII C of the California Constitution; (2) the charge does not satisfy the exception for a charge imposed for a specific benefit conferred or privilege granted, or any other exception under article XIII C; and (3) the challenged provisions of the ordinance are not severable, so the entire ordinance must be invalidated, including the ban on single-use plastic bags.

DISCUSSION

1. Standard of Review

The trial court's ruling turned on its construction of article XIII C of the California Constitution, as amended by Proposition 26, and its determination that the amount charged did not exceed the reasonable costs. [HN1](#) We review the ruling de novo to the extent that the court decided questions of law concerning the construction of constitutional provisions and not turning on any disputed facts. ([Professional Engineers in California Government v. Kempton \(2007\) 40 Cal.4th 1016, 1032 \[56 Cal. Rptr. 3d 814, 155 P.3d 226\]](#) (*Professional Engineers*)). We review the court's factual findings [***8](#) under the substantial evidence standard. (*Ibid.*)

2. Construction of a Voter Initiative

[HN2 CA\(1\) \(1\)](#) We construe provisions added to the state Constitution by a voter initiative by applying the same principles governing the construction of a statute. ([Professional Engineers, supra, 40 Cal.4th at p. 1037.](#)) Our task is to ascertain the intent of the electorate so as to effectuate the purpose of the law. ([Robert L. v. Superior Court \(2003\) 30 Cal.4th 894, 901 \[135 Cal. Rptr. 2d 30, 69 P.3d 951\]](#)). We first examine the language of the initiative as the best indicator of the voters' intent. ([Kwikset Corp. v. Superior Court \(2011\) 51 Cal.4th 310, 321 \[120 Cal. Rptr. 3d 741, 246 P.3d 877\]](#)). We give the words of the initiative their ordinary and usual meaning and construe them in the context of the entire scheme of law of which the initiative is a part, so that the whole may be harmonized and given effect. ([Professional Engineers, supra, at p. 1037; State Farm Mutual Automobile Ins. Co. v. Garamendi \(2004\) 32 Cal.4th 1029, 1043 \[12 Cal. Rptr. 3d 343, 88 P.3d 71\]](#)).

If the language is unambiguous and a literal construction would not result in absurd consequences, we presume that the voters intended

the meaning on the face of the initiative and the plain meaning governs. ([Professional Engineers, supra, 40 Cal.4th at p. 1037; \[***9\] Coalition of Concerned Communities, \[*1317\] Inc. v. City of Los Angeles \(2004\) 34 Cal.4th 733, 737 \[21 Cal. Rptr. 3d 676, 101 P.3d 563\]](#).) If the language is ambiguous, we may consider the analyses and arguments contained in the official ballot pamphlet as extrinsic evidence of the voters' intent and understanding of the initiative. ([Professional Engineers, supra, at p. 1037.](#))

[HN3](#) The construction of a statute or an initiative, including the resolution of any ambiguity, is a question of law that we review de novo. ([Bruns v. E-Commerce Exchange, Inc. \(2011\) 51 Cal.4th 717, 724 \[122 Cal. Rptr. 3d 331, 248 P.3d 1185\]](#).)

3. Historical Foundations of Proposition 26

a. Proposition 13

California voters adopted Proposition 13 in June 1978, adding article XIII A to the California Constitution. [***357](#) Proposition 13 “impos[ed] important limitations upon the assessment and taxing powers of state and local governments.” ([Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization \(1978\) 22 Cal.3d 208, 218 \[149 Cal. Rptr. 239, 583 P.2d 1281\]](#) (*Amador Valley*)). Proposition 13 generally (1) limited the rate of any ad valorem tax on real property to 1 percent; (2) limited increases in the assessed value of real property to 2 percent annually absent a change in ownership; (3) required that ““any changes in State taxes enacted [***10](#) for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation”” must be approved by two-thirds of the Legislature; and (4) required that special taxes imposed by cities, counties and special districts must be approved by a two-thirds vote of the electors. ([Amador Valley, supra, at p. 220](#), quoting former [art. XIII A, § 3](#), as added by Prop. 13.)

The California Supreme Court in [Amador Valley](#),

[supra](#), 22 Cal.3d at page 231, stated that the various elements of Proposition 13 formed “an interlocking ‘package’” with the purpose of providing effective real property tax relief. *Amador Valley* rejected several constitutional challenges to the initiative. Local governments, however, soon found ways to generate additional revenue without a two-thirds vote of the electors despite Proposition 13. Some of those efforts were approved by the courts.

The California Supreme Court in [Los Angeles County Transportation Com. v. Richmond \(1982\) 31 Cal.3d 197, 208 \[182 Cal. Rptr. 324, 643 P.2d 941\]](#) (*Richmond*), held that a sales tax imposed by the Los Angeles County Transportation Commission and approved by a majority, but less than two-thirds, of county voters was validly adopted. [***11] The state Legislature, before the [*1318] passage of Proposition 13, had authorized the local commission to adopt a sales tax to fund public transit projects. Writing for a plurality of three justices, Justice Mosk stated that the term “‘special districts’ ” in [section 4 of article XIII A of the California Constitution](#) was ambiguous. (*Richmond, supra*, at p. 201 (plur. opn. of Mosk, J.).) Justice Mosk stated that the requirement of a two-thirds vote imposed by the state's voters on local voters was “fundamentally undemocratic” and that the language of [section 4](#) therefore must be strictly construed in favor of allowing local voters to approve special taxes by a majority vote rather than a two-thirds vote. (*Richmond, supra*, at p. 205 (plur. opn. of Mosk, J.).) Noting that [section 4](#) expressly prohibited cities, counties and special districts from imposing ad valorem taxes on real property or transaction or sales taxes on the sale of real property even with a two-thirds vote, and citing language in the ballot pamphlet, the plurality held that “‘special districts’ ” under [section 4](#) must be limited to special districts authorized to levy taxes on real property. (*Richmond, supra*, at p. 205 (plur. opn. of [***12] Mosk, J.).) Two justices concurred in the judgment and also concluded that the term “‘special districts’ ” was limited to special districts authorized to levy taxes on real property.

(*Richmond, supra*, at p. 209 (conc. opn. of Kaus, J.).)

Justice Richardson stated in a dissent that the sales tax imposed by the local commission served as a convenient substitute for an increase in real property taxes. (*Richmond, supra*, 31 Cal.3d at pp. 212–213 (dis. opn. of Richardson, J.).) The dissent stated that under the holding by the majority, the creation of districts without real property [***358] taxing authority provided a means by which local governments could readily avoid the restrictions of Proposition 13. (31 Cal.3d at p. 213 (dis. opn. of Richardson, J.).) The dissent concluded that just as the county would be prohibited from imposing the new tax without a two-thirds vote of its voters, the local commission as the county's surrogate should be prohibited from imposing the new tax without the required voter approval. (*Id.* at p. 215 (dis. opn. of Richardson, J.).)

[City and County of San Francisco v. Farrell \(1982\) 32 Cal.3d 47 \[184 Cal. Rptr. 713, 648 P.2d 935\]](#) [***13] held that a payroll and gross receipts tax imposed on businesses operating within the City and County of San Francisco, but not approved by a two-thirds vote of the voters, was valid. *Farrell* concluded that the requirement in [section 4 of article XIII A of the California Constitution](#) that “‘special taxes’ ” imposed by cities, counties and special districts must be approved by a two-thirds vote of the electors applied only to taxes levied for a specific purpose and did not apply to taxes paid into the general fund to be used for general governmental purposes. (*Farrell, supra*, at p. 57.)

[Rider v. County of San Diego \(1991\) 1 Cal.4th 1 \[2 Cal. Rptr. 2d 490, 820 P.2d 1000\]](#) found invalid a sales tax imposed by the County of San Diego [***1319] for the purpose of financing the construction and operation of criminal detention and courthouse facilities. The tax was enacted without the approval of two-thirds of the voters.¹

¹The tax was approved by 50.8 percent, a bare majority of the county voters. (*Rider, supra*, 1 Cal.4th at p. 6.)

Distinguishing [Richmond, supra, 31 Cal.3d 197](#), the *Rider* court held that a local agency that the trial court found was created solely for the purpose of circumventing Proposition 13's two-thirds voter approval requirement was a "special district" ([Cal. Const., art. XIII A, § 4](#)) despite its lack of authority to levy taxes [***14] on real property. ([Rider, supra, at pp. 8, 10.](#)) *Rider* stated, "To hold otherwise clearly would create a wide loophole in Proposition 13 as feared by the dissent in *Richmond*." ([Id. at p. 10.](#)) *Rider* noted a proliferation of governmental entities lacking the power to levy real property taxes raising revenues through sales taxes without the approval of two-thirds of the voters following [Richmond, supra, 31 Cal.3d 197](#). ([Rider, supra, at p. 10.](#)) *Rider* stated that the framers of Proposition 13 and the voters who adopted it could not have "intended to adopt a definition [of 'special districts'] that could so readily permit circumvention of [section 4](#)." ([Rider, supra, at p. 11.](#)) *Rider* held that the term "'special district' " includes "any local taxing agency created to raise funds for city or county purposes to replace revenues lost by reason of the restrictions of Proposition 13." (*Ibid.*)

[Knox v. City of Orland \(1992\) 4 Cal.4th 132 \[14 Cal. Rptr. 2d 159, 841 P.2d 144\]](#) held that a charge levied against real property in the City of Orland for the maintenance of public parks was a "special assessment," and was not a "special tax" within [***15] the meaning of [section 4 of article XIII A of the California Constitution](#). *Knox* stated that a special assessment is a charge levied against real property within a particular district for the purpose of conferring a special benefit on the assessed properties beyond any benefit received by the general public. ([Knox, supra, at pp. 141–142.](#)) A "special tax," in contrast, is imposed to provide [***359] benefits to the general public. ([Id. at pp. 142–143.](#)) *Knox* concluded that the park maintenance charge was a special assessment and therefore was not subject to the two-thirds voter approval requirement. ([Id. at pp. 140–141, 145.](#))

b. Proposition 218

California voters adopted Proposition 218 in November 1996, adding articles XIII C and XIII D to the California Constitution. Proposition 218 imposed additional voting approval requirements on the imposition of taxes by a local government. Proposition 218 also added to Proposition 13's limitations on ad valorem property taxes and special taxes similar limitations on assessments, fees, and charges relating to real property. ([Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles \(2001\) 24 Cal.4th 830, 837 \[*1320\] \[102 Cal. Rptr. 2d 719, 14 P.3d 930\]](#) (*Apartment Assn.*)). The initiative measure's [***16] findings and declaration of purpose stated: "The people of the State of California hereby find and declare that Proposition 13 was intended to provide effective tax relief and to require voter approval of tax increases. However, local governments have subjected taxpayers to excessive tax, assessment, fee and charge increases that not only frustrate the purposes of voter approval for tax increases, but also threaten the economic security of all Californians and the California economy itself. This measure protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) text of Prop. 218, § 2, p. 108; see Historical Notes, 2A West's Ann. Cal. Const. (2013 supp.) foll. art. XIII C, § 1, p. 171.)

Section 2, subdivision (a) of article XIII C of the California Constitution, added by Proposition 218, states: "All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes." Section 1 of article XIII C defines "'[g]eneral tax' " as "any tax imposed [***17] for general governmental purposes" and defines "'[s]pecial tax' " as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (*Id.*, subds. (a), (d).) Proposition 218 required that all general taxes imposed by a local government must be approved by a majority vote of

the electorate and all special taxes imposed by a local government must be approved by a two-thirds vote of the electorate.² (Cal. Const., art. XIII C, § 2, subds. (b), (d).) Proposition 218, however, did not define the term “tax.”

Section 3, subdivision (a) of article XIII D of the California Constitution, added by Proposition 218, states that the only “taxe[s], assessment[s], fee[s], or charge[s]” that a local government may impose “as an *****18** incident of property ownership” are ad valorem property taxes, special taxes approved by two-thirds of the voters, “[a]ssessments as provided by this article,” and “[f]ees or charges for property related services as provided by this article.” Proposition 218 restricted a local government’s ability to impose real property assessments by (1) tightening the definitions of “special benefit” *****360** and “proportional[ity]” (Cal. Const., art. XIII D, §§ 2, subd. (i), 4, subd. (a)); (2) establishing strict procedural requirements for the imposition of an assessment (*id.*, § 4, subds. (b)–(e)); and (3) shifting to the public agency the burden of demonstrating the legality of an assessment (*id.*, § 4, subd. (f)). ([Silicon Valley \[*1321\] Taxpayers’ Assn., Inc. v. Santa Clara County Open Space Authority \(2008\) 44 Cal.4th 431, 443–444 \[79 Cal. Rptr. 3d 312, 187 P.3d 371\]](#).) Proposition 218 also established procedural requirements for the imposition of new or increased fees and charges relating to real property and requirements for existing fees and charges. (Cal. Const., art. XIII D, § 6.)

[Apartment Assn., supra, 24 Cal.4th at page 838](#), held that article XIII D of the California Constitution restricted only fees imposed on real property owners in their capacity *****19** as owners and therefore did not apply to an inspection

fee imposed by the City of Los Angeles on property owners in their capacity as landlords.

c. *Sinclair Paint Co. v. State Board of Equalization*

In [Sinclair Paint Co. v. State Bd. of Equalization \(1997\) 15 Cal.4th 866 \[64 Cal. Rptr. 2d 447, 937 P.2d 1350\]](#) (*Sinclair Paint*), the California Supreme Court decided the question whether fees imposed by the Legislature on manufacturers and others contributing to environmental lead contamination were “ ‘taxes enacted for the purpose of increasing revenues’ ” under former [section 3 of article XIII A of the California Constitution](#), and therefore subject to the requirement of a two-thirds vote of the Legislature. ([Sinclair Paint, supra, at p. 873](#).) *Sinclair Paint* construed the language “ ‘taxes enacted for the purpose of increasing revenues’ ” in former [section 3 of article XIII A](#), which had not been construed in any California appellate opinion, by reference to prior opinions construing the term “special taxes” in [section 4 of article XIII A](#). ([Sinclair Paint, supra, at pp. 873–881](#).) *Sinclair Paint* stated:

“The cases recognize that ‘tax’ has no fixed meaning, and that the distinction between taxes and fees is frequently ‘blurred,’ taking on different meanings *****20** in different contexts. [Citations.] In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted. [Citations.] ...

“The ‘special tax’ cases have involved three general categories of fees or assessments: (1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power.” ([Sinclair Paint, supra, 15 Cal.4th at p. 874](#).)

Sinclair Paint stated that the courts had held that special assessments and development fees satisfying certain requirements were not “special taxes” under [article XIII A, section 4 of the California Constitution](#). ([Sinclair Paint, supra, 15](#)

² California Constitution, article XIII C, section 2, subdivision (b) states, in relevant part, “No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote.” Subdivision (d) of section 2 states, in relevant part, “No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.”

[Cal.4th at pp. 874–875.](#)) *Sinclair Paint* stated that regulatory fees that do not exceed the reasonable cost of providing the services for which the [*1322] fees are charged and are not levied for any unrelated revenue purposes also are not “ ‘special taxes’ ” subject to the two-thirds voting requirement of [section 4](#). ([Sinclair Paint, supra, at p. 876.](#)) *Sinclair Paint* rejected the holding by the Court of Appeal in that case that the fees were not regulatory in [***21] nature because the legislation imposing the fees imposed no other conditions [**361] on persons subject to the fees. Instead, *Sinclair Paint* concluded that the fees were regulatory because the legislation “requires manufacturers and other persons whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community.” ([Id. at p. 877.](#)) *Sinclair Paint* stated that such “ ‘mitigating effects’ fees” were just as regulatory in nature as fees imposed on polluters or producers of contaminating products for the initial permit or licensing programs, and that such fees in substantial amounts also regulate future conduct by deterring the conduct subject to the fee and by encouraging research and development of alternative products. (*Ibid.*)

Sinclair Paint rejected the argument that the state had no authority to impose the fees, stating that the case law “clearly indicates that the police power is broad enough to include mandatory remedial measures to mitigate the *past, present, or future* adverse impact of the fee payer’s operations, at least where, as here, the measure requires a causal connection or nexus [***22] between the product and its adverse effects. [Citations.]” ([Sinclair Paint, supra, 15 Cal.4th at pp. 877–878.](#)) *Sinclair Paint* stated that if the primary purpose of a fee is to regulate rather than to raise revenue, the fee is not a tax. ([Id. at p. 880.](#))

4. Proposition 26

[CA\(2\)](#) (2) California voters approved Proposition 26 on November 2, 2010. [HN4](#) Proposition 26

expanded the definition of taxes so as to include fees and charges, with specified exceptions; required a two-thirds vote of the Legislature to approve laws increasing taxes on any taxpayers; and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax. Proposition 26 amended [section 3 of article XIII A](#) and section 1 of article XIII C of the California Constitution. The initiative was an effort to close perceived loopholes in Propositions 13 and 218 and was largely a response to [Sinclair Paint, supra, 15 Cal.4th 866](#). Proposition 26’s findings and declaration of purpose stated:

“The people of the State of California find and declare that:

“(a) Since the people overwhelmingly approved Proposition 13 in 1978, the Constitution of the State of California has required that increases in state [***23] taxes be adopted by not less than two-thirds of the members elected to each house of the Legislature.

[*1323]

“(b) Since the enactment of Proposition 218 in 1996, the Constitution of the State of California has required that increases in local taxes be approved by the voters.

“(c) Despite these limitations, California taxes have continued to escalate. Rates for state personal income taxes, state and local sales and use taxes, and a myriad of state and local business taxes are at all-time highs. Californians are taxed at one of the highest levels of any state in the nation.

“(d) Recently, the Legislature added another \$12 billion in new taxes to be paid by drivers, shoppers, and anyone who earns an income.

“(e) This escalation in taxation does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as ‘fees’ in order to extract even more revenue from California taxpayers without having to abide by

these constitutional voting requirements. Fees couched as ‘regulatory’ but which **[**362]** exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually **[***24]** taxes and should be subject to the limitations applicable to the imposition of taxes.

“(f) In order to ensure the effectiveness of these constitutional limitations, this measure also defines a ‘tax’ for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as ‘fees.’ ” (Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, § 1, p. 114; see Historical Notes, 2A West’s Ann. Cal. Const., *supra*, foll. art. XIII A, § 3, pp. 141–142.)

Proposition 26 amended [section 3 of article XIII A of the California Constitution](#) to read:

“(a) [HN5](#) Any change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

“(b) As used in this section, ‘tax’ means any levy, charge, or exaction of any kind imposed by the State, except the following:

“(1) A charge imposed for a specific benefit conferred or privilege granted **[***25]** directly to the payor that is not provided to those not charged, and which does **[*1324]** not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.

“(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of

providing the service or product to the payor.

“(3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

“(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by [Section 15 of Article XI](#).

“(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law.

“(c) Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after **[***26]** the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

“(d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.”³

³ [Former section 3 of article XIII A of the California Constitution](#) stated, in its entirety, before the enactment of Proposition 26: “From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.” Proposition 26 amended the first sentence **[***27]** of [section 3](#), designated the first paragraph as [subdivision \(a\)](#), and added [subdivisions \(b\)](#), [\(c\)](#) and [\(d\)](#).

[363]** Proposition 26 amended section 1 of article XIII C of the California Constitution to read:
[*1325]

“(a) [HN6](#) ‘General tax’ means any tax imposed for general governmental purposes.

“(b) ‘Local government’ means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

“(c) ‘Special district’ means an agency of the state, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

“(d) ‘Special tax’ means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

“(e) As used in this article, ‘tax’ means any levy, charge, or exaction of any kind imposed by a local government, except the following:

“(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the **[***28]** local government of conferring the benefit or granting the privilege.

“(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

“(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

“(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

“(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

“(6) A charge imposed as a condition of property development.

“(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

[*1326]

“The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more **[***29]** than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.”⁴

Proposition 26, in an effort to curb the perceived problem of a proliferation of regulatory fees imposed by the state without a two-thirds vote of the Legislature or imposed **[**364]** by local governments without the voters' approval, defined a “tax” to include “any levy, charge, or exaction of any kind imposed by” the state or a local government, with specified exceptions. The question here is whether the paper carryout bag charge constitutes a tax and therefore is subject to one of the two voter approval requirements (Cal. Const., art. XIII C, § 2, subds. (b), (d)).

5. *The Paper Carryout Bag Charge Is Not a Tax*

The county contends the paper carryout bag charge is not a tax because it is payable to and retained by the retail store and is not remitted to the county. We

⁴ Proposition 26 added subdivision (e) to California Constitution, article XIII C, section 1 and left subdivisions (a) through (d) of section 1 unchanged.

agree.

HN7 CA(3) (3) The term “tax” in ordinary usage refers [***30] to a [*1327] compulsory payment made to the government or remitted to the government. Taxes ordinarily are imposed to raise revenue for the government (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 437 [121 Cal. Rptr. 3d 37, 247 P.3d 112] [“Ordinarily taxes are imposed for revenue purposes and not ‘in return for a specific benefit conferred or privilege granted.’”]; *Sinclair Paint, supra*, 15 Cal.4th at p. 874 [“In general, taxes are imposed for revenue purposes, rather than in return for a specific benefit conferred or privilege granted.”]; *Morning Star Co. v. Board of Equalization* (2011) 201 Cal.App.4th 737, 750 [135 Cal. Rptr. 3d 457]), although taxes may be imposed for nonrevenue purposes as well (see *Washington v. Confederated Tribes* (1980) 447 U.S. 134, 158 [65 L. Ed. 2d 10, 100 S. Ct. 2069] [“taxes can be used for distributive or regulatory purposes, as well as for raising revenue ...”]).

HN8 The definition of a “tax” in California Constitution, article XIII C, section 1, subdivision (e) does not explicitly state that the levy, charge or exaction must be payable to a local government, but does state that it must be “imposed by a local government.” In light of the ordinary meaning of a “tax” as [***31] a compulsory payment made to the government or remitted to the government, we conclude that subdivision (e) is ambiguous as to whether a levy, charge or exaction must be payable to a local government in order to constitute a tax. Our consideration of other language added to article XIII C by Proposition 26 helps to resolve this ambiguity.

HN9 CA(4) (4) Subdivision (e) of California Constitution, article XIII C, section 1 lists seven exceptions to the rule that “‘tax’ means any levy, charge, or exaction of any kind imposed by a local government” (*ibid.*). The exceptions (quoted *ante*) all relate to charges ordinarily payable to the government, including charges imposed in

connection with governmental activities or use of government property, fines imposed by the government for a violation of law, development fees and real property assessments. (*Ibid.*)

The first three exceptions, in particular, state that a charge imposed by a local government is not a tax if the charge does not exceed “the reasonable costs to the local government” of conferring a specific benefit or privilege directly to the payor or providing a specific service or product directly to the payor, and also except from the definition of a tax a charge “for the [***32] reasonable regulatory costs to a local government for issuing licenses and permits” and related activities. (Cal. Const., art. XIII C, § 1, subd. (e)(1), (2) & (3).) These exceptions, generally speaking, except from the definition of a “tax” charges not exceeding the reasonable costs to the local government of providing specific benefits or regulatory services. These exceptions do not contemplate the situation where a charge is paid to an entity or [***365] person other than a local government or where such an entity or person incurs reasonable costs. In our view, this suggests an understanding that the language “any levy, charge, or exaction of any kind imposed by a local government” in the first paragraph of article XIII C, section 1, subdivision (e) is limited to charges payable to a local government. This is consistent with the ordinary meaning of the term “tax.”⁵

⁵ None of the seven exceptions expressly refers to the reasonable costs to a nongovernmental entity or person or to activities undertaken by or payments typically made to a nongovernmental entity or person. Consideration of the final paragraph of California Constitution, article XIII C, section 1, subdivision (e) supports the view that the exceptions [***33] all refer to activities directly undertaken by the local government. The final paragraph states, “The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of *the governmental activity*, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, *the governmental activity*.” (Italics added.) Use of the term “the governmental activity” as a shorthand reference for the activities described in the exceptions suggests that the exceptions all refer to activities undertaken directly

No reason appears on the face of Proposition 26, or from our consideration of the voter information guide and the historical foundations of the initiative, [*1328] to conclude that the voters approving the initiative intended the definition of a “tax” to include both charges payable to a local government and charges payable to a nongovernmental entity or person, while limiting the “reasonable costs” exceptions to charges payable to a local government. In other [***34] words, there is no reason to believe that the voters approving Proposition 26 intended to except from the definition of a “tax” and, consequently, from the voter approval requirements, charges payable to a local government not exceeding the reasonable costs of providing specific benefits or regulatory activities, but intended the same charges if made payable to another person or entity in an amount not exceeding the reasonable costs to be considered taxes subject to the voter approval requirements.

