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Planned Parenthood v. Casey: The Death of Repose in Reproductive Decision Making

John F. Nivala

**PLANNED PARENTHOOD v. CASEY: THE DEATH OF
REPOSE IN REPRODUCTIVE DECISIONMAKING**

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I. INTRODUCTION

Upon first inspection, the Supreme Court's decision in *Planned Parenthood of Pennsylvania v. Casey*¹ appears to be a triumph for those who favor a woman's unique right to make reproductive decisions. *Casey* is, however, a most disquieting decision: it validated, without sustaining justification, government's authority to interfere with an individual's freedom to exercise that right.² Listen to one voice reacting to *Casey*:

Abortion has been much on my mind in recent days. One particular abortion. I was young — but plenty old enough to know better — and recently divorced. I had two young sons, an interesting job, (though I didn't make much money), friends, a promising future.

. . . .

It was an intensely personal experience and, until today, a private one.

I tell this story now only because it's the best way I know to make the point that is so obvious to the millions of women who have had a safe, legal abortion, the millions more who will need one

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¹112 S. Ct. 2791 (1992) (plurality opinion) (invalidating the section of a Pennsylvania statute requiring a woman to inform her husband before she obtains an abortion).

²*Id.* Specifically, the Court validated the following restrictions as not being an "undue burden on a woman's choice": (1) the woman must give her "informed consent" before she receives her abortion; (2) at least 24 hours prior to the abortion, the woman must be furnished with certain information; (3) in the case of a minor seeking an abortion, she must obtain the "informed consent" of one parent or exercise a judicial bypass if she is unable or does not wish to obtain consent of one parent; and (4) the facility that furnishes the abortion must report certain information. *Id.* at 2822-33. The Court concluded, however, that the requirement of spousal notice prior to an abortion was an undue burden and, therefore, unconstitutional. *Id.* at 2831.

someday and all the others who understand and support us:

A woman's decision about when and under what circumstances to bear a child is the most personal and private of matters and should be free from government intrusion.

I tell it also to explain why so many women are angry. Yes, a centrist trio on the U.S. Supreme Court helped create a 5-4 majority to uphold *Roe v. Wade*. But, despite many comforting words in their written opinion about "reproductive choice" and "fundamental liberties," that same trio endorsed government intrusions — lectures, pictures, waiting periods, record-keeping — into a woman's life at a time she is making the most private and sensitive of decisions — whether or not to bear a child.

. . . .

I credit O'Connor, Kennedy and Souter for their valiant effort to find a compromise on an issue that has confused and saddened most Americans for two decades and left the rest divided into angry — often ugly — factions.

But they failed. Failure is the inevitable result of the search for compromise on fundamental liberties.

. . . .

My own search for common ground on this most divisive of issues also failed.

I remember that time so many years ago. There were no placards accusing me of murdering a "pre-born." There was no government-ordered speech for the doctor to recite or pictures he had to show me, no state imposed waiting period, no concern about my name appearing on medical records that might someday be made public.

It was a personal, private episode and nobody's business but mine

. . . .

I don't know any abortion-rights supporters who are pro-abortion. Many of us know from our personal experience that having an abortion is a crummy, painful ordeal. Unfortunately, it's also a welcome and necessary option. And it is none of government's business if we exercise that option.³

³Mindy Cameron, *An Intensely Personal, Private Decision*, SEATTLE TIMES, July 5, 1992, at A12.

For this woman, *Casey* may have upheld the right to decide, but it also validated government intrusion into that decisionmaking process. What this woman claims is the freedom to make certain decisions in quiet, without pre-decision interference or post-decision recrimination. The freedom she claims is repose in reproductive decisionmaking, a freedom which is necessary to exercise a right implicit in our constitutional architecture.⁴

The construction of our constitutional architecture has always been a complex and, at times, contradictory process which should be welcomed, not avoided. From the founding of our nation, we have valued heterogeneity, our diversity within the whole.⁵ The states retain their sovereignty within a national government.⁶ People retain their individuality within a community; they retain a personal enclave which is protected, in part, by implicit rights.⁷ This article argues that our complex and contradictory constitutional architecture includes the freedom to exercise those rights in repose — to make, in quiet, personal, life-directing decisions.

Many lawyers have difficulty describing this freedom, but it has been done.⁸ Section II briefly discusses the description of repose, the freedom to exercise certain rights in quiet, without government intrusion. Section III

⁴See generally, Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (1992); John Devlin & Paul M. Hebert, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade Be Alive and Well in the Bayou State?*, 51 LA. L. REV. 685 (1991); Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 WASH. L. REV. 293 (1986); Helaine F. Lobman, *Spousal Notification: An Unconstitutional Limitation on a Woman's Right to Privacy in the Abortion Decision*, 12 HOFSTRA L. REV. 531 (1984).

⁵See generally Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988).

⁶See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Terrence M. Messannier, *A Neo-Federalist Interpretation of the Tenth Amendment*, 25 AKRON L. REV. 213 (1991); John Minor Wisdom, Symposium, *Civil Rights and Federalism Foreword — The Ever-Whirling Wheels of American Federalism*, 59 NOTRE DAME L. REV. 1003 (1984).

⁷See Gordon J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231, 254 (1975); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 160-61 (1988). The plurality opinion in *Casey* commented that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2805 (1992) (plurality opinion).

⁸See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1001 (1964).

documents the evanescent life of this freedom in the federal constitutional architecture, focusing on the Supreme Court decisions involving reproductive decisionmaking which culminated in *Casey*. This section will further illustrate that the concept of repose underlies the meaningful exercise of those rights. Finally, section IV is a prayer for the spirit of repose.

II. DESCRIBING A FREEDOM OF REPOSE

In *Roe v. Wade*,⁹ Justice Douglas had little difficulty describing the freedom to make certain decisions in quiet, without government intrusion. This freedom accompanied rights which have been traditionally retained by individuals.¹⁰ First among the freedoms listed by Justice Douglas was an "autonomous control over the development and expression of one's intellect, interests, tastes, and personality."¹¹ Second was a "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreating, contraception, and the education and upbringing of children."¹² That freedom of choice is fundamental; it can be impaired only if government establishes a compelling justification for doing so. Finally, the Justice noted

⁹410 U.S. 113 (1973) (holding the Constitution protected a woman's right to obtain an abortion).

¹⁰*See id.* at 210. History professor Jack Rakove agreed with the Court, stating:

As we all know, it is no easy matter to define exactly what we mean by rights; but however open or complex our definitions, we think of rights as durable claims that individuals and groups may maintain against the political will of the community or the state. Rights are permanent and inalienable. New rights may be created, but old rights should never be abolished once their legitimacy is accepted. Yet we also know from our own experience that our particular conceptions of rights, and our conceptions of particular rights, vary all the time.

Jack N. Rakove, *The Madisonian Theory of Rights*, 31 WM. & MARY L. REV. 245, 247 (1990).

¹¹*Roe*, 410 U.S. at 211.

¹²*Id.* The freedom to make basic decisions respecting the course of one's life has been upheld by the Supreme Court as fundamental. *Id.* The standard of review that the Court affords to state action impairing individual freedom depends entirely upon the nature of the right asserted by the individual. DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 722 (1989). Fundamental rights are those specifically enumerated in the Constitution and generally prohibit governmental interference with those rights. *Id.* Government may only interfere with an individual's exercise of fundamental rights where the government regulation is the most narrowly tailored means to meet a compelling government interest. *Roe*, 410 U.S. at 211; CRUMP ET AL., *supra*, at 722.

that the Constitution guaranteed individuals the "freedom to care for [their] health and person[s], freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf."¹³

Justice Douglas determined that the Constitution afforded individuals the freedom to make basic, personal decisions in quiet.¹⁴ The rights and freedom catalogued in his *Roe* opinion embrace a long-standing tradition of promoting individualism and personal autonomy¹⁵ and describe an individual's reasonable expectations regarding treatment by others, including the government.¹⁶

Although individuals join together in a community, they retain a personal enclave which government should not enter.¹⁷ As one commentator has

¹³*Roe*, 410 U.S. at 213.

¹⁴One commentator suggests that privacy rights have been applied to regulations that tend to subsume the lives of individuals to the degree that the laws "occupy and preoccupy" the daily existence of individuals. Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 784 (1989).

¹⁵See Paust, *supra* note 7, at 256-57. Paust commented that the Framers believed that certain rights and values are so fundamental to humankind that the Constitution silently assumes their existence without ever enumerating those rights. *Id.* Specifically, Paust contended that the presence of the Ninth Amendment in the Constitution lends credence to this proposition. *Id.* See U.S. CONST. amend. IX. ("The enumeration in the Constitution, of certain rights, shall not be construed to encourage or disparage others retained by the people."). Accord Randy Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 34-35 (1988) (arguing that individual rights are "as numerous as the various acts we may perform within our respective jurisdictions . . . a conception in keeping with that held at the time of the framing of the Ninth Amendment — it is simply impossible to specify in advance all the rights we have.").

¹⁶Charles Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1410 (1991). In his article, Reich elaborated upon the notion that:

[T]he development of a jurisprudence of individual protection has been retarded by a fundamental misconception of what individualism is all about.

Individualism does not mean self-absorption, selfishness, narcissism, or a flight from responsibility . . . [A] healthy individualism supports relationships, family, and community, creates wealth, beauty, and spiritual meaning, respects the rights of others, and performs the duties of sovereign democratic citizenship. It is these values, and not their negation, which an individual sector would nurture and protect.

Id.

¹⁷See Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 229 (1965). See also Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305, 1308-09 (1985). Nichol suggested that most

written, this enclave "protects against coercions of belief, or derivatively, against actions designed to make the holder of belief uncomfortable, or against any undue social intrusions on the intimacies and dignities of life."¹⁸ American culture has jealously guarded this enclave and has traditionally resented any governmental incursion into private lives beyond that absolutely necessary to perpetuate the larger community.¹⁹ This tradition underlies the Constitution and the Bill of Rights;²⁰ it reflects a traditional distrust of authority which would impair an individual's rights to make certain decisions.²¹

Any governmental intrusion into this enclave threatens an individual's freedom to make personal decisions.²² One commentator has suggested that to avoid such intrusions, government must recognize "first, that persons have the capacity to be autonomous in living their life; second, that persons are entitled, as persons, to equal concern and respect in exercising their

Americans intuitively believe that intimate experiences, such as relations between men and women and their chosen lifestyles, are outside of government's authority. *Id.* at 1308. Nichol asserted that although this intuition is and always has been vague, it has nevertheless longstanding and deeply-rooted in American history and culture. *Id.* at 1308-09.

¹⁸Robert G. Dixon, *The Griswold Penumbra: Constitutional Charter of an Expanded Law of Privacy?*, 64 MICH. L. REV. 197, 205 (1965).

¹⁹*See generally* GUIDO CALABRESI, *THE SUPREME COURT: 1990 TERM FOREWORD: ANTIDISCRIMINATION AND CONSTITUTIONAL ACCOUNTABILITY DEBATE* (1991).

²⁰*See* Eugene M. Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U. L. REV. 1, 11 (1968). Recounting the philosophy of the Framers, Van Loan stated:

[The] men who were involved in the framing of the Constitution and the Bill of Rights were guided by a philosophical tradition dictating that power over certain rights *could not* be delegated to *any* government The theory of natural rights taught that certain rights were unalienable; they were beyond the powers of government and could not be surrendered to it.

Id.

²¹*See* Erwin N. Griswold, *The Right To Be Let Alone*, 55 NW. U. L. REV. 216, 226 (1960).

²²*See* Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1032 (1989) [hereinafter *Revolutions and Constitutions*].

capacities for living autonomously.”²³ These assumptions predate and underlie America’s independence and are shaped by complex, even contradictory, views; our nation’s basic charters, the Constitution and the Bill of Rights, reflect a counterpoised goal of governing the community without consuming the individual.²⁴

Amid regulation, government must allow individuals the right to define themselves, a right which cannot be sacrificed to some homogenized construct.²⁵ A meaningful exercise of this right, however, requires repose, the “freedom from disturbing influences.”²⁶ This freedom recognizes “that there are intrinsic limits on the power of individuals and the state to violate basic interests of the person.”²⁷ Without this freedom, individuals would

²³David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957, 964 (1979) [hereinafter *Sexual Autonomy*].

