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 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 Health Services*, 492 U. S. 490, 532 (1989) (SCALIA, J., concurring in part and concurring in judgment), and *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 520 (1990) (*Akron II*) (SCALIA, J., concurring). 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*, at 8. The Court is correct in adding the qualification that

this "assumes a state of affairs in which the choice does not intrude upon a protected liberty," *ante*, at 9—but the crucial part of that qualification is the penultimate word. A State's choice between two positions on which reasonable people can disagree is constitutional even when (as is often the case) it intrudes upon a "liberty" in the absolute sense. Laws against bigamy, for example—which entire societies of reasonable people disagree with—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 this case: 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, 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*,

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[1]The Court's suggestion, *ante*, at 5, 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 Protec-tion Clause that explicitly establishes racial equality as a constitutional value. See *Loving* v. *Virginia*, 388 U. S. 1, 9 (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

at 520 (SCALIA, J., concurring).

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*, at 5 (citing *Michael H.* v. *Gerald D.*, 491 U. S. 110, 127, n. 6 (1989) (opinion of SCALIA, J.). That is not, however, what *Michael H.* says; it merely observes that, in defining "lib-erty," we may not disregard a specific, "relevant tradition protecting, or denying protection to, the asserted right," 491 U. S., at 127, n. 6. 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 "cur[b] the discretion of federal judges," *ante*, at 5, is of course rhetoric rather than reality; no government official is "tempted" to place

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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*, 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*, at 17, 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.

restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify." The Court's temptation is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs.

Beyond that brief summary of the essence of my position, I will not swell the United States Reports with repetition of what I have said before; and applying the rational basis test, I would uphold the Pennsylvania statute in its entirety. I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered. I shall discuss each of them under a quotation from the Court's opinion to which they pertain.

"**The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.**"

Ante, at 7.

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 (1973). Today's opinion describes the methodology of *Roe*, quite accurately, as weighing against the woman's interest the State's "`important and legitimate interest in protecting the potentiality of human life.'" *Ante*, at 28–29 (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 (1976); *Colautti* v. *Franklin*, 439 U. S. 379, 386 (1979); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 428 (1983) (*Akron I*); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 482 (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 is in some critical sense merely potentially human. There is of course no way to determine that as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.

The authors of the joint opinion, of course, do not squarely contend that *Roe* v. *Wade* was a *correct* application of "reasoned judgment"; merely that it must be followed, because of *stare decisis*. *Ante*, at 11, 18–19, 29. But in their exhaustive discussion of all the factors that go into the determination of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "[t]he Court's power lies . . . in its legitimacy, a product of substance and perception," *ante*, at 23, the "substance" part of the equation demands that plain error be acknowledged and eliminated. *Roe* was plainly wrong—even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.

The emptiness of the "reasoned judgment" that produced *Roe* is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon

dozens of *amicus* briefs submitted in this 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*, at 7; it involves a "most intimate and personal choic[e]," *ante*, at 9; it is "central to personal dignity and autonomy," *ibid.*; it "originate[s] within the zone of conscience and belief," *ibid.*; it is "too intimate and personal" for state interference, *ante*, at 10; it reflects "intimate views" of a "deep, personal character," *ante*, at 11; it involves "intimate relationships," and notions of "personal autonomy and bodily integrity," *ante*, at 15; and it concerns a particularly "`important decisio[n],'" *ante*, at 16 (citation omitted).[2] But it is 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

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[2]JUSTICE BLACKMUN's parade of adjectives is similarly empty: Abortion is among "the most intimate and personal choices," *ante*, at 2–3; 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*, at 6. 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*, at 5; it involves a "difficult choice having serious and personal consequences of major importance to [a woman's] future," *ibid.*; the authority to make this "traumatic and yet empowering decisio[n]" is "an element of basic human dignity," *ibid.*; and it is "nothing less than a matter of conscience," *ibid.*

(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 "deep[ly] 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:

> "[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean." *Dred Scott* v. *Sandford*, 19 How. 393, 621 (1857) (Curtis, J., dissenting).

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

Ante, at 1.

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

—is really more than one should have to bear.