The analysis and arguments for and against the initiative in the official voter information guide discussed the impact of the initiative on the ability of local government to raise revenues. The analysis by the Legislative Analyst stated, “Generally, the types of fees and charges that would become taxes under the measure are ones that government imposes to address health, environmental, or other societal or economic concerns.” (Voter Information Guide, *supra*, analysis of Prop. 26 by Legis. Analyst, p. 58.) A chart listed several examples of regulatory fees that could be considered taxes under the measure, stating as to each one that the state or local government “uses the funds” for specified purposes, necessarily implying that the fees were payable to the government. There was [***35] no discussion in the voter information guide of any charges or fees payable to a nongovernmental entity or person and nothing to suggest to the voters that Proposition 26 would have any impact on such

charges or fees.⁶

CA(5) (5) [366]** Accordingly, we conclude that **HN10** the language “any levy, charge, or exaction of any kind imposed by a local government” in the first paragraph of [*1329] California Constitution, article XIII C, section 1, subdivision (e) is limited to charges payable to, or for the benefit of, a local government.⁷

CA(6) (6) Petitioners note that **HN11** Proposition 26 deleted the language “any change in state taxes enacted for the purpose of increasing revenues collected pursuant thereto” in *article XIII A, section 3 of the California Constitution* and replaced it with “[a]ny change in state statute which results in any taxpayer paying a higher tax.” Petitioners argue that this amendment indicates an intent to eliminate the prior requirement that a charge must produce revenue for the government to be considered a tax. We disagree. This amendment was to the provision requiring approval by two-thirds of the Legislature for any increase in state taxes. The provisions [***37] requiring voter approval for increases in local taxes (*Cal. Const., arts. XIII A, § 4, XIII C, § 2*), in contrast, never included the language “for the

⁶ Another part of the Legislative Analyst's analysis provided other examples of regulatory fees, including “fees on the purchase of beverage containers to support recycling programs.” (Voter Information Guide, *supra*, analysis of Prop. 26 by Legis. Analyst, p. 56.) The California Beverage Container Recycling and Litter Reduction Act (*Pub. Resources Code, § 14500 et seq.*) requires a payment by the distributor to the Department of Resources Recycling and Recovery for each beverage container sold or transferred to a retailer. (*Id.*, § 14574.) The burden of the distributor's payment is passed on to the consumer through a fee charged by the retailer. The payments are deposited into a fund in the State Treasury and used for the administration of the recycling program. (*Id.*, §§ 14574, 14580, *subd. (a).*) Here, in contrast, the paper carryout bag charge is retained by the retailer, and no payment is made into any government fund. Contrary to Petitioners' argument, the charge here is not akin to a beverage container fee, and the reference in the ballot materials to beverage [***36] container fees did not suggest to the voters that a charge such as the paper carryout bag charge would be considered a tax.

⁷ A charge payable to a third party creditor to extinguish a debt owed by a local government, for example, would effectively be equivalent to a payment made to the local government.

purpose of increasing revenues” or any similar limiting language. The purpose of this amendment to [article XIII A, section 3](#) was to end the Legislature's practice of approving by a simple majority vote so-called “revenue-neutral” laws that increased taxes for some taxpayers but decreased taxes for others. The Legislative Analyst's analysis in the official voter information guide stated:

“Current Requirement. The State Constitution currently specifies that laws enacted ‘for the purpose of increasing revenues’ must be approved by two-thirds of each house of the Legislature. Under current practice, a law that increases the amount of taxes charged to some taxpayers but offers an equal (or larger) reduction in taxes for other taxpayers has been viewed as not increasing revenues. As such, it can be approved by a majority vote of the Legislature.

“New Approval Requirement. The measure specifies that state laws that result in *any* taxpayer paying a higher tax must be approved by two-thirds of each house of the Legislature.” (Voter Information Guide, *supra*, analysis of Prop. 26 by Legis. Analyst, pp. 58–59, boldface omitted.)

[CA\(7\)](#) (7) Accordingly, [***38] we conclude that the amendment to [California Constitution, article XIII A, section 3](#) does not support Petitioners' position. [HN12](#) The paper carryout bag charge is payable to and retained by the retail store providing the bag, which is required to use the funds for specified purposes. The charge is not remitted to the county. Because the charge is not remitted to the county and raises no revenue for the county, we conclude that the charge is not a “tax” for purposes of article XIII C of the California Constitution. The voter approval requirements of article XIII C, section 2 [***1330] therefore are inapplicable. In light of our conclusion, we need not decide whether, if the charge were otherwise considered a tax, any of the specified exceptions would apply.

The judgment is affirmed. Respondents are entitled to recover their costs on appeal.

[**367] Kitching, J., and Aldrich, J., concurred.

On March 11, 2013, the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied May 15, 2013, S209633. Kennard, J., and Corrigan, J., were of the opinion that the petition should be granted.

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DISPOSITION



Shelley v. Kraemer

Supreme Court of the United States

January 15-16, 1948, Argued ; May 3, 1948, Decided

No. 72

Reporter

334 U.S. 1 *; 68 S. Ct. 836 **; 92 L. Ed. 1161 ***; 1948 U.S. LEXIS 2764 ****; 3 A.L.R.2d 441

SHELLEY ET UX. v. KRAEMER ET UX.

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

No. 72. The Supreme Court of Missouri reversed a judgment of a state trial court denying enforcement of a private agreement restricting the use or occupancy of certain real estate to persons of the Caucasian race. [355 Mo. 814, 198 S. W. 2d 679](#). This Court granted certiorari. 331 U.S. 803. Reversed, p. 23.

No. 87. The Supreme Court of Michigan affirmed a judgment of a state trial court enjoining violation of a private agreement restricting the use or occupancy of certain real estate to persons of the Caucasian race. [316 Mich. 614, 25 N. W. 2d 638](#). This Court granted certiorari. 331 U.S. 804. Reversed, p. 23.

Disposition: [355 Mo. 814, 198 S. W. 2d 679](#), and [316 Mich. 614, 25 N. W. 2d 638](#), reversed.

Core Terms

color, state court, occupy, occupancy, state action, equal protection, restrictive covenant, covenant, equal protection of the law, judicial enforcement, property owner, trial court, white person, due process, common-law, parcel, ordinance, ownership, deprive

Case Summary

Procedural Posture

On writs of certiorari to the Supreme Courts of Missouri and Michigan, petitioners challenged decisions that enforced restrictive covenants in deeds of residential property whereby the owner agreed that it should not be used or occupied by any person except a Caucasian.

Overview

The cases involved suits in state courts to enforce restrictive covenants in deeds of residential property whereby the owners agreed that the property should not be used or occupied by any person except a Caucasian. The court reversed the state courts' decisions upholding the covenants because, in granting judicial enforcement of the covenants, the states denied petitioners the equal protection of the laws. Although there was no state statute regulating the matter, there was nonetheless state action within the meaning of [U.S. Const. amend. XIV](#). The action of the state courts in imposing penalties or depriving parties of substantive rights without providing adequate notice and an opportunity to defend themselves was a denial of due process of law guaranteed by [U.S. Const. amend. XIV](#). The court concluded that because of petitioners' race or color, they were denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.

* Together with No. 87, *McGhee et ux. v. Sipes et al.*, on certiorari to the Supreme Court of Michigan.

Outcome

The court reversed the lower state court decisions because the states denied petitioners the equal protection of the law in granting judicial enforcement of the restrictive agreements.

LexisNexis® Headnotes

Constitutional Law > Equal Protection > Nature & Scope of Protection

[HN1](#) See 8 U.S.C.S. § 42.

Civil Rights Law > Protection of Rights > Public Versus Private Discrimination

Constitutional Law > Substantive Due Process > Scope

[HN2](#) The action inhibited by the first section of [U.S. Const. amend. XIV](#) is only such action as may fairly be said to be that of the States. The [Fourteenth Amendment](#) erects no shield against merely private conduct, however discriminatory or wrongful.

Constitutional Law > Equal Protection > Nature & Scope of Protection

[HN3](#) It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth Amendment](#), [U.S. Const. amend. XIV](#), extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.

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

Constitutional Law > ... > Fundamental

Rights > Procedural Due Process > Scope of Protection

[HN4](#) The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has long been regarded as a denial of the due process of law guaranteed by [U.S. Const. amend. XIV](#).

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

Constitutional Law > Substantive Due Process > Scope

Governments > State & Territorial Governments > General Overview

[HN5](#) The action of the States to which the [Fourteenth Amendment](#), [U.S. Const. amend. XIV](#), has reference includes action of state courts and state judicial officials. Although, in construing the terms of the [Fourteenth Amendment](#), differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

Constitutional Law > Equal Protection > National Origin & Race

Constitutional Law > Equal Protection > Nature & Scope of Protection

Governments > Police Powers

[HN6](#) The [Fourteenth Amendment](#), [U.S. Const. amend. XIV](#), declares that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made

against them by law because of their color.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Real Property Law > Encumbrances > Restrictive Covenants > General Overview

Real Property Law > Encumbrances > Restrictive Covenants > Enforcement of Restrictive Covenants

HN7 The United States Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. The power of the State to create and enforce property interests must be exercised within the boundaries defined by the [Fourteenth Amendment](#), [U.S. Const. amend. XIV](#).

Lawyers' Edition Display

Summary

The judicial enforcement by state courts of covenants restricting the use or occupancy of real property to persons of the Caucasian race was held by six members of Court, in opinion by Vinson, Ch. J. (Reed, Jackson, and Rutledge, JJ., not participating), to violate the [equal protection clause of the 14th Amendment](#). Conceding that the Amendment is directed against state action only and does not reach private conduct, however discriminatory, the opinion holds that judicial action, even for the enforcement of private agreements, is state action, and so within the Amendment's field of operation; and that the enforcement of restrictive covenants against certain races is none the less discriminatory because courts will enforce them against any race against whom they are directed, including the white race.

Headnotes

CIVIL RIGHTS, §7 > enforcement of restrictive

covenants based on race or color as violation of constitutional rights. -- > Headnote:

[LEdHN\[1\]](#) [1]

While restrictive covenants as to ownership or occupancy of property, based on race or color, cannot in themselves be regarded as a violation of the [equal protection clause of the Fourteenth Amendment](#), judicial enforcement by state courts of such covenants is inhibited by the [equal protection clause](#) of such Amendment, even though such courts stand ready to enforce restrictive covenants irrespective of the race of which exclusion is sought (distinguishing [Corrigan v. Buckley](#), 271 US 323, 70 L ed 969, 46 S Ct 621 and [Hansberry v. Lee](#), 311 US 32, 85 L ed 22, 132 ALR 741, 61 S Ct 115).

CONSTITUTIONAL LAW, §315 > equal protection -- rights protected. -- > Headnote:

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

Among the civil rights intended to be protected from discriminatory state action by the [Fourteenth Amendment](#) are the rights to acquire, enjoy, own and dispose of property.

CIVIL RIGHTS, §7 > legislative restrictions on right to acquire or occupy property as violation of constitutional rights. -- > Headnote:

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

A state statute or local ordinance imposing restrictions based on color or race on the right to acquire or occupy property offends the [equal protection clause of the Fourteenth Amendment](#) (dictum).

CONSTITUTIONAL LAW, §314 > equal protection

-- scope of Fourteenth Amendment -- state action and private conduct. -- > Headnote:
[LEdHN\[4\]](#) [4]

The action inhibited by the [equal protection clause of the Fourteenth Amendment](#) is only such action as may fairly be said to be that of the states. The Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

CONSTITUTIONAL LAW, §314 > equal protection -- scope of Fourteenth Amendment -- judicial enforcement of private agreement as state action. -- > Headnote:
[LEdHN\[5\]](#) [5]

The action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the provision of the [Fourteenth Amendment](#) that no state shall deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTIONAL LAW, §865 > police power -- discrimination based on race or color as not within. -- > Headnote:
[LEdHN\[6\]](#) [6]

Discriminations imposed by state courts in denying equal protection of property rights to a designated class of citizens of specified race and ancestry cannot be justified as proper exertions of the state police power.

CONSTITUTIONAL LAW, §316 > equal protection -- indiscriminate inequalities. -- > Headnote:
[LEdHN\[7\]](#) [7]

Equal protection of the laws required by the [Fourteenth Amendment](#) is not achieved through indiscriminate imposition of inequalities.

CONSTITUTIONAL LAW, §488 > judicial refusal to enforce racial covenants as unconstitutional discrimination. -- > Headnote:
[LEdHN\[8\]](#) [8]

Property owners who are parties to agreements restricting the occupancy of property to persons of a specified race are not denied the equal protection of the laws if denied access to the courts to enforce such agreements and to assert property rights which the state courts have held to be created thereby.

CONSTITUTIONAL LAW, §314 > property rights -- state powers as limited by the Fourteenth Amendment. - > Headnote:
[LEdHN\[9\]](#) [9]

The power of the states to create and enforce property interests must be exercised within the boundaries defined by the [Fourteenth Amendment](#).

COURTS, §95 > STATES, §15 > duty of Supreme Court to declare state action unconstitutional. -- > Headnote:
[LEdHN\[10\]](#) [10]

Where the action of a state clearly violates the terms of the Federal Constitution, it is the duty of the Supreme Court of the United States so to declare.

CONSTITUTIONAL LAW, §17 > construction of

Fourteenth Amendment with reference to historical background. -- > Headnote:

[LEdHN\[11\]](#) [11]

The historical context in which the [Fourteenth Amendment](#) became a part of the Constitution indicates that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the states based on considerations of race and color; and the provisions of the Amendment are to be construed with this fundamental purpose in mind.

Syllabus

Private agreements to exclude persons of designated race or color from the use or occupancy [****2] of real estate for residential purposes do not violate the [Fourteenth Amendment](#); but it is violative of the [equal protection clause of the Fourteenth Amendment](#) for state courts to enforce them. [Corrigan v. Buckley, 271 U.S. 323](#), distinguished. Pp. 8-23.

(a) Such private agreements standing alone do not violate any rights guaranteed by the [Fourteenth Amendment](#). Pp. 12-13.

(b) The actions of state courts and judicial officers in their official capacities are actions of the states within the meaning of the [Fourteenth Amendment](#). Pp. 14-18.

(c) In granting judicial enforcement of such private agreements in these cases, the states acted to deny petitioners the equal protection of the laws, contrary to the [Fourteenth Amendment](#). Pp. 18-23.

(d) The fact that state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by them does not prevent the enforcement of covenants excluding colored persons from

constituting a denial of equal protection of the laws, since the rights created by § 1 of the Fourteenth Amendment are guaranteed to the individual. Pp. 21-22.

(e) Denial of access to the courts [****3] to enforce such restrictive covenants does not deny equal protection of the laws to the parties to such agreements. P. 22.

Counsel: George L. Vaughn and Herman Willer argued the cause and filed a brief for petitioners in No. 72. Earl Susman was also of counsel.

Thurgood Marshall and Loren Miller argued the cause for petitioners in No. 87. With them on the brief were Willis M. Graves, Francis Dent, William H. Hastie, Charles H. Houston, George M. Johnson, William R. Ming, Jr., James Nabrit, Jr., Marian Wynn Perry, Spottswood W. Robinson, III, Andrew Weinberger and Ruth Weyand.

By special leave of Court, Solicitor General Perlman argued the cause for the United States, as amicus curiae, supporting petitioners. With him on the brief was Attorney General Clark.

Gerald L. Seegers argued the cause for respondents in No. 72. With him on the brief was Walter H. Pollmann. Benjamin F. York was also of counsel.

Henry Gilligan and James A. Crooks argued the cause and filed a brief for respondents in No. 87. Lloyd T. Chockley was also of counsel.

Briefs of amici curiae supporting petitioners were filed by Perry W. Howard for the Civil Liberties Department, Grand Lodge of Elks, I. B. [****4] P. O. E. W.; Isaac Pacht, Irving Hill and Clore Warne; Robert McC. Marsh and Eugene Blanc, Jr. for the Protestant Council of New York City; Herbert S. Thatcher and Robert A. Wilson for the American Federation of Labor; Julius L. Goldstein for the Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc.; Melville J. France for the General Council of Congregational Christian Churches et al.; Robert W. Kenny, O. John Rogge and Mozart G. Ratner for the National Lawyers Guild; Lee Pressman, Eugene Cotton,

Frank Donner, John J. Abt, Leon M. Despres, M. H. Goldstein, Isadore Katz, David Rein, Samuel L. Rothbard, Harry Sacher, William Standard and Lindsay P. Walden for the Congress of Industrial Organizations et al.; Phineas Indritz, Irving R. M. Panzer and Richard A. Solomon for the American Veterans Committee; William Maslow, Shad Polier, Joseph B. Robison, Byron S. Miller and William Strong for the American Jewish Congress; Joseph M. Proskauer and Jacob Grumet for the American Jewish Committee et al.; William Strong for the American Indian Citizens League of California, Inc.; Francis M. Dent, Walter M. Nelson, Eugene H. Buder, Victor B. Harris, Luther Ely Smith and Harold I. Kahen [****5] for the American Civil Liberties Union; Earl B. Dickerson, Richard E. Westbrook and Loring B. Moore for the National Bar Association; Alger Hiss, Joseph M. Proskauer and Victor Elting for the American Association for the United Nations; and Edward C. Park and Frank B. Frederick for the American Unitarian Association.

Briefs of amici curiae supporting respondents were filed by Roger J. Whiteford and John J. Wilson for the National Association of Real Estate Boards; Ray C. Eberhard and Elisabeth Eberhard Zeigler for the Arlington Heights Property Owners Association et al.; and Thomas F. Cadwalader and Carlyle Barton for the Mount Royal Protective Association, Inc.

Judges: Vinson, Black, Frankfurter, Douglas, Murphy, Burton; Reed, Jackson and Rutledge took no part in the consideration or decision of this case.

Opinion by: VINSON

Opinion

[*4] [**838] [***1176] MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as

restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership [****6] or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

"... the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [sic] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any [*5] portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described [****7] in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and "in the immediate vicinity" of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by

Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question.¹ The trial court found that petitioners had no actual knowledge of the restrictive agreement [****8] at the time of the purchase.

[*6] On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon [***1177] which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was [****9] not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

[**839] The Supreme Court of Missouri sitting *en banc* reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution.² At the time the court rendered its decision, petitioners were occupying the property in

question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

"This property shall not be used [****10] or occupied by any person or persons except those of the Caucasian race.

[*7] "It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction."

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded; and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within ninety days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan [****11] affirmed, deciding adversely to petitioners' contentions that they had been denied rights protected by the [Fourteenth Amendment](#).³

¹The trial court found that title to the property which petitioners Shelley sought to purchase was held by one Bishop, a real estate dealer, who placed the property in the name of Josephine Fitzgerald. Bishop, who acted as agent for petitioners in the purchase, concealed the fact of his ownership.

²[Kraemer v. Shelley, 355 Mo. 814, 198 S. W. 2d 679 \(1946\).](#)

³[Sipes v. McGhee, 316 Mich. 614, 25 N. W. 2d 638 \(1947\).](#)

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the [Fourteenth Amendment of the Federal Constitution](#) and Acts of Congress passed pursuant to that Amendment.⁴ Specifically, [*8] petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

[****12] I.

[LEdHN\[1\]](#) [1]

Whether the [equal protection clause of the Fourteenth Amendment](#) [***1178] inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have involved the enforcement of such agreements. The first of these was the case of [Corrigan v. Buckley, 271 U.S. 323 \(1926\)](#). There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here [**840] on appeal. It is apparent that that case, which had originated in the federal courts and involved the enforcement of covenants on land located in the District of Columbia, could present no issues under the [Fourteenth Amendment](#); for that Amendment by its terms applies only to the States.

⁴The first section of the [Fourteenth Amendment](#) provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Nor was the question of the validity of court enforcement of the restrictive covenants under the [Fifth Amendment](#) [****13] properly before the Court, as the opinion of this Court specifically recognizes.⁵ The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue [*9] before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. Accordingly, the appeal was dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements.

[****14] The second of the cases involving racial restrictive covenants was [Hansberry v. Lee, 311 U.S. 32 \(1940\)](#). In that case, petitioners, white property owners, were enjoined by the state courts from violating the terms of a restrictive agreement. The state Supreme Court had held petitioners bound by an earlier judicial determination, in litigation in which petitioners were not parties, upholding the validity of the restrictive agreement, although, in fact, the agreement had not been signed by the number of owners necessary to make it effective under state law. This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process of law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court, that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. In arriving at its result, this Court did not reach the issues presented by the cases now under

⁵[Corrigan v. Buckley, 271 U.S. 323, 330-331 \(1926\)](#).

consideration.

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that [****15] no part of the [*10] affected property shall be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri [***1179] courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that "This property shall not be used or occupied by any person or persons except those of the Caucasian race."

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or [****16] make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more." ⁶

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

It [**841] cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the [Fourteenth Amendment](#) are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that

Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. ⁷ Thus, [*11] § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the [Fourteenth Amendment](#) was also under consideration, ⁸ provides:

[HN1](#) " [****17] All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." ⁹

This Court has given specific recognition to the same principle. [Buchanan v. Warley, 245 U.S. 60 \(1917\)](#).

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private [****18] agreements in these cases could not be squared with the requirements of the [Fourteenth Amendment](#) if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of [Buchanan v. Warley, supra](#), a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: "The [Fourteenth Amendment](#) and

⁷ [Slaughter-House Cases, 16 Wall. 36, 70, 81 \(1873\)](#). See Flack, The Adoption of the [Fourteenth Amendment](#).

⁸ In [Oyama v. California, 332 U.S. 633, 640 \(1948\)](#) the section of the Civil Rights Act herein considered is described as the federal statute, "enacted before the [Fourteenth Amendment](#) but vindicated by it." The Civil Rights Act of 1866 was reenacted in § 18 of the Act of May 31, 1870, subsequent to the adoption of the [Fourteenth Amendment](#). 16 Stat. 144.

⁹ 14 Stat. 27, 8 U. S. C. § 42.

⁶ [Buchanan v. Warley, 245 U.S. 60, 73 \(1917\)](#).

these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire [*12] property without state legislation discriminating against him solely because of color."

10

[***1180] In [****19] *Harmon v. Tyler*, 273 U.S. 668 (1927), a unanimous court, on the authority of [Buchanan v. Warley, supra](#), declared invalid an ordinance which forbade any Negro to establish a home on any property in a white community or any white person to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected."

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

The precise question before this Court in both the *Buchanan* and *Harmon* cases involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color. But that such legislation is also offensive to the rights of those desiring to acquire and occupy property and barred on grounds of race or color is clear, not only from the language of the opinion in [Buchanan v. Warley, supra](#), but from this Court's disposition of the case of *Richmond v. Deans*, 281 U.S. 704 (1930). There, a Negro, barred from the occupancy [****20] of certain property by the terms of an ordinance similar to that in the *Buchanan* case, sought injunctive relief in the federal courts to enjoin the enforcement of the ordinance on the grounds that its provisions violated the terms of the [Fourteenth Amendment](#). Such relief was granted, and this Court affirmed, finding the [**842] citation of [Buchanan v. Warley, supra](#), and *Harmon v. Tyler, supra*, sufficient to support its judgment.¹¹

¹⁰ [Buchanan v. Warley](#), 245 U.S. 60, 79 (1917).

¹¹ Courts of Georgia, Maryland, North Carolina, Oklahoma, Texas, and Virginia have also declared similar statutes invalid as being in

[****21] But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. [*13] Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the [Fourteenth Amendment](#).

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

Since the decision of this Court in the [Civil Rights Cases](#), 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that [HN2](#) the action inhibited by the first section of the [Fourteenth Amendment](#) is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.¹²

[****22] We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the [Fourteenth Amendment](#). So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. [Corrigan v. Buckley, supra](#).

But here there was more. These are cases in which the purposes of the agreements were secured only

contravention of the [Fourteenth Amendment](#). *Glover v. Atlanta*, 148 Ga. 285, 96 S. E. 562 (1918); [Jackson v. State](#), 132 Md. 311, 103 A. 910 (1918); [Clinard v. Winston-Salem](#), 217 N. C. 119, 6 S. E. 2d 867 (1940); [Allen v. Oklahoma City](#), 175 Okla. 421, 52 P. 2d 1054 (1936); *Liberty Annex Corp. v. Dallas*, 289 S. W. 1067 (Tex. Civ. App. 1927); [Irvine v. Clifton Forge](#), 124 Va. 781, 97 S. E. 310 (1918).

¹² And see [United States v. Harris](#), 106 U.S. 629 (1883); [United States v. Cruikshank](#), 92 U.S. 542 (1876).

[***1181] by judicial enforcement by state courts of the restrictive [*14] terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the [Fourteenth Amendment](#). Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the [Fourteenth Amendment](#). We move to a consideration of these matters.

II.

[****23]

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the [Fourteenth Amendment](#), is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the [Fourteenth Amendment](#). Thus, in [Virginia v. Rives](#), [100 U.S. 313, 318 \(1880\)](#), this Court stated: "[HN3](#) It is doubtless true that a State may act through different agencies, -- either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." In [Ex parte Virginia](#), [100 U.S. 339, 347 \(1880\)](#), the Court observed: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." In the [Civil Rights Cases](#), [109 U.S. 3, 11, 17 \(1883\)](#), [****24] this Court pointed out that the Amendment makes void "State action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority [**843] in the shape of laws, customs, or judicial or executive proceedings." Language to like effect is employed [*15] no less than eighteen times during the

course of that opinion.¹³

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action [****25] of the State for the purposes of the [Fourteenth Amendment](#), are to be found in numerous cases which have been more recently decided. In [Twining v. New Jersey](#), [211 U.S. 78, 90-91 \(1908\)](#), the Court said: "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." In [Brinkerhoff-Faris Trust & Savings Co. v. Hill](#), [281 U.S. 673, 680 \(1930\)](#), the Court, through Mr. Justice Brandeis, stated: "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." Further examples of such declarations in the opinions of this Court are not lacking.¹⁴

[****26] One of the earliest applications of the prohibitions contained in the [***1182] [Fourteenth Amendment](#) to action of state [*16] judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in

¹³ Among the phrases appearing in the opinion are the following: "the operation of State laws, and the action of State officers executive or judicial"; "State laws and State proceedings"; "State law . . . or some State action through its officers or agents"; "State laws and acts done under State authority"; "State laws, or State action of some kind"; "such laws as the States may adopt or enforce"; "such acts and proceedings as the States may commit or take"; "State legislation or action"; "State law or State authority."