²⁴See Edward G. White, *Forward: Placing the American Revolution*, 62 VA. L. REV. 839, 840 (1976); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1412 (1974) [hereinafter *Privacy and Autonomy*] (stating that the Constitution “places limits on the infringement of private rights by government, both the rights specified and all others ‘retained by the people.’”).

²⁵Commenting upon the “right to define ourselves,” scholar Charles Fried commented that:

[T]his most complete form of privacy is perhaps the most basic, as it is necessary not only to our freedom to define our relations to others but also to our freedom to define ourselves. To be deprived of this control not only over what we do but over who we are is the ultimate assault on liberty, personality, and self-respect.

Charles Fried, *Privacy*, 77 YALE L.J. 475, 485 (1968). See also *Privacy and Autonomy*, *supra* note 24, at 1412 (“[T]he Constitution blended several related elements — the original equality and independence of the individual, the sovereignty of the people . . . limited government by consent of the governed for purposes determined by them, and rights retained under government.”).

²⁶II THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2497 (1982).

²⁷*Sexual Autonomy*, *supra* note 23, at 1016. Richards continued:

This meaning is the basic constitutional commitment to the ultimate values of human rights, the guarantee to persons of effective institutional respect for their capacities, as free and rational beings, to define the meaning of their own lives Whether derived as an implication of various amendments, as a right reserved to the people by the ninth amendment, or as a substantive right required by due process of law, the constitutional right to privacy makes ultimate moral sense of the constitutional design.

likely be treated "as 'some featureless amalgam, a statistical unit without identifiable, specifically human features and purposes of their own.'" ²⁸ Indeed, our tradition "stands at odds to such human fungibility." ²⁹ To take a stand otherwise is terrible to contemplate.

A proper regard for others and for ourselves lies "at the heart of our notion of ourselves as person as among persons." ³⁰ Undisturbed individuality is "the necessary atmosphere for these attitudes and actions, as oxygen is for combustion." ³¹ John Rawls, in constructing *A Theory of Justice*, viewed individuals as equally moral, possessing equal dignity, and desiring certain primary goods defining their standard of well being and their legitimate expectations. ³² The most important primary good is "self-respect

Id. at 1016-17.

²⁸Gary C. Leeds, *Reasonable Expectations and the Concept of Due Process of Law*, 35 U. FLA. L. REV. 254, 263 (1983) (citing I. Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 155 (1978)).

²⁹Bloustein, *supra* note 8, at 1003.

³⁰*Id.* This proposition is furthered in JOHN RAWLS, *A THEORY OF JUSTICE* (1971), where the author suggested:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others [I]n a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

Id.

³¹Fried, *supra* note 25, at 478. Similarly, Nichol argued that the underlying component in perpetuating a society which protects individualism is respect for the dignity of other people. See Nichol, *supra* note 17, at 1344.

³²RAWLS, *supra* note 30. Such primary goods include exercising self-respect and self-confidence. *Id.* at 396. Rawls' work is relevant to a discussion of constitutional values. See generally Stephen M. Griffin, *Reconstructing Rawl's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715 (1987), and Kevin Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in Privacy Cases*, 33 ARIZ. L. REV. 811 (1991), for further discussions of John Rawls' scholarship in this area.

and a sure confidence is one's own worth."³³ A just community recognizes each individual's worth and acknowledges each individual's right to equal concern and respect. This right is inherent; it is not a matter of luck or grace.

Individuality does not mean isolation.³⁴ A community is necessary in order to promote a cooperative effort among individuals to further a common good which improves everyone's lives.³⁵ Individual rights and social order have both common and contrasting interests.³⁶ A just government reconciles these interests.³⁷ In reconciling individuality and common good, however, government at all times must emphasize individual equality so that all persons are treated alike by the government and other individuals.³⁸ Rawls described this as "the natural duty of mutual respect."³⁹

Rawls' theory of individuals possessing a natural duty of mutual respect reiterates a basic tenet of any organized society: individuals must treat others as they wish others to treat them.⁴⁰ This reflects a willingness to assume

³³See RAWLS, *supra* note 30, at 3-4.

³⁴*Id.* at 3.

³⁵*Id.*

³⁶*Id.* at 3-4. Rawls posited that individualism and society as a cooperative share common interests to the extent that social cooperation enhances life for every individual to a degree greater than each individual could advance his or her own rights apart from the community. *Id.* at 4. Conversely, Rawls observed that "there is a conflict of interests since persons are not indifferent as to how the greater benefits . . . are distributed . . ." *Id.*

³⁷*Id.* ("[T]he principles of social justice . . . provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation.").

³⁸*Id.*

³⁹*Id.* at 179.

⁴⁰See David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 859 (1986) [hereinafter *Constitutional Legitimacy*]. Richards argued that the duty of mutual respect underlies the ethics in the Constitution's protection of personal liberties. *Id.* The author commented:

The relevant ethical approach is to treat other persons as one would oneself want to be treated, that is, as a person and with respect for those liberties central to a free and self-governing moral agent. Such an ethical approach expresses itself . . . in a constitutional commitment to the liberties essential to the moral individuality of a free people. These constitutional liberties can only be guaranteed if the state is required

another's point of view, to acknowledge another's conception of a life plan.⁴¹ Thus, even within a community, individuals possess an inherent right to make personal decisions.⁴² A just community not only affords individuals the freedom to decide in quiet, but also responds to the decision in a way which acknowledges and respects individual worth and dignity.⁴³

A freedom of repose protects this. An individual's freedom to make certain personal decisions in quiet may be disturbed only when such a disturbance is justified in a manner respecting the individual's right to a separate life.⁴⁴ The next section argues that although *Casey* reaffirmed the right to decide, it restricted the freedom which is necessary for the meaningful exercise of that right.

to be tolerant among forms of conscience, speech, and ways of life unless there is a compelling showing of a clear and present danger of secular harms.

Id. See also Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981). Mashaw contended that due process rights reflect the degree to which American culture strives to "preserve and enhance human dignity and self-respect." *Id.*

⁴¹See RAWLS, *supra* note 30, at 337-38.

⁴²David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1225 (1979) [hereinafter *Commercial Sex*]. Richards described the right to make choices affecting one's life as "fundamental to the concept of what it is to be a person and because all are equal in their possession of it, all persons are entitled to equal concern and respect, as persons." *Id.*

⁴³See RAWLS, *supra* note 30, at 15, 126-27, 193. For a creative explication of this concept, see Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 399 (1985).

⁴⁴See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), affirming this right in the context of reproductive decision making. See Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 708 (1980). Professor Murphy concluded that "[t]he basic value in the United States Constitution broadly conceived, has become a concern for human dignity." *Id.* at 745. This "notion is an inherent part of constitutionalism[,] . . . is also congruent with democratic theory . . . [and] fits the spirit, structure, and purposes of the constitutional document and the development of this country's political ideals." *Id.* at 754. See also Nichol, *supra* note 17, at 1310 (arguing that America's "constitutional ethos assumes not only the intrinsic value of personal choice, but is premised upon a sense of moral equality and independence reflecting a belief that human beings are capable of setting the course for their own lives.").

III. A FREEDOM OF REPOSE IN REPRODUCTIVE DECISIONMAKING

Like many others, the right which repose makes meaningful is not explicit in the Constitution but, rather, is "implicit in many of the provisions of the Constitution and in the philosophic background out of which the Constitution was formulated."⁴⁵ James Madison believed that the unwritten rights retained by Americans "find their source in the immutable, inalienable rights of mankind, possessed apart from and transcendent to government."⁴⁶ One scholar has argued that the recognition of such rights established "zones of individual and familial autonomy that were to be protected from the majority will of larger communities";⁴⁷ the law's function is to identify these zones and "establish the limits of majoritarian intrusion."⁴⁸ The Constitution was designed to prevent government intrusion into the various personal rights reserved to the people.⁴⁹

⁴⁵Griswold, *supra* note 21, at 216.

⁴⁶Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 329 (1987). Madison's concept of "responsible self-government" has a "Rawlsian tone," as evidenced in the following formula:

"The great desideratum in Government is, so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society [as] to controul [sic] one part from invading the rights of another, and at the same time sufficiently controulled [sic] itself, from setting up an interest adverse to that of the entire Society." In other words, liberty, the right to be left alone if you are law abiding, is the blessing conferred on citizens in a society that knows how to control itself.

Robert A. Rutland, *The Trivialization of the Bill of Rights: One Historian's View of How the Purposes of the First Ten Amendments Have Been Defiled*, 31 WM. & MARY L. REV. 287, 289-90 (1990) (citing Letter from James Madison to Thomas Jefferson (Oct. 24, 1781), reprinted in 10 THE PAPERS OF JAMES MADISON 206, 214 (1977)).

⁴⁷Hon. John J. Gibbons, *Keynote Address*, 56 N.Y.U. L. REV. 260, 273 (1981).

⁴⁸*Id.* at 273. See also David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1526 (1992). Faigman noted that the Constitution "juxtaposes" opposite fundamental principles: majority rule and individual rights. *Id.* The juxtaposition of these interests is often called the "Madisonian dilemma." *Id.*

⁴⁹Massey, *supra* note 46, at 344. Likewise, another commentator stated that:

As a practical matter, we must choose between two fundamentally different constructions of the Constitution, each resting on a different presumption. We either

Recognizing such personal rights presents a challenging task. The Supreme Court assumed this challenge in *Griswold v. Connecticut*,⁵⁰ where the Court invalidated "an uncommonly silly law"⁵¹ criminalizing the disclosure of any information regarding contraception to anyone, married or not.⁵² One commentator argued that the State's application of its silly law demonstrated the "growing tension" in the country "between the assumed necessity for a strong state largely devoted to the achievement of social welfare ends and the equally pressing need to preserve the individual from the gathering forces of big government."⁵³ The State's application led to a timely examination of whether individuals retained certain rights that were not expressly guaranteed in the Constitution.⁵⁴

Justice Douglas delivered the opinion in *Griswold*.⁵⁵ The Justice began by recognizing that the Court does not generally act as a "super-legislature"

accept the presumption that in pursuing happiness persons may do whatever is not justly prohibited or we are left with a presumption that the government may do whatever is not expressly prohibited. The presence of the Ninth Amendment in the Constitution strongly supports the first of these two presumptions.

Barnett, *supra* note 15, at 37.

⁵⁰381 U.S. 479 (1965).

⁵¹*Id.* at 527 (Stewart, J., dissenting).

⁵²See *id.* at 480, stating:

The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principle offender."

Id. (citation omitted).

⁵³Robert B. McKay, *The Right of Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259, 279 (1965).

⁵⁴Terrence J. Moore, *The Ninth Amendment — Its Origin and Meaning*, 7 NEW. ENG. L. REV. 215, 296 (1972).

⁵⁵*Griswold v. Connecticut*, 381 U.S. 479 (1965).

regarding laws touching social conditions, economic problems, or business affairs.⁵⁶ However, Connecticut's law directly intruded into the intimate lives of married couples and the physician's involvement in how those couples choose to control that intimacy.⁵⁷ Striking down the state law, Justice Douglas determined that married couples possess a fundamental right to make unfettered choices regarding their intimate lives.⁵⁸

The Justice acknowledged, however, that the right of married persons to make unfettered decisions regarding their intimate lives was not explicitly set forth in the Constitution or in the Bill of Rights.⁵⁹ Rather, Justice Douglas concluded that this right was a "peripheral right" to those specifically enumerated in the Constitution, without which "the specific rights would be less secure."⁶⁰ The Justice stated that this peripheral or implicit right was formed by emanations of and gave life to those rights which the Constitution had explicitly established.⁶¹ Justice Douglas explained that these explicit rights created "zones of privacy" which protect against government intrusion.⁶² Validating this proposition, the Justice concluded that the

⁵⁶*Id.* at 482. See also Symposium, *The Twenty-Fifth Anniversary of Griswold v. Connecticut*, 23 CONN. L. REV. 853 (1991).

⁵⁷*Griswold*, 381 U.S. at 482.

⁵⁸*Id.*

⁵⁹*Id.* at 482-83.