The joint opinion frankly concedes that the amorphous concept of "undue burden" has been inconsistently applied by the Members of this Court in the few brief years since that "test" was first explicitly propounded by JUSTICE O'CONNOR in her dissent in *Akron I*, *supra*. See *Ante*, at 34.[3] Because the three Justices now wish to "set forth a standard of general application," the joint opinion announces that

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[3]The joint opinion is clearly wrong in asserting, *ante*, at 32, 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 (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 (1979) (plurality opinion of Powell, J.) (*Bellotti II*); *Carey* v. *Population Services International*, 431 U. S. 678, 705 (1977) (Powell, J., 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*, 462 U. S. 416, 420, n. 1 (1983) (*Akron I*). The joint opinion's reliance on *Maher* v. *Roe*, 432 U. S. 464, 473 (1977), and *Harris* v. *McRae*, 448 U. S. 297, 314 (1980), is entirely misplaced, since those cases did not involve regulation of abortion but mere refusal to fund it. In any 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*, at 35.

"it is important to clarify what is meant by an undue burden," *ibid.* I certainly agree with that, but I do not agree that the joint opinion succeeds in the announced endeavor. To the contrary, its efforts at clarification make clear only that the standard is inherently manipulable and will prove hopelessly unworkable in practice.

The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Ibid.*; see also *ante*, at 35–36. An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." *Ante*, at 34.[4] This latter statement cannot possibly

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[4]The 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*, at 34–35. 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, ___ (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 (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 (1989), which adopted the rational basis test, could join an

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

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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 citation of the plurality opinion in *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, ___ (1990) (*Akron II*) (opinion of KENNEDY, J.), as applying the undue burden test. See *ante*, at 34 (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*, at 35–36, 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

back to square one: Defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

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*, at 22, while "[t]he 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 of laws that do not impose an "undue burden." *Ante*, at 31. 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*, at 31–32. I agree, indeed I have 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. ___, ___ (1992) (slip op., at 11); *Employment Division, Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 878–882 (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

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undue burden test.

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¢. 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 this case, to preserve some judicial foothold in this ill-gotten territory. In claiming otherwise, the three Justices show their willingness to place all constitutional rights at risk in an effort to preserve what they deem the "central holding in *Roe*," *ante*, at 31.

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*, at 35. 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 (O'CONNOR, J., dissenting) (emphasis added); see also *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 828 (1986) (O'CONNOR, J., dissenting). 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 imposes a "substantial" obstacle to abortion decisions. See, *e.g.*, *ante*, at 53, 59. 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 (1983) (dissenting opinion), that a medical regulation which

imposes an "undue burden" could nevertheless be upheld if it "reasonably relate[s] to the preservation and protection of maternal health," *id.*, at 505 (citation and internal quotation marks omitted). In today's version, even health measures will be upheld only "*if they do not constitute an undue burden*," *ante*, at 35 (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 (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 "substantial" or "profound" interest, *ante*, at 34, 36. (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 decried 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*, at 18.[5] It is difficult to maintain

[5]Of 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*, at 28. 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

the illusion that we are interpreting a Constitution rather than inventing one, when we amend its provisions so breezily.

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 this case. 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*, at 43. 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*, at 44–45. 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 to a substantial obstacle to a woman seeking an abortion," *ante*, at 42. 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" to abortion decisions. *Ante*, at 59. But at the same time the

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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.

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*, at 45–49.

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 fact-intensive analysis is that it does not result in any measurable clarification of the "undue burden" standard. 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 the provision either does or does not impose a "substantial

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[6]The 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*, at 49–52. 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.

obstacle" or an "undue burden." See, *e.g.*, *ante*, at 38, 42, 44–45, 45, 52, 53, 59. 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 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 Circuit Court or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.

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 "prevent[s] a significant number of women from obtaining an abortion," *ante*, at 52; whether a "significant number of women . . . are likely to be deterred from procuring an abortion," *ibid.*; and whether the regulation often "deters" women from seeking abortions, *ante*, at 55–56. We are not told, however, what forms of "deterrence" are impermissible or what degree of success in deterrence is too much to be tolerated. If, for example, a State required a woman to read a pamphlet describing, with illustrations, the facts of fetal development before she could obtain an abortion, the effect of such legislation might be to "deter" a "significant number of women" from procuring abortions, thereby seemingly allowing a district judge to invalidate it as an undue burden. Thus, despite flowery rhetoric about the State's

"substantial" and "profound" interest in "potential human life," and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful. As JUSTICE BLACKMUN recognizes (with evident hope), *ante*, at 5, 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 "express[ing] a preference for childbirth over abortion," *ante*, at 41. Reason finds no refuge in this jurisprudence of confusion.