¹⁴ [Neal v. Delaware](#), [103 U.S. 370, 397 \(1881\)](#); [Scott v. McNeal](#), [154 U.S. 34, 45 \(1894\)](#); [Chicago, Burlington and Quincy R. Co. v. Chicago](#), [166 U.S. 226, 233-235 \(1897\)](#); [Hovey v. Elliott](#), [167 U.S. 409, 417-418 \(1897\)](#); [Carter v. Texas](#), [177 U.S. 442, 447 \(1900\)](#); [Martin v. Texas](#), [200 U.S. 316, 319 \(1906\)](#); [Raymond v. Chicago Union Traction Co.](#), [207 U.S. 20, 35-36 \(1907\)](#); [Home Telephone and Telegraph Co. v. Los Angeles](#), [227 U.S. 278, 286-287 \(1913\)](#); [Prudential Insurance Co. v. Cheek](#), [259 U.S. 530, 548 \(1922\)](#); [American Railway Express Co. v. Kentucky](#), [273 U.S. 269, 274 \(1927\)](#); [Mooney v. Holohan](#), [294 U.S. 103, 112-113 \(1935\)](#); [Hansberry v. Lee](#), [311 U.S. 32, 41 \(1940\)](#).

violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute. Thus, in [Strauder v. West Virginia, 100 U.S. 303 \(1880\)](#), this Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. In the same volume of the reports, the Court in [Ex parte Virginia, supra](#), held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

[****27] [HN4](#) The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the [Fourteenth Amendment](#). [Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra](#). Cf. [Pennoyer v. Neff, 95 U.S. 714 \(1878\)](#).¹⁵

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the [**844] essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. [Moore v. Dempsey, 261 U.S. 86 \(1923\)](#). And see [Frank v. Mangum, 237 U.S. 309 \(1915\)](#). Convictions obtained by [*17] coerced [****28] confessions,¹⁶ by the use of perjured testimony known by the prosecution to be such,¹⁷ or without the effective assistance of

counsel,¹⁸ have also been held to be exertions of state authority in conflict with the fundamental rights protected by the [Fourteenth Amendment](#).

But the examples of state judicial action which have been held by this Court to violate [****29] the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by [***1183] those courts, may result in the denial of rights guaranteed by the [Fourteenth Amendment](#), even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.¹⁹ Thus, in [American Federation of Labor v. Swing, 312 U.S. 321 \(1941\)](#), enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion.²⁰ In [Cantwell v. Connecticut, 310 U.S. 296 \(1940\)](#), [*18] a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In [Bridges v. California, 314 U.S. 252 \(1941\)](#), enforcement [****30] of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the [Fourteenth Amendment](#).

¹⁵ And see [Standard Oil Co. v. Missouri, 224 U.S. 270, 281-282 \(1912\)](#); [Hansberry v. Lee, 311 U.S. 32 \(1940\)](#).

¹⁶ [Brown v. Mississippi, 297 U.S. 278 \(1936\)](#); [Chambers v. Florida, 309 U.S. 227 \(1940\)](#); [Ashcraft v. Tennessee, 322 U.S. 143 \(1944\)](#); [Lee v. Mississippi, 332 U.S. 742 \(1948\)](#).

¹⁷ See [Mooney v. Holohan, 294 U.S. 103 \(1935\)](#); [Pyle v. Kansas, 317 U.S. 213 \(1942\)](#).

¹⁸ [Powell v. Alabama, 287 U.S. 45 \(1932\)](#); [Williams v. Kaiser, 323 U.S. 471 \(1945\)](#); [Tomkins v. Missouri, 323 U.S. 485 \(1945\)](#); [De Meerleer v. Michigan, 329 U.S. 663 \(1947\)](#).

¹⁹ In applying the rule of [Erie R. Co. v. Tompkins, 304 U.S. 64 \(1938\)](#), it is clear that the common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State.

²⁰ And see [Bakery Drivers Local v. Wohl, 315 U.S. 769 \(1942\)](#); [Cafeteria Employees Union v. Angelos, 320 U.S. 293 \(1943\)](#).

²¹ And cf. *Chicago, Burlington and Quincy R. Co. v. Chicago*, 166 U.S. 226 (1897).

The short of the matter is that from the time of the adoption of the [Fourteenth Amendment](#) until the present, it has been the consistent ruling of this Court that [****31] [HN5](#) the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the [Fourteenth Amendment](#), differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

III.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements [**845] in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

[*19] We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish [****32] homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of [***1184] race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these [****33] cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. ²² In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for [*20] want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. ²³ The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the [Fourteenth Amendment](#) simply because it is taken pursuant to the state's common-law policy. ²⁴ Nor is

²² See *Swain v. Maxwell*, 355 Mo. 448, 196 S. W. 2d 780 (1946); *Koehler v. Rowland*, 275 Mo. 573, 205 S. W. 217 (1918). See also *Parmalee v. Morris*, 218 Mich. 625, 188 N. W. 330 (1922). Cf. *Porter v. Barrett*, 233 Mich. 373, 206 N. W. 532 (1925).

²³ Cf. *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907).

²⁴ *Bridges v. California*, 314 U.S. 252 (1941); *American Federation*

²¹ And see *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947).

the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the [Fourteenth Amendment](#), refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the [****34] protection of the [Fourteenth Amendment](#), it is the obligation of this Court to enforce the constitutional commands.

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

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of [****35] the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the [Fourteenth Amendment](#). That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by [**846] other citizens of different race or [*21] color.²⁵ [HN6](#) The [Fourteenth Amendment](#) declares "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."²⁶ [Strauder v. West Virginia](#), [***1185] *supra* at 307. Only recently this Court had occasion to declare that a state law which denied equal enjoyment of property rights to

a designated class of citizens of specified race and ancestry, [****36] was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws. [Oyama v. California](#), 332 U.S. 633 (1948). Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power.²⁷ Cf. [Buchanan v. Warley](#), *supra*.

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

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected.²⁸ This contention does [*22] not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the [Fourteenth Amendment](#) are, by its terms, guaranteed to the individual. The rights established are personal rights.²⁹ It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition [****38] of inequalities.

[of Labor v. Swing](#), 312 U.S. 321 (1941).

²⁵ See [Yick Wo v. Hopkins](#), 118 U.S. 356 (1886); [Strauder v. West Virginia](#), 100 U.S. 303 (1880); [Truax v. Raich](#), 239 U.S. 33 (1915).

²⁶ Restrictive agreements of the sort involved in these cases have been used to exclude other than Negroes from the ownership or occupancy of real property. We are informed that such agreements have been directed against Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos, among others.

²⁷ See [Bridges v. California](#), 314 U.S. 252, 261 (1941); [Cantwell v. Connecticut](#), 310 U.S. 296, 307-308 (1940).

²⁸ It should be observed that the restrictions relating to residential occupancy contained in ordinances involved in the *Buchanan*, *Harmon* and *Deans* cases, cited *supra*, and declared by this Court to be inconsistent with the requirements of the [Fourteenth Amendment](#), applied equally to white persons and Negroes.

²⁹ [McCabe v. Atchison, Topeka & Santa Fe R. Co.](#), 235 U.S. 151, 161-162 (1914); [Missouri ex rel. Gaines v. Canada](#), 305 U.S. 337 (1938); [Oyama v. California](#), 332 U.S. 633 (1948).

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

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. [HN7](#) The Constitution confers upon [****39] no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the [Fourteenth Amendment](#). Cf. [Marsh v. Alabama, 326 U.S. 501 \(1946\)](#).

[LEdHN\[10\]](#) [10]

The problem of defining the scope of the restrictions which the Federal Constitution [**847] imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider. [***1186] That problem was foremost in the minds of the framers of the Constitution, [*23] and, since that early day, has arisen in a multitude of forms. The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms [****40] of the fundamental charter, it is the obligation of this Court so to declare.

[LEdHN\[11\]](#) [11]

The historical context in which the [Fourteenth Amendment](#) became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based

on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.³⁰ Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the [Fourteenth Amendment](#). Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

[****41] For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

End of Document

³⁰ [Slaughter-House Cases, 16 Wall. 36, 81 \(1873\)](#); [Strauder v. West Virginia, 100 U.S. 303 \(1880\)](#). See Flack, *The Adoption of the Fourteenth Amendment*.



Skinner v. Oklahoma

Supreme Court of the United States

May 6, 1942, Argued ; June 1, 1942, Decided

No. 782

Reporter

316 U.S. 535 *; 62 S. Ct. 1110 **; 86 L. Ed. 1655 ***; 1942 U.S. LEXIS 493 ****

SKINNER v. OKLAHOMA EX REL.
WILLIAMSON, ATTORNEY GENERAL

Prior History: CERTIORARI TO THE
SUPREME COURT OF OKLAHOMA.

CERTIORARI, 315 U.S. 789, to review the affirmance of a judgment in a proceeding under the Oklahoma Habitual Criminal Sterilization Act, wherein it was ordered that the [****2] defendant (petitioner here) be made sterile.

Disposition: [189 Okla. 235, 115 P. 2d 123](#), reversed.

Core Terms

sterilize, embezzlement, felony, inheritable, equal protection clause, classification, habitual, convert, larceny, sexually, fraudulent intent, larceny by fraud, intrinsically, transmissible, offender, sentence, condemn, confine, steal

Case Summary

Procedural Posture

Defendant was convicted of more than two felonies and, under the Habitual Criminal Sterilization Act (act), [Okla. Stat. Ann. tit. 57, § 171 et seq.](#), was ordered to be rendered sterile. The Oklahoma Supreme Court affirmed the order that the operation be performed. Defendant was granted certiorari.

Overview

Defendant claimed that the act violated the [Fourteenth Amendment](#), [U.S. Const. amend. XIV](#). The court held that the act failed to meet the requirements of the [equal protection clause of the Fourteenth Amendment](#). The court found that defendant was convicted of larceny and that the act treated larceny and embezzlement, intrinsically the same crime and punishable in the same manner, the same except for the sterilization provision. The [equal protection clause](#) did not prevent a legislature from recognizing degrees of evil, and the constitution did not require things different in fact or opinion to be treated in law as though they were the same. However, where legislation laid an unequal hand on those who had committed the same quality of offense, the [equal protection clause](#) would be a formula of empty words if such conspicuously artificial lines could be drawn. The crimes of larceny and embezzlement rated the same terms of fines and imprisonment, but when it came to sterilization the pains and penalties of the law were different, which made for invidious discrimination against groups of individuals in violation of the constitutional guaranty of just and equal laws.

Outcome

The judgment of the state supreme court affirming the order for sterilization was reversed.

LexisNexis® Headnotes

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > ... > Theft & Related Offenses > Embezzlement > General Overview

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > Three Strikes

HN1 Classification of Offenses, Felonies

Oklahoma's Habitual Criminal Sterilization Act, [Okla. Stat. Ann. tit. 57, § 171 et seq.](#), defines an "habitual criminal" as a person who, having been convicted two or more times for crimes amounting to felonies involving moral turpitude, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. [Okla. Stat. Ann. tit. 57, § 173](#). A proceeding may be instituted for a judgment that such person shall be rendered sexually sterile. [Okla. Stat. Ann. tit. 57, §§ 176, 177](#). Notice, an opportunity to be heard, and the right to a jury trial are provided. [Okla. Stat. Ann. tit. 57, §§ 177-181](#). If the court or jury finds that the defendant is an habitual criminal and may be rendered sexually sterile without detriment to his or her general health, then the court shall render judgment to the effect that said defendant be rendered sexually sterile. [Okla. Stat. Ann. tit. 57, § 182](#). Offenses arising out of violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this act. [Okla. Stat. Ann. tit. 57, § 195](#).

Criminal Law & Procedure > ... > Theft & Related Offenses > Embezzlement > Elements

Criminal Law & Procedure > Criminal Offenses > Theft & Related Offenses > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Embezzlement > General Overview

Criminal Law & Procedure > ... > Theft & Related Offenses > Larceny & Theft > General Overview

HN2 Embezzlement, Elements

There may be larceny by fraud rather than embezzlement even where the owner of the personal property delivers it to the defendant, if the latter has at that time a fraudulent intention to make use of the possession as a means of converting such property to his own use, and does so convert it. If the fraudulent intent occurs later and the defendant converts the property, he is guilty of embezzlement. Whether a particular act is larceny by fraud or embezzlement thus turns not on the intrinsic quality of the act but on when the felonious intent arose -- a question for the jury under appropriate instructions.

Constitutional Law > Equal Protection > Nature & Scope of Protection

Governments > Police Powers

HN3 Equal Protection, Nature & Scope of Protection

A State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the [equal protection clause](#) from confining "its restrictions to those classes of cases where the need is deemed to be clearest.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN4 Equal Protection, Nature & Scope of Protection

The law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow.

Constitutional Law > Substantive Due
Process > Scope

HN5 Constitutional Law, Substantive Due Process

Marriage and procreation are fundamental to the very existence and survival of the race.

Constitutional Law > Equal Protection > Nature
& Scope of Protection

Criminal Law & Procedure > ... > Adjustments
& Enhancements > Criminal History > Three
Strikes

Constitutional Law > Equal
Protection > Judicial Review > Standards of
Review

HN6 Equal Protection, Nature & Scope of Protection

Strict scrutiny of the classification which a state makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of equal protection of the laws is a pledge of the protection of equal laws. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Lawyers' Edition Display

Headnotes

CONSTITUTIONAL LAW, §512 > equal protection
-- sterilization of habitual criminals. -- > Headnote:

[LEdHN\[1\]](#) [1]

A state statute, which, in providing for the sterilization of habitual criminals, defined as persons convicted two or more times for crimes amounting to felonies involving moral turpitude, applies to persons convicted of larceny, including larceny by fraud, but expressly exempts from its operation persons convicted of embezzlement, although, under many circumstances, the nature of the two crimes is intrinsically the same and, under the law of the state, they are punishable in the same manner, constitutes a violation of the [equal protection clause of the Fourteenth Amendment](#).

CONSTITUTIONAL LAW, §318 > equal protection
-- classification on basis of needs and experience. --
> Headnote:

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

A state need not, in order to meet the requirements of equal protection, provide for abstract symmetry in its legislation, but it may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience.

APPEAL, §731 > from state court to Supreme Court -
- constitutionality of state statute -- effect of severability
clause. -- > Headnote:

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

The Supreme Court of the United States, in holding a state criminal statute unconstitutional upon the ground that an exemption therein makes it a violation of the [equal protection clause of the](#)

[Fourteenth Amendment](#), will not undertake to determine whether, by the application of a severability clause in the statute, this constitutional objection may be avoided, but will leave this question to be determined in the state courts, where the constitutionality of the statute as a whole has been sustained in the state courts without reference to the severability clause, and it is not clear whether, applying that clause, the scope of the statute ought to be enlarged or contracted in order to make it constitutional.

Syllabus

[****1] 1. A statute of Oklahoma provides for the sterilization, by vasectomy or salpingectomy, of "habitual criminals" -- an habitual criminal being defined therein as any person who, having been convicted two or more times, in Oklahoma or in any other State, of "felonies involving moral turpitude," is thereafter convicted and sentenced to imprisonment in Oklahoma for such a crime. Expressly excepted from the terms of the statute are certain offenses, including embezzlement. As applied to one who was convicted once of stealing chickens and twice of robbery, *held* that the statute violated the [equal protection clause of the Fourteenth Amendment](#). P. 537.

2. The State Supreme Court having sustained the Act, as applied to the petitioner here, without reference to a severability clause, the question whether that clause would be so applied as to remove the particular constitutional objection is one which may appropriately be left for adjudication by the state court. P. 542.

Counsel: Messrs. W. J. Hulsey, H. I. Aston, and Guy L. Andrews submitted for petitioner.

Mr. Mac Q. Williamson, Attorney General of Oklahoma, for respondent.

Judges: Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, Jackson

Opinion by: DOUGLAS

Opinion

[*536] [**1111] [***1657] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race -- the right to have offspring. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the [Fourteenth Amendment](#). Because that decision raised grave and substantial constitutional questions, we granted the petition for certiorari.

The statute involved is [HN1](#) Oklahoma's Habitual Criminal Sterilization Act. [Okla. Stat. Ann. Tit. 57, §§ 171, et seq.](#); L. 1935, pp. 94 *et seq.* That Act defines an "habitual criminal" as a person who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude," either in an Oklahoma court or in a court of [****3] any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. § 173. Machinery is provided for the institution by the Attorney General of a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile. §§ 176, 177. Notice, an opportunity to be heard, and the right to a jury trial are provided. §§ 177-181. The issues [***1658] triable in such a proceeding are narrow and confined. [*537] If the court or jury finds that the defendant is an "habitual criminal" and that he "may be rendered sexually sterile without detriment to his or her general health," then the court "shall render judgment to the effect that said defendant be rendered sexually sterile" (§ 182) by the operation of vasectomy in case of a male, and of salpingectomy in case of a female. § 174. Only one other provision of the Act is material here, and that is § 195, which provides that "offenses arising

out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act."

Petitioner was [****4] convicted in 1926 of the crime of stealing chickens, and was sentenced to the Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with firearms, and was sentenced to the reformatory. In 1934 he was convicted again of robbery with firearms, and was sentenced to the penitentiary. He was confined there in 1935 when the Act was passed. In 1936 the Attorney General instituted proceedings against him. Petitioner in his answer challenged the Act as unconstitutional by reason of the [Fourteenth Amendment](#). A jury trial was had. The court instructed the jury that the crimes of which petitioner had been convicted were felonies involving moral turpitude, and that the only question for the jury was whether the operation of vasectomy could be performed on petitioner without detriment to his general health. The jury found that it could be. A judgment directing that the operation of vasectomy be performed on petitioner was affirmed by the Supreme Court of Oklahoma by a five to four decision. [189 Okla. 235, 115 P. 2d 123](#).

[LEdHN\[1\]](#) [1]Several objections to the constitutionality of the Act have been pressed upon us. It is urged that the Act cannot be sustained as an exercise [****5] of the police power, in view [538] of the state of scientific authorities respecting inheritability of criminal traits. ¹ [****6] It is argued that due process is lacking

[**1112] because, under this Act, unlike the Act ² upheld in [Buck v. Bell, 274 U.S. 200](#), the defendant is given no opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring. See [Davis v. Berry, 216 F. 413](#); [Williams v. Smith, 190 Ind. 526, 131 N. E. 2](#). It is also suggested that the Act is penal in character and that the sterilization provided for is cruel and unusual punishment and violative of the [Fourteenth Amendment](#). See [Davis v. Berry, supra](#). Cf. [State v. Feilen, 70 Wash. 65, 126 P. 75](#); [Mickle v. Henrichs, 262 F. 687](#). We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is, its failure to meet the requirements of the [equal protection clause of the Fourteenth Amendment](#).

We do not stop to point out all of the inequalities in this Act. A few examples will suffice. In Oklahoma, grand larceny is a felony. [Okla. Stats. Ann. Tit. 21, §§ 1705, 5](#). Larceny is grand larceny when the property taken exceeds \$ 20 in value. *Id.* § 1704. Embezzlement is punishable [***1659] "in the manner prescribed for feloniously stealing property of the value of that embezzled." *Id.* § 1462. Hence, he who embezzles property worth more than \$ 20 is guilty of a felony. A clerk who appropriates over \$ 20 from his employer's till (*id.* § 1456) and a stranger who steals the same [*539] amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. [****7] A person who enters a chicken coop and steals chickens commits a felony (*id.* § 1719); and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. *Id.* § 1455. Hence, no matter how

¹ Healy, *The Individual Delinquent* (1915), pp. 188-200; Sutherland, *Criminology* (1924), pp. 112-118, 621-622; Gillin, *Criminology and Penology* (1926), c. IX; Popenoe, *Sterilization and Criminality*, 53 Rep. Am. Bar. Assoc. 575; Myerson et al., *Eugenical Sterilization* (1936), c. VIII; Landman, *Human Sterilization* (1932), c. IX; Summary of the Report of the American Neurological Association Committee for the Investigation of Sterilization, 1 Am. Journ. Med. Jur. 253 (1938).

² And see [State v. Troutman, 50 Ida. 673, 299 P. 668](#); Chamberlain, *Eugenics in Legislatures and Courts*, 15 Am. Bar Assn. Journ. 165; Castle, *The Law and Human Sterilization*, 53 Rep. Am. Bar Assoc., 556, 572; 2 [Bill of Rights](#) Review 54.

habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. Thus, the nature of the two crimes is intrinsically the same and they are punishable in the same manner. Furthermore, the line between them follows close distinctions -- distinctions comparable to those highly technical ones which shaped the common law as to "trespass" or "taking." Bishop, Criminal Law (9th ed.) Vol. 2, §§ 760, 799, *et seq.* [HN2](#) There may be larceny by fraud rather than embezzlement even where the owner of the personal property delivers it to the defendant, if the latter has at that time "a fraudulent intention to make use of the possession as a means of converting such property to his own use, and does so convert it." [Bivens v. State, 6 Okla. Cr. 521, 529, 120 P. 1033, 1036](#). If the fraudulent intent occurs later and the defendant converts the property, he is guilty of embezzlement. **[****8]** [Bivens v. State, supra](#); [Flohr v. Territory, 14 Okla. 477, 78 P. 565](#). Whether a particular act is larceny by fraud or embezzlement thus turns not on the intrinsic quality of the act but on when the felonious intent arose -- a question for the jury under appropriate instructions. [Bivens v. State, supra](#); [Riley v. State, 64 Okla. Cr. 183, 78 P. 2d 712](#).

[LEdHN\[2\]](#) [2]It was stated in [Buck v. Bell, supra](#), that the claim that state legislation violates the [equal protection clause of the Fourteenth Amendment](#) is "the usual last resort of constitutional arguments." [274 U.S. p. 208](#). Under our constitutional **[*540]** system the States in determining the reach and scope of particular legislation need not provide "abstract symmetry." [Patsone v. Pennsylvania, 232 U.S. 138, 144](#). They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. See [Bryant v. Zimmerman, 278 U.S. 63](#), and cases cited. It was in that connection that Mr. Justice Holmes, speaking for the Court in [Bain Peanut Co. v. Pinson, 282 U.S. 499, 501](#), stated, "We must remember that the machinery of government would

not **[****9]** work if it were not allowed a little play in its joints." Only recently we reaffirmed the view that the [equal protection clause](#) does not prevent the legislature from recognizing "degrees of evil" ([Truax v. Raich, 239 U.S. 33, 43](#)) by our ruling in [Tigner v. Texas, 310 U.S. 141, 147](#), that "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." And see [Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362](#). Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised. See [Moore v. Missouri, 159 U.S. 673](#); [Hawker v. New York, 170 U.S. 189](#); **[***1660]** [Finley v. California, 222 U.S. 28](#); [Patsone v. Pennsylvania, supra](#). For [HN3](#) a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the [equal protection clause](#) from confining "its restrictions to those classes of cases where the need is deemed to be clearest." [Miller v. Wilson, 236 U.S. 373, \[****10\] 384](#). And see [McLean v. Arkansas, 211 U.S. 539](#). As stated in [Buck v. Bell, supra, p. 208](#), ". . . [HN4](#) the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."

[*541] But the instant legislation runs afoul of the [equal protection clause](#), though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man. [HN5](#) Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We

mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in [****11] emphasis of our view that [HN6](#) strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." [Yick Wo v. Hopkins, 118 U.S. 356, 369.](#) When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. [Yick Wo v. Hopkins, supra; Gaines v. Canada, 305 U.S. 337.](#) Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, "with reference [****12] to the time when the [*542] fraudulent intent to convert the property to the taker's own use" arises. [Riley v. State, supra, 64 Okla. Cr. at p. 189, 78 P. 2d p. 715.](#) We have not the slightest basis for inferring that that line has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The [equal \[**1114\] protection clause](#) would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. See [Smith v. Wayne Probate Judge, 231 Mich. 409, 420-421, 204 N. W. 40.](#) In [Buck v. Bell, supra,](#) the Virginia statute was upheld though it applied only

to feeble-minded [***1661] persons in institutions of the State. But it was pointed out that "so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached." [274 U.S. p. 208.](#) [****13] Here there is no such saving feature. Embezzlers are forever free. Those who steal or take in other ways are not. If such a classification were permitted, the technical common law concept of a "trespass" (Bishop, Criminal Law, 9th ed., vol. 1, §§ 566, 567) based on distinctions which are "very largely dependent upon history for explanation" (Holmes, The Common Law, p. 73) could readily become a rule of human genetics.