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.* The Court has engaged in "many controversies over these penumbral rights of 'privacy and repose,'" but the cases taken together "bear witness that the right of privacy which presses for recognition here is a legitimate one." See generally Mary F. Lehem, Note, *A Question of Class: Does 42 U.S.C. Section 1985(3) Protect Women Who Are Barred from Abortion Clinics?*, 60 FORDHAM L. REV. 715, 721 (1992) (arguing that the penumbra theory of the right to privacy has been scrutinized since *Roe v. Wade*); Steven P. Oates, Note, *Caller ID: Privacy Protector or Privacy Invader?*, 1992 U. ILL. L. REV. 219, 225 (1992) (asserting that the confusion with the right to privacy, as exemplified in *Griswold v. Connecticut*, lies in the Court's disagreement over its origins); Symposium, *Perspective on Natural Law — Forward: Natural Law, Natural Rights*, 61 U. CIN. L. REV. 1, 3 (1992) (reviewing the Court's history of disagreement over where the penumbral right to privacy originates); Mark John Kappelhoff, Note, *Bowers v. Hardwick: Is there a Right to Privacy?*, 37 AM. U. L. REV. 487, 492 (1988) (expressing the disagreement between the Justices as to where, if at all, the right to privacy is contained in the Constitution); John R. Hamilton, Note, *The Unwed Father and the Right to Know His Child's Existence*, 76 KY. L.J. 949, 990 n.324 (1988) (stating that the constitutional basis for the right to privacy is under dispute).

implicit right to privacy predated the Bill of Rights.⁶³

In a separate concurring opinion, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, agreed that certain individual rights are fundamental and protected under the broad concept of liberty, even if not explicitly provided for in the Bill of Rights.⁶⁴ The Justice wrote separately, however, to argue that the implied privacy rights within the Constitution were secured by the Ninth Amendment, not "zones of privacy" emanating from specifically enumerated rights.⁶⁵

Justice Goldberg's examination of history revealed that the framers of the Constitution recognized that individuals possessed additional fundamental rights which were to be protected against government intrusion.⁶⁶ Justice Goldberg maintained that the Ninth Amendment reflects the Framers' intent to preserve unenumerated, fundamental rights and to have those rights co-exist with the rights specifically enumerated in the first eight amendments to the Constitution.⁶⁷ Moreover, the Justice stated that the establishment of these additional fundamental rights is not the result of a judge's personal or private views.⁶⁸ Rather, the judge must determine whether a principle is so firmly rooted in tradition and the community's collective conscience that it

⁶³*Id.* at 486.

⁶⁴*Id.* (Goldberg, J., concurring in the Court's opinion and in the judgment). Generally, the Court has found that rights which are fundamental can exist even though they are not expressly contained within the Constitution. *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968) (asserting that a right to a jury trial in criminal cases is fundamental and, therefore, applied to the states through the Fourteenth Amendment); Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 136 n.41 (1985) (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969) (finding a fundamental right to travel)). Moreover, courts have recognized and upheld certain fundamental rights not expressly contained in the Constitution, such as: "freedom of association; voting and participation in the electoral process; interstate travel; fairness in the criminal process; privacy; and 'fairness in the procedures concerning individual claims against governmental deprivation of life, liberty, or property.'" Hon. Roger J. Miner, *Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions*, 23 SETON HALL L. REV. 821, 840 (1993) (citing JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 460 (2d ed. 1983)).

⁶⁵*Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring).

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.* at 493 (Goldberg, J., concurring).

should be considered fundamental and protected by the Ninth Amendment.⁶⁹ Justice Goldberg believed that privacy is such a fundamental right.

Justice Harlan concurred in the judgment only.⁷⁰ The Justice wrote separately to argue that the proper constitutional inquiry is whether the state statute encroaches upon an individual's right to due process under the Fourteenth Amendment.⁷¹ The Justice reasoned that the State statute was invalid because the law violated basic values "implicit in the concept of ordered liberty."⁷² Responding to criticisms that such a vague standard would result in unrestrained judicial activity, Justice Harlan contended that judicial self-restraint in this constitutional area can be maintained by insisting upon respect for this country's history and basic democratic values.⁷³

Justice White also concurred in the judgment only, concluding that the statute threatened to deprive married couples of a liberty interest preserved

⁶⁹*Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). See also *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (commenting that fundamental rights are "deeply rooted in this nation's history and tradition.") (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

Justice Goldberg then found that the right to privacy fell within our national traditions and collective conscience and was long considered a "fundamental personal right" emanating "from the totality of the constitutional scheme under which we live" *Griswold*, 381 U.S. at 494 (Goldberg, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting)). Continuing, the Justice asserted that the right to privacy is established by "the entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees." *Id.* at 495. Justice Goldberg concluded that the right to privacy in the context of marital relations is a fundamental right the Constitution reserved to the people. *Id.* at 499.

⁷⁰*Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring in judgment).

⁷¹*Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁷²*Id.* (quoting *Palko*, 302 U.S. at 325). This view was reaffirmed in *Roe v. Wade*, where the Court concluded that fundamental rights were those "implicit in the concept of ordered liberty." *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko*, 302 U.S. at 325).

⁷³*Griswold*, 381 U.S. at 501 (Harlan, J., concurring). The Justice commented that "[j]udicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise apprehension of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." *Id.*

by the Fourteenth Amendment.⁷⁴ Noting that the nature of the right infringed is pertinent to the Fourteenth Amendment liberty interest inquiry, Justice White stated that the Connecticut statute could be valid if the law was reasonably necessary to effectuate a legitimate and substantial government interest and was not applied in an arbitrary or capricious manner.⁷⁵ Nonetheless, the Justice observed that the record had no facts justifying the government's interference with the freedoms of married persons.⁷⁶

In a dissenting opinion, Justice Black argued that the government is entitled to invade an individual's privacy unless the Constitution specifically prohibits it from doing so.⁷⁷ Justice Black was animated by a fear that personal rather than constitutional based decisionmaking would result from the unchecked judicial activism that a majority seemed to endorse.⁷⁸

In a separate dissenting opinion, Justice Stewart noted that while the statute was "uncommonly silly," a plain reading of the Constitution indicated that the statute was nonetheless valid.⁷⁹ The Justice stated that there simply was no constitutionally based right to privacy.⁸⁰ In the absence of a specifically enumerated provision providing for such a right, Justice Stewart voted, albeit reluctantly, to uphold the statute.⁸¹

⁷⁴*Id.* at 502 (White, J., concurring in judgment).

⁷⁵*Id.* at 503-04 (White, J., concurring in judgment).

⁷⁶*Id.* at 507 (White, J., concurring in judgment).

⁷⁷*Id.* at 510 (Black, J., dissenting). It has been recognized that while a right may be considered fundamental, it is not absolute. Rieder, *supra* note 64, at 137 n.42. Consequently, such rights would be balanced with countervailing state interests. *Id.* See, e.g., *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961) (recognizing that where constitutional protections are asserted against the exercise of valid governmental powers, a reconciliation must be effected requiring the balancing of the respective interests involved). Privacy has been recognized as one of those rights. Martha Christine Foley, Note, *Hospitalization Requirements for Second Trimester Abortions: For the Purpose of Health or Hindrance?*, 71 GEO. L.J. 991, 995 (1983) (citing *Roe v. Wade*, 410 U.S. 113, 154 (1973)).

⁷⁸*Griswold v. Connecticut*, 381 U.S. 479, 519 (1965) (Black, J., dissenting). In expressing this fear, the Justice noted that "the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the '[collective] conscience of our people.'" *Id.*

⁷⁹*Id.* at 527 (Stewart, J., dissenting). Justice Stewart was joined by Justice Black. *Id.*

⁸⁰*Id.* at 530-31 (Stewart, J., dissenting).

⁸¹*Id.*

The Connecticut statute at issue in *Griswold* was more than just “an uncommonly silly law”⁸² — it was an oppressively intrusive and disrupting law, enacted without sustaining justification. The opinions in *Griswold* demonstrated the Court’s ability to provide a varied and flexible constitutional interpretation for those situations which involve important values but where established categories are not completely applicable.⁸³ The opinions in *Griswold* expressed a deep concern over governmental intrusions into individual lives. *Griswold* opened the door to the development of a modern, stable basis for insuring that government respects that enclave, a door from which the current Court has backed rather than going forward.

The unenumerated rights discussed by the Court may not be objective, but they are recognizable⁸⁴ and are essential to ensuring social cooperation.⁸⁵ This premise was not, as Justice Black seemed to fear, the precursor of some sweeping judicial initiative. Rather, the Court proceeded incrementally, inching forward to block unwarranted governmental attempts to intrude upon individual life-directing decisions. Taken together, the post-*Griswold* cases,

⁸²*Id.* at 527 (Stewart, J., dissenting).

⁸³Dixon, *supra* note 18, at 205. One commentator concluded that:

Griswold . . . is a reaffirmation of a power long exercised by the Court in protecting fundamental rights For a court to find that these rights are fundamental, whether because they are deeply written in the tradition and conscience of our people, are part of the concept of ordered liberty, are implicit in the notion of a free society, or emanate from the totality of the constitutional order, involves no immodest or startling exercise of judicial power. In exercising its power in *Griswold* to protect a fundamental personal liberty, the Court . . . was treading a worn and familiar path.

Id. See also Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 258 (1965).

⁸⁴Norman Redlich, *Are There “Certain Rights . . . Retained by the People”?*, 37 N.Y.U. L. REV. 787, 812 (1962). Redlich stated that:

In this realm, as in others, there exists no purely objective set of criteria. That the criteria are loose, however, does not mean that they do not exist. Our Constitution provides the basic text for the delineation of rights retained by the people with respect to which state and federal governments have been denied the power to act. Accordingly, the Ninth and Tenth Amendments should be used to define rights adjacent to, or analogous to, the pattern of rights which we find in the Constitution.

Id.

⁸⁵See *Constitutional Legitimacy*, *supra* note 40, at 832-33.

until recently, did no more than recognize that the Constitution embodies a promise to leave a certain private enclave largely beyond government's reach.⁸⁶

In particular, the Court, cautiously but clearly, defined an enclave of repose in reproductive decisionmaking. This is not surprising as few, if any, decisions are more personal and life-directing. Although the statute invalidated by the Court in *Griswold* criminalized the use of contraceptive devices by married persons, the statute in *Eisenstadt v. Baird*⁸⁷ regulated the distribution of contraceptive devices to single persons.⁸⁸ In *Eisenstadt*, William Baird was convicted for displaying contraceptive items during a lecture and for distributing containers of vaginal foam afterwards, apparently

⁸⁶*Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 777 (1986).

⁸⁷405 U.S. 438 (1972).

⁸⁸*Id.* at 441. Massachusetts General Laws Ann., C. 272, § 21 provided in full:

"Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, or whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars."

Massachusetts General Laws Ann., C. 272, § 21, *reprinted in Eisenstadt*, 405 U.S. at 441 n.2. Section 21A provided in full:

"A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device."

Id., *reprinted in Eisenstadt*, 405 U.S. at 441 n.2.

to an unmarried woman.⁸⁹ Reversing Mr. Baird's conviction, the Court held that individuals must be free to exercise the unenumerated right set forth in *Griswold*, without government intrusion.⁹⁰ Recognizing the right to privacy as a fundamental right implicit in the Constitution, the Court stated that if this right "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 to bear or beget a child."⁹¹

For one Justice, that freedom, if it meant anything, did not mean what the Court said in *Eisenstadt*. Chief Justice Burger did not challenge *Griswold* "despite its tenuous mooring to the text of the Constitution,"⁹² but he did distinguish it: the *Griswold* statute prohibited distribution of contraceptives; the *Eisenstadt* statute merely regulated distribution.⁹³ By using *Griswold* to strike down the *Eisenstadt* statute, the Chief Justice stated that the Court "passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections."⁹⁴

If the Chief Justice was concerned in *Eisenstadt* about tenuous moorings and uncharted seas, he must have been doubly so in *Roe v. Wade*,⁹⁵ where

⁸⁹See *Eisenstadt*, 405 U.S. at 440. Justice White, joined by Justice Blackmun, concurred in the result because "nothing has been placed in the record to indicate [the recipient's] marital status," *id.* at 464 (White, J., concurring in result), a fact which deprived the Court "of knowing whether Baird was in fact convicted for making a constitutionally protected distribution of [the foam] to a married person." *Id.* at 465 (White, J., concurring in result). Justice Douglas concurred separately, finding this to be "a simple First Amendment case." *Id.* at 455 (Douglas, J., concurring).

⁹⁰*Id.* at 453. In justifying the Court's holding, the majority rejected the State's contention that the privacy rights in *Griswold* emanated from the marital status of the defendants in that case. *Id.*

⁹¹*Id.* (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)). In *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688-89 (1977), the Court found that the right to privacy, implicit in the Constitution, precluded states from denying individuals access to contraceptives because "such access is essential to exercise of the constitutionally protected right of decision in matters of childrearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt* . . . and *Roe*" *Carey*, 431 U.S. at 688-89.