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

Ante, at 11.

The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. I wonder whether, as applied to *Marbury* v. *Madison*, 1 Cranch 137 (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 the Court is able to say, in urging *stare decisis*, that *Roe* "has in no sense proven `unworkable,'" *ante*, at 13. I suppose the Court is entitled to call a "cen-tral 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*, at 38–42.

●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*, at 42.

●Under *Roe*, requiring a 24–hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional, *Akron I*, *supra*, at 449–451. Under the "undue burden" regime (as applied today, at least) it is not, *ante*, at 43–45.

●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*, at 58–59.

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

Ante, at 24.

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

compromise was possible.

Roe's mandate for abortion-on-demand destroyed the compromises of the past, rendered compromise impossible for the future, and required the entire issue to be resolved uniformly, at the national level. At the same time, *Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. ("If the Constitution *guarantees* abor-tion, 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 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.

"**[T]o overrule under fire . . . would subvert the Court's legitimacy . . . .**

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

"**[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, at 25–26.

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 "speak[s] 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 this ecstasy of a Supreme Court in which there is, especially on controversial matters, no shadow of change or hint of alteration ("There is a limit to the amount of error that can plausibly be imputed to prior courts," *ante*, at 24), with the more democratic views of a more humble man:

> "[T]he 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*, at 26, of "remain[ing] steadfast," *id.*, at 25, of adhering to "principle," *id.*, *passim*. Among the five Justices who purportedly adhere to *Roe*, at most three agree upon the *principle* that constitutes adherence (the joint opinion's "undue burden" standard)—and that principle is inconsistent with *Roe*, see 410 U. S., at 154–156.[7] To make matters worse, two of the three, in order thus to remain steadfast, had to abandon previously stated positions. See n. 4 *supra*; see *supra*, at 11-12. 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*, at 23. The only principle the Court "adheres" to, it seems to me, is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik*—and a wrong one at that.

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

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[7]JUSTICE BLACKMUN's effort to preserve as much of *Roe* as possible leads him to read the joint opinion as more "constan[t]" 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*, at 5, but that could only be true if a "substantial obstacle," *ante*, at 34 (joint opinion), were the same thing as a non-*de minimis* obstacle—which it plainly is not.

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*, 19 How. 393 (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 (1937), which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal. (Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of "substantive due process" that the Court praises and employs today. Indeed, *Dred Scott* was "very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner* v. *New York* and *Roe* v. *Wade*." 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 has an evolving meaning, see *ante*, at 6; that the Ninth Amendment's reference to "othe[r]" 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. We

are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has never thought the Constitution requires. These people who refuse to be "tested by following" must be taught a lesson. We have no Cossacks, but at least we can stubbornly refuse to abandon an erroneous opinion that we might otherwise change—to show how little they intimidate us.

Of course, as THE CHIEF JUSTICE points out, we have been subjected to what the Court calls "political pressure" by *both* sides of this issue. *Ante*, at 21. Maybe today's decision *not* to overrule *Roe* will be seen as buckling to pressure from *that* direction. Instead of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is *legally* right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.

In truth, I am as distressed as the Court is—and expressed my distress several years ago, see *Webster*, 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 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*, at 7, which turns out to be nothing but philosophical predilection and moral intuition. All manner of "liberties," the Court tells us, inhere in the Constitution and are enforceable by this Court—not just those mentioned in the text or established in the traditions of our society. *Ante*, at 5–6. Why even the Ninth Amendment—which says only that "[t]he 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*, at 6–7.

What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text, as we did, for example, five days ago in declaring unconstitutional invocations and benedictions at public-high-school graduation ceremonies, *Lee* v. *Weisman*, 505 U. S. ___ (1992); if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties"

protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidently committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward. JUSTICE BLACKMUN

not only regards this prospect with equanimity, he solicits it, *ante*, at 22–23.

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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 "cal[l] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Ante*, at 24.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer, and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court, and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "call[ing] 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 case, than it was for him in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be "speedily and

finally settled" by the Supreme Court, as President James Buchanan in his inaugural address said the issue of slavery in the territories would be. 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 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.