[LEdHN\[3\]](#) [3]It is true that the Act has a broad severability clause.³ But we will not endeavor to determine whether its application [*543] would solve the equal protection difficulty. The Supreme Court of Oklahoma sustained the Act without reference to the severability clause. We have therefore a situation where the Act as construed and applied to petitioner is allowed to perpetuate the discrimination which we have found to be fatal. Whether the severability clause would be so applied as to remove this particular constitutional objection is a question which may be more appropriately left for adjudication by the Oklahoma court. [Dorcy v. Kansas, 264 U.S. 286.](#) That is reemphasized here by our uncertainty as to what excision, if any, would be made as a matter [****14] of Oklahoma law. Cf. [Smith v. Cahoon, 283 U.S. 553.](#) It is by no means clear whether, if an excision were made, this particular constitutional

³ Sec. 194 provides:

"If any section, sub-section, paragraph, sentence, clause or phrase of this Act shall be declared unconstitutional, or void for any other reason by any court of final jurisdiction, such fact shall not in any manner invalidate or affect any other or the remaining portions of this Act, but the same shall continue in full force and effect. The Legislature hereby declares that it would have passed this Act, and each section, subsection, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, sub-sections, paragraphs, sentences, clauses or phrases be declared unconstitutional."

difficulty might be solved by enlarging on the one hand or contracting on the other (cf. Mr. Justice Brandeis dissenting, *National Life Ins. Co. v. United States*, 277 U.S. 508, 534-535) the class of criminals who might be sterilized.

[****15] *Reversed*.

Concur by: STONE; JACKSON

Concur

MR. CHIEF JUSTICE STONE, concurring:

I concur in the result, but I am not persuaded that we are aided in reaching it by recourse to the [equal protection clause](#).

If Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the [equal protection clause](#) requires it to apply the measure to all criminals in the first instance, or to none. See [Rosenthal v. New York](#), 226 U.S. 260, 271; [*544] *Keokee Coke Co. v. Taylor*, 234 U.S. 224, 227; [Patsone v. Pennsylvania](#), 232 U.S. 138, 144.

Moreover, if we must presume that the legislature knows -- what science has been unable to ascertain -- that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals, I should suppose that we must likewise presume that the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders are more likely to be transmitted than those of others. And so I think the real question we have to consider is not one of equal [****16] protection, but whether the wholesale condemnation of a [**1115] class [***1662] to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.

There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned (see [United States v. Carolene Products Co.](#), 304 U.S. 144, 152, n. 4) and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action. Although petitioner here was given a hearing to ascertain whether sterilization would be detrimental to his health, he was given none to discover whether his criminal tendencies are of an inheritable type. Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies. [Buck v. Bell](#), 274 U.S. 200. But until now we have not been called upon to say that it may do so without [****17] giving him a hearing and opportunity to challenge the existence as to him of the only facts which could justify so drastic a measure.

[*545] Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend -- nor can there be any pretense -- that either common knowledge or experience, or scientific investigation,¹ has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable. In such circumstances, inquiry whether such is the fact in the case of any particular individual cannot rightly be dispensed with. Whether the procedure by which a statute carries its mandate into execution satisfies due process is a

¹See *Eugenical Sterilization*, A Report of the Committee of the American Neurological Association (1936), pp. 150-52; Myerson, Summary of the Report, 1 *American Journal of Medical Jurisprudence* 253; Popenoe, *Sterilization and Criminality*, 53 *American Bar Assn. Reports* 575; Jennings, *Eugenics*, 5 *Encyclopedia of the Social Sciences* 617, 620-21; Montagu, *The Biologist Looks at Crime*, 217 *Annals of American Academy of Political and Social Science* 46.

matter of judicial cognizance. A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process. [Morrison v. California](#), 291 U.S. 82, 90, and cases cited; [Taylor v. Georgia](#), 315 U.S. 25. And so, while the state may protect itself from the demonstrably [****18] inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects.

[****19] [*546] MR. JUSTICE JACKSON concurring:

I join the CHIEF JUSTICE in holding that the hearings provided are too limited in the context of the present Act to afford due process of law. I also agree with the opinion of MR. JUSTICE DOUGLAS that the scheme of classification set forth in the Act denies equal protection of the law. I disagree with the opinion of each in so far as it rejects or minimizes the grounds taken by the other.

Perhaps to employ a broad and [***1663] loose scheme of classification would be permissible if accompanied by the individual hearings indicated by the CHIEF JUSTICE. On the other hand, narrow classification with reference to the end to be accomplished by the Act might justify limiting individual hearings to the issue whether the individual belonged to a class so defined. [**1116] Since this Act does not present these questions, I reserve judgment on them.

I also think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate

from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity. This Court has sustained [****20] such an experiment with respect to an imbecile, a person with definite and observable characteristics, where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in generations to come. [Buck v. Bell](#), 274 U.S. 200.

There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority -- even those who have been guilty of what the majority define as crimes. But this Act falls down before reaching this problem, which I mention only to [*547] avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment.

End of Document

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ficial title, and the action brought in that form, as seems to have been the case, it could scarcely have been given to his commissary in that form, and it would seem must have been in his individual name.

Since the decision of this court in *The Ordinary v. Updike*, settling the propriety of suing in the name of the ordinary alone, the practice of using the individual name of the officer is perhaps not to be commended. It may expose the pleader to the hazard of some of the embarrassments pointed out by the court in that case. Yet if the pleader chooses to encounter those hazards, he does not therefore incur the penalties of vicious pleading. The use of the individual name may be treated as surplusage. The demurrer must be overruled, with costs.

CARPENTER, and RANDOLPH, Justices, concurred.

Demurrer overruled.

THE STATE v. ELIAKIM COOPER.

1. An attempt to do a wrongful act is not a crime or misdemeanor, if the act attempted is not a criminal offence.
2. To cause or procure abortion before the child is quick, is not a criminal offence at common law, and has never been made so by statute in New Jersey.
3. An attempt made to cause an abortion when the woman is not quick with child, if made with her consent, is not an indictable assault upon her: the consent of the party takes away the criminal character of the assault.
4. To cause abortion when the child is quick, is not murder or manslaughter at common law, but a great misdemeanor.
5. Although the law, for many civil purposes, recognises the existence of a child from its conception, it does not, for the purpose of punishing its destruction, recognise it as a living being until it quickens or stirs in the womb.
6. It is not an assault to cause abortion upon a woman not yet quick with child, if done with her consent. It is only in cases of high crimes that the person assaulted is incapable of assenting.

This case was upon an indictment found in the Oyer and Terminer of Morris county. On a motion to quash the indict-

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ment, that court had reserved the question of the sufficiency of the indictment for the advisory opinion of this court, and the argument was had upon a case stated and certified to this court.

The offences charged in the indictment appear in the opinion of the court.

Argued before the CHIEF JUSTICE, and RANDOLPH and OGDEN, Justices, by *Scofield* and *Attorney General*, for the state, *Whelpley*, for defendant.

The CHIEF JUSTICE delivered the opinion of the court.

The only point reserved, and submitted for the opinion of this court, is whether *an attempt* to procure an abortion, the mother not being quick with child, is an indictable offence at the common law. It may simplify the inquiry to consider whether the procuring an abortion under such circumstances constitutes a crime. If the character of the act itself, when accomplished, be clearly *ascertained*, we shall be enabled with more certainty to decide upon the character of a mere *attempt* to commit the act.

Is, then, the procuring of an abortion, either by means of potions or of an operation used by the mother herself, or by another with her consent, an indictable offence at the common law, unless the mother be quick with child?

Undoubtedly the commission of such an act without the consent of the mother is indictable, as an assault upon the mother. The indictment in this case, charging, as it does in one count, that the defendant assaulted the mother and administered the potions, and in the other, that he made the assault and used violence to procure an abortion, is clearly good, and the court were right in refusing to quash. The indictment charges an assault with circumstances of aggravation. The offence charged is against the person of the mother, and is presumed to be, as in all other cases of assault, without her consent.

But when no assault is alleged or proved, where the act is done by the mother herself or with her assent, a very different question is presented. It was insisted indeed, upon the argu-

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ment, that the assent of the mother was null; that the offence was of so high a nature that no assent of hers could purge its criminality. But this, it is obvious, is begging the question. The charge of assault, of an offence against the person of the mother, is clearly purged of criminality by her assent. The ingredient which, according to the argument, gives character to the offence, and takes away the power of the mother to consent, is the attempt to procure abortion, which it is alleged is an offence against the person of the child. But the very point of inquiry is, whether that be at all an offence or not, and whether the child be *in esse*, so that any crime can be committed against its person.

In regard to offences against the person of the child, a distinction is well settled between its condition before and after its birth. Thus, it is not murder to kill a child before it be born, even though it be killed in the very process of delivery. *Hale's P. C.* 433.

There appears to be at the common law a distinction equally well settled between the condition of the child before and after the mother is quick. "Life," says Blackstone, "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 *Bl. Com.* 129.

It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. *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.

The offence of procuring an abortion seems, by the ancient common law writers, to be treated only as an offence against life. Thus Coke says, "If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her whereby the child dieth in her body, and she is delivered, this is a great misprision, but no murder." 3 *Inst.* 50. It was anciently holden that the causing of an abortion by giving a potion to, or striking a woman big with child, was murder; but at this day it is said to be a great misprision only,

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and not murder, unless the child be born alive, and die thereof. 1 *Hawk. B.* 1, c. 31, § 16.

If a woman be *quick* or *great* with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in *rerum naturæ*, though it be a great crime. 1 *Hale's P. C.* 433. If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if any one beat her whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor. 1 *Bl. Com.* 129.

In two of these authorities (*Hale* and *Hawkins*) the term "*big*" or "*great*" is obviously used as tantamount to "*quick*." In all of them, the authors are treating of the crime of murder, of the offence against human life; and they distinguish between the destruction of the life of the infant before and after birth. There is in none of them a reference to the mere procuring of an abortion by the destruction of a *fœtus* unquickened, as a crime against the person or against God and religion. *Abortion*, as a crime, is to be found only in modern treatises and in modern statutes. No trace of it is to be found in the ancient common law writers. Bracton, indeed, uses language which at first view might seem to favor a different conclusion. He says, "*Si aliquis, mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortionem, si puerperiem jam formatum fuerit, et maxime si animatum, facit homicidium.*" Bracton, *L.* 3, c. 21.

He is treating, however, of the crime of homicide, and it is perfectly certain, by the unanimous concurrence of all the authorities, that that offence could not be committed unless the child had quickened.

So far as my researches have gone, I have found no precedent, no authority, nor even a *dictum* (prior to Lord Ellenborough's act, 43 *Geo.* 3, c. 58,) which recognizes the mere procuring of an abortion as a crime known to the law.

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There is a precedent in 3 *Chitty's Crim. Law* 557, which has been frequently referred to in support of the principle, that an attempt to procure an abortion was a crime at the common law. Properly considered, however, it is rather an authority the other way. It charges, in each of its counts, an assault by the defendant upon the mother; it is, indeed, a mere indictment for an assault with circumstances of aggravation. It contains no count for the mere procuring of an abortion, or for an attempt to commit the offence; thus affording a strong indication that the pleader deemed some other ingredient necessary to constitute a crime. It has been well observed, moreover, that the indictment contains averments, which if not directly, yet by necessary or fair implication, show that the child had quickened. It is remarkable, too, that this indictment was drawn at Trinity term, 42 *Geo. 3*. The next year Lord Ellenborough's act was passed, declaring the procuring of an abortion, though the mother be not quick with child, a felony. It seems not improbable that a supposed defect in the law, in the very particular now under consideration, led to the passing of the act.

The distinction, thus clearly recognised in the ancient law, between the condition of the child, and the consequent criminality of an act tending to its destruction, before and after quickening, has been fully recognised by the earlier legislation upon the subject. Thus the statute 43 *Geo. 3*, makes it a capital offence to cause the miscarriage of a woman quick with child, and a felony of a mitigated character to cause a miscarriage before the quickening.

The earlier legislation in this country upon the subject recognises the same distinction. 2 *Rev. Stat. New York* (1829) 661, 38, 9; 694 § 21; *Rev. Stat. Ohio* (1804) 252; *Rev. Stat. Conn.* (1838) 145, § 15. It is only in very recent statutes that the distinction has been abolished.

By the laws of most countries, this crime is punished with more severity if committed after the quickening than before. The Roman penal code made the same distinction. *Male's Jur. Med.* 113.

It is true that, for certain civil purposes, the law regards an infant as *in being* from the time of conception, yet it seems no

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where to regard it as *in life*, or to have respect to its preservation as a living being. So if the mother be convicted of a capital offence, the mere fact of pregnancy is of no avail to stay execution of the sentence of death. It is only when the mother is found "quick with child" that the sentence is respited till after delivery. 4 B. C. 395.

In a modern case, a distinction was taken, by a learned judge upon the circuit, between the terms "*quick with child*" and "*with quick child*," and it was said that the former term means simply having conceived. *Regina v. Wycherley*, 8 Car. and P. 262. There is no foundation whatever in law for this distinction. The ancient authorities show clearly that the terms are synonymous, both importing that the child had quickened in the womb, and that the period had arrived when the life of the infant, in contemplation of law, had commenced. *Sarah Baynton's case*, 14 State Trials 634; 1 Hale's P. C. 368; 4 B. C. 395.

In England there does not appear to have been any adjudication upon the point now under consideration. But the Supreme Court of Massachusetts have decided that the procuring of an abortion, unless the mother be quick with child, is not an indictable offence at the common law. *Commonwealth v. Parker*, 9 Mete. 263; *Commonwealth v. Banks*, 9 Mass. 388.

Two modern elementary writers upon criminal law, of acknowledged reputation, have given some countenance to the idea, that the mere attempt to procure an abortion is an indictable offence at the common law. 1 *Russell on Cr.* 540; *Roscoe's Crim. Ev.* 190. Neither of them, however, states the principle with confidence, or distinguishes between the condition of the child before and after quickening. Both refer to the precedent in *Chitty's Crim. Law* as the only authority for the proposition. That precedent, as has been seen, does not support the doctrine. See, also, 1 *Lewis's Crim. Law*, 1, note b.

In a recent American treatise upon criminal law, the proposition, that the procuring of an abortion was indictable at the common law, had been stated, and advocated with much learning. *Wharton's Crim. Law* 308; *Wharton's Prec.* 108. The only direct authority cited in support of the doctrine, is

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the case of *The Commonwealth v. Demain*, decided by the Supreme Court of Pennsylvania, at January term, 1846, and reported in 6 *Penn. Law Journal* 29. Although in that case the point appears to have been elaborately argued by counsel, it does not appear to have been decided by the court. On the contrary, the court are reported as declaring that the indictment before them sufficiently averred that the party injured was pregnant and *quick* with child, which was destroyed and killed. The obvious inference would seem to be, that the court regarded the fact, that the child was quick (either by direct averment or necessary implication), as essential to the validity of the indictment. It is difficult to perceive how the court could, in any aspect of that case, have sustained the demurrer. The indictment (like the precedent in *Chitty*) charged that the defendant committed an assault upon the woman, and was clearly a good indictment at common law.

We are of opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently that the mere attempt to commit the act is not indictable. There is neither precedent nor authority to support it. If the good of society requires that the evil should be suppressed by penal inflictions, it is far better that it should be done by legislative enactments than that courts should, by judicial construction, extend the penal code or multiply the objects of criminal punishment. We deem it unwise upon this subject to occupy debatable ground. A reasonable doubt should be resolved in favor of the accused.

The indictment is valid ; but if upon the trial it appears that the means used to procure the abortion were used with the consent of the mother, the defendant must be acquitted. (a)

RANDOLPH and OGDEN, Justices, concurred.

(a) This decision induced the legislature to amend the criminal code, so as to make the offence in question a crime. *Vide* act of March 1, 1849, *Pam.* 266.

CITED in *State v. Murphy*, 3 *Dutch.* 114.

Tulare Medical Center Property Owners Assn. v. Valdivia

Court of Appeal of California, Fifth Appellate District

April 7, 2026, Opinion Filed

F089334

Reporter

119 Cal. App. 5th 967 *; 343 Cal. Rptr. 3d 230 **; 344 Cal. Rptr. 3d 403 ***; 2026 Cal. App. LEXIS 218 ****; 2026 LX 181735; 2026 WL 1379800

TULARE MEDICAL CENTER PROPERTY OWNERS ASSOCIATION, Plaintiff, Cross-defendant and Appellant, v. LEOPOLDO VALDIVIA et al., Defendants, Cross-complainants and Respondents.

Notice: As modified May 6, 2026.
CERTIFIED FOR PARTIAL PUBLICATION*

Subsequent History: Modified by, Rehearing denied by [Tulare Medical Center Property Owners Assn. v. Valdivia, 2026 Cal. App. LEXIS 286, 2026 WL 1244154 \(May 6, 2026\)](#)

Request granted [Tulare Medical Center Property Owners Assn. v. Valdivia, 2026 Cal. LEXIS 3668 \(June 4, 2026\)](#)

Review denied by, Request denied by [Tulare Med. Ctr. Prop. Owners Ass'n v. Valdivia, 2026 Cal. LEXIS 3794 \(July 15, 2026\)](#)

Prior History: [****1] APPEAL from a judgment of the Superior Court of Tulare County, No. VCU313532, Bret D. Hillman, Judge.

Core Terms

abortion, civil rights, abortion clinic, preliminary injunction, fundamental public policy, trial court, constitutional right, public policy, entity, right to

privacy, compelling interest, court's, government action, woman's, prong, common interest development, pregnant, the, covenant, abortion services, reproductive, pregnancy, prevail, privacy, local hospital district, judicial construction, legitimate business, appellate court, district's, void

Case Summary

Overview

HOLDINGS: [1]-A medical center owners' association was not entitled to a preliminary injunction to enforce a provision of the covenants, codes, and restrictions (CC&Rs) prohibiting operation of an abortion clinic because the CC&Rs were adopted by a local government entity and interfered with rights of privacy and reproductive choice under [Cal. Const., art. I, §§ 1, 1.1](#), so the compelling state interest standard applied, and a violation of fundamental public policy rendered the prohibition unreasonable under [Civ. Code, §§ 5975, subd. \(a\)](#), 6856, subd. (a), and unenforceable; [2]-As an alternate ground of unenforceability, a land use prohibition because of any characteristic listed or defined in the *Unruh Civil Rights Act*, *Civ. Code*, § 51 et seq., or added by judicial construction was void under [Civ. Code, § 53](#), and the decision to have an abortion satisfied the analytic framework.

Outcome

Order affirmed.

LexisNexis® Headnotes

* Pursuant to [California Rules of Court, rules 8.1105\(b\)](#) and [8.1110](#), this opinion is certified for publication with the exception of part V. of the Discussion.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Constitutional Law > State Constitutional
Operation

HN1 Privacy, Personal Decisions

The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles. The California Constitution deals with the divergent views of its citizens by explicitly providing all pregnant individuals in California with a fundamental constitutional right to reproductive choice. [*Cal. Const., art. I, §§ 1, 1.1.*](#)

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Healthcare Law > Medical
Treatment > Abortion > Right to Privacy

HN2 Privacy, Personal Decisions

When a statutory provision intrudes or impinges upon the most intimate and fundamental constitutional right to reproductive choice, the California Supreme Court has concluded the intrusion or impingement must be evaluated under the compelling interest standard.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Real Property
Law > Encumbrances > Restrictive
Covenants > Creation of Restrictive Covenants

Real Property
Law > Encumbrances > Restrictive
Covenants > Enforcement of Restrictive
Covenants

HN3 Privacy, Personal Decisions

The compelling interest standard for state statutes intruding or impinging upon reproductive choice also applies to the evaluation of land use restrictions in covenants, codes, and restrictions adopted by a public entity.

Civil Procedure > Judicial
Officers > Judges > Discretionary Powers

Civil
Procedure > Remedies > Injunctions > Prelimin
ary & Temporary Injunctions

HN4 Judges, Discretionary Powers

[*Code Civ. Proc., § 526*](#), authorizes trial courts to issue injunctions during litigation. The decision whether to issue a preliminary injunction requires the court to weigh two interrelated factors: (1) the likelihood the moving party will prevail on the merits at trial and (2) the relative balance of interim harms that are likely to result from granting or denying a preliminary injunction. Generally, the weighing of the factors lies within the trial court's discretion.

Civil Procedure > Appeals > Standards of
Review > Abuse of Discretion

Evidence > Burdens of Proof > Allocation

Civil
Procedure > Remedies > Injunctions > Prelimin
ary & Temporary Injunctions

Civil Procedure > Appeals > Standards of
Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN5 Standards of Review, Abuse of Discretion

Rulings on an application for a preliminary injunction generally are reviewed for an abuse of discretion. The abuse of discretion standard is not unified, and a more specific rule may apply once the appellate court has identified the particular aspect of the trial court's determination being challenged. When the challenged aspect is the sufficiency of the evidence to support the trial court's express and implied findings of fact, the substantial evidence standard applies. When the challenged aspect is the trial court's resolution of a question of law, an independent (i.e., de novo) review is conducted on appeal. In particular, when the likelihood of prevailing on the merits depends on a question of law, an appellate court independently decides that question of law and, thus, whether there was a possibility of the moving party succeeding on the merits. In accordance with the general principle that an appellant has the burden of affirmatively demonstrating prejudicial error, a party challenging the grant or denial of a preliminary injunction has the burden of showing trial court error under the foregoing standards of review.

Real Property
Law > Encumbrances > Restrictive
Covenants > Enforcement of Restrictive
Covenants

HN6 Restrictive Covenants, Enforcement of Restrictive Covenants

An equitable servitude will be enforced unless (1) it violates public policy; (2) it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or (3) it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be

enforced. Therefore, use restrictions for a common interest development should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit.

Real Property
Law > Encumbrances > Restrictive
Covenants > Enforcement of Restrictive
Covenants

HN7 Restrictive Covenants, Enforcement of Restrictive Covenants

The reasonableness of a use restriction is determined not by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole.

Real Property
Law > Encumbrances > Restrictive
Covenants > Creation of Restrictive Covenants

Real Property
Law > Encumbrances > Restrictive
Covenants > Enforcement of Restrictive
Covenants

HN8 Restrictive Covenants, Creation of Restrictive Covenants

Cases confirm constitutional and statutory provisions as sources of California's fundamental public policies. This method for identifying fundamental public policies applies in the context of determining whether a land use restriction contained in the covenants, codes, and restrictions of a common interest development violates a fundamental public policy and, thus, is unreasonable for purposes of [Civ. Code, §§ 5975, subd. \(a\)](#), or 6856, subd. (a).

Constitutional Law > Substantive Due
Process > Privacy > Personal Information

Governments > Courts > Judicial Precedent

Constitutional Law > State Constitutional
Operation

HN9 Privacy, Personal Information

The case law addressing the right to privacy is relevant to interpreting the reproductive freedom afforded individuals by [Cal. Const., art. I, § 1.1](#).

Healthcare Law > Medical
Treatment > Abortion > Right to Privacy

HN10 Abortion, Right to Privacy

The Legislature has protected provider autonomy by recognizing the right of certain persons to refuse to directly participate in performing an abortion. [Health & Saf. Code, § 123420, subd. \(a\)](#).

Healthcare Law > Medical
Treatment > Abortion > Right to Privacy

HN11 Abortion, Right to Privacy

The Legislature has not extended the freedom of choice afforded individual doctors, nurses and other employees regarding participation in abortion to public entities such as local healthcare districts or to nonpublic entities generally.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Healthcare Law > Medical
Treatment > Abortion > Right to Privacy

Constitutional Law > State Constitutional
Operation

HN12 Privacy, Personal Decisions

A fundamental public policy of California is (1) to protect an individual's personal choice on the subject of abortion, which includes a pregnant person's right to choose to continue a pregnancy or have an abortion, under [Cal. Const., art. I, § 1.1](#), and (2) to limit government action that unduly intrudes or impinges that choice.

Constitutional Law > Substantive Due
Process > Privacy

Constitutional Law > State Constitutional
Operation

HN13 Substantive Due Process, Privacy

Either government or private action is capable of unlawfully infringing the right of privacy. [Cal. Const., art. I, § 1](#), creates a right of action against private as well as government entities. The existence of government action controls the legal standard for evaluating whether a constitutional violation occurred.

Civil Procedure > Judicial
Officers > Judges > Discretionary Powers

Civil
Procedure > Remedies > Injunctions > Prelimin
ary & Temporary Injunctions

Civil Procedure > Appeals > Reviewability of
Lower Court Decisions > Preservation for
Review

HN14 Judges, Discretionary Powers

Appellate courts have discretion to address legal questions not raised in the trial court when the question can be decided based on uncontroverted facts in the record. When reviewing a preliminary injunction, an appellate court may reach the merits of purely legal questions.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

HN15 Privacy, Personal Decisions

State action exists, in the context of determining whether California's constitutional right of privacy has been violated, where there is such a close nexus between the state and the challenged action that seemingly private behavior may be fairly treated as action of the state itself.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Constitutional Law > State Constitutional
Operation

HN16 Privacy, Personal Decisions

The legal standard for determining whether government action intruding on a privacy interest violates the California Constitution varies depending upon the privacy interest asserted. The California Supreme Court has limited the application of the compelling interest test to those cases that implicate an obvious invasion of an interest fundamental to personal autonomy. In other cases, the court has applied a general balancing test without requiring the asserted countervailing interest to be compelling.