⁹²*Eisenstadt*, 405 U.S. at 465 (Burger, C.J., dissenting).

⁹³*Id.* at 472 (Burger, C.J., dissenting).

⁹⁴*Id.*

⁹⁵410 U.S. 113 (1973).

seven members of the Court, including the Chief Justice, voted to invalidate a series of Texas abortion statutes that denied women the right to terminate a pregnancy.⁹⁶ Writing for the majority, Justice Blackmun began by stating the obvious: the "Constitution does not explicitly mention any right of privacy."⁹⁷ The Justice then acknowledged, however, that for eighty years, the Court had construed the Constitution to imply a right to privacy or a guarantee of certain zones of privacy.⁹⁸ The Court held that the right to personal privacy was expansive enough to afford a woman the right to decide whether to terminate a pregnancy.⁹⁹ Thus, the Court concluded that government could not completely deny women the freedom to make this choice; government could interfere only if it could first justify such a restriction by articulating a compelling state interest.¹⁰⁰

⁹⁶*Id.*

⁹⁷*Id.* at 152.

⁹⁸*Id.* Justice Blackmun recognized that the limits of this right were left to judicial interpretation. *Id.* For example, the Justice observed that the district court had justified the existence of this right under the concept of ordered liberty in the Ninth Amendment, while the Supreme Court reasoned that the right was embodied within the Due Process Clause of the Fourteenth Amendment. *Id.*

⁹⁹*Id.* at 153.

¹⁰⁰*Id.* at 155. The Court then set forth the much debated "trimester standard." Justice Blackmun reasoned that the state interest in protecting unborn human life was weakest in the first three months after conception, as the fetus could not survive outside of the mother's womb. *Id.* at 163. Accordingly, the Court determined that a woman possessed unfettered reproductive choice at this stage in her pregnancy. *Id.* The majority stated that this right virtually dissipated during the final three months of a woman's pregnancy, when the state possessed a compelling interest in protecting unborn human life. *Id.* at 163-64. Justice Blackmun reasoned that the fetus then could survive outside of a woman's womb and thus, could be protected by the state. *Id.*

Justice White dissented, echoing concerns expressed by others in *Griswold* and *Eisenstadt*. *Id.* at 221 (White, J., dissenting). The Justice could not find a textual or historical mooring for the Court's judgment. Justice White contended that the Court had fashioned and announced a new constitutional right and, "with scarcely any reason or authority," invested "that right with sufficient substance to overrule most existing state abortion statutes." *Id.* at 221-22 (White, J., dissenting).

Justice Rehnquist also dissented. *Id.* at 171 (Rehnquist, J., dissenting). Although agreeing that the Fourteenth Amendment's liberty "embraces more than the rights found in the Bill of Rights," *id.* at 172-173 (Rehnquist, J., dissenting), the Justice argued that those rights are only guaranteed against deprivation without due process. *Id.* at 173 (Rehnquist, J., dissenting). The Justice commented that the traditional test for this guarantee was "whether or not a law such as that challenged has a rational relation to a valid state objective." *Id.* (citing *Williams v. Lee Optical Co.*, 348 U.S. 483, 491 (1955)).

Roe predictably fueled reaction and resistance. Legislatures, state and federal, imposed barriers, financial and procedural, that tested *Roe's* limits.¹⁰¹ The Court determined that these financial barriers did not impair a woman's right to choose to terminate her pregnancy. Rather, by using unequal funding schemes, legislatures encourage an alternative which they consider to be in the public interest.¹⁰²

Until recently, the Court was less receptive to procedural barriers,¹⁰³ especially when they intruded upon the relationship between an adult woman and her doctor.¹⁰⁴ The Court's impatience with such legislative meddling was evident in *Thornburgh v. American College of Obstetricians and Gynecologists*.¹⁰⁵ In *Thornburgh*, the Court summarized the *Roe* reaction and reaffirmed its commitment to a woman's freedom to exercise such a

¹⁰¹See *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding a St. Louis ordinance providing publicly financed hospital services for childbirth, but not nontherapeutic abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (holding a Connecticut welfare regulation limiting state Medicaid benefits for first trimester abortions to those "medically necessary" did not impair a woman's fundamental right to privacy); *Beal v. Doe*, 432 U.S. 438 (1977) (upholding Medicaid restrictions prohibiting expenditure of public funds for abortions); see also *Harris v. McRae*, 448 U.S. 297 (1980) (upholding federal Hyde Amendment prohibiting disbursement of Medicaid payments to states for nontherapeutic abortions performed in public hospitals).

¹⁰²See, e.g., *McRae*, 448 U.S., at 315. The alternative approach encouraged is childbirth, regardless of whether or not the accompanying pregnancy is unwanted or dangerous to the mother. *Id.* at 324-25.

¹⁰³See *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983) (invalidating a statute requiring that abortions occur in a hospital); *Bellotti v. Baird*, 443 U.S. 622 (1979) (holding states must provide alternative parental authorization schemes where the state requires minors to obtain consent from one or both parents before undergoing an abortion); *Colautti v. Franklin*, 439 U.S. 379 (1979) (invalidating as vague a statutory provision requiring physicians to balance the privacy rights of a woman and the potential life of the fetus before performing an abortion). Compare *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (upholding Virginia criminal statute criminalizing second trimester abortions); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding Utah statute giving parents "veto power" over the decision of their female children to obtain an abortion).

¹⁰⁴See *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976). Compare *Ohio v. Akron Center For Reproductive Health*, 497 U.S. 502 (1990) (invalidating an Ohio statute criminalizing a physician performing an abortion upon an unemancipated minor without first affording the minor's parents "timely notice."); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding statute requiring minors to obtain the consent of both parents before the minor receives an abortion).

¹⁰⁵476 U.S. 747 (1986).

personal right without governmental intrusion.¹⁰⁶

The statute at issue in *Thornburgh* was Pennsylvania's then-latest attempt to limit abortions.¹⁰⁷ Striking down the statute, the Court reasoned that the law intimidated women into continuing pregnancies rather than obtaining an abortion and deterred them from "making a decision that, with her physician, is hers to make."¹⁰⁸ The Court acknowledged that "constitutional rights do not always have easily ascertainable boundaries" and that the controversy over them "frequently has been turbulent."¹⁰⁹ Nonetheless, the Court concluded that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."¹¹⁰

The Court pointedly reaffirmed *Roe's* general principles, recognizing that *Roe* still provided compelling constitutional justification for granting a

¹⁰⁶*See id.* at 759. The Court argued that:

In the years since this Court's decision in *Roe*, States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice But the constitutional principles that led this Court to its decision in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy.

Id.

¹⁰⁷For a detailed history, see *id.* at 751-54. The sections of the Pennsylvania statute reviewed by the Supreme Court in *Thornburgh* are as follows: "§ 3205 ('informed consent'); § 3208 ('printed information'); § 3214(a), (h) (reporting requirements); § 3211(a) (determination of viability); § 3210 (b) (degree of care required in post viability abortions); and § 3210 (c) (second-physician requirement)." *Id.* at 758 (citation omitted).

¹⁰⁸*Id.* at 759.

¹⁰⁹*Id.* at 771.

¹¹⁰*Id.* at 772. Expanding upon this point, the Court wrote:

Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result . . . would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.

Id.

woman the right to decide whether to terminate her pregnancy.¹¹¹ And that, one might have thought, was that. But not so in Missouri and not on the Court.

The future was foretold in Justice White's dissent in *Thornburgh*.¹¹² The Justice declared that "the time has come to recognize that *Roe v. Wade* . . . 'departs from a proper understanding' of the Constitution and to overrule it."¹¹³ Justice White stated that neither he nor the Court subscribed to simplistic plain meaning or original intent arguments.¹¹⁴ However, the Justice believed that fundamental rights and liberties are most clearly evident when the Constitution provides explicit textual recognition of both their existence and importance.¹¹⁵ Thus, Justice White lamented that *Roe* "essentially created something out of nothing."¹¹⁶

Responding to Justice White, Justice Stevens stated that the individual's freedom from unjustified governmental interference when making reproductive decisions came to the Court "with a momentum for respect that is lacking when appeal is made to liberties which derive merely from shifting

¹¹¹*Id.* at 759.

¹¹²*Id.* at 785 (White, J., dissenting).

¹¹³*Id.* at 788 (White, J., dissenting). Justice White was joined by Justice Rehnquist. *See id.* Chief Justice Burger dissented separately. *See id.* at 782 (Burger, C.J., dissenting).

[D]iscovering constitutional infirmities in state regulations of abortions that are in accord with our history and tradition, we may have lured judges into "roaming at large in the constitutional field." The soundness of our holdings must be tested by the decisions that purport to follow them. If *Danforth* and today's holding really mean what they seem to say, I agree we should re-examine *Roe*.

Id. at 785 (Burger, C.J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 502 (1973) (Harlan, J., concurring)). Justice O'Connor also filed a separate dissent, believing that "the Court prematurely decides serious constitutional questions on an inadequate record, in contravention of settled principles of constitutional adjudication and procedural fairness." *Id.* at 815 (O'Connor, J., dissenting).

¹¹⁴*Id.* at 786 (White, J., dissenting).

¹¹⁵*Id.* at 789-90 (White, J., dissenting). Justice White was convinced that "the values animating the Constitution do not compel recognition of the abortion liberty as fundamental. In so denominating that liberty, the Court engages not in constitutional interpretation, but in the unrestrained imposition of its own . . . preferences." *Id.* at 793-94 (White, J., dissenting).

¹¹⁶*Id.* at 813-14 (White, J., dissenting).

economic arrangements.”¹¹⁷ The Justice observed that *Roe* presumes that it is better to allow some individuals to make wrong decisions than it is to deny all individuals the right to make decisions that might have a significant effect upon their destiny.¹¹⁸ Justice Stevens noted that there are “certain values . . . more important than the will of a transient majority.”¹¹⁹

Justice Stevens’s concern for those values was well placed. In fact, *Webster v. Reproductive Health Services*¹²⁰ accelerated the Court’s retrenchment in protecting against governmental intrusion into reproductive decisionmaking.¹²¹ The door opened by *Griswold* was being slammed shut. In *Webster*, the Court examined four sections of the State’s latest legislative assault against a woman’s right to choose whether to end her pregnancy.¹²² In particular, the Court considered and ultimately upheld a statutory section

¹¹⁷*Id.* at 775 (Stevens, J., dissenting).

¹¹⁸*Id.* at 781 (Stevens, J., dissenting).

¹¹⁹*Id.* at 782 (Stevens, J., dissenting).

¹²⁰492 U.S. 490 (1989) (plurality opinion).

¹²¹See generally Colloquy, *Webster v. Reproductive Health Servs.*, 138 U. PA. L. REV. 83 (1989). *Webster* represented the Court’s fourth Missouri-generated abortion rights decision. See *infra* note 123 for a discussion of these cases and the history described in *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 500 n.1 (1989) (plurality opinion). See also Lynn D. Wardle, “Time Enough”: *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 882-914 (1989).

¹²²MO. REV. STAT. § 188.029 (1986). The statute provided:

“Physician, determination of viability, duties: Before a physician performs an abortion on a woman he has *reason to believe* is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.”

Id., reprinted in *Webster*, 492 U.S. at 513 (plurality opinion) (emphasis added) (citation omitted).

requiring viability-testing before an abortion is performed.¹²³

Viability-testing was the key issue in *Webster*. The section has two sentences. The first says a physician who “has reason to believe” that a fetus is “of twenty or more weeks gestational age” must determine if the fetus “is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar circumstances.”¹²⁴ In making this determination, the second sentence says the physician “shall perform or cause to be performed” certain examinations and tests “necessary to make a finding” of the fetus’s “gestational age, weight, and lung maturity.”¹²⁵ The lower federal courts had found that the second sentence commanded the physician to perform the specified examination and tests in any situation where the fetus possibly had a gestational age of twenty or more weeks.¹²⁶

Although the Court’s “usual practice” is to accept lower court construction of a state statute,¹²⁷ a plurality in *Webster*¹²⁸ did not follow this practice because it believed the lower courts had “‘fallen into plain error’ in this case.”¹²⁹ The plurality read the second sentence “to require only

¹²³See *Reproductive Health Servs. v. Webster*, 662 F. Supp. 407, 423 (W.D. Mo. 1987) (holding that the statute was “an impermissible legislative intrusion upon a matter of medical skill and judgment The state may not dictate either the tests or the findings which enter into a decision whether or not a fetus is viable.”); *Reproductive Health Servs. v. Webster*, 851 F.2d 1071, 1074 (8th Cir. 1988) (“[T]he Supreme Court has squarely addressed this point and declared that ‘neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability — be it weeks of gestation or fetal weight or any other single factor.’” (citing *Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979))).

