SUPREME COURT OF THE UNITED STATES

NOS. 91–744 AND 91–902

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

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91–902 *v.*
PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 1992]

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.

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

[1]It is sometimes useful to view the issue of *stare decisis* from a historical perspective. In the last nineteen years, fifteen Justices have confronted the basic issue presented in *Roe.* Of those, eleven 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.

central holding of *Roe* v. *Wade,* 410 U. S. 113 (1973), has been a "part of our law" for almost two decades. *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52, 101 (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 (1965). See also *Carey* v. *Population Services Int'l*, 431 U. S. 678, 687, 702 (1977) (WHITE, J., concurring in part and concurring in result). The societal costs of overruling *Roe* at this late date would be enormous. *Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women.

Stare decisis also provides a sufficient basis for my agreement with the joint opinion's reaffirmation of *Roe*'s post-viability analysis. Specifically, I accept the proposition that "[i]f the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." 410 U. S., at 163–164; see *ante*, at 36–37.

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 must take precedence over any duty to the unborn. The Court in *Roe* carefully considered, and rejected, the State's argument "that the fetus is a `person' within the language and meaning of the Fourteenth Amendment." 410 U. S., at 156. 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. Accordingly, an 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

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[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

has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

My disagreement with the joint opinion begins with its understanding of the trimester framework established in *Roe*. Contrary to the suggestion of the joint opinion, *ante*, at 33, 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

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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." Dworkin, Unenumerated Rights: Whether and How *Roe* Should be Overruled, 59 U. Chi. L. Rev. 381, 400–401 (1992).

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 (1986) (STEVENS, J., concurring); see generally *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 563–572 (1989) (STEVENS, J., concurring in part and dissenting in part). Moreover, as discussed above, the state interest in potential human life is not an interest *in loco parentis*, for the fetus is not a person.

Identifying the State's interests—which the States rarely articulate with any precision—makes clear that the interest in protecting potential life is not grounded in the Constitution. It is, instead, an indirect interest supported by both humanitarian and pragmatic concerns. Many of our citizens believe that any abortion reflects an unacceptable disrespect for potential human life and that the performance of more 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]

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[3]The state interest in protecting potential life may be compared to the state interest in protecting those who seek to immigrate to this country. A contemporary example is provided by the Haitians who have risked the perils of the sea in a desperate attempt to become “persons” protected by our laws. Humanitarian and practical concerns would support a state policy allowing those persons unrestricted entry; countervailing interests in population control

believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State's interest in potential human life.

In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person. See *e.g., Rochin* v. *California*, 342 U. S. 165 (1952); *Skinner* v. *Oklahoma*, 316 U. S. 535 (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 (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*, 409 U. S. 589, 598–600 (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. The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently

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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.

demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.

Weighing the State's interest in potential life and the woman's liberty interest, I agree with the joint opinion that the State may "`expres[s] a preference for normal childbirth,'" that the State may take steps to ensure that a woman's choice "is thoughtful and informed," and that "States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning." *Ante*, at 30. Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." *Ante*, at 36. Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the virtues of family; but it must respect the individual's freedom to make such judgments.

This theme runs throughout our decisions concerning reproductive freedom. In general, *Roe*'s requirement that restrictions on abortions before viability be justified by the State's interest in *maternal* health has prevented States from interjecting regulations designed to influence a woman's decision. Thus, we have upheld regulations of abortion that are not efforts to sway or direct a woman's choice but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision. We have, for example, upheld regulations requiring written informed consent, see *Planned Parenthood of Central Mo.* v. *Danforth,* 428 U. S. 52 (1976); limited recordkeeping and reporting, see *ibid.*; and pathology reports, see *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft,* 462 U. S. 476 (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 (1983). Conversely, we have consistently rejected state efforts to prejudice a woman's choice, either by limiting the information available to her, see *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), or by "requir[ing] the delivery of information designed `to influence the woman's informed choice between abortion or childbirth.'" *Thornburgh*, 476 U. S., at 760; see also *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 442–449 (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, §§3205(a)(2)(i)-(iii) 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 State is free, pursuant to §3208 of the Pennsylvania law, to produce and disseminate such material, the State may not inject such information into the woman's deliberations just as she is weighing such an important choice.

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

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 State'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 State'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 State cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right.

Second, it can more reasonably be argued that the 24–hour delay furthers the State'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 and unacceptable assumptions about the decisionmaking capacity of women. While there are well-established and consistently maintained reasons for the State to view with skepticism the ability of minors to make decisions, see *Hodgson* v. *Minnesota*, 497 U. S. 417, 449 (1990),[4] none of those reasons applies to an adult woman's decisionmaking ability. Just as we have left behind the belief that a woman must consult her husband before undertaking serious matters, see *ante*, at 54–57, 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 (1971).

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[4]As we noted in that opinion, the State's “legitimate interest in protecting minor women from their own immaturity” distinguished that case from *Akron* which involved “a provision that required mature women, capable of consenting to an abortion, [to] wait 24 hours after giving consent before undergoing an abortion.” *Hodgson,* 497 U. S., at 449, n. 35.

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]

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[5]The joint opinion's reliance on the indirect effects of the regulation of constitutionally protected activity, see *ante*, 31–32, 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 (1969), or deny prisoners the right to marry, *Turner* v. *Safley*, 482 U. S. 78, 94–99 (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 (1967). In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize

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.

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: A burden may be "undue" either because the burden is too severe or because it lacks a legitimate, rational justification.[6]

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nontherapeutic abortions for minors or adults. See, e.g., *Maher* v. *Roe*, 432 U. S. 464 (1977); cf. *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 508–511 (1989) (plurality opinion); *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 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.'" *Hodgson*, 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*, at 11–12 (opinion of SCALIA, J.),

The 24–hour delay requirement fails both parts of this test. The findings of the District Court establish the severity of the burden that the 24–hour delay imposes on many pregnant women. Yet even in those cases in which the delay is not especially onerous, it is, in my opinion, "undue" because there is no evidence that such a delay serves a useful and legitimate purpose. As indicated above, there is no legitimate reason to require a woman who has agonized over her decision to leave the clinic or hospital and return again another day. While a general requirement that a physician notify her patients about the risks of a proposed medical procedure is appropriate, a rigid requirement that all patients wait 24 hours or (what is true in practice) much longer to evaluate the significance of information that is either common knowledge or irrelevant is an irrational and, therefore, "undue" burden.

The counseling provisions are similarly infirm. Whenever government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate. In this case, the Pennsylvania statute directs that counselors provide women seeking abortions with information concerning alternatives to abortion, the availability of medical assistance benefits, and the possibility of

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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 (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.

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 trimester[7] when fetal age has less relevance than when the fetus nears viability. Nor can the information required by the statute be justified as relevant to any "philosophic" or "social" argument, *ante*, at 30, either favoring or disfavoring the abortion decision in a particular case. In light of all of these facts, I conclude that the information requirements in §3205(a)(1)(ii) and §§3205(a)(2)(i)-(iii) do not serve a useful purpose and thus constitute an unnecessary—and therefore undue—burden on the woman's constitutional liberty to decide to terminate her pregnancy.

Accordingly, while I disagree with Parts IV, V-B, and V-D of the joint opinion,[8] I join the remainder of the Court's opinion.

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

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