Civil
Procedure > ... > Justiciability > Standing > Per
sonal Stake

Civil Procedure > Parties > Real Party in
Interest

HN17 Standing, Personal Stake

Pursuant to [Code Civ. Proc., § 367](#), a person who commences a judicial proceeding is required to

have a real interest in the ultimate adjudication. Such an interest is lacking if the party has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented. The purpose of the statutory requirement that claims be prosecuted by the real party in interest (i.e., a party with standing) is to prevent a defendant against whom a judgment may be obtained from further harassment or vexation at the hands of other claimants to the same demand.

Real Property
Law > Encumbrances > Restrictive
Covenants > Creation of Restrictive Covenants

Real Property
Law > Encumbrances > Restrictive
Covenants > Enforcement of Restrictive
Covenants

HN18 Restrictive Covenants, Creation of Restrictive Covenants

Land use restrictions in covenants, codes, and restrictions (CC&Rs) are enforceable unless unreasonable. [Civ. Code, §§ 5975, subd. \(a\)](#), 6856, subd. (a). The statutory text means that owners of a unit in a common interest development and their tenants are allowed to defend against a suit alleging they are violating a restriction in the CC&Rs by arguing the restriction is unreasonable—that is, it (1) is wholly arbitrary, (2) violates a fundamental public policy, or (3) imposes a burden on the use of affected land that far outweighs any benefit. More specifically, such defendants have standing to argue a restriction violates a fundamental public policy because it interferes with the constitutional rights of third parties who might patronize the business being operated on the property. The owner of the business has sufficient interest at stake to assure the relevant facts and issues are adequately developed.

Civil Rights Law > Protection of

Rights > Public Facilities > Scope

Real Property

Law > Encumbrances > Restrictive

Covenants > Enforcement of Restrictive
Covenants

(e)(6). The phrase “is not limited to” suggests sex is to be interpreted broadly.

Civil Rights Law > Protection of
Rights > Public Facilities > Scope

Governments > Legislation > Interpretation

HN19 Protection of Rights, Public Facilities

Civ. [Code, § 53](#), renders a land use prohibition void if the prohibition is because of any characteristic listed or defined in the *Unruh Civil Rights Act*, Civ. Code, § 51 et seq. Civ. Code, § 53, subds. (a), [\(b\)](#). Conversely, if the prohibition is not because of any characteristic listed or defined in the *Unruh Act*, [§ 53](#) will not invalidate the prohibition.

Civil Rights Law > Protection of
Rights > Public Facilities > Scope

HN20 Protection of Rights, Public Facilities

The list of characteristics expressly protected by the *Unruh Civil Rights Act*, Civ. Code, § 51 et seq., includes sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, and immigration status. § 51, subd. (b). The *Unruh Act* provides that all persons within California’s jurisdiction, regardless of these characteristics, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. § 51, subd. (b).

Civil Rights Law > Protection of
Rights > Public Facilities > Scope

HN21 Protection of Rights, Public Facilities

“Sex” is defined by the *Unruh Civil Rights Act*, Civ. Code, § 51 et seq., to include, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. § 51, subd.

HN22 Protection of Rights, Public Facilities

When discussing the *Unruh Civil Rights Act*, Civ. Code, § 51 et seq., the California Supreme Court has stated the kinds of discrimination it specifies are illustrative, rather than restrictive, indicia of the type of conduct condemned. This statutory construction was approved by the Legislature when it adopted the Civil Rights Act of 2005.

Civil Rights Law > Protection of
Rights > Public Facilities > Remedies

Governments > Legislation > Interpretation

Civil Rights Law > Protection of
Rights > Public Facilities > Scope

HN23 Public Facilities, Remedies

Given the Legislature’s explicit guidance and the general principle that the *Unruh Civil Rights Act*, Civ. Code, § 51 et seq., is to be liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice, the reference in [Civ. Code, § 53](#), to any characteristic listed or defined in Civ. Code, § 51, subd. (b) or (e), should be interpreted to include characteristics added to the *Unruh Act*’s protection by judicial construction. Accordingly, the principles used by courts are considered when determining whether to include a particular characteristic with those listed in the *Unruh Act* and those already added by judicial construction.

Civil Rights Law > Protection of
Rights > Public Facilities > Scope

HN24 Protection of Rights, Public Facilities

The history and language of the *Unruh Civil Rights Act, Civ. Code, § 51 et seq.*, disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise, but this broad interdiction of the Unruh Act is not absolute.

Civil Rights Law > Protection of
Rights > Public Facilities > Scope

HN25 Protection of Rights, Public Facilities

The California Supreme Court has created a three-part analytic framework for determining whether a future claim of discrimination, involving a category not enumerated in the statute or added by prior judicial construction, should be cognizable under the *Unruh Civil Rights Act, Civ. Code, § 51 et seq.* The three inquiries are (1) whether the claim is based on a personal characteristic similar to those listed in the statute; (2) whether the alleged discrimination is justified by a legitimate business interest; and (3) what the potential consequences of recognizing the new claim will be. Economic distinctions furthering legitimate business interests are fundamentally different from the categories specified in the Unruh Act or added by judicial construction. The categories enumerated in the Unruh Act or added by judicial construction represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

HN26 Privacy, Personal Decisions

The right to choose whether to continue or to terminate a pregnancy implicates a woman's

fundamental interest in the preservation of her personal health (and in some instances the preservation of her life), her interest in retaining personal control over the integrity of her own body, and her interest in deciding for herself whether to parent a child. The California Supreme Court has made clear the profound importance of this constitutional right: This right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny. The implications of an unwanted child for a woman's education, employment opportunities and associational opportunities (often including marriage opportunities) are of enormous proportion. The right of choice also may implicate a woman's deepest philosophical, moral, and religious concerns, including her personal beliefs regarding the meaning of human existence and the beginning of human life. A pregnant woman's constitutional right of choice is among the most intimate and fundamental of all constitutional rights. This discussion leaves little doubt that the decision to have an abortion is a personal choice fundamental to a person's identity, beliefs and self-definition.

Civil Rights Law > Protection of
Rights > Public Facilities > Enforcement
Actions

Evidence > Burdens of Proof > Allocation

HN27 Public Facilities, Enforcement Actions

The defendant has the burden of proving a legitimate business interest justified a prohibition that is alleged to have violated the *Unruh Civil Rights Act, Civ. Code, § 51 et seq.*, and the standard of review applied to the trial court's determination that the defendant failed to carry the burden is whether the evidence compels a finding in the defendant's favor as a matter of law.

Evidence > Burdens of Proof > Allocation

Evidence > ... > Presumptions > Particular
Presumptions > Regularity

HN28 Burdens of Proof, Allocation

An order challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively show the trial court erred.

Civil Rights Law > Protection of
Rights > Public Facilities > Scope

Governments > Legislation > Interpretation

HN29 Protection of Rights, Public Facilities

The third prong of the Harris analysis examines the consequences that will flow from a particular interpretation—that is, from adding a characteristic to the types of discrimination prohibited by the *Unruh Civil Rights Act*, *Civ. Code*, § 51 *et seq.* This prong is derived from the principle of statutory construction that courts addressing the meaning of an ambiguous statute should consider the consequences of the competing interpretations. Therefore, the third prong of the analysis applies generally and is not limited to characteristics that are economic or financial.

Civil Rights Law > Protection of
Rights > Public Facilities > Remedies

HN30 Public Facilities, Remedies

Civ. [*Code*, § 53](#), voids a prohibition that is because of a characteristic protected by the *Unruh Civil Rights Act*, *Civ. Code*, § 51 *et seq.*, without an inquiry into whether the plaintiff has personally suffered discrimination prohibited by the *Unruh Act* or has standing to assert a violation suffered by a third party, which is sometimes referred to as *tertii* standing.

Constitutional Law > Substantive Due
Process > Privacy > Personal Decisions

Healthcare Law > Medical
Treatment > Abortion > Right to Privacy

HN31 Privacy, Personal Decisions

The balance struck by the California Constitution and by legislation addressing abortion is that the decision to have an abortion or participate in an abortion procedure is personal.

Contracts Law > Defenses > Public Policy
Violations

Real Property
Law > Encumbrances > Restrictive
Covenants > Enforcement of Restrictive
Covenants

HN32 Defenses, Public Policy Violations

It is not reasonable to expect that a land-use prohibition contrary to California's public policy will be enforced.

Headnotes/Summary

Summary

**[*967] CALIFORNIA OFFICIAL REPORTS
SUMMARY**

The trial court denied a preliminary injunction ([*Code Civ. Proc.*, § 526](#)) requested by the owners' association of a medical center, which sought to enforce a provision of the covenants, codes, and restrictions (CC&Rs) prohibiting the operation of an abortion clinic. The CC&Rs were adopted and recorded by a local hospital district, which transferred parcels to private owners. The owners of a parcel intended to lease their property for use as a facility providing abortion services. (Superior Court of Tulare County, No. VCU313532, Bret D. Hillman, Judge.)

The Court of Appeal affirmed, holding the association had the burden to demonstrate a compelling state interest because the prohibition was adopted by a government entity, its enforcement therefore implicated government action, and it interfered with the rights of privacy and reproductive choice protected by the California Constitution ([Cal. Const., art. I, §§ 1, 1.1](#)). The association did not meet its burden because unjustified governmental interference with constitutionally protected rights violated a fundamental public policy of the State of California, which rendered the prohibition unreasonable and unenforceable ([Civ. Code, §§ 5975, subd. \(a\), 6856, subd. \(a\)](#)). The parcel's owners and lessees had standing as real parties in interest ([Code Civ. Proc., § 367](#)) to raise the public policy argument because unreasonable land use restrictions encompass interference with the constitutional rights of potential clients. As an alternate ground of unenforceability, a land use prohibition because of any characteristic listed or defined in the *Unruh Civil Rights Act* ([Civ. Code, § 51 et seq.](#)), including characteristics added by judicial construction, is void ([Civ. Code, § 53](#)), and although having an abortion is not explicitly listed, the decision to have an abortion satisfies the [*968] analytic framework for such determinations. (Opinion by Franson, J., with Hill, P. J., and Harrell, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) (1)

Privacy § 3—Nature and Extent of Right— Reproductive Choice.

The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly

divergent convictions and principles. The California Constitution deals with the divergent views of its citizens by explicitly providing all pregnant individuals in California with a fundamental constitutional right to reproductive choice ([Cal. Const., art. I, §§ 1, 1.1](#)).

[CA\(2\)](#) (2)

Privacy § 7—Actions—Compelling Interest Standard—Reproductive Choice—Challenge to Statute.

When a statutory provision intrudes or impinges upon the most intimate and fundamental constitutional right to reproductive choice, the California Supreme Court has concluded the intrusion or impingement must be evaluated under the compelling interest standard.

[CA\(3\)](#) (3)

Privacy § 7—Actions—Compelling Interest Standard—Reproductive Choice—Challenge to Land Use Restrictions Adopted by Public Entity.

The compelling interest standard for state statutes intruding or impinging upon reproductive choice also applies to the evaluation of land use restrictions in covenants, codes, and restrictions adopted by a public entity.

[CA\(4\)](#) (4)

Injunctions § 15—Preliminary—Factors— Likelihood of Success and Balancing of Harms.

[Code Civ. Proc., § 526](#), authorizes trial courts to issue injunctions during litigation. The decision whether to issue a preliminary injunction requires the court to weigh two interrelated factors: (1) the likelihood the moving party will prevail on the merits at trial and (2) the relative balance of interim harms that are likely to result from granting or denying a preliminary injunction. Generally, the

weighing of the factors lies within the trial court's discretion.

[CA\(5\)](#) (5)

Injunctions § 21—Preliminary—Appeal—Standards of Review.

Rulings on an application for a preliminary injunction generally are reviewed for an abuse of discretion. The abuse of discretion standard is not unified, and a more specific rule may apply once the appellate court has identified the particular aspect of the trial court's determination being challenged. When the challenged aspect is the sufficiency of the [*969] evidence to support the trial court's express and implied findings of fact, the substantial evidence standard applies. When the challenged aspect is the trial court's resolution of a question of law, an independent (i.e., de novo) review is conducted on appeal. In particular, when the likelihood of prevailing on the merits depends on a question of law, an appellate court independently decides that question of law and, thus, whether there was a possibility of the moving party succeeding on the merits. In accordance with the general principle that an appellant has the burden of affirmatively demonstrating prejudicial error, a party challenging the grant or denial of a preliminary injunction has the burden of showing trial court error under the foregoing standards of review.

[CA\(6\)](#) (6)

Covenants, Conditions, and Restrictions § 11—Restraints Upon Use of Property—Enforceability.

An equitable servitude will be enforced unless (1) it violates public policy; (2) it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or (3) it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be

enforced. Therefore, use restrictions for a common interest development should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit.

[CA\(7\)](#) (7)

Covenants, Conditions, and Restrictions § 11—Restraints Upon Use of Property—Enforceability—Reasonableness.

The reasonableness of a use restriction is determined not by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole.

[CA\(8\)](#) (8)

Covenants, Conditions, and Restrictions § 11—Restraints Upon Use of Property—Enforceability—Reasonableness—Fundamental Public Policy.

Cases confirm constitutional and statutory provisions as sources of California's fundamental public policies. This method for identifying fundamental public policies applies in the context of determining whether a land use restriction contained in the covenants, codes, and restrictions of a common interest development violates a fundamental public policy and, thus, is unreasonable for purposes of [Civ. Code, § 5975, subd. \(a\)](#), or [Civ. Code, § 6856, subd. \(a\)](#).

[CA\(9\)](#) (9)

Privacy § 3—Nature and Extent of Right—Reproductive Choice—Case Law.

The case law addressing the right to privacy is relevant to interpreting the reproductive freedom afforded individuals by [Cal. Const., art. I, § 1.1](#).

CA(10) (10)

**Constitutional Law § 52—Constitutional Right—
Conditioning Receipt of Benefit upon Waiver.**

The *Danskin-Bagley* doctrine, which is a three-part test, is applied whenever the state conditions the receipt of a benefit [*970] upon the waiver of a constitutional right or discriminatorily withholds such a benefit from individuals who exercise such right.

CA(11) (11)

**Healing Arts § 30—Practitioners—Duties and
Liabilities—Refusal to Participate in Performing
Abortion.**

The Legislature has protected provider autonomy by recognizing the right of certain persons to refuse to directly participate in performing an abortion (*Health & Saf. Code, § 123420, subd. (a)*).

CA(12) (12)

**Healing Arts § 30—Practitioners—Duties and
Liabilities—Refusal to Participate in Performing
Abortion—Scope.**

The Legislature has not extended the freedom of choice afforded individual doctors, nurses and other employees regarding participation in abortion to public entities such as local health care districts or to nonpublic entities generally.

CA(13) (13)

**Privacy § 3—Nature and Extent of Right—
Reproductive Choice—Fundamental Public Policy.**

A fundamental public policy of California is (1) to protect an individual's personal choice on the subject of abortion, which includes a pregnant person's right to choose to continue a pregnancy or

have an abortion (*Cal. Const., art. I, § 1.1*), and (2) to limit government action that unduly intrudes or impinges that choice.

CA(14) (14)

**Privacy § 7—Actions—Right of Action—Against
Private and Government Entities—Determining
Whether California Constitution Violated—
Existence of Government Action.**

Either government or private action is capable of unlawfully infringing the right of privacy. *Cal. Const., art. I, § 1*, creates a right of action against private as well as government entities. The existence of government action controls the legal standard for evaluating whether a constitutional violation occurred.

CA(15) (15)

**Injunctions § 21—Preliminary—Appeal—
Discretion to Address Legal Questions Not Raised
Below.**

Appellate courts have discretion to address legal questions not raised in the trial court when the question can be decided based on uncontroverted facts in the record. When reviewing a preliminary injunction, an appellate court may reach the merits of purely legal questions.

CA(16) (16)

**Privacy § 7—Actions—Right of Action—Against
Private and Government Entities—Determining
Whether California Constitution Violated—
Existence of Government Action.**

State action exists, in the context of determining whether California's constitutional right of privacy has been violated, where there is such a close nexus between the state and the challenged action that seemingly private behavior may be fairly treated as action of the state itself.

CA(17) (17)**Privacy § 7—Actions—Compelling Interest Standard—Applicability—Obvious Invasion of Interest Fundamental to Personal Autonomy.**

The legal standard for determining whether government action intruding [*971] on a privacy interest violates the California Constitution varies depending upon the privacy interest asserted. The California Supreme Court has limited the application of the compelling interest test to those cases that implicate an obvious invasion of an interest fundamental to personal autonomy. In other cases, the court has applied a general balancing test without requiring the asserted countervailing interest to be compelling.

CA(18) (18)**Parties § 5—Real Party in Interest—Sufficiency of Interest in Ultimate Adjudication.**

Pursuant to [Code Civ. Proc., § 367](#), a person who commences a judicial proceeding is required to have a real interest in the ultimate adjudication. Such an interest is lacking if the party has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented. The purpose of the statutory requirement that claims be prosecuted by the real party in interest (i.e., a party with standing) is to prevent a defendant against whom a judgment may be obtained from further harassment or vexation at the hands of other claimants to the same demand.

CA(19) (19)**Covenants, Conditions, and Restrictions § 11—Restraints Upon Use of Property—Enforceability—Reasonableness—Fundamental Public Policy—Standing to Challenge.**

Land use restrictions in covenants, codes, and

restrictions (CC&Rs) are enforceable unless unreasonable ([Civ. Code, §§ 5975, subd. \(a\), 6856, subd. \(a\)](#)). The statutory text means that owners of a unit in a common interest development and their tenants are allowed to defend against a suit alleging they are violating a restriction in the CC&Rs by arguing the restriction is unreasonable—that is, it (1) is wholly arbitrary, (2) violates a fundamental public policy, or (3) imposes a burden on the use of affected land that far outweighs any benefit. More specifically, such defendants have standing to argue a restriction violates a fundamental public policy because it interferes with the constitutional rights of third parties who might patronize the business being operated on the property. The owner of the business has sufficient interest at stake to assure the relevant facts and issues are adequately developed.

CA(20) (20)**Covenants, Conditions, and Restrictions § 11—Restraints Upon Use of Property—Enforceability—Reasonableness—Fundamental Public Policy—Abortion Clinic Prohibition Adopted by Public Entity—Burden to Show Compelling Interest.**

The presumption that restrictions in covenants, codes, and restrictions (CC&Rs) are valid was rebutted at the preliminary injunction stage of enforcement proceedings. The undisputed facts in the record showed that (1) an abortion clinic prohibition was adopted by a government entity and, thus, the enforcement of that prohibition by the owners' association implicated government action; and (2) the prohibition interfered with the right of privacy and the right of reproductive choice explicitly protected by the California Constitution. As a result, [*972] the burden shifted to the association to demonstrate that the governmental interference was justified by a compelling state interest, which the association failed to do. The unjustified governmental interference with constitutionally protected rights violated a fundamental public policy of the State of

California, which rendered the CC&Rs’ prohibition of abortion clinics unreasonable and, thus, unenforceable (*Civ. Code*, §§ 5975, *subd. (a)*, 6856, *subd. (a)*). The association did not establish it was likely to succeed on the merits, which provided a ground for affirming the denial of the association’s request for a preliminary injunction.

[*Cal. Real Estate Law & Practice (2026) ch. 385A, § 385A.06*; Cal. Forms of Pleading and Practice (2026) ch. 124A, Condominiums: Commercial and Industrial Common Interest Developments, § 124A.16.]

CA(21) (21)

Civil Rights § 5—Property—Land Use Prohibition—Based on Protected Characteristics—Unruh Civil Rights Act.

Civ. Code, § 53, *subds. (a), (b)*, renders a land use prohibition void if the prohibition is because of any characteristic listed or defined in the *Unruh Civil Rights Act* (*Civ. Code*, § 51 *et seq.*). Conversely, if the prohibition is not because of any characteristic listed or defined in the *Unruh Civil Rights Act*, § 53 will not invalidate the prohibition.

CA(22) (22)

Civil Rights § 2—Definitions and Distinctions—Protected Characteristics—Unruh Civil Rights Act.

The list of characteristics expressly protected by the *Unruh Civil Rights Act* (*Civ. Code*, § 51 *et seq.*) includes sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, and immigration status (§ 51, *subd. (b)*). The act provides that all persons within California’s jurisdiction, regardless of these characteristics, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments

of every kind whatsoever (§ 51, *subd. (b)*).

CA(23) (23)

Civil Rights § 2—Definitions and Distinctions—Protected Characteristics—Sex—Unruh Civil Rights Act.

“Sex” is defined by the *Unruh Civil Rights Act* (*Civ. Code*, § 51 *et seq.*) to include, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth (§ 51, *subd. (e)(6)*). The phrase “is not limited to” suggests sex is to be interpreted broadly.

CA(24) (24)

Civil Rights § 2—Definitions and Distinctions—Protected Characteristics—Unruh Civil Rights Act—Illustrative Rather than Restrictive.

When discussing the *Unruh Civil Rights Act* (*Civ. Code*, § 51 *et seq.*), the California Supreme Court has stated the kinds of discrimination it specifies are illustrative, rather than restrictive, indicia of the type of conduct [*973] condemned. This statutory construction was approved by the Legislature when it adopted the Civil Rights Act of 2005 (*Civ. Code*, § 51.7).

CA(25) (25)

Civil Rights § 2—Definitions and Distinctions—Protected Characteristics—Unruh Civil Rights Act—Characteristics Added by Judicial Construction.

Given the Legislature’s explicit guidance and the general principle that the *Unruh Civil Rights Act* (*Civ. Code*, § 51 *et seq.*) is to be liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice, the reference in *Civ. Code*, § 53, to any characteristic listed or defined in *Civ. Code*, § 51, *subd. (b)* or *(e)*, should be interpreted to include characteristics added to

the Unruh Civil Rights Act's protection by judicial construction. Accordingly, the principles used by courts are considered when determining whether to include a particular characteristic with those listed in the Unruh Civil Rights Act and those already added by judicial construction.

CA(26) (26)

Civil Rights § 1—Unruh Civil Rights Act—Purpose and Scope.

The history and language of the *Unruh Civil Rights Act* (Civ. Code, § 51 et seq.) disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise, but this broad interdiction of the act is not absolute.

CA(27) (27)

Civil Rights § 2—Definitions and Distinctions—Protected Characteristics—Unruh Civil Rights Act—New Categories—Determinations.

The California Supreme Court has created a three-part analytic framework for determining whether a future claim of discrimination, involving a category not enumerated in the statute or added by prior judicial construction, should be cognizable under the *Unruh Civil Rights Act* (Civ. Code, § 51 et seq.). The three inquiries are (1) whether the claim is based on a personal characteristic similar to those listed in the statute; (2) whether the alleged discrimination is justified by a legitimate business interest; and (3) what the potential consequences of recognizing the new claim will be. Economic distinctions furthering legitimate business interests are fundamentally different from the categories specified in the Unruh Civil Rights Act or added by judicial construction. The categories enumerated in the Unruh Civil Rights Act or added by judicial construction represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition.

CA(28) (28)

Privacy § 3—Nature and Extent of Right—Reproductive Choice—Fundamental to Identity, Beliefs, and Self-definition.

The right to choose whether to continue or to terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health (and in some instances the preservation of her life), her interest in retaining personal control over the integrity of her own body, and her interest in deciding for herself whether to parent a child. The California [*974] Supreme Court has made clear the profound importance of this constitutional right: This right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role and personal destiny. The implications of an unwanted child for a woman's education, employment opportunities and associational opportunities (often including marriage opportunities) are of enormous proportion. The right of choice also may implicate a woman's deepest philosophical, moral, and religious concerns, including her personal beliefs regarding the meaning of human existence and the beginning of human life. A pregnant woman's constitutional right of choice is among the most intimate and fundamental of all constitutional rights. This discussion leaves little doubt that the decision to have an abortion is a personal choice fundamental to a person's identity, beliefs and self-definition.

CA(29) (29)

Civil Rights § 8—Procedural Matters—Unruh Civil Rights Act—Defendant's Burden of Proof—Standard of Review.

The defendant has the burden of proving a legitimate business interest justified a prohibition that is alleged to have violated the *Unruh Civil Rights Act* (Civ. Code, § 51 et seq.), and the standard of review applied to the trial court's

determination that the defendant failed to carry the burden is whether the evidence compels a finding in the defendant's favor as a matter of law.

CA(30) (30)

Appellate Review § 135—Scope—Presumptions—Correctness.

An order challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively show the trial court erred.

CA(31) (31)

Civil Rights § 2—Definitions and Distinctions—Protected Characteristics—Unruh Civil Rights Act—New Categories—Determinations—Examining Consequences.

The third prong of the *Harris* analysis examines the consequences that will flow from a particular interpretation—that is, from adding a characteristic to the types of discrimination prohibited by the *Unruh Civil Rights Act* (Civ. Code, § 51 *et seq.*). This prong is derived from the principle of statutory construction that courts addressing the meaning of an ambiguous statute should consider the consequences of the competing interpretations. Therefore, the third prong of the analysis applies generally and is not limited to characteristics that are economic or financial.