¹²⁴See *supra* note 122 for the full text of the first sentence of the statute. See also *Webster*, 492 U.S. at 513 (plurality opinion).

¹²⁵See *supra* note 122 for the full text of the second sentence of the statute. See also *Webster*, 492 U.S. at 513 (plurality opinion).

¹²⁶See *Reproductive Health Servs.*, 851 F.2d at 1075 n.5.

¹²⁷*Webster v. Reproductive Health Servs.*, 492 U.S. 491, 514 (1989) (plurality opinion) (citing *Frisby v. Schultz*, 478 U.S. 474, 483 (1988)).

¹²⁸Chief Justice Rehnquist was joined by Justice White and Kennedy. *Id.* at 498-99 (plurality opinion).

¹²⁹*Id.* at 514 (plurality opinion) (citations omitted).

those tests that are useful to making subsidiary findings as to viability.”¹³⁰ For these Justices, the second sentence only “directs the physician’s determination as to viability by specifying consideration, if feasible, of gestational age, fetal weight, and lung capacity.”¹³¹

The plurality acknowledged that the statute undoubtedly imposed a state regulation on a physician’s ability to determine whether a fetus is viable, an intrusion which the Court’s precedent indicated was unconstitutional.¹³² The plurality also acknowledged that viability testing actually increased the cost of what would have been second-trimester abortions, an increase which the Court’s precedent indicated was unconstitutional.¹³³ The fault, according to the plurality, lay not in the statute, but in the precedent. The plurality thought *Roe* had “proved ‘unsound in principle and unworkable in practice.’”¹³⁴

The plurality rejected *Roe* on two grounds.¹³⁵ First, the obvious: the plurality observed that the Constitution does not specifically mention the two elements vital to the *Roe* framework — viability and trimesters.¹³⁶ Second,

¹³⁰*Id.* The plurality stated that “the viability-testing provision makes sense only if the second sentence is [construed]” in this manner. *Id.*

¹³¹*Id.*

¹³²*Id.* at 517 (plurality opinion) (citing *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 763 (1986)).

¹³³*Id.* The plurality acknowledged that there was “no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of [prior] cases” *Id.* at 520-21 (plurality opinion).

¹³⁴*Id.* As is later discussed, the Court at least partially employs this standard to determine whether to overrule precedent. See *infra* notes 174-213, discussing *Planned Parenthood of Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) (plurality opinion).

¹³⁵See *Webster v. Reproductive Health Servs.*, 492 U.S. 491, 518 n.15 (1989) (plurality opinion). The plurality asserted that *Roe* in large part had been abandoned and criticized “the fine distinctions endemic in the *Roe* framework.” *Id.*

¹³⁶*Id.* at 519 (plurality opinion). Justice Blackmun responded to this analysis, stating:

[R]ather than arguing that the text of the Constitution makes no mention of the right to privacy, the plurality complains that the critical elements of the *Roe* framework . . . do not appear in the Constitution and are, therefore, somehow inconsistent with a Constitution cast in general terms Were this a true concern, we would have to abandon most of our constitutional jurisprudence. As the plurality well knows, or should know, the “critical elements” of countless constitutional doctrines nowhere appear in the Constitution’s text Like the *Roe* framework, these tests or

and more significantly, the plurality could not understand why state interests in protecting potential human life should be triggered only at viability.¹³⁷ Although the legislatively mandated tests increased the cost of obtaining an abortion and controlled the physician's discretion in determining whether a fetus is viable, the plurality was nonetheless satisfied that the legislation permissibly advanced the State's interest in protecting and preserving potential human life.¹³⁸

In an astonishing constitutional coda, the plurality said it was leaving *Roe* undisturbed,¹³⁹ reasoning that the statute in *Roe* criminalized almost all abortions;¹⁴⁰ the statute in *Webster* regulated the right to choose abortions only at the point of viability.¹⁴¹ Therefore, the plurality concluded that *Webster* was not the case for reconsidering the holding in *Roe*, although such a case might arise in the future.¹⁴²

Justice Scalia concurred in part and in the judgment.¹⁴³ Stating that the

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.

Id. at 547-48 (Blackmun, J., concurring in part and dissenting in part).

¹³⁷*Id.* at 519 (plurality opinion). Earlier, the plurality had said that the viability-testing provision "is concerned with promoting the state's interest in potential human life rather than in maternal health." *Id.* at 515 (plurality opinion).

¹³⁸*Id.* The plurality Justices never forthrightly announced what standard they applied to gauge the constitutionality of the viability-testing provision. *Id.* It appears, however, that they applied a rational basis or reasonably related test, the lowest constitutional threshold. *Id.* at 519-20 (plurality opinion) (stating that the plurality was satisfied that "the requirement of these tests permissibly furthers the State's interest in protecting potential human life."). Justice Blackmun commented that the "plurality's novel test appears to be nothing more than a dressed-up version of the rational basis review, this Court's most lenient level of scrutiny." *Id.* at 555 (Blackmun, J., concurring in part and dissenting in part). For a discussion of the three tiers of equal protection review, see *supra* note 12.

¹³⁹*Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989) (plurality opinion).

¹⁴⁰*Roe v. Wade*, 410 U.S. 113, 117-18 (1973).

¹⁴¹*Webster*, 492 U.S. at 521 (plurality opinion).

¹⁴²*Id.* at 521-22 (plurality opinion).

¹⁴³*Id.* at 532 (Scalia, J., concurring in part and in the judgment).

plurality's analysis effectively overruled *Roe*,¹⁴⁴ the Justice wrote separately to argue that the Court should have used this opportunity to explicitly overrule *Roe*.¹⁴⁵ Like the plurality, Justice Scalia acknowledged that the State's viability-testing provision may well have contravened precedent.¹⁴⁶ The Justice wanted to directly re-examine the precedent, rather than obliquely examining the contravention.¹⁴⁷

In a separate opinion, Justice O'Connor also concurred in part and in the judgment, although on grounds far removed from those used by Justice Scalia.¹⁴⁸ The Justice accepted the plurality's reading of the second half of the viability-testing section of the statute.¹⁴⁹ Notably, however, Justice O'Connor rejected the plurality's conclusion that this interpretation conflicted with precedent.¹⁵⁰

Justice O'Connor observed that neither party had appealed the district court's ruling that the first half of the provision was constitutional.¹⁵¹ Accordingly, the Justice stated that no dispute existed regarding the

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 532 (Scalia, J., concurring in part and in judgment). On the constitutionality of the testing provision, Justice Scalia decided to "concur in the judgment of the Court and strongly dissent from the manner in which it has been reached." *Id.* at 537 (Scalia, J., concurring in part and in judgment).

¹⁴⁶*Id.* at 536 n. (Scalia, J., concurring in part and in judgment).

¹⁴⁷*Id.*

¹⁴⁸Justice Scalia responded to Justice O'Connor, stating that "Justice O'Connor's assertion . . . that 'a fundamental role of judicial restraint' requires us to avoid reconsidering *Roe*, cannot be taken seriously." *Id.* at 532 (Scalia, J., concurring in part and in judgment). Continuing, the Justice argued that Justice O'Connor "incorrectly" answered the question whether the testing provision violated *Roe* and introduced an "irrational . . . new concept . . . into the law in order to achieve her result." *Id.* at 536 n. (Scalia, J., concurring in part and in judgment).

¹⁴⁹*Id.* at 524 (O'Connor, J., concurring in part and in judgment).

¹⁵⁰*Id.* at 527-28 (O'Connor, J., concurring in part and in judgment). This position aligned Justice O'Connor with three of the dissenting Justices. The dissenters disagreed with the plurality's reading of the provision's second sentence; they did agree that if the plurality's reading were accepted, "the testing provision . . . is consistent with the *Roe* framework and could be upheld effortlessly under current doctrine." *Id.* at 545 (Blackmun, J., concurring in part and dissenting in part).

¹⁵¹*Id.* at 526 (O'Connor, J., concurring in part and in judgment).

presumption that viability attains at a gestational age of twenty weeks.¹⁵² Justice O'Connor concluded that the effect of the second half of the provision only required, "when not imprudent, the performance of those tests that are useful to making subsidiary findings as to viability."¹⁵³

Justice Blackmun dissented and was joined by Justices Brennan and Marshall;¹⁵⁴ Justice Stevens filed a separate dissenting opinion.¹⁵⁵ Justice Blackmun criticized the plurality for failing to address the issue underlying this case: whether the Constitution included the implicit privacy right recognized in *Griswold* and *Roe*, and whether such a right extended to matters of family life and childbearing, including abortion.¹⁵⁶ The Justice asserted that few decisions are "more appropriate to that 'certain private sphere of individual liberty' that the Constitution reserves from the intrusive reach of the government than the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy."¹⁵⁷ Justice Blackmun also commented that the Constitution reflects the moral fact

¹⁵²*Id.*

¹⁵³*Id.* at 527-28 (O'Connor, J., concurring in part and in judgment). Justice O'Connor believed that this limitation did not place an undue burden upon a woman's decision whether or not to choose abortion, Justice O'Connor applied a heightened scrutiny, speaking of the state's "compelling interest in potential life post-viability." *Id.* at 531 (O'Connor, J., concurring in part and in judgment). Unlike the plurality, however, Justice O'Connor indicated that abortion-related privacy rights were fundamental constitutional rights. *See id.* at 530 (O'Connor, J., concurring in part and in judgment).

¹⁵⁴*Id.* at 537 (Blackmun, J., concurring in part and dissenting in part).

¹⁵⁵*Id.* at 560 (Stevens, J., concurring in part and dissenting in part). Justice Stevens was satisfied that "the Court of Appeals, as well as the District Court, correctly concluded that the Missouri legislature meant exactly what it said in the second sentence of [the viability-testing provision]." *Id.* at 561 (Stevens, J., concurring in part and dissenting in part).

¹⁵⁶*Id.* at 547 (Blackmun, J., concurring in part and dissenting in part). The Chief Justice responded:

[The dissent] takes us to task for our failure to join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in cases such as *Griswold* . . . and *Roe*. But *Griswold* . . ., unlike *Roe*, did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply.

Id. at 520 (plurality opinion).

¹⁵⁷*Id.* at 557 (Blackmun, J., concurring in part and dissenting in part).

that an individual must be afforded self-determination; each person belongs to him or herself, not to others nor to society as a whole.¹⁵⁸

What the plurality in *Webster* did not acknowledge is that the rights at issue are inherent in the citizen: they are not rights conditioned on pregnancy nor rights dispensed by the government. Reproductive decisions are those which the individual must be free to make without intrusion unless the government demonstrates a compelling reason for intruding into the process. That was the lesson of *Thornburgh*; that was the lesson repudiated in *Rust v. Sullivan*.¹⁵⁹

At issue in *Rust* were regulations imposing new restrictions on Title X grants of federal funds for family planning services.¹⁶⁰ The service providers were prohibited from providing abortion counseling or referrals,¹⁶¹ even when clients directly inquired about institutions that performed abortion services.¹⁶²

The Court upheld the regulation in a 5-4 opinion.¹⁶³ In response to a Fifth Amendment challenge, the majority ruled that the restriction on the distribution of information did not "impermissibly burden" a woman's freedom to exercise her right to decide about abortion.¹⁶⁴ The Court

¹⁵⁸*Id.*

¹⁵⁹111 S. Ct. 1759 (1991). See Moria T. Roberts, Note, *Individual Rights and Government Power in Collision: A Look at Rust v. Sullivan Through the Lens of Power Analysis*, 49 WASH. & LEE L. REV. 1023, 1051 (1992) (noting that *Rust* "allows government to exercise manipulative power to undermine the individual's right to make a decision.").

¹⁶⁰*Rust*, 111 S. Ct. at 1764. See 42 U.S.C.A. §§ 300-300a-6 (1988) (authorizing the secretary to "make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment an operation of voluntary family planing projects which shall offer a broad range of acceptable and effective family planing method and services.").

¹⁶¹*Rust*, 111 S. Ct. at 1765.

¹⁶²See *id.* at 1764-66. Doctors and counselors were required to respond to abortion inquires by stating that he or she did not consider abortion an appropriate method of family planning. *Id.*

¹⁶³*Id.* at 1778.

¹⁶⁴*Id.* at 1777. In justifying this decision, the Court reasoned:

Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the government had chosen not to fund family planning services at all. The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she

reasoned that the woman was in the same position as if the Government had chosen not to fund any family planning services.¹⁶⁵ Unlike the statute in *Thornburgh*, requiring all doctors to furnish patients certain information, the statute in *Rust* permitted doctors to provide whatever information considered necessary or appropriate outside the setting of a Title X project.¹⁶⁶

Justice Blackmun, joined by Justices Marshall and Stevens, dissented, criticizing the majority's decision as a virtual abandonment of the principle that there could be no governmental intrusion on a woman's freedom to decide, without coercion, whether to continue her pregnancy to term.¹⁶⁷ The Justice reasoned that the freedom to make choices regarding abortion is purely personal.¹⁶⁸ By manipulating the doctor-patient relationship, the regulations represented an effort to discourage a woman from exercising her right to decide.¹⁶⁹

would have been if the government had not enacted Title X.

Id.

¹⁶⁵*Id.*

¹⁶⁶*Id.* Amazingly, the Court stated that the decision in *Rust* preserved the integrity of *Thornburgh*, in which the Court had strongly condemned Pennsylvania's attempts to intrude into the doctor-patient relationship without regarding either the patient's or the doctor's desires. For a detailed discussion of *Thornburgh*, see *supra* notes 105-23 and accompanying text.

¹⁶⁷*Rust v. Sullivan*, 111 S. Ct. 1759, 1784 (1991) (Blackmun, J., dissenting). Justice O'Connor also dissented because "neither the language nor the history [of Title X] compels the Secretary's interpretation and that interpretation raises serious First Amendment concerns." *Id.* at 1788-89 (O'Connor, J., dissenting).

¹⁶⁸*Id.* at 1784-85 (Blackmun, J., dissenting).

¹⁶⁹*Id.* at 1786 (Blackmun, J., dissenting). See Susan J. Levy, Comment, *The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome — AIDS*, 37 EMORY L.J. 217, 233 n.89 (1988) (noting the Court's recognition, in *Griswold*, of the existence of personal privacy); Theodore C. Hirt, Comment, *Why the Government is not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895, 1896-97 (1988) (referring to *Roe* where the Court based its determination on a woman's "personal liberty," which includes her right to terminate her pregnancy); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1944 (1986) (reasoning that a "woman's freedom to pursue her personal goals" encompasses her inalienable right to have an abortion); Michele N. Coleman, Note, *Embryo Transplant, Parental Conflict, and Reproductive Freedom: A Prospective Analysis of Issues and Arguments Created by Forthcoming Technology*, 15 HOFSTRA L. REV. 609, 615 (1987) (asserting that it is a woman's "right of personal choice" to start a family, as well as to

Rust restricted a doctor's ability to give, and a woman's ability to receive, information; while not benign, it was the federal government's decision to withhold information from certain women receiving federal assistance.¹⁷⁰ Perhaps this could, as the Court tried to do, be squared with *Thornburgh* and other cases. However, Pennsylvania's decision in *Planned Parenthood of Pennsylvania v. Casey*¹⁷¹ to once again intrude into the decisionmaking process could not. The statutes involved in *Casey*¹⁷² directly intruded into

terminate a pregnancy). *See also* *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[T]he right to privacy . . . is the right of the individual, married or single"); Thomas R. Bearrows, *Transition: Abolishing the Marital Exemption for Rape: A Statutory Proposal*, 1983 U. ILL. L. REV. 201, 219 n.136 (1983); Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 46 (1985). *See generally* J. KLEIN, *PATERNALISM* 51-55 (1984).

¹⁷⁰*Rust v. Sullivan*, 111 S. Ct. 1759, 1777-78 (1991).

¹⁷¹112 S. Ct. 2791, 2855, 2860 (1992) (plurality opinion).

¹⁷²*Id.* at 2833 (plurality opinion). Amended § 3205 of the Pennsylvania Abortion Control Act of 1982 provided:

"(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 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 has been delegated by 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.
- (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 case of rape, this information may be omitted."

Id. (citation omitted).

Amended § 3214 of the Pennsylvania Abortion Control Act of 1982 provided:

the enclave established in *Thornburgh*¹⁷³ — an intrusion which the Court now validated.

The key to *Casey* is the standard of review adopted by the plurality¹⁷⁴ and the plurality's attempt to find a middle ground between competing opinions. At one end of *Casey*'s spectrum, Chief Justice Rehnquist asserted that *Roe* was wrongly decided because a woman's decision to end her pregnancy did not merit classification as a fundamental right deserving strict scrutiny constitutional protection.¹⁷⁵ Accordingly, the Chief Justice concluded that a woman's ability to choose was a form of liberty which the states may regulate if such regulation is rationally related to a valid state interest.¹⁷⁶

"[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 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 or 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)."

Id. at 2832-33 (citation omitted) (plurality opinion).

¹⁷³See *supra* notes 105-23 for a detailed discussion of *Thornburgh*.

¹⁷⁴Justices O'Connor, Kennedy, and Souter jointly authored the plurality opinion. *Casey*, 112 S. Ct. at 2803 (plurality opinion).

¹⁷⁵*Id.* at 2855, 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Thus, the Chief Justice sided with the *Webster* plurality in this regard. See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (plurality opinion).

¹⁷⁶*Casey*, 112 S. Ct. at 2867 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice Scalia authored a separate concurring opinion, *id.* at 2873 (Scalia, J., concurring in the judgment in part and dissenting in part), postulating that "the permissibility of abortion and the limitations upon it" are purely political questions to be

At the opposite end of *Casey's* spectrum stands Justice Blackmun's opinion.¹⁷⁷ The Justice remained firm in his conviction that reproductive choice is entitled to full protection under the Constitution.¹⁷⁸ Unlike the hands-off approach of the Chief Justice, Justice Blackmun would subject a state's abortion restriction to the strictest of judicial scrutiny.¹⁷⁹ The Justice stated that such restrictions are valid only where they do not significantly disrupt a woman's ability to exercise her right and are justified by clearly articulated, significant state health interests.¹⁸⁰

In a separate dissenting opinion, Justice Stevens adopted a standard similar to that of Justice Blackmun.¹⁸¹ Weighing the interests at stake, the Justice saw no contradiction in recognizing that "the State may have a legitimate interest in potential life" and yet also concluding that such an "interest does not justify the regulation of abortion before viability"¹⁸² Justice Stevens commented 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"¹⁸³ The Justice evaluated the state's regulation by its effect and character.¹⁸⁴

determined by each state. *Id.* Thus, the Justice concluded that the Supreme Court had no role to play. *Id.* at 2885 (Scalia, J., concurring in the judgment in part and dissenting in part).

¹⁷⁷*Id.* at 2843 (Blackmun, J., concurring in part and dissenting in part).

¹⁷⁸*Id.* at 2844 (Blackmun, J., concurring in part and dissenting in part).

¹⁷⁹*Id.* at 2845-46 (Blackmun, J., concurring in part and dissenting in part).

¹⁸⁰*Id.* at 2847 n.5 (Blackmun, J., concurring in part and dissenting in part). The government must "demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest." *Id.* at 2847 (Blackmun, J., concurring in part and dissenting in part).

¹⁸¹*Id.* at 2838 (Stevens, J., concurring in part and dissenting in part).

¹⁸²*Id.* at 2839 (Stevens, J., concurring in part and dissenting in part).

¹⁸³*Id.* at 2843 n.6 (Stevens, J., concurring in part and dissenting in part).

¹⁸⁴*Id.* Justice Stevens's explication of this standard seems to have been prompted by the standard of review applied by the plurality in *Casey*. See *infra* notes 189-201 and accompanying text. *Casey's* standard of review was the same standard which had been established in *Thornburgh* and its predecessors. See *supra* notes 105-23 and accompanying text. Pursuant to that standard, the plurality determined that the most recent version of the Abortion Control Act at issue in *Casey* would undoubtedly have been ruled unconstitutional.

Justice Stevens explained that a “burden may be ‘undue’ either because the burden is too severe or because it lacks a legitimate, rational justification.”¹⁸⁵

Justice Stevens’s explication of this standard was prompted by what is the core of *Casey*: the jointly authored plurality opinion of Justices O’Connor, Kennedy, and Souter. Their standard was determinative.¹⁸⁶ All of the Justices knew that the main provisions of Pennsylvania’s latest version of its Abortion Control Act were unconstitutional if *Thornburgh* and its predecessors were followed. The Chief Justice’s and Justice Scalia’s opinions validated these provisions;¹⁸⁷ Justice Blackmun’s strict scrutiny and Justice Stevens’s balancing test invalidated them.¹⁸⁸

Thus, as in *Webster*, the focus was on the plurality opinion, which sought to “define the rights of the woman and the legitimate authority of the state respecting the termination of pregnancies by abortion procedures.”¹⁸⁹ The opinion was based on three ideas: first, a woman may obtain an abortion before fetal viability “without undue influence from the State”; second, after viability, the state may restrict abortions except when the woman’s life or health is endangered; and third, the state possesses “legitimate interests from the outset of pregnancy in protecting the health of the mother and the life of the fetus that may become a child.”¹⁹⁰

Under the Court’s precedent, the plurality had dug itself a hole. It acknowledged that the precedent required 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.”¹⁹¹ The

¹⁸⁵*Planned Parenthood of Pennsylvania v. Casey*, 112 S. Ct. 2791, 2842-43 (1992) (Stevens, J., concurring in part and dissenting in part).

¹⁸⁶*Id.* at 2803 (plurality opinion).

¹⁸⁷*Id.* at 2855, 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

¹⁸⁸*Id.* at 2845-46 (Blackmun, J., concurring in part and dissenting in part); *id.* at 2838 (Stevens, J., concurring in part and dissenting in part).

¹⁸⁹*Id.* at 2804 (plurality opinion).

¹⁹⁰*Id.* The plurality believed that these three principles were the gravamen of the Court’s opinion in *Roe*. *Id.*

¹⁹¹*Id.* at 2817 (plurality opinion). In fact, the plurality went through great lengths to uphold the validity of *Roe* and the protection it afforded a woman’s right to choose. The plurality rejected Pennsylvania’s contention that *Roe* should be overruled in its entirety. *Id.*

plurality's "undue interference" criterion, and its recognition of a state's "legitimate interests from the outset of pregnancy," could not be reconciled with the precedent.¹⁹² Like the plurality in *Webster*, the plurality in *Casey* examined the precedent and found that *Thornburgh* had misinterpreted *Roe* and should be overruled.¹⁹³ However, the plurality's criterion and recognition likewise could not be reconciled with certain aspects of *Roe*; it thus decided to "reject the trimester framework which we do not consider to be part of the essential holding of *Roe*."¹⁹⁴ That framework was now said to misconceive "the nature of the pregnant woman's interest" and to undervalue "the State's interest in potential life"¹⁹⁵

Having identified these interests, the plurality was faced with reconciling

at 2807 (plurality opinion). In so doing, the plurality found that: *Roe*'s "central ruling" was workable in practice, *id.* at 2809 (plurality opinion); *Roe* could not be overruled without causing significant injury to those who have come to rely upon it, *id.*; *Roe*'s "central holding" has not been ignored or abandoned by those charged with implementing it, *id.* at 2810-11 (plurality opinion); and *Roe*'s "central holding" was not irrelevant or unjustifiable in dealing with the right to choose, *id.* at 2811-12 (plurality opinion). The plurality then compared *Roe* with instances where the Court had overruled established law and determined that *Roe* was dissimilar to those cases. *See id.* at 2812-16 (discussing *Lochner v. New York*, 198 U.S. 45 (1905) (substantive due process for economic liberties); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (*de jure* racial segregation in public schools)).

¹⁹²*Id.* at 2821-22 (plurality opinion).