CA(32) (32)

Civil Rights § 5—Property—Land Use Prohibition—Based on Protected Characteristics—Unruh Civil Rights Act—Standing.

Civ. Code, § 53, voids a prohibition that is because of a characteristic protected by the *Unruh Civil Rights Act* (Civ. Code, § 51 *et seq.*) without an inquiry into whether the plaintiff has personally suffered discrimination prohibited by the act or has

standing to assert a violation suffered by a third party, which is sometimes referred to as *jus tertii* standing. [*975]

CA(33) (33)

Privacy § 3—Nature and Extent of Right—Reproductive Choice—Abortion Decisions.

The balance struck by the California Constitution and by legislation addressing abortion is that the decision to have an abortion or participate in an abortion procedure is personal.

CA(34) (34)

Covenants, Conditions, and Restrictions § 11—Restraints Upon Use of Property—Enforceability—Reasonableness—Contrary to Public Policy.

It is not reasonable to expect that a land use prohibition contrary to California's public policy will be enforced.

Counsel: Braun Gosling, Douglas A. Gosling, Sam Van Eerden; Catherine W. Short and Corrine G. Konczal for Plaintiff, Cross-defendant and Appellant.

Herr Pedersen & Berglund, Leonard C. Herr, Rachele Berglund and Ron Statler for Defendants, Cross-complainants and Respondents.

Judges: Opinion by Franson, J., with Hill, P. J., and Harrell, J., concurring.

Opinion by: Franson, J.

Opinion

[**407] [***407] [**235] [***235]

FRANSON, J.—This appeal from the denial of a preliminary injunction presents a question of state law that has not been decided by a California

appellate court: When a public entity adopts and records covenants, codes, and restrictions (CC&Rs) for a common interest development that prohibit abortion clinics within the development, is the prohibition enforceable? We conclude the prohibition is not enforceable. First, the adoption and recording of the CC&Rs is government action that, in the circumstances of this case, interferes with the **[**408] [***408]** fundamental right of procreative choice and, therefore, violates a fundamental public policy expressed in the California Constitution. (*Cal. Const., art. I, § 1.1.*) Second, *Civil Code section 53*¹ renders the prohibition “void” because it is a covenant or condition **[****2]** in a recorded instrument that “indirectly limits the ... use ... of [real] property because of a[] characteristic” protected by the Unruh Civil Rights Act (§ 51 *et seq.*).

CA(1) (1) Abortion is a divisive subject, both in California and nationwide. Judicial decisions often emphasize that the *morality* of abortion is not an issue in the case. (E.g., *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 313 [66 Cal.Rptr.2d 210, 940 P.2d 797] (*Lungren*).) **HN1** ““The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable **[*976]** people can, and do, adhere to vastly divergent convictions and principles.”” (*Ibid.*) The California Constitution deals with the divergent views of its citizens by explicitly providing all pregnant individuals in California with a fundamental constitutional right to reproductive choice. (*Cal. Const., art. I, §§ 1* [right of privacy], *1.1* [reproductive choice].) **HN2 CA(2) (2)** When a statutory provision intrudes or impinges upon this most intimate and fundamental constitutional right, the California Supreme Court has concluded the intrusion or impingement must be evaluated under the compelling interest standard. (*Lungren, supra, at p. 340.*) **CA(3) (3)** We conclude **HN3** the compelling interest standard for state statutes also applies to the evaluation of land

use restrictions **[****3]** in CC&Rs adopted by a public entity.

Here, the CC&Rs were adopted and recorded in 1991 by the Tulare Local Hospital District, a public entity organized under California statute. In the proceedings below, no compelling interest was demonstrated justifying the CC&Rs’ prohibition of abortion clinics at the Tulare Medical Center. Consequently, enforcement of the prohibition would violate the state Constitution and a fundamental public policy of California. It follows that the property owners association responsible for enforcing the CC&Rs did not show a likelihood of succeeding on the merits of its claim to enjoin a family planning clinic from providing abortion services at the medical center.

We therefore affirm the order denying the preliminary injunction.

FACTS

In March 1991, the Tulare Local Hospital District adopted and recorded a declaration of CC&Rs for parcels of land within a common interest development known as the Tulare Medical Center. The declaration was signed by the president of the district’s board of directors. In November 1991, the district’s board of directors unanimously **[**236] [***236]** adopted resolution No. 635, which approved a declaration of annexation that added parcels in the Tulare **[****4]** Medical Center. The declaration of annexation was recorded in December 1991.

In 2001, the Tulare Local Hospital District executed a grant deed transferring real estate to defendants and cross-complainants Leopoldo Valdivia, M.D., and Jennifer Valdivia (collectively, the Valdivias). The grant deed described the real estate as lot 9 of tract Tulare Medical Center unit No. 2; the lot’s address is on North Cherry Street (the Property). The Property is among the parcels added to the medical center by the declaration of annexation recorded in 1991. As a result, the

¹ Undesignated statutory references are to the Civil Code.

Property is subject to the CC&Rs, **[**409] [***409]** which run with all lots within the development and are binding on successive owners and their tenants. **[*977]**

Plaintiff and cross-defendant Tulare Medical Center Property Owners Association (Association) is an unincorporated association appointed in the CC&Rs. Every owner of a parcel subject to assessment under the CC&Rs is a member of the Association. The Association is authorized by the CC&Rs to seek injunctive relief for any violation or threatened violation of its terms.

Article VII of the CC&Rs contains general area covenants addressing matters such as minimum building size, utility easements, signs, lighting, and parking. **[****5]** Section 7.01 of those covenants is labeled “Land Use” and provides: “All parcels in this phase of the development shall be used only for medically related fields and not detrimental to the TULARE LOCAL HOSPITAL DISTRICT. The decision of the declarant or thereafter the Board as whether a use is medically related or detrimental to said hospital shall be final, nor shall any unit be used for the following types of practices: *abortion clinic*, drug or alcohol care unit (including methadone clinics), emergency ward, surgi-center, chiropractory and herbal medicine. The Board shall have no authority to grant variances or exceptions from the restrictions imposed by this Section 7.01.” (Italics added.)

Section 7.04 of the general area covenants in the CC&Rs is labeled “Nuisances” and provides: “No noxious or offensive activity shall be carried on upon the premises, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the complex. All garbage shall be kept in sanitary containers and screened from view. All premises shall be maintained in an orderly fashion.”

In January 2024, the Association learned the Valdivias were considering leasing the Property to defendant **[****6]** and cross-complainant Family Planning Associates Medical Group, Inc., a

California corporation (FPA). FPA provides family planning and abortion services. On February 1, 2024, the Association’s property manager sent a letter to the Valdivias quoting the abortion clinic restriction in section 7.01 of the CC&Rs and asserting FPA would not be allowed at the Property because it provides abortions.

FPA’s chief executive officer responded in a letter confirming FPA intended to lease the Property. The letter stated FPA provided full scope women’s health and family planning services in 24 locations throughout California; its services included full scope gynecological care, STD testing and screening, sexual health education, and virtually all methods of birth control for both women and men. The letter acknowledged that FPA provides surgical abortion services at some of its locations, but “it is not one of the intended or **[**237] [***237]** planned uses of our occupancy” of the Valdivias’ unit. In the chief executive officer’s view, the absence of surgical abortion services meant the location would not be used as an “abortion clinic” as that term is used in the CC&Rs and, as a result, the intended use of the Property **[****7]** was not prohibited **[*978]** .

A March 11, 2024 letter from the Association’s attorney expressed the Association’s disagreement with FPA’s narrow interpretation of the CC&Rs’ abortion clinic prohibition and asserted it was not limited to surgical abortion but included a facility that provides any abortion services. The letter also stated the mere prospect of FPA operating at the center had caused a nuisance for other members in the form of **[**410] [***410]** picketers and protests, which interfered with the use and quiet enjoyment of other properties at the center. Accordingly, the letter asserted FPA’s use of the Property would violate sections 7.01 and 7.04 of the CC&Rs and, thus, the Association would not allow FPA to conduct business within the center.

In September 2024, a post on FPA’s public Instagram account stated it would begin seeing patients in Tulare on October 1, 2024, and gave the

Property's North Cherry Street address. Abortion was the first service listed in an image that accompanied the announcement.

PROCEEDINGS

On September 30, 2024, the Association filed a complaint for injunctive relief against the Valdivias and FPA (collectively, defendants). After defendants answered and filed a cross-complaint, [****8]² the Association filed an ex parte application for a temporary restraining order and a preliminary injunction against violations of the CC&Rs.

In December 2024, defendants filed an opposition to the preliminary injunction request. Defendants argued the Association was not likely to prevail on the merits because the restriction against operation of an abortion clinic (1) discriminates against women in violation of the Unruh Civil Rights Act, and (2) is unconstitutional and, therefore, against California public policy. Alternatively, defendants argued that, when properly interpreted, the restriction is limited to surgical abortions because that was the only approved abortion process that existed when the CC&Rs were adopted in 1991.

The Association's reply papers addressed points raised in the opposition, including whether the CC&Rs violated the Unruh Civil Rights Act, the California Constitution, or public policy. The reply also argued any harm to defendants was self-inflicted and could easily have been avoided by FPA finding another location for its clinic.

On December 16, 2024, the trial court held a hearing on the Association's request for a preliminary injunction. The court began by stating "this is a case [*979] [****9] where I think we need some appellate guidance. I think you've got a

fairly clear contractual issue here, and I think you got a lot of countervailing public policy issues and identity issues on the other side of that question. [¶] I'm perfectly willing to do what the Appellate Court wants me to do on this, but at this point, I don't think it's clear enough ... that I can find the [Association] is going to prevail." After hearing counsel's arguments, the court stated it would consider the matter further and issue a written ruling.

[**238] [***238] The next day, the trial court filed a ruling denying the preliminary injunction request. The court determined that, if the injunction were denied, FPA's occupancy of the Property entailed a credible threat that abortion services violating the CC&Rs would be performed. However, the court determined the Association had not met its burden of showing a likelihood of prevailing "because the court believes it is an open question, given the apparent absence of clearly relevant prior authority, whether restrictions on the operation of abortion clinics on private property, as in the subject CC&Rs, run afoul of the Unruh Civil Rights Act."

The trial court also addressed [****10] the balance of respective harms, which is the second factor a party moving for a preliminary [**411] [***411] injunction must establish. The court concluded "the Association fails to show that the balance of harms supports the issuance of a preliminary injunction."

The trial court stated its determination of the statutory claim meant it did not need to reach the question whether the CC&Rs violated [section 1.1 of article I of the California Constitution](#) regarding reproductive freedom. Nonetheless, the court quoted that constitutional provision and stated that it "appears, on its face, to limit solely state action and not the actions of private parties."

The Association filed a timely appeal.

In December 2025, this court issued a supplemental briefing order pursuant to [Government Code section 68081](#) directing the parties to answer

² The cross-complaint's causes of action were labeled (1) declaratory relief, (2) intentional interference with contractual relations, (3) intentional interference with prospective economic relations, and (4) injunctive relief.

questions about whether the Tulare Local Hospital District was a public entity; whether the district's acts in adopting and recording the CC&Rs qualified as state action³ that interfered with the rights of privacy and procreative choice contained in [sections 1](#) and [1.1 of article I of the California Constitution](#); and the appropriate legal standard for determining whether any such interference was justified or invalid.

The Association's supplemental brief (1) acknowledged the Tulare Local Hospital District was a public [****11] entity in 1991 when it adopted and recorded [*980] the CC&Rs; (2) argued the district's acts of drafting, adopting, and recording the CC&Rs did not qualify as state action for purposes of the right to privacy in [section 1 of article I of the California Constitution](#) or action of "[t]he state" for purposes of [section 1.1 of article I of the California Constitution](#); (3) asserted the applicable legal standard for testing the validity of the abortion clinic prohibition is whether the district's decision was arbitrary, capricious, or entirely lacking in evidentiary support or contrary to established public policy; and (4) argued application of that standard requires a remand to develop the factual record, after which the Association is likely to prevail on the merits. Also, the Association argued this court cannot affirm the denial of the preliminary injunction on constitutional grounds because the trial court explicitly declined to rule on those grounds and, more specifically, defendants never raised the theory that the abortion clinic prohibition was unenforceable because it was adopted by a public entity.

In comparison, defendants' supplemental brief contends (1) the Tulare Local Hospital District's acts of drafting, adopting, and recording the CC&Rs qualify as state action for purposes of constitutional [****12] analysis; (2) the compelling state interest test applies—that is, such

an interest is needed to justify the interference with the right of [**239] [***239] privacy or the right to procreative choice; and (3) the Association is not likely to prevail under that test. Defendants also argued sending the case back to the trial court for a further development of the record was entirely unnecessary because the case should proceed to a final resolution of its merits rather than a reconsideration of the preliminary injunction.

DISCUSSION

I. General Principles

A. Criteria for Granting a Preliminary Injunction

[HN4 CA\(4\) \(4\) Code of Civil Procedure section 526](#) authorizes trial courts to issue injunctions during the litigation. ([County of Kern v. T.C.E.F., Inc. \(2016\) 246 Cal.App.4th \[**412\] \[***412\] 301, 315 \[200 Cal.Rptr.3d 714\] \(T.C.E.F.\)](#).) The decision whether to issue a preliminary injunction requires the court to weigh two interrelated factors: (1) the likelihood the moving party will prevail on the merits at trial and (2) the relative balance of interim harms that are likely to result from granting or denying a preliminary injunction. Generally, the weighing of the factors lies within the trial court's discretion. (*Ibid.*)

B. Standards of Review

The parties disagree on the applicable standard of review. Defendants contend the Association's appeal challenges the trial court's [****13] determination [*981] that the facts and circumstances presented did not demonstrate a likelihood that the Association would prevail. Based on this interpretation of the court's decision, they conclude it should be reviewed for an abuse of discretion. In contrast, the Association's initial briefing contends the trial court's assessment of the likelihood of success on the merits depended upon legal rather than factual questions and, therefore, the standard of review is de novo.

[CA\(5\) \(5\)](#) This court's decisions acknowledge [HN5](#)

³ This opinion uses the terms "state action" and "government action" to mean the same thing.

the general principle that rulings on an application for a preliminary injunction are reviewed for an abuse of discretion. (*T.C.E.F., supra*, 246 Cal.App.4th at pp. 315–316; see *Tulare Lake Canal Co. v. Stratford Public Utility Dist.* (2023) 92 Cal.App.5th 380, 402 [309 Cal.Rptr.3d 493] (*Tulare Lake*).) We also stated that description of the standard of review was incomplete “because the abuse of discretion standard is not unified and a more specific rule might apply once the appellate court has identified the particular aspect of the trial court’s determination being challenged.” (*T.C.E.F., supra*, at p. 316, citing *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711 [76 Cal.Rptr.3d 250, 182 P.3d 579]; see *Tulare Lake, supra*, at p. 402.)

When the challenged aspect is the sufficiency of the evidence to support the trial court’s express and implied findings of fact, the substantial evidence standard applies. (*T.C.E.F., supra*, 246 Cal.App.4th at p. 316.) When the challenged aspect is the trial court’s resolution of a question of law, an [****14] independent (i.e., de novo) review is conducted on appeal. (*Ibid.*) In particular, when the likelihood of prevailing on the merits depends on a question of law, an appellate court independently decides that question of law and, thus, whether there was a possibility of the moving party succeeding on the merits. (*Id.* at p. 317.) In accordance with the general principle that an appellant has the burden of affirmatively demonstrating prejudicial error, a party challenging the grant or denial of a preliminary injunction has the burden of showing trial court error under the foregoing standards of review. [**240] [***240] (*Tulare Lake, supra*, 92 Cal.App.5th at pp. 403, 415; see *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [86 Cal.Rptr. 65, 468 P.2d 193] [appellant’s burden to demonstrate error].)

C. Presumption That CC&Rs Are Valid and Enforceable

Both the *Commercial and Industrial Common Interest Development Act* (§§ 6500–6876) and the

Davis-Stirling Common Interest Development Act (§§ 4000–6150) address the enforceability of covenants and restrictions in a declaration for a common interest development. Sections 5975 and 6856 contain identical *subdivisions (a)*, which state: “The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the [**413] [***413] benefit of and bind all owners of separate [*982] interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, [****15] or by both.”

The Supreme Court interpreted the text of these subdivisions’ first sentence when that text was contained in former *section 1354, subdivision (a)*. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 378 [33 Cal.Rptr.2d 63, 878 P.2d 1275] (*Nahrstedt*).) The court first concluded the use of the phrase ““unless unreasonable”” cloaked use restrictions in recorded CC&Rs “with a presumption of reasonableness by shifting the burden of proving otherwise to the party challenging the use restriction.” (*Id.* at p. 380.)⁴

CA(6) (6) Next, because the Legislature used the term ““enforceable equitable servitudes,”” the court stated it “must examine the principles governing enforcement of equitable servitudes.” (*Nahrstedt, supra*, 8 Cal.4th at p. 380.) The court distilled the following principle from its review of case law and other authorities: *HN6* “An equitable servitude will be enforced unless [1] it violates public policy; [2]

⁴ The parties’ appellate briefing does not explicitly address which act applies to the CC&Rs. The Association’s opening brief refers to former *section 1354* and defendants’ respondents’ brief quotes *section 5975*. Because the relevant text is the same in each act, we need not resolve which one applies in this case. (See § 4202.) We note that papers filed by the Association with the trial court state its action was brought under *section 6856*, which suggests the Tulare Medical Center is exclusively commercial or industrial development with no residential component. (See 8 Miller & Starr, Cal. Real Estate (4th ed. 2025) § 28:1, p. 714 [developments with mixed residential and commercial components are governed by the Davis-Stirling Act].)

it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or [3] it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced." (*Id.* at p. 382.) The court determined these standards were embedded in the statutory text and, therefore, concluded use restrictions for a common interest development "should be enforced unless [****16] they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." (*Ibid.*)

CA(7) (7) The court explained its interpretation by stating: "Our social fabric is founded on the stability of expectation and obligation that arises from the consistent enforcement of the terms of deeds, contracts, wills, statutes, and other writings. To allow one person to escape obligations under a written instrument upsets the expectations of all the other parties governed by that instrument ... that [it] will be uniformly [****241**] [*****241**] and predictably enforced." (*Nahrstedt, supra, 8 Cal.4th at p. 384.*) The court rejected a case-by-case inquiry into the reasonableness of a use restriction because such inquiries [***983**] would impose substantial litigation costs and strain the social fabric of the development. (*Ibid.*) As a result, **HN7** the reasonableness of a use restriction is "determined not by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole." (*Id.* at p. 386.)

In *Nahrstedt*, the Supreme Court applied the foregoing principles to conclude as a matter of law that the challenged pet restriction prohibiting dogs and cats was rational and enforceable. ([****17] *Nahrstedt, supra, 8 Cal.4th at p. 386.*) [****414**] [*****414**] As a result, the court determined the plaintiff homeowner failed to state a cause of action for declaratory relief holding the pet restriction unenforceable. (*Id.* at p. 388.)

To summarize, we conclude the statutory

interpretation set forth in *Nahrstedt* governs in this case, regardless of whether the CC&Rs are subject to [section 5975](#) or [section 6856](#). Under that statutory interpretation, defendants have the burden of rebutting the presumption that use restrictions are reasonable and, to carry that burden, they must show the prohibition of abortion clinics is "wholly arbitrary, violate[s] a fundamental public policy, or impose[s] a burden on the use of affected land that far outweighs any benefit." (*Nahrstedt, supra, 8 Cal.4th at p. 382*; see 8 Miller & Starr, Cal. Real Estate, *supra*, §§ 28:108, 28:221, pp. 988, 1193 [enforcement of restriction in CC&Rs].)

II. California's Public Policies Relating to Abortion

A. Identifying Fundamental Public Policies

The inquiry into whether a land use restriction, such as the prohibition of abortion clinics, violates a fundamental public policy raises a question of law about how courts identify a public policy that is fundamental. This question is addressed (1) in employment law cases discussing the tort of wrongful discharge of an at-will employee in violation of public policy and (2) in cases [******18**] involving attorney fees awards under the private attorney general doctrine, which is codified in [Code of Civil Procedure section 1021.5](#).

In *Tameny v. Atlantic Richfield Co. (1980) 27 Cal.3d 167 [164 Cal.Rptr. 839, 610 P.2d 1330]*, the Supreme Court determined that "when an employer's discharge of an employee violates *fundamental* principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Id.* at p. 170, italics added.) Later, the court concluded "employees who assert *Tameny* claims must show that the important public interests they seek to protect are 'tethered to fundamental policies that are delineated in constitutional or statutory provisions.'" (*Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1095 [4 Cal.Rptr.2d [*984] 874, 824 P.2d 680]*.)" (*Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66, 71*

[\[78 Cal.Rptr.2d 16, 960 P.2d 1046\]](#); see [Turner v. Anheuser-Busch, Inc. \(1994\) 7 Cal.4th 1238, 1252, 1256 \[32 Cal.Rptr.2d 223, 876 P.2d 1022\]](#) [a policy embodied in a constitutional provision is a fundamental public policy for purpose of a wrongful discharge claim].) In *Green*, the court expanded this principle, concluding administrative regulations implementing a public safety statute are “a source of fundamental public policy that limits an employer’s right to **[**242] [***242]** discharge an at-will employee.” (*Green, supra, at p. 71* [federal regulation promulgated under the Federal Aviation Act of 1958 ([Pub.L. No. 85-726 \(Aug. 23, 1958\) 72 Stat. 731](#))]).) The court stated it “continue[d] to believe that, aside from constitutional policy, the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state.” **[*****19]** (*Ibid.*)

CA(8) (8) Similarly, in cases applying the private attorney general doctrine, our Supreme Court has stated that “‘doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions.’” ([Conservatorship of Whitley \(2010\) 50 Cal.4th 1206, 1218 \[117 Cal.Rptr.3d 342, 241 P.3d 840\]](#), quoting [Woodland Hills Residents Assn., Inc. v. City \[**415\] \[***415\] Council \(1979\) 23 Cal.3d 917, 933 \[154 Cal.Rptr. 503, 593 P.2d 200\]](#); see [Code Civ. Proc., § 1021.5](#).) These **HN8** cases confirm constitutional and statutory provisions as sources of California’s fundamental public policies.

We conclude the method for identifying fundamental public policies adopted in the foregoing cases applies in the context of determining whether a land use restriction contained in the CC&Rs of a common interest development violates a fundamental public policy and, thus, is “unreasonable” for purposes of [subdivision \(a\)](#) of either [section 5975](#) or [6856](#). (See [Nahrstedt, supra, 8 Cal.4th at p. 382](#) [interpreting predecessor statute].) The parties have not suggested a different method should be used.

B. Policies of Reproductive Freedom and Privacy

1. Historical Overview of the State Constitutional Right

In [People v. Belous \(1969\) 71 Cal.2d 954 \[80 Cal.Rptr. 354, 458 P.2d 194\]](#), the California Supreme Court recognized a “fundamental right ... to choose whether to bear children” was included in the implied state constitutional right to privacy or in the liberty afforded matters related to marriage, **[*****20]** family, and sex. ([Id. at p. 963.](#))

In 1972, California’s voters added an explicit right of privacy to the other inalienable rights protected by the state Constitution. ([White v. Davis \(1975\) \[*985\] 13 Cal.3d 757, 773 \[120 Cal.Rptr. 94, 533 P.2d 222\]](#).) As a result, [section 1 of article I of the California Constitution](#) states: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” (Italics added.)

In 1973, four years after the California Supreme Court recognized the state constitutional right of procreative choice in [People v. Belous, supra, 71 Cal.2d 954](#), the United States Supreme Court decided [Roe v. Wade \(1973\) 410 U.S. 113 \[35 L.Ed.2d 147, 93 S.Ct. 705\]](#) and acknowledged the existence of a comparable right under the [Fourteenth Amendment](#).

In June 2022, United States Supreme Court decided [Dobbs v. Jackson Women’s Health Organization \(2022\) 597 U.S. 215 \[213 L.Ed.2d 545, 142 S.Ct. 2228\]](#) (*Dobbs*), concluding the United States “Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.” (*Dobbs, supra, at p. 302.*) Accordingly, the court overruled [Roe v. Wade, supra, 410 U.S. 113](#), and “return[ed] that authority to the people and their elected representatives.” (*Dobbs, supra, at p. 302.*) As a result, the right to procreative choice **[**243] [***243]** discussed in this opinion is derived entirely from California law and the federal

Constitution plays no role in defining that right.

In November 2022, California’s electorate exercised [****21] the authority to regulate abortion identified in [Dobbs](#) and approved Proposition 1. It added [section 1.1 of article I of the California Constitution](#), which provides in full: “The state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by [Section 1](#), and the constitutional right to not be denied equal protection guaranteed by [Section 7](#). [**416] [***416] Nothing herein narrows or limits the right to privacy or equal protection.”