¹⁹³*Id.* at 2817-18 (plurality opinion). Specifically, the plurality incorrectly asserted that *Thornburgh* was inconsistent with *Roe* because the plurality believed *Thornburgh* ignored precedent establishing that the state had a legitimate interest in "promoting life of the unborn." *Id.*

As Justice Blackmun argued, however, the plurality was well off the mark. The Justice agreed that *Roe* and *Thornburgh* both acknowledged the state possessed a *legitimate interest* in protecting fetal life. *Id.* at 2848-49 (Blackmun, J., concurring in part and dissenting in part) (citation omitted). The Justice asserted, however, that *Roe* and its progeny, including *Thornburgh*, had measured the state's legitimate interest against a strict scrutiny analysis, which was often too heavy a burden for the state's legitimate interest to overcome. *Id.* at 2849 (Blackmun, J., concurring in part and dissenting in part).

¹⁹⁴*Id.* at 2818 (plurality opinion). The plurality acknowledged that the trimester framework was conceived 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, not in fact." *Id.* Nonetheless, the plurality believed that the trimester framework was too inflexible and at times contradicted the exercise of lawful power by government. *Id.*

¹⁹⁵*Id.* In essence, the plurality determined that the framework created by the Court in *Roe* was unable to effectively balance a woman's right to choose with the state's interest in promoting fetal life. *See id.*

them. The means chosen was the “undue burden” standard of review.¹⁹⁶ To create an “undue burden” on a woman’s freedom to exercise her right to choose, the state regulation must have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.”¹⁹⁷ The woman has only “a right to make the ultimate decision, not a right to be insulated from all others in doing so.”¹⁹⁸ The State may “create a structural mechanism” for expressing its “profound respect for the life of the unborn” if the mechanism does not create “a substantial obstacle to the woman’s exercise of the right to choose.”¹⁹⁹ Absent that effect, the State’s intrusion will be upheld if “reasonably related” to maternal health or to persuading the woman to choose childbirth over abortion.²⁰⁰ This is a minimal standard, one which, in practice, may afford no protection at all.²⁰¹

Most of Pennsylvania’s provisions passed this test:²⁰² the only provision

¹⁹⁶*Id.* at 2820 (plurality opinion).

¹⁹⁷*Id.* The plurality determined that “an undue burden is an unconstitutional burden.” *Id.*

¹⁹⁸*Id.* at 2821 (plurality opinion).

¹⁹⁹*Id.*

²⁰⁰*Id.*

²⁰¹*See id.* at 2853-55 (Blackmun, J., concurring in part and dissenting in part). The rational basis standard is the lowest possible level of constitutional scrutiny afforded to exercising liberties. *See CRUMP ET AL.*, *supra* note 12, at 722. Thus, without adequately justifying the adoption of the rational basis standard of review for the right to choose, the plurality exchanged the highest level of constitutional review for the lowest.

²⁰²First among the valid provisions was § 3205(2), stating that all pregnant women must be given abortion-related information designed to persuade her to carry the fetus to term. *Casey v. Planned Parenthood of Pennsylvania*, 112 S. Ct. 2791, 2823 (1992) (plurality opinion). The plurality reasoned that provided the information was truthful and not misleading, the State possessed a legitimate interest in ensuring that a woman understands the consequences of her decision. *Id.* Section 3205(1), requiring that information about the consequences of abortion must be provided by a doctor, even when those consequences are not directly related to the woman’s health, was also upheld. *Id.* The plurality determined this was a reasonable regulation because its effect was to ensure that a women’s decision was an informed one. *Id.* at 2823-24 (plurality opinion). The third provision that the plurality validated required all pregnant women to wait 24 hours after receiving this information. *Id.* at 2833 (plurality opinion). Although the plurality determined that this provision did not further a health interest, it upheld the law as reasonable means to protect potential life that did not constitute an undue burden. *Id.* at 2825 (plurality opinion). The final provision the plurality upheld, § 3412(A), mandated that each facility maintain and file highly detailed

which the plurality found sufficiently intrusive required a married woman to attest that she had notified her husband of the intended abortion.²⁰³ The plurality concluded that this was “likely to prevent a significant number of women from obtaining an abortion.”²⁰⁴

As the woman quoted at the beginning so strongly stated, it is indeed frustrating for those who favor *Roe* that an opinion which spoke of insulating individuals from intrusive governmental interference would validate, perhaps even encourage, governmental intrusions into a woman’s reproductive decisionmaking. The plurality did not even require the government to justify its intrusion; it is enough that the plurality can perceive a rational basis for it.²⁰⁵

The frustration may be the result of expectations raised by the prologue to the plurality’s analysis of Pennsylvania’s statute. The prologue began with a strong declaration:

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 . . . that definition of liberty is still questioned.²⁰⁶

The plurality found that this protection derives from the Fourteenth Amendment’s Due Process Clause, a clause that “for at least 105 years . . . has been understood to contain a substantive component . . . ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’”²⁰⁷

The plurality emphasized that the Constitution promises that “there is a

reports on each abortion. *Id.*

²⁰³*Id.* at 2831 (plurality opinion).

²⁰⁴*Id.* The provision embodied “a view of women . . . repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution.” *Id.* Those rights protect everyone, “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.” *Id.* at 2827 (plurality opinion).

²⁰⁵*Id.*

²⁰⁶*Id.* at 2804 (plurality opinion).

²⁰⁷*Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

realm of personal liberty which the government may not enter.”²⁰⁸ This promise is not susceptible to precise definition; the boundaries of this realm cannot be drawn with a straightedge. However, the plurality, quoting from Justice Harlan’s dissent in *Poe v. Ullman*,²⁰⁹ stated that describing them is a traditional task of the Court.

The plurality said that an aspect of American tradition is respecting an individual’s freedom to make certain personal decisions free from governmental intrusion:

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.²¹⁰

The plurality’s prologue held out promise to those who favor *Roe*; their frustration arises from the remainder of the opinion which did much to undercut the freedom necessary to meaningfully exercise the right established by *Roe*. It is as if the plurality did not heed its own words. The plurality declared that the Constitution is “a covenant . . . a coherent succession,” a document whose “written terms embody ideas and aspirations that must

²⁰⁸*Id.* at 2805 (plurality opinion).

²⁰⁹*Id.* at 2806 (plurality opinion). The plurality recounted that:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society 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

Id. (citing *Poe v. Ullman*, 376 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional appeal)).

²¹⁰*Id.* at 2807 (plurality opinion). The plurality supported this statement with references to precedent securing “constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing, and education.” *Id.* (citing *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977)).

survive more ages than one.”²¹¹ The plurality claimed to accept a “responsibility not to retreat from interpreting the full meaning of the covenant in light of all our precedents.”²¹² Yet, these words cannot obscure the reality so sharply pointed out by the Chief Justice and Justice Scalia. The plurality did retreat from the post-*Roe* cases which were necessary to define and protect the rights which *Roe* began to articulate but necessarily could not detail.²¹³

The plurality ran back to *Roe* as if to save it; in truth, that retreat may have let loose the states to smother it. The states may now, in a most intrusive fashion, so inject themselves into this most private enclave of individual decisionmaking as to become the woman’s partner. The right to make reproductive decisions exists in theory, but the freedom to exercise that right in quiet exists only at the whim of government. The woman need not notify her husband, but she is not to be free of governmental intrusion.

As noted at the beginning, for those who value *Roe* and its progeny, *Casey* was no victory. It marks, instead, the death of repose in reproductive decisionmaking. *Webster*,²¹⁴ *Rust*, and *Casey* permit — indeed, encourage — government intrusion on the individual’s repose in making basic life directing decisions. The freedom of repose necessary to exercise rights given life in *Griswold* is now moribund, cut off from the support necessary to

²¹¹*Id.* at 2833 (plurality opinion).

²¹²*Id.*

²¹³*Id.* at 2861-62 (Rehnquist, C.J., concurring in judgment in part and dissenting in part); *id.* at 2872-74 (Scalia, J., concurring in judgment in part and dissenting in part). At the very least, the Chief Justice and Justice Scalia recognized that *Roe*’s trimester framework provided a definite standard of analysis. *Id.* at 2868 (Rehnquist, C.J., concurring in judgment in part and dissenting in part); *id.* at 2728 (Scalia, J., concurring in judgment in part and dissenting in part).

²¹⁴Certainly *Webster* encouraged attacks on *Roe* by the states. See, e.g., the opening paragraph of Justice Blackmun’s dissenting opinion:

Today, *Roe v. Wade* and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure. Although the Court extricates itself from this case without making a single, even incremental, change in the law of abortion, the plurality and Justice Scalia would overrule *Roe* (the first silently, the other explicitly) and would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term.

Webster v. Reproductive Health Servs., 492 U.S. 490, 537 (1989) (Blackmun, J., concurring in part and dissenting in part).

reach maturity.

The next logical sanctuary for the right to repose is the various state constitutions.²¹⁵ State constitutions can protect the freedom to decide in quiet.²¹⁶ But a dark side exists to this approach — the laboratory may produce a monster. A uniform exposition of fundamental rights and the freedoms necessary for their meaningful exercise is undoubtedly better than an uncertain, fragmented, state by state approach.²¹⁷ Unfortunately, that is a responsibility which the Supreme Court has shunned.

IV. A PRAYER FOR THE SPIRIT OF REPOSE

The freedom which this article describes, the freedom of repose, is admittedly attendant to rights which are not explicit in the Constitution. That freedom and those rights are nonetheless real, representing values which underlie what it means to be an American, regardless of one's position on any political spectrum. When we make fundamental decisions over the direction of our individual lives, the government's position should be one of respect, not unjustified intrusion.

Perhaps the woman quoted at the beginning of this article had it right. Perhaps we should acknowledge the insurmountable complexity of this issue,

²¹⁵See Kimberly A. Chaput, Comment, *Abortion Rights Under State Constitutions: Fighting the Abortion War in the State Courts*, 70 OR. L. REV. 593 (1991), for a comprehensive discussion of states that protect the right to repose in their constitutional jurisprudence.

²¹⁶See Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 691 (1992).

²¹⁷See Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 151 (1989), responding to the question: "why not leave these matters to the political process?"

The short answer, of course, is that we don't leave freedom of speech or religion or association to the political process, even on good days when the polls suggest they might stand a chance, at least in some states. The very essence of a fundamental right is that it "depend[s] on the outcome of no elections." Moreover, several state constitutions explicitly or implicitly protect a right of privacy that is interpreted to include the right to an abortion.

The long answer is, as always, that fundamental liberties are not occasions for the experimentation that federalism invites. The right to abortion should not depend on where you live and how much money you have for travel. And, regardless of our recent, at long-last successes, the reality remains that the political process is to be trusted the least where, as here, it imposes burdens unequally.

the unavoidable contradictions inherent in it, and tolerate each individual's right to make a decision in quiet, free from governmental intrusion. These complexities and contradictions should be welcomed, not avoided; our constitutional architecture should respect the individual's freedom of repose when making certain fundamental decisions.²¹⁸

The term constitutional architecture is appropriate. Law and architecture are related. They are both concerned with complex and contradictory relationships, with reconciling past lessons with present needs, and with fashioning solutions which enhance the quality of life, both communal and individual.²¹⁹ Architecture should be, like any approach to constitutional values, humanistic and pluralistic.²²⁰ This view welcomes tension, includes rather than excludes, and embraces the discordant and diverse. It promotes "richness and ambiguity over unity and clarity, contradiction and redundancy over harmony and simplicity."²²¹

²¹⁸ROBERT VENTURI, *COMPLEXITY AND CONTRADICTION IN ARCHITECTURE* (2d ed. 1977) [hereinafter *COMPLEXITY AND CONTRADICTION*]. For discussions of Venturi's architecture, see A. VON MOOS, VENTURI, RAUCH & SCOTT BROWN (1987), and *THE ARCHITECTURE OF ROBERT VENTURI* (Charles Mead ed., 1989). Venturi was awarded architecture's "rough equivalent of the Nobel Prize." Paul Goldberger, *Robert Venturi, Gentle Subverter of Modernism*, N.Y. TIMES, Apr. 14, 1991, at 36H.