[CA\(9\)](#) (9) As a result, the fundamental right to choose that had been regarded as part of the constitutional right to privacy was made explicit. Based on the foregoing history and the wording of [section 1.1 of article I of the California Constitution](#), we conclude [HN9](#) the case law addressing the right to privacy is relevant to interpreting the reproductive freedom afforded individuals by [section 1.1 of article I](#). That constitutional provision was relied upon by defendants in the trial court in arguing the prohibition of abortion clinics was unconstitutional and, thus, was against California public policy.

2. Case Law

[CA\(10\)](#) (10) Several decisions of the California Supreme Court have addressed the right [****22] to choose to bear a child or have an abortion embedded in the right [*986] to privacy. In 1981, nine years after the explicit right to privacy was added to the California Constitution, the court determined restrictions in a state budget act that eliminated Medi-Cal funding of abortions while maintaining Medi-Cal funding of prenatal care and childbirth was unconstitutional because it violated a pregnant woman’s right to privacy. ([Committee to Defend Reproductive Rights v. Myers \(1981\) 29](#)

[Cal.3d 252 \[172 Cal.Rptr. 866, 625 P.2d 779\] \(Myers\)](#).) The court described “the decision whether to bear a child or to have an abortion [as] so private and so intimate that each woman in this state—rich or poor—is guaranteed the constitutional right to make that decision *as an individual*, uncoerced by governmental intrusion.” (*Id. at p. 284*.) The court evaluated the constitutionality of the legislation by applying a “three-part test” it referred to as the “*Danskin-Bagley* doctrine.” (*Id. at pp. 257–258, 268*.) That test is applied “whenever the state conditions the receipt of a benefit upon the waiver of a constitutional right or discriminatorily withholds such a benefit from individuals who exercise such right.” (*Id. at p. 269*.) After analyzing the three prongs, which included weighing the utility of withholding funding against the resulting impairment to the woman’s right of procreative choice, the court concluded the restrictions on funding for abortion were constitutionally invalid.

In 1997, the Supreme Court addressed the validity of a statute requiring a pregnant [****23] minor to secure parental consent or judicial authorization before obtaining an abortion. ([Lungren, supra, 16 Cal.4th at p. 313](#).) The court concluded the state Constitution provided greater protection of a woman’s right of choice than the federal Constitution and the privacy protections in the state Constitution encompassed procreative decisionmaking. (*Id. at p. 327*.) As a result, the court evaluated the statute’s validity under state constitutional principles rather than federal law. (*Id. at p. 328*.) [**244] [***244] It concluded a pregnant woman’s right of choice was clearly among the most fundamental of all state constitutional rights and a statutory intrusion on this fundamental right must be evaluated under the compelling interest standard. (*Id. at pp. 333, 340*.) After concluding the defendants had failed to demonstrate a compelling interest justified the intrusion on a pregnant minor’s state constitutional right to privacy, the court affirmed a judgment [**417] [***417] permanently enjoining the statute’s enforcement. (*Id. at pp. 324, 359*.)

3. Public Policy Embodied in Statute

Our discussion of California's public policies relating to abortion also considers the public policies declared by the Legislature. In the [Reproductive Privacy Act \(Health & Saf. Code, § 123460 et seq.\)](#), the Legislature declared "that every individual possesses a fundamental right of privacy with respect [****24] to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including ... [*987] abortion care." ([Health & Saf. Code, § 123462](#).) In accordance with this recognition of individual rights, "it is the *public policy* of the State of California that ... [¶] ... [¶] ... [e]very pregnant individual ... has the *fundamental right* to choose to bear a child or to choose to have and to obtain an abortion" ([Health & Saf. Code, § 123462, subd. \(b\)](#)), italics added.)

CA(11) (11) Tensions can arise between a pregnant individual's right of self-determination and the autonomy interests of health care providers. [HN10](#) The Legislature has protected provider autonomy by recognizing the right of certain persons to refuse to directly participate in performing an abortion. [Health and Safety Code section 123420, subdivision \(a\)](#) provides: "No employer or other person shall require a physician, a registered nurse, a licensed vocational nurse, or any other person employed or with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion, if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate in the [****25] abortion."

CA(12) (12) In addition, the Legislature has provided that a nonprofit hospital or other facility or clinic organized or operated by a religious entity is not required to permit or provide abortion services. ([Health & Saf. Code, § 123420, subd. \(c\)](#); see generally Miller, *Reflections on Protecting*

Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations (2006) 15 S. Cal. Rev. L. & Soc. Just. 327, 331.) [HN11](#) The Legislature has not extended the freedom of choice afforded individual doctors, nurses and other employees to public entities such as local health care districts or to nonpublic entities generally. Accordingly, Association's references to [Health and Safety Code section 123420](#) do not demonstrate California has a public policy that allows a local hospital district to interfere with individuals' autonomy and freedom of choice.

The Legislature has adopted several other statutes addressing abortion, including the [Abortion Accessibility Act \(Health & Saf. Code, § 1367.251; Ins. Code, § 10123.1961](#); see Stats. 2022, ch. 11, §§ 1, 2.) Many of the statutes address economic and financial issues that impact access to abortion and contraception. (See [Health & Saf. Code, §§ 140 \[California Reproductive Justice and Freedom Fund\], 123430, subd. \(a\)\(1\)](#) [California Health and Human Services Agency internet website giving the public access to [**245] [***245] information about abortion services in the state], [123451–123453](#) [Abortion Practical Support Fund], [127630–127639](#) [Reproductive [****26] Health Equity Fund]; [Ed. Code, § 99251, subd. \(a\)](#) ["each public university student health center shall offer abortion by medication techniques onsite"]; [Lab. Code, § 2808.1](#) [Department of Industrial Relations website about abortion and contraception benefits or services]; [Bus. & Prof. Code, § 8790](#) [expedited the licensure [**418] [***418] process for an applicant who intends to provide abortions].) [*988]

4. Conclusion

CA(13) (13) The foregoing authorities establish [HN12](#) a fundamental public policy of California is (1) to protect an individual's personal choice on the subject of abortion, which includes a pregnant person's right to choose to continue a pregnancy or have an abortion (see [Cal. Const., art. I, § 1.1](#)), and

(2) to limit government action that unduly intrudes or impinges that choice.

III. Unconstitutional Government Action

Before addressing the legal standard for evaluating the constitutionality of the prohibition of abortion clinics, we consider (1) whether the Tulare Local Hospital District is a governmental entity; (2) the disputed issue of whether its acts in adopting and recording the CC&Rs qualify as government action for purposes of determining if [sections 1](#) or [1.1 of article I of the California Constitution](#) were violated; and (3) the disputed issue of whether the ban on abortion clinics in the CC&Rs constitutes an intrusion upon the fundamental right to choose to continue a pregnancy or have an abortion.

A. Local Hospital Districts Are Public Entities

The Association's supplemental brief concedes the Tulare Local Hospital District was a public [****27] (i.e., government) entity in 1991 when it recorded the CC&Rs. We accept this concession. (See [Health & Saf. Code, § 32000 et seq.](#); Stats. 1945, ch. 932, § 1, p. 1738 ["The Local Hospital District Law"]; Stats. 1994, ch. 696, § 1, p. 3323 [renamed "The Local Health Care District Law"]; [Rosner v. Eden Township Hospital Dist. \(1962\) 58 Cal.2d 592, 594 \[25 Cal.Rptr. 551, 375 P.2d 431\]](#) [Eden Township Hospital District referred to as "a governmental entity functioning under The Local Hospital District Law"].)

B. Role of Government Action in the Legal Analysis

[CA\(14\) \(14\)](#) The Association's supplemental brief states the constitutional right to privacy "does not have a state action requirement, so the concept of 'qualifying as state action' does not apply," but "the distinction between government and private action is nonetheless relevant to determining whether [there was] an actionable invasion." We agree that [HN13](#) either government or private action is capable of unlawfully infringing the right of privacy. (See [Lungren, supra, 16 Cal.4th at p. 329](#); [Hill v. National Collegiate Athletic Assn. \(1994\) 7 Cal.4th 1, 20 \[26 Cal.Rptr.2d 834, 865](#)

[P.2d 633\]](#) [[Cal. Const., art. I, § 1](#) "creates a right of action against private as well as government entities"]; [Conservatorship of Wendland \(2001\) 26 Cal.4th 519, 541, fn. 10 \[110 Cal.Rptr.2d 412, 28 P.3d \[*989\] 151\]](#).) We also agree the existence of government action controls the legal standard for evaluating whether a constitutional violation occurred.

A question of state constitutional law not resolved in an appellate decision is whether the right to procreative choice, like the right to privacy, is protected from infringement [****28] by private entities. We note this question but do not resolve it because, as explained below, the existence of government action and the lack of a compelling interest establish a constitutional violation that justifies the denial of the [**246] [***246] preliminary injunction request. (See fn. 5., *post.*)

C. Existence of Government Action in This Case

[CA\(15\) \(15\)](#) The Association's supplemental brief contends the Tulare Local Hospital [**419] [***419] District's act of drafting, adopting, and recording the CC&Rs do not qualify as state action. This contention implies the relevant conduct is limited to the enforcement of the abortion clinic prohibition and excludes the creation of the prohibition. The Association asserts the district is in no way involved in enforcing the CC&Rs and, moreover, defendants did not argue in the trial court that government action was at issue. We conclude that whether government action is implicated in this litigation is a question of law that can be properly raised and resolved at the appellate level. (See [Esparza v. KS Industries, L.P. \(2017\) 13 Cal.App.5th 1228, 1237–1238 \[221 Cal.Rptr.3d 594\]](#) [[HN14](#) appellate courts have discretion to address legal questions not raised in the trial court when the question can be decided based on uncontroverted facts in the record]; [Crespin v. Kizer \(1990\) 226 Cal.App.3d 498, 507 \[276 Cal.Rptr. 571\]](#) [when reviewing a preliminary [****29] injunction, appellate court may reach the merits of purely legal questions].)

[CA\(16\)](#) (16) A question of law is presented because the undisputed evidence shows (1) the initial recording of the CC&Rs was done by the Tulare Local Hospital District’s president and (2) the Property became subject to the abortion clinic prohibition in the CC&Rs as a result of the district’s voter-elected board of directors unanimously approving the declaration of annexation and the subsequent recording of that declaration. The Tulare Local Hospital District’s creation of the prohibition easily establishes a close nexus between the district’s conduct and the Association’s conduct of attempting to enforce the CC&Rs. (See [Anchor Pacifica Management Co. v. Green](#) (2012) 205 Cal.App.4th 232, 243 [140 Cal.Rptr.3d 524] [[HN15](#)] state action exists where there is such a close nexus between the state and the challenged action that seemingly private behavior may be fairly treated as action of the state itself], citing [Brentwood Academy v. Tennessee Secondary School Athletic Assn.](#) (2001) 531 U.S. 288, 295 [148 L.Ed.2d 807, 121 S.Ct. 924].) The foundational role of the district’s conduct means the Association’s [****30] lawsuit is more than *entwined* with the district’s abortion policy. The lawsuit is an attempt to [*990] implement that policy even though the district itself is not a party to the litigation. (See [Anchor Pacifica Management Co., supra, at p. 243.](#))

Consequently, we conclude as a matter of law based on the record before us that the district’s acts of approving the CC&Rs and making the Property subject to the CC&Rs constitute government action for purposes of identifying the appropriate legal standard for determining whether the prohibition of abortion clinics violates the state Constitution.⁵

⁵Based on this conclusion, we do not reach the question whether the Association and its conduct in enforcing the prohibition constitutes the actions of a quasi-public or quasi-governmental entity for purposes of state constitutional analysis. (See [Valley Hospital Assn., Inc. v. Mat-Su Coalition for Choice](#) (Alaska 1997) 948 P.2d 963 [nonprofit corporation operating a hospital was a quasi-public institution; its policy on abortion did not comply with the state constitutional right to privacy; permanent injunction against enforcing the policy affirmed].) Also, we do not address the legal

In addition, we conclude a public entity’s inclusion of a ban on abortion clinics in CC&Rs constitutes an intrusion upon the fundamental right to choose to continue a pregnancy or have an abortion. By adopting the ban, the district used the CC&Rs to erect a barrier that, on its face, discriminatorily withholds a benefit—namely, use of the medical center—based on how the [**420] [***420] fundamental right to choose is exercised. (See [Myers, supra, 29 Cal.3d at p. 269.](#)) This type of discrimination by a public entity qualifies as an intrusion upon the constitutional right of privacy and right of procreative choice.

[**247] [***247] D. *The Compelling Interest Test Applies*

[HN16](#) [CA\(17\)](#) (17) The legal standard for determining whether government action intruding on a privacy interest violates the state Constitution varies depending upon the privacy interest asserted. ([Lewis v. Superior Court](#) (2017) 3 Cal.5th 561, 572 [220 Cal.Rptr.3d 319, 397 P.3d 1011].) In *Lewis*, the court stated it had “limited the application of the ‘compelling interest test’ to those cases that implicate an ‘obvious invasion of an interest fundamental to personal autonomy.’” (*Ibid.*) The court described cases in which it applied a general balancing test without requiring the asserted countervailing interest to be compelling. (*Id. at p. 573.*) Next, the court stated: “The only case requiring a compelling interest involved a challenge to a statute requiring a pregnant [****31] minor to obtain parental consent or judicial authorization before having an abortion, an issue that ‘unquestionably impinges upon “an interest fundamental to personal autonomy.”’” ([American Academy of Pediatrics v. Lungren](#), *supra*,] 16 Cal.4th 307, 340.)” ([Lewis, supra, 3 Cal.5th at p. 573](#) [**991] .)

Consequently, we conclude the compelling interest

standard used to determine when private action is unlawful because it interferes with the constitutionally protected rights of privacy and reproductive freedom.

test applies to the CC&Rs' prohibition of abortion clinics. To the extent the Association contends the compelling interest test should be limited to statutes enacted by the Legislature, like statutes in questions in [Myers](#) and [Lungren](#), we reject that contention.

Here, the Association's papers requesting a preliminary injunction incorrectly treated the land use restriction as solely a private contractual matter and made no attempt to identify a compelling interest that justified the Tulare Local Hospital District's impingement of an interest fundamental to personal autonomy. As a result of this omission, the Association's papers did not demonstrate any likelihood of succeeding in having the prohibition of abortion clinics upheld under the compelling interest test. Indeed, the trial court stated, "the Association d[id] not submit any argument, or evidence, to the effect that a legitimate business interest underlies the CC&Rs prohibition of abortion clinics." [****32] Consequently, no purpose would be served by remanding the matter to the trial court for further consideration of the Association's evidence to determine whether that evidence carried the Association's burden, as moving party, of demonstrating a compelling interest giving it a likelihood of succeeding on the merits. Furthermore, the proper course is not to give the Association a second bite at the preliminary injunction apple, which would delay the ultimate resolution of this case. Rather, the Association will have an opportunity in subsequent proceedings (e.g., a motion for summary judgment or trial) to develop the evidence it considers relevant to evaluating the prohibition under the compelling interest test.

E. Standing To Raise the Public Policy Defense

The Association has argued that defendants lack standing to raise the Unruh Civil Rights Act as a defense to the enforcement of the CC&Rs. Here, we consider whether defendants have standing to defend against the enforcement of the CC&Rs on the ground that the prohibition of abortion clinics violates a fundamental public policy.

[CA\(18\)](#) (18) [**248] [***248] [**421] [***421] A person's standing to raise a defense is not addressed in the Code of Civil Procedure. In contrast, standing to sue is. [****33] "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." ([Code Civ. Proc., § 367.](#)) [HN17](#) Thus, a person who commences a judicial proceeding is required to "have a real interest in the ultimate adjudication." ([Schmier v. Supreme Court \(2000\) 78 Cal.App.4th 703, 707 \[93 Cal.Rptr.2d 580\].](#)) Such an interest is lacking if the party has "neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." (*Ibid.*) The purpose of the statutory requirement that [*992] claims be prosecuted by the real party in interest (i.e., a party with standing) "is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand." ([Giselman v. Starr \(1895\) 106 Cal. 651, 657 \[40 P. 8\].](#))

[CA\(19\)](#) (19) The statute invoked by the parties provides that [HN18](#) a CC&Rs land use restrictions are enforceable "unless unreasonable." (§§ 5975, *subd. (a)*, 6856, *subd. (a)*.) We interpret the statutory text to mean that owners of a unit in a common interest development and their tenants are allowed to defend against a suit alleging they are violating a restriction in the CC&Rs by arguing the restriction is "unreasonable"—that is, it (1) is wholly arbitrary, (2) violates a fundamental public [****34] policy, or (3) imposes a burden on the use of affected land that far outweighs any benefit. ([Nahrstedt, supra, 8 Cal.4th at p. 380.](#)) More specifically, we conclude such defendants have standing to argue a restriction violates a fundamental public policy because it interferes with the constitutional rights of third parties who might patronize the business being operated on the property. A simple analogy demonstrates this point. If a restriction prohibits a business in a common interest development from serving members of a particular race or ethnicity, the owner of the

business should be allowed to defend against enforcement even if the owner is not a member of that race or ethnicity. In that situation, as here, the owner of the business has sufficient interest at stake to assure the relevant facts and issues are adequately developed. (See Schmier v. Supreme Court, *supra*, 78 Cal.App.4th at p. 707.) Consequently, defendants have standing to raise section 1.1 of article I of the California Constitution as a basis for concluding the CC&Rs' prohibition of abortion clinics is "unreasonable." (§§ 5975, *subd. (a)*, 6856, *subd. (a)*.)

F. Summary

CA(20) (20) The presumption that restrictions in CC&Rs are valid has been rebutted at this stage of the proceedings. The undisputed facts in the record show that (1) the abortion clinic prohibition was adopted by a government entity and, thus, [****35] the enforcement of that prohibition by the Association implicates government action and (2) the prohibition interferes with the right of privacy and the right of reproductive choice explicitly protected by the California Constitution. As a result, the burden shifted to the Association to demonstrate that the governmental interference was justified by a compelling state interest, which the Association failed to do. The unjustified governmental interference with constitutionally protected rights violates a fundamental public policy of the State of California, which renders the CC&Rs' prohibition of abortion clinics "unreasonable" and, thus, unenforceable. (§§ 5975, *subd. (a)*, 6856, *subd. (a)*.) These conclusions demonstrate the Association did [*993] not establish it was [**249] [***249] [**422] [***422] likely to succeed on the merits and, thus, provide one ground for affirming the denial of the Association's request for a preliminary injunction.

IV. Section 53 Applies to the Prohibition of Abortion Clinics

Defendants' alternate ground of unenforceability raises additional issues of first impression involving

the Unruh Civil Rights Act and section 53. In the trial court, defendants asserted the restriction against operating an abortion clinic is discriminatory against women (i.e., is based [****36] on generalized traits of sex and medical condition) in violation of the Unruh Civil Rights Act. The lack of precedent on this type of claim was acknowledged by the trial court both during the hearing on the preliminary injunction and in its written ruling denying the request.

Our analysis of the relevant statutory text does not begin with the Unruh Civil Rights Act itself, but with section 53, a provision tied to the Unruh Civil Rights Act. Section 53 explicitly addresses the enforceability of discriminatory restrictions or prohibitions in written instruments relating to real property. Before we set forth section 53's text, we address how that statute affects the scope of the issues decided in this opinion. Section 53 was not relied upon by defendants in the trial court and the court's ruling did not refer to section 53. On appeal, defendants have argued that section 53 applies to the CC&Rs' abortion clinic prohibition and voids that prohibition. Defendants' argument expands the issues raised on appeal to include questions involving the interpretation and application of section 53 but also narrows the issues involving the Unruh Civil Rights Act. For example, because of section 53's scope, we do not reach whether defendants personally suffered an Unruh Civil Rights Act violation or whether they have representative standing under [****37] the Unruh Civil Rights Act.

The Association's reply brief did not mention section 53 and, thus, (1) did not directly address the statute's meaning or application to the facts of this case and (2) did not argue this court should not consider the issues raised by section 53 because those issues were not raised below. Nonetheless, the Association has indirectly addressed section 53's application by arguing the CC&Rs do not violate the Unruh Civil Rights Act because the CC&Rs do not discriminate against women, pregnant women, or women considering abortion.

Restated in terms of [section 53](#)'s text, the parties have addressed whether a woman's decision to have an abortion should be treated as a "characteristic listed or defined in *subdivision (b) or (e) of Section 51*." ([§ 53, subs. \(a\), \(b\)](#) [*994] .)

A. Statutory Text

[Section 53, subdivision \(a\)](#) provides: "Every provision in a written instrument relating to real property that purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of that real property to any person because of any characteristic listed or defined in *subdivision (b) or (e) of Section 51* is void, and every restriction or prohibition as to the use or occupation of real property because of any characteristic listed or defined in *subdivision (b) or (e) of Section 51* is void." (Italics added.)

In addition, [section 53, subdivision \(b\)](#) states: "Every restriction or prohibition, whether by way of [****38] covenant, condition upon use or occupation, or upon transfer of title to real property, which restriction or prohibition directly or indirectly limits the acquisition, use or occupation of that property because of any characteristic listed or defined in *subdivision (b) or (e) of Section 51* is void." (Italics added.)

[**250] [***250] [**423] [***423]

A

California real property treatise describes the impact of [section 53](#) and parallel statutory provisions by stating: "By statute, restrictions that prevent the use of property on the basis of all classifications prohibited by the Unruh Civil Rights Act, and the Fair Employment and Housing Act, ... are now completely unenforceable." (6 Miller & Starr, Cal. Real Estate (4th ed. 2005) § 16:35, p. 455, fns. omitted [defenses to enforcement—public policy or discrimination]; see [Civ. Code, §§ 782](#) [discriminatory restrictions in deeds], [782.5](#) [discriminatory restrictions in title-related instruments], [4225](#), [6606](#).) We note a person asserting that a prohibition on the use of real property is void under [subdivision \(a\)](#) or [\(b\) of section 53](#) is not required by the statutory text to

prove all the elements of an Unruh Civil Rights Act violation. For instance, it need not be proven that the person (or anyone else) suffered an injury or harm or that the prohibition was a substantial factor in causing that harm. (See generally CACI No. 3060 [essential elements of an Unruh Civil Rights Act claim].)

B. Meaning and Application of Section 53

1. Prohibition as to Use

The Association may have chosen not to address some aspects of the application of [section 53](#)'s text to the facts of this case because that application to the provision addressing abortion clinics is straightforward. First, the CC&Rs are clearly a "written instrument relating to real property" within the meaning of [subdivision \(a\) of section 53](#). Because the CC&Rs were recorded, we do not decide whether this [****39] statutory provision applies to documents that are not recorded. [*995]

Second, the provision addressing abortion clinics is clearly a "prohibition" for purposes of [section 53](#). Section 7.01 ("[Land Use](#)") of the CC&Rs states that "nor shall any unit be used for the following types of practices: abortion clinic" The term "nor shall" is mandatory language that plainly states the specified practices are barred—that is, prohibited.

Third, the prohibition of abortion clinics in the CC&Rs qualifies as a prohibition "as to the use ... of real property" within the meaning of [subdivision \(a\) of section 53](#) and a prohibition "by way of covenant [or] condition upon use" of real property that "directly or indirectly limits the ... use ... of that property" within the meaning of [subdivision \(b\) of section 53](#). In particular, section 7.01 of the CC&Rs "directly" prohibits the Property from being used as an abortion clinic and, thus, "indirectly" limits individuals from obtaining abortion services at the Property.

We have set forth these seemingly obvious legal conclusions because the parties have not cited, and we have not located, a published appellate decision

applying [section 53](#)'s text to CC&Rs or other document containing a prohibition of abortion clinics. In making these legal conclusions on issues not [****40] raised in the trial court, we have exercised our discretion to consider such issues because the relevant facts are undisputed and the Association, despite having the opportunity, did not argue against considering [section 53](#)'s application.

CA(21) (21) To summarize, based on the plain meaning of the statute and the undisputed contents of the CC&Rs, we conclude the land use prohibitions in section 7.01 of the CC&Rs are subject to [section 53](#). As a result, [HN19](#) the statute will render the prohibition of abortion clinics "void" if the prohibition is "because of any characteristic listed or defined" in the Unruh Civil Rights Act. ([§ 53, subds. \(a\), \(b\).](#)) Conversely, if the prohibition is not "because of any characteristic listed or defined" in the Unruh Civil Rights Act ([§ 53, subds. \(a\), \(b\).](#)), [section 53](#) will not invalidate the prohibition.

[**424] [***424] We also conclude defendants have standing to raise [section 53](#) as a ground rendering the prohibition of abortion clinics unenforceable. Defendants own or rent the Property, which is subject to a prohibition on its use, which gives them sufficient interest to assure the relevant facts and issues are adequately developed. (See [Schmier v. Supreme Court, supra](#), [78 Cal.App.4th \[**251\] \[***251\] at p. 707](#) [interest required to have standing to sue].)

2. The List of Protected Characteristics

HN20 CA(22) (22) The list of characteristics expressly protected by the Unruh Civil Rights Act includes "sex, race, color, [****41] religion, ancestry, national origin, [*996] disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, [and] immigration status." ([§ 51, subd. \(b\).](#)) The Unruh Civil Rights Act provides that "all persons" within California's jurisdiction, regardless of these characteristics, "are entitled to the full and equal accommodations, advantages, facilities, privileges,

or services in all business establishments of every kind whatsoever." ([§ 51, subd. \(b\).](#)) The act of operating an abortion clinic and the decision to have an abortion are not expressly listed in *subdivision (b) of section 51*.

CA(23) (23) Similarly, the Unruh Civil Rights Act's definitions do not address these decisions. **HN21** "Sex" is defined to include, "but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth." ([§ 51, subd. \(e\)\(6\)](#), italics added.) The phrase "is not limited to" suggests sex is to be interpreted broadly⁶. "Medical condition" has the same meaning as defined in *subdivision (i) of Section 12926 of the Government Code*. ([§ 51, subd. \(e\)\(3\).](#)) The [California Fair Employment and Housing Act \(FEHA; Gov. Code, § 12900 et seq.\)](#) states the term "medical condition" means either genetic characteristics or any cancer-related health impairment. ([Gov. Code, § 12926, subd. \(i\).](#)) Thus, having an abortion is not itself a "medical condition" as defined in the FEHA and the Unruh Civil Rights Act.

The Unruh Civil Rights Act's list of characteristics and [****42] the definitions of those characteristics does not explicitly *include* or *exclude* the act of operating an abortion clinic and the decision to have an abortion. Consequently, we next consider how to interpret the phrase "any characteristic listed or defined in *subdivision (b)* or

⁶"Sex" also includes, but is not limited to, a person's gender. 'Gender' means sex, and includes a person's gender identity and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth." ([§ 51, subd. \(e\)\(6\).](#)) An individual's gender-related appearance and behavior are the result of the individual's personal choices (i.e., decisions). Association's argument that it makes no sense definitionally to include an act, or the decision to undertake an act such as abortion, as a *characteristic* for purposes of the Unruh Civil Rights Act ignores personal decisions related to gender identity and expression are included in the definition of "sex." Thus, Association's view that an individual's decision can never be treated as a characteristic protected by the Unruh Civil Rights Act contradicts the plain text of the statute.

(e) of Section 51.” (§ 53, subds. (a), (b).) It could be interpreted narrowly to mean characteristics expressly listed or defined in the Unruh Civil Rights Act. Alternatively, it could be interpreted liberally to include both expressly listed characteristics and those added by judicial construction. [*997]

3. Recognizing Unlisted Characteristics

HN22 CA(24) (24) When discussing the Unruh Civil Rights Act, the California Supreme Court has stated the kinds of discrimination it specifies are “illustrative, rather than restrictive, indicia of the type of conduct condemned.” (*In re Cox* (1970) 3 Cal.3d 205, 212 [90 Cal.Rptr. 24, 474 P.2d 992] (Cox); see *Marina Point, Ltd.* [**425] [***425] v. *Wolfson* (1982) 30 Cal.3d 721, 725 [180 Cal.Rptr. 496, 640 P.2d 115] [same]; *Civil Rights Dept. v. Cathy’s Creations, Inc.* (2025) 109 Cal.App.5th 204, 226 [329 Cal.Rptr.3d 846] [Unruh Civil Rights Act’s “protection against discrimination is not confined to the expressly articulated classes”].) This statutory construction was approved by the Legislature when it adopted the Civil Rights Act of 2005 (*Civ. Code, § 51.7*) and declared: “In keeping with that history and the legislative history of the Unruh Civil Rights Act, California courts have interpreted the categories enumerated in the act to be illustrative rather than restrictive. It is the intent of the Legislature [****43] that these enumerated bases shall continue to be construed as illustrative rather than restrictive.” (Stats. 2005, ch. 420, § 2, subd. (b), p. 3513; see § 51.7, subd. (b)(1) [list of characteristics “is illustrative rather than restrictive”].)

HN23 CA(25) (25) Given the Legislature’s explicit guidance and the general principle that the “Unruh Act is to be liberally construed with a view to effectuating the purposes for which it was enacted and to promote justice” (*Koire v. Metro Car Wash* (1985) [**252] [***252] 40 Cal.3d 24, 28 [219 Cal.Rptr. 133, 707 P.2d 195]), we conclude the phrases “any characteristic listed or defined in

subdivision (b) or (e) of Section 51” in [section 53](#) also should be interpreted to include characteristics added to the Unruh Civil Rights Act’s protection by judicial construction. Accordingly, we consider the principles used by courts when determining whether to include a particular characteristic with those listed in the Unruh Civil Rights Act and those already added by judicial construction.

4. Identifying Unlisted Yet Protected Characteristics

CA(26) (26) In *Cox*, the court determined **HN24** the history and language of the Unruh Civil Rights Act “disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise” but explained “that this broad interdiction of the [Unruh A]ct is not absolute.” (*Cox, supra*, 3 Cal.3d at p. 212.) For instance, the act did not prohibit a business from asking a customer to leave its premises if the customer [****44] damaged property, injured others, or otherwise disrupted the business. (*Id. at p. 217.*) In contrast, the court illustrated what it meant by “arbitrary” discrimination by stating a business could not “exclude individuals who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations.” (*Id. at pp. 217–218* [*998] .)

In the 1980’s, the Supreme Court recognized the Unruh Civil Rights Act protected additional unlisted characteristics from discrimination by business establishments. The owner of an apartment is prohibited from refusing to rent an apartment to a family with a minor child. (*Marina Point, Ltd. v. Wolfson, supra*, 30 Cal.3d at p. 735.) Also, a restriction in the CC&Rs of a condominium development limiting residency to persons over the age of 18 violated the Unruh Civil Rights Act. (*O’Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 792 [191 Cal.Rptr. 320, 662 P.2d 427].)

CA(27) (27) In 1991, **HN25** the Supreme Court

“created a three-part analytic framework for determining whether a future claim of discrimination, involving a category not enumerated in the statute or added by prior judicial construction, should be cognizable under the [Unruh Civil Rights] Act.” (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 840 [31 Cal.Rptr.3d 565, 115 P.3d 1212] (*Koebke*), citing *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d [**426] [***426] 1142 [278 Cal.Rptr. 614, 805 P.2d 873] (*Harris*), superseded by statute on another ground as noted in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664 [94 Cal.Rptr.3d 685, 208 P.3d 623].) The three inquiries are (1) whether the claim [****45] is based on a personal characteristic similar to those listed in the statute; (2) whether the alleged discrimination is justified by a legitimate business interest; and (3) what the potential consequences of recognizing the new claim will be. (*Koebke, supra, at p. 841*, citing *Harris, supra, at p. 1154*; see *Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794].)

In *Harris*, two women filed a representative action against the owner and the managers of two apartment buildings, alleging their requirement that prospective tenants have a gross monthly income of at least three times the rent charged constituted arbitrary economic discrimination and sex discrimination due to its adverse impact on women. (*Harris, supra, 52 Cal.3d at pp. 1148–1149.*) [**253] [***253] The trial court sustained the defendants’ demurrers without leave to amend and the Court of Appeal reversed as to the economic discrimination claim. (*Id. at p. 1149.*) The Supreme Court reversed the appellate court and directed both claims be dismissed. (*Id. at p. 1175.*) The Supreme Court concluded a sex discrimination claim under the Unruh Civil Rights Act required intentional discrimination and, thus, could not be established using a disparate impact analysis. (*Harris, supra, at p. 1175.*) The court also rejected the claim of arbitrary economic discrimination, concluding the minimum income requirement did not distinguish

among persons based on the classifications [****46] listed in the Unruh Civil Rights Act or similar personal traits and the distinctions made were based on the landlord’s legitimate business interest in assessing prospective tenants’ ability to pay rent on a continuing basis. (*Harris, supra, at p. 1169.*) The court noted that economic distinctions furthering legitimate business interests are fundamentally different from the categories specified in the Unruh Civil Rights Act or added by [*999] judicial construction. The court stated the unspecified categories added by judicial construction—physical appearance and family status—“were based on *personal characteristics* of individuals that bore little or no relationship to their abilities to be responsible consumers of public accommodations.” (*Harris, supra, at p. 1148*, italics added.)

In 2005, 14 years after *Harris*, the Supreme Court acknowledged it had not defined the term “personal characteristic” used in the first prong of the three-part *Harris* analysis. (*Koebke, supra, 36 Cal.4th at p. 842.*) The court explained the term by stating the categories enumerated in the Unruh Civil Rights Act or added by judicial construction “represent traits, conditions, decisions, or choices fundamental to a person’s identity, beliefs and self-definition.” (*Koebke, at pp. 842–843.*) For purposes of applying the first prong of the *Harris* framework to this case, we refer to this [****47] standard as the *Koebke* test.

In *Koebke*, the plaintiffs were registered domestic partners who sued a country club for refusing to extend them certain benefits extended to married couples. (*Koebke, supra, 36 Cal.4th at p. 831.*) The court stated, “the decision whether to enter into a domestic partnership is motivated by personal values and beliefs,” a fact confirmed by the [**427] [***427] California Domestic Partner Rights and Responsibilities Act of 2003 (*Fam. Code*, § 297 *et seq.*). (*Koebke, at p. 843.*) Thus, the court concluded the *Koebke* test was satisfied and concluded “discrimination against registered domestic partners in favor of married couples is a

type of discrimination that falls within the ambit of the [Unruh Civil Rights] Act.” (*Koebke*, at p. 846.)

We conclude the principles contained in *Harris* and *Koebke* control whether an individual’s decision to have an abortion should be treated as a “characteristic listed or defined” in the Unruh Civil Rights Act for purposes of *subdivision (a)* and *(b) of section 53*. Those principles include the three-part analysis adopted in *Harris* and the *Koebke* test used to complete the first prong of that analysis. Accordingly, we next consider the application of those principles to the record before us. Unlike the application of *section 53*, that particular analysis does not involve issues that were not raised and considered in the trial court because the trial court discussed the three-part analysis, including the *Koebke* test.

[254] [***254] 5. The Decision [****48] To Have an Abortion Is a Protected Characteristic**

The Association contends the *Koebke* test is not satisfied because “simply making a choice to undertake (or undergo) an action does not of itself create a protected class of choice-makers, even if the choice involves a constitutional right.” The Association argues the requisite choice “is not a one-time [*1000] action, but a choice that moves the individual into or out of, or identifies one with, a category of individuals.” The Association’s examples of decisions that put an individual into a protected category are (1) the decision to get married, which places the individual in the class of married persons protected from discrimination, and (2) the decision to join a particular religion, which makes the person a member and protected from discrimination against that religion.

The Association cites *Gayer v. Polk Gulch, Inc.* (1991) 231 Cal.App.3d 515 [282 Cal.Rptr. 556] (*Gayer*), a case in which the plaintiff sued the owner of a bar for permanently excluding him from entering the premises. (*Id.* at p. 517.) A doorman had told the plaintiff he would not be served

because he had filed a lawsuit against the bar in small claims court. In the prior small claims action, plaintiff alleged the defendant, a gay bar, had discriminated against him in violation [****49] of the Unruh Civil Rights Act because he was gay. (*Gayer*, *supra*, at p. 518, fn. 2.) The First District (1) concluded that membership in a protected class is a requirement for protection under the Unruh Civil Rights Act and (2) rejected plaintiff’s argument that he was a member of a class of civil rights litigants. (*Gayer*, *supra*, at pp. 522, 525.) The court addressed the first prong of the *Harris* framework by stating the bar’s discrimination against the plaintiff “is neither based on status as a member of a class nor on personal characteristics but is, instead, based on the conduct of an individual” and cited a case stating the Unruh Civil Rights Act “‘does [not] seek to remedy discrimination based on purely personal grounds.’” (*Gayer*, *supra*, at p. 525.) In other words, the plaintiff was treated differently because he had sued the bar, not because he was a member of a class of civil rights litigants.⁷

[**428] [***428] *Gayer* was filed before the Supreme Court decided *Koebke* and stated the common element among the categories protected by the Unruh Civil Rights Act was “that they represent traits, conditions, *decisions*, or *choices* fundamental to a person’s identity, beliefs and self-definition.” (*Koebke*, *supra*, 36 Cal.4th at pp. 842–843, italics added.) The distinction drawn in *Gayer* between personal *characteristics* and *conduct* does not fit perfectly with the Supreme Court’s inclusion of characteristics [****50] that represent *decisions* or *choices* fundamental to a person’s identity, beliefs and self-definition. (See *Koebke*, *supra*, at

⁷The court in *Gayer* addressed the third prong of the *Harris* framework by stating: “Were we to hold that the conduct involved here gave rise to a protected class under the [Unruh Civil Rights] Act, we would open the door for a seemingly endless stream of new cases never contemplated by the Legislature. Given such lack of legislative direction, this court is reluctant to add a new class of ‘civil rights litigants’ within the protection of the [Unruh Civil Rights] Act.” (*Gayer*, *supra*, 231 Cal.App.3d at p. 525.)

pp. 842–843.) Therefore, to the extent that [Gayer](#)’s discussion of conduct conflicts with the [Koebke](#) test’s analysis of decisions and choices, we must follow the Supreme Court’s [Koebke](#) decision. (See [Auto Equity Sales, Inc. v. Superior Court \(1962\) 57 Cal.2d 450, 455 \[20 Cal.Rptr. \[*1001\] 321, 369 P.2d 937\]](#).) As a result, labeling the decision to have an abortion as **[**255] [***255]** conduct does not resolve how the [Koebke](#) test should be applied to that decision.

Furthermore, the ban of the plaintiff from the business in [Gayer](#) is factually distinguishable from the prohibition of abortions in this case because the ban affected only a single individual and was not shown to have affected other members of the class that the plaintiff argued were being discriminated against—namely, civil rights litigants. Here, the prohibition of abortion clinics, if enforced, would affect every individual who would have sought abortion services from FPA at the Property. Thus, the prohibition is not “purely personal” in the sense it affects only a single individual but applies to everyone in the class. ([Gayer, supra, 231 Cal.App.3d at p. 525](#); see [Scripps Clinic v. Superior Court \(2003\) 108 Cal.App.4th 917, 934 \[134 Cal.Rptr.2d 101\]](#) [no Unruh Civil Rights Act violation for medical group to deny care for any patient who previously sued the group for medical malpractice].) As a result, the reasoning **[****51]** in [Gayer](#) does not persuade us to abandon or limit the [Koebke](#) test. Accordingly, we next consider whether an individual’s decision to have an abortion is a “decision[] ... or choice[] fundamental to a person’s identity, beliefs and self-definition.” ([Koebke, supra, 36 Cal.4th at pp. 842–843](#).)

CA(28) (28) The California Supreme Court’s statements about the decision to have an abortion (see pt. II.B.2., *ante*) guide our application of the [Koebke](#) test. In [Lungren](#), the court stated its earlier decisions had explained:**HN26** “[T]he right to choose whether to continue or to terminate a pregnancy implicates a woman’s fundamental interest in the preservation of her personal health (and in some instances the preservation of her life),

her interest in retaining personal control over the integrity of her own body, and her interest in deciding for herself whether to parent a child. And our court also has made clear the profound importance of this constitutional right: ‘This right of personal choice is central to a woman’s control not only of her own body, but also to the control of her social role and personal destiny. ... “*The implications of an unwanted child for a woman’s education, employment opportunities and associational opportunities (often including marriage opportunities)*’ **[****52]** *are of enormous proportion.*” [Citation.]’ ([Myers, supra, 29 Cal.3d at p. 275](#), italics added.) The right of choice may also implicate a woman’s **[**429] [***429]** deepest philosophical, moral, and religious concerns, including her personal beliefs regarding the meaning of human existence and the beginning of human life. (Accord, [\[Planned Parenthood of Southeastern PA. v.\] Casey \[\(1992\)\] 505 U.S. 833, 851 \[120 L.Ed.2d 674, 112 S.Ct. 2791, 2806–2807\]](#) (lead opn.) [‘[P]ersonal decisions relating to ... procreation ... involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy ... [and] to the liberty protected by the [Fourteenth Amendment](#). At the heart of liberty is the right to define one’s **[*1002]** own concept of existence, of meaning, of the universe, and of the mystery of human life.’].) In [Myers, supra, 29 Cal.3d 252, 275](#), we declared that a pregnant woman’s constitutional right of choice is ‘clearly among the most intimate and fundamental of all constitutional rights.’” ([Lungren, supra, 16 Cal.4th at pp. 332–333](#), fns. omitted; see [Lewis v. Superior Court, supra, 3 Cal.5th at p. 573](#).)

[256] [***256]** This discussion leaves little doubt that the decision to have an abortion is a personal “choice[] fundamental to a person’s identity, beliefs and self-definition.” ([Koebke, supra, 36 Cal.4th at pp. 842–843](#).) The fact the discussion cites [Casey](#), a decision overruled by [Dobbs, supra, 597 U.S. at page 231](#), does not undermine the court’s description of how the choice to continue or terminate a pregnancy is

viewed under California law. Furthermore, [****53] the discussion in *Lungren* is not out of date because the fundamental nature of an individual's right to choose was confirmed after *Lungren* and *Dobbs* when voters passed Proposition 1 in November 2022. (See *Cal. Const., art. I, § 1.1*.) Therefore, we resolve an issue of first impression by concluding the decision or choice to have an abortion satisfies the *Koebke* test, which is the first prong of the *Harris* analysis.

The second prong of the three-part analytic framework adopted in *Harris* asks “whether a legitimate business interest justified” the alleged discrimination. (*Koebke, supra*, 36 Cal.4th at p. 841.) The trial court addressed this prong by stating “the Association does not expressly articulate any legitimate business interest justified by the CC&Rs prohibition against abortion clinics.” The court also stated, “the Association does not submit any argument, or evidence, to the effect that a legitimate business interest underlies the CC&Rs prohibition of abortion clinics.” As a result, the court determined the Association had not carried its burden of establishing a likelihood of prevailing on the merits.

CA(29) (29) We conclude *HN27* the Association had the burden of proving a legitimate business interest justified the prohibition and the standard of review applied to the trial court's [****54] determination that the Association failed to carry the burden is whether the evidence compels a finding in the Association's favor as a matter of law. (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 [159 Cal.Rptr.3d 832]; *Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 966 [141 Cal.Rptr.3d 103].) On appeal, the Association has not acknowledged this standard of review, which is difficult to meet, and has not cited evidence in the record compelling a finding in its favor. As a result, the Association has not carried its burden, as the appellant, of affirmatively demonstrating trial court error. **CA(30) (30)** (*Denham v. Superior Court, supra*, 2

Cal.3d at p. 564 [**430] [***430] [*HN28* an order challenged on appeal is presumed correct and it is the appellant's burden to affirmatively show the trial court erred].) [*1003]

HN29 CA(31) (31) The third prong of the *Harris* analysis examines “the consequences that will flow from a particular interpretation”—that is, from adding a characteristic to the types of discrimination prohibited by the Unruh Civil Rights Act. (*Harris, supra*, 52 Cal.3d at p. 1165.) This prong is derived from the principle of statutory construction that courts addressing the meaning of an ambiguous statute should consider the consequences of the competing interpretations. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323] [where uncertainty exists consideration should be given to the consequences that will flow from a particular statutory interpretation]; *Zieve, Brodnax & Steele, LLP v. Dhindsa* (2020) 49 Cal.App.5th 27, 35 [262 Cal.Rptr.3d 567] [same].) Therefore, we conclude the third prong of the *Harris* analysis [****55] applies generally and is not limited to characteristics that are economic or financial.

[**257] [****257] One consequence of including the decision to have an abortion with the characteristics listed in *subdivision (b) of section 51* is that business establishments lacking a legitimate interest (such interests are analyzed under *Harris's* second prong) would be liable for refusing accommodations or services to individuals who were considering having an abortion or who had had an abortion, provided that the other elements of an Unruh Civil Rights Act violation were proven. The parties' briefing does not discuss the existence or prevalence of this particular type of discrimination in California or elsewhere. Examples of this type of refusal of service are (1) a taxi or ride-share driver who refuses to transport a woman from a nonprofit hospital that does not perform abortions to a hospital that performs such procedures and (2) the owner of a restaurant who refuses to serve a person seen leaving a family

planning clinic because the owner perceives that person to be someone who has had or is considering an abortion. (Cf. [Civil Rights Dept. v. Cathy's Creations, Inc.](#), *supra*, 109 Cal.App.5th at p. 218 [bakery's policy of refusing to sell predesigned cake for use at same-sex wedding reception intentionally discriminated against a protected characteristic and, thus, violated the Unruh Civil Rights Act].) There is nothing in the record suggesting that treating women who consider or decide to have an abortion as "a protected class under the [Unruh Civil Rights] Act ... would open the door for a seemingly endless stream of new cases." ([Gayer](#), *supra*, 231 Cal.App.3d at p. 525.) Given the many statutes that address abortion and the private nature of the right to choose an abortion, it is unlikely the Legislature would condone discrimination against women who make a particular type of reproductive health decision.

The Association has argued that a consequence of interpreting the statute broadly is that private landowners will be required to make their property available for the provision of abortion services, which would interfere with the right of landowners to choose to oppose abortion. This argument does not [*1004] accurately reflect the scope of the statutory interpretations adopted in this opinion and, as a result, overstates the consequences.

Our conclusion that the decision to have an abortion is included with the characteristics listed [****56] in *subdivision (b) of section 51* and is limited by the further conclusion that a land use prohibition of abortion clinics "indirectly limits the ... use ... of [real] property" "because of" that decision for purposes of *subdivision (b) of section 53*. This interpretation and application of [**431] [***431] *section 53* to void a recorded instrument's prohibition or restriction on the use of real property is readily distinguished from affirmatively requiring a landowner to rent his or her property to an abortion clinic. Individual choice on the subject of abortion is the thread that runs through this opinion, and nothing should be

interpreted as compelling a landowner's [****57] choice, one way or the other. The prohibition in the CC&Rs is not an individual choice. Rather, the CC&Rs were the hospital district's attempt to take the choice away from the individuals who own or rent units within the medical center. A statutory interpretation that voids the land use prohibition of abortion clinics means that the creator of CC&Rs, equitable servitudes, or restrictive covenants cannot impose that prohibition on subsequent owners and thereby deprive them of the choice. In other words, voiding the restriction would not compel any owner to rent to an abortion clinic or to offer abortion services on their property. As a result, that type of compulsion is not a consequence of the statutory interpretation adopted in this opinion.⁸

[CA\(32\)](#) (32) A consequence that does *not* flow from our interpretation of [section 53](#) is a broadening of the standing requirements applied to a cause of action seeking relief under the Unruh Civil Rights Act. [HN30 Section 53](#) voids a prohibition that is "because of" a characteristic protected by the Unruh Civil Rights Act without an inquiry into whether the plaintiff has personally suffered discrimination prohibited by the Unruh Civil Rights Act or has standing to assert a violation suffered by a third party, which is sometimes [****58] referred to a *jus tertii* standing. (See [Glassdoor, Inc. v. Superior Court](#) (2017) 9 Cal.App.5th 623, 629 [215 Cal.Rptr.3d 395].)

[**258] [****258] Other consequences raised by the Association are tied to the rationale for presuming land use restrictions in CC&Rs are

⁸Thus, the Association's petition for rehearing greatly exaggerates the scope of this opinion by claiming it prevents an owner of an event venue from declining to rent space to someone raising funds for a pregnancy care center with a view of abortion contrary to the owner's view. Furthermore, [section 53](#) does not apply to this hypothetical for the additional reason that the hypothetical does not involve a recorded "written instrument relating to real property" or a recorded prohibition "by way of covenant, condition upon use or occupation, or upon transfer of title to real property." ([§ 53, subs. \(a\), \(b\)](#).)

reasonable. (See pt. II.C., *ante*.) The Association contends the failure to enforce the prohibition would (1) undermine the expectations of the owners of other units within the [*1005] medical center and (2) force those owners in the medical center to endure the negative impacts that picketers and protestors, even when lawful and unobstructive, have on their businesses, their employees, and their patients.

[CA\(33\)](#) (33) The argument that a land use restriction prohibiting an activity involving the exercise of an individual's fundamental constitutional right should be upheld because of protestors is unconvincing because it would, in practical effect, empower protestors to override the personal choices of patients, health care providers, and landlords. [HN31](#) The balance struck by the California Constitution and by legislation addressing abortion is that the decision to have an abortion or participate in an abortion procedure is personal. Finally, to the extent that other owners expect the prohibition to be enforced, that general expectation must give way [****59] to California's public policy on abortion and the requirements of [section 53](#), which are more specific than [section 5975](#) or [section 6856](#). [CA\(34\)](#) (34) Stated another way, [HN32](#) it is not reasonable to expect that a prohibition contrary to California's public policy will be enforced.

Consequently, we conclude that applying the three-part [Harris](#) analysis [**432] [***432] and our interpretation of [section 53](#) to the record before us leads to the conclusion that the Association did not establish a likelihood of success on the merits. As a result, [section 53](#) provides an alternate ground for affirming the trial court's denial of the preliminary injunction request.

V. *Other Issues** [NOT CERTIFIED FOR PUBLICATION]

DISPOSITION

The order denying the Association's application for a preliminary injunction is affirmed. Defendants, as the prevailing party before this court, shall recover their costs on appeal. ([Cal. Rules of Court, rule 8.278\(a\)\(1\), \(2\).](#))

Hill, P. J., and Harrell, J., concurred.

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* See footnote, *ante*, page 967.