²¹⁹See ADA LOUIS HUXTABLE, *GOODBYE HISTORY, HELLO HAMBURGER* 54, 90 (1986). Huxtable draws constitutional lessons from architecture. For example, she wrote that a visit to the University of Virginia, "a work so distinctly from the heart and mind of Thomas Jefferson . . . whose art and politics shared a common philosophy and culture" was "a fine way to touch base with the beginnings of the new nation." *Id.* at 129. She felt that "Jefferson's design suggests the whole range of values to which the American democracy aspired: unity in variety, the subordination of the parts to the whole, a humanistic order, and the dignity of the individual." *Id.* at 131. Similarly, Nichol commented that:

It is possible that in honoring Jefferson and Lincoln the American people reflect their own ideals and aspirations more than history. But it is in part . . . the ideals and aspirations of the nation which constitutional law seeks to tap. The felt, symbolic hold which both they and their visions of political life exercise over the American people are more important than their specific actions. For me, Jefferson and Lincoln are principal architects of our constitutive tradition. Even if they are not, their efforts at least represent major contributions to our societal attempts at self-definition.

Nichol, *supra* note 17, at 1323-24.

²²⁰See *COMPLEXITY AND CONTRADICTION*, *supra* note 218, at 13, 16. This inclusive view appreciates, as constitutional law should, "a complex and contradictory architecture based on the richness and ambiguity of modern experience" *Id.*

²²¹Robert Venturi, *Diversity, Relevance and Representation in Historicism*, in ROBERT VENTURI ET AL., *A VIEW FROM THE CAMPIDOGLIO* 108 (1984).

This view does not homogenize and exclude. Rather, its goal is “the development of a pluralist sensibility, one which enables [a] decision to be made with sensitivity to multifarious identities.”²²² This inclusive view recognizes the diversity in the community and strives for a totality which is meaningful on various levels.²²³

The architecture of inclusion is vital because it tolerates, as constitutional architecture should, both the simple and the difficult, the communal and the individual.²²⁴ It rejects the idea that there exists only one correct approach to doing something and that all other approaches are inferior and invalid.²²⁵ Architecture, like constitutional law, “is not a single simple scale of values . . . [but] is a product of numerous forces — economic, social, cultural,

²²²BOOK REVIEW, J. SOC. ARCHITECTURAL HISTORIANS, Nov. 1973, at 259 [hereinafter BOOK REVIEW]. See also ROBERT M.A. STERN, NEW DIRECTIONS IN AMERICAN ARCHITECTURE 50 (1969) (describing Venturi as “the chief advocate of the inclusive approach, leading to what he describes as the ‘difficult order’ wherein all levels of problems and all solutions . . . are considered as one.”).

²²³BOOK REVIEW, *supra* note 222, at 258.

²²⁴See ROBERT VENTURI ET AL., LEARNING FROM LAS VEGAS 53 (2d ed. 1977). Venturi stated that:

These [images] show the vitality that may be achieved by an architecture of inclusion or, by contrast, the deadness that results from too great a preoccupation with tastefulness and total design Allusion and comment, on the past or present or on our great commonplaces or old cliches, and the inclusion of the everyday in the environment, sacred and profane — these are what are lacking in present-day Modern architecture. We can learn about them from Las Vegas as have other artists from their own profane and stylistic sources.

VENTURI, LEARNING, *supra*, at 53.

²²⁵Robert Venturi, *A Definition of Architecture as Shelter with Decoration on it, and Another Plea for a Symbolism of the Ordinary in Architecture*, in CAMPIDOGGIO, *supra* note 221, at 66. See also VON MOOS, *supra* note 218, at 32. Von Moos posited that:

[The Venturis'] intention seems to be to undermine the validity of universal rules in architecture [A]rchitectural theory had been essentially normative. The main concern was the establishment and the polemical spread of a formal language and of systematic rules that were supposed to guarantee “correct” building. The Venturis, however, view stylistic “purity” with suspicion. With them it does not seem at all to be a matter of substituting new forms of architectural language for old ones but rather of introducing the aesthetic principle of complexity in order to avoid the uncritical application of allegedly universal forms and rules.

Id.

political, functional, aesthetic — and must be evaluated in terms of how well it has responded to all of these forces.”²²⁶

To be vibrant and meaningful, constitutional architecture must acknowledge the promise of multiplicity, the value of heterogeneity.²²⁷ Constitutional architecture is made challenging and great by respecting traditional values of variety, vitality, and humanity.²²⁸ Homogenized

²²⁶PAUL GOLDBERGER, *ON THE RISE* 118 (1983). Similar evaluations crop up for those dealing with constitutional architecture. Frank Michelman commented that:

Formative contexts, including political constitutions and governing arrangements, are always in some measure socially joint, so that to change them for one is to change them for all. As context-transcending agents, then, our freedoms as individual personalities can never be ours in isolation. The freedoms are interdependent. In light of this fact, the superliberal vision of a constituted society becomes one of individuals enabled (insofar as institutional arrangements can enable them) to choose and shape their own identities and lives (in part through contention over aims for the institutions they share) through vistas of possibility opened by what Robert Post has nicely styled “critically interactive” social engagements, thriving on difference, dissent, and even disturbance.

Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.’s Constitutional Thought*, 77 VA. L. REV. 1261, 1266 (1991).

²²⁷See COMPLEXITY AND CONTRADICTION, *supra* note 218, at 9-10. See also Laura S. Fitzgerald, *Towards a Modern Art*, 96 YALE L.J. 2051 (1987). Fitzgerald discussed the importance of heterogeneity to concepts of equality in the United States:

Equality dictates a radical change in all relationships within the legal composition. In an art of law, the reconstructed pattern of rights and responsibilities would reflect the differentness of those plastic means given new compositional worth. The value of heterosexuality, of whiteness, of maleness, could no longer rest on assumptions about their objective moral or social superiority as components of identity. Consequently, affirming a positive value in differentness would be costly to those enjoying advantage in the status quo: “Equivalence” demands a reassessment of conventional claims to power, status, and privilege.

Id. at 2080-81.

²²⁸HUXTABLE, *supra* note 219, at 109. Constitutional architects must avoid falling back, like critics of inclusive architecture, on a preoccupation with homogeneity. VINCENT SCULLY, *AMERICAN ARCHITECTURE & URBANISM* 229 (1969). Scully argued that:

The principles of compromise and accommodation suggested [by an inclusive architecture] have never been popular in America, despite the pluralism of the American condition. It is undoubtedly because of that very heterogeneity that Americans have so often preferred “unifying” homogenized solutions. The self-righteousness of American puritanism, which must see alternatives in black or

solutions, including those in constitutional architecture, offer false hopes for the artless. However, the more artful are unconvinced and unmoved and, perhaps, even a little shamed by such false heroics.²²⁹ Homogenized solutions settle for the “easy unity of exclusion” rather than working for “the difficult unity of inclusion.”²³⁰

white, also continues to play a part.

Id.

²²⁹HUXTABLE, *supra* note 219, at 191. The author continued:

It seems spurious and oversimplified; at best, hollow; at worst, a mockery [T]here are no longer the cultural absolutes, the emotional innocence, the intellectual faith and naivete that legitimize the kind of monument that correctly expressed that faith and naivete in an earlier time. Thoughtful men are no less concerned with society; it is just that their faith and feelings are infinitely more vulnerable and complex.

Id. Justice Blackmun found the plurality opinion in *Webster* to be like this architecture: at best, hollow — at worst, a mockery:

Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review, the plurality obscures the portent of its analysis . . . The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly, but turns a stone face to anyone in search of what the plurality conceives as the scope of a woman's right under the Due Process Clause to terminate a pregnancy free from the coercive and brooding influence of the State.

Webster v. Reproductive Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part).

²³⁰COMPLEXITY AND CONTRADICTION, *supra* note 188, at 16. Venturi queried:

Should we not resist bemoaning confusion? Should we not look for meaning in the complexities and contradictions of our times and acknowledge the limitations of systems? These, I think, are the two justifications for breaking order: the recognition of variety and confusion inside and outside, in program and environment, indeed, at all levels of experience; and the ultimate limitation of all orders composed by man. When circumstances defy order, order should bend or break: anomalies and uncertainties give validity to architecture.

See id. at 41. A similar analysis can be made of the complexities and contradictions of constitutional jurisprudence, particularly in the area of fundamental individual rights. *See* Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 194 (1982) (noting that the “task of harmonizing current values with past” in questions concerning “the promotion of autonomous self-development involves serious theoretical dilemmas” and produces “ongoing doctrinal perplexity.”).

The image left by the unity of exclusion is bland, inert, and uncultured. In law, as in architecture, vitality, beauty, and importance come from seeing and respecting the interests and values of different people and cultures.²³¹ These qualities are advanced by including, not excluding; they come from respecting, not repressing, differing perceptions of the good.²³² They are also qualities which have escaped those constitutional homogenizers who validate government's authority to intrude on the individual's freedom of

²³¹See CHARLES JENCKS, *MODERN MOVEMENTS IN ARCHITECTURE* 221-22 (1973). Jenkins stated that:

Venturi's gentle manifesto has had an extraordinary impact in architectural circles [H]is arguments for an "inclusive architecture" which can use any elements whatever . . . have effectively challenged the prevailing exclusivist arguments for purity and restriction In a sense his polemic is directed against the idea of an historicist sensibility which wants to restrict the available metaphors to those which are only current or technologically up to date. The idea is that in the age of travel and tourism, the age of "museum without walls," this restriction is no longer relevant and furthermore that in any large city with its plurality of sub-cultures, such limitation is highly paternalistic.

Id. The same Venturi-like arguments can be made in law. See Janice Toran, *'Tis a Gift to be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 356 (1990). In her article, Toran noted that:

The process of formulating and choosing procedures may never be free of aesthetic considerations, nor should it be. The human tradition of striving toward a world which inspires and pleases us is a venerable one. Nevertheless, bringing an awareness of aesthetic components to the surface may help to ensure that the role of aesthetics is controlled and positive. Such an awareness may also encourage the development of alternative aesthetic visions, less dependent on simplicity and more reflective of the complexity of human interactions, on which to build future reforms.

Id.

²³²This is not a new lesson; it was known to Thomas Jefferson in his architecture for the University of Virginia, an architecture which should also be reflected in constitutional law:

[T]here is nothing doctrinaire about this architecture as a whole, and that is the reason for its beauty and importance. Although it gives the appearance of uniformity in the classical totality of its composition and details, it is still rich in calculated variety The architecture is a kind of paradox: at once didactic and free, monumental and humanistic, aristocratic and pragmatic, romantic and rational, formal and hospitable. It combines a human scale with controlled, universal vistas. The result is consummately lovely, with a quality of grace lost to our age. These are lessons that have escaped the modern monumentalists.

HUXTABLE, *supra* note 219, at 130.

repose. These homogenizers cannot, or do not want to, confront modern complexity and contradiction. Their arguments and opinions, while claiming to be anchored in our traditions, do not have the quality necessary for an inclusive constitutional architecture.²³³

The Constitution cannot explicitly protect all fundamental rights. It cannot exhaustively catalog them. However, the Constitution implicitly recognizes certain fundamental rights and recognizes that every individual is entitled to be free from unwanted, unwarranted intrusions upon repose when deciding whether to exercise those rights. This is a freedom which predates any social charter; it is a freedom which is born with each person and which has received expression throughout our history.²³⁴ The Constitution evokes a certain spirit, has a soul as well as a text. It speaks to an independent individual, free to make, in quiet, self-directing decisions; it implicitly reflects a traditional acknowledgment of individual rights and freedoms.²³⁵

²³³Law, and the opinions pronouncing it, have an aesthetic quality. In *Justice, Expediency, and Beauty*, Louis Schwartz proposed as one of his theses that "an important criterion of justice is aesthetic: a just decision or statute will be beautiful in that it fits, is proportionate to, or is 'just right' for its setting and era." Louis B. Schwartz, *Justice, Expediency, and Beauty*, 136 U. PA. L. REV. 141, 141 (1987). Schwartz believed that beauty, "a concept, like love or patriotism, that is essential and useful although difficult to appraise and impossible to quantify," *id.* at 145, evoked in the appropriate audience "a recognition of rightness, of fittingness according to a complex of psychological, historical, and political background shared by that audience." *Id.* at 145-46. Likewise, "justice is . . . a complex quality of fitness, proportionateness to the situation, responsiveness to tradition as well as to the need for change, and sensitivity to both individual hardship and the general good." *Id.* at 142.

²³⁴See Estrich & Sullivan, *supra* note 217, at 130. Professors Estrich and Sullivan argued that:

Even if there were any disagreement about the degree of bodily or decisional autonomy that is essential to personhood, there is a separate, alternative rationale for the privacy cases: keeping the state out of the business of reproductive decision-making. Regimentation of reproduction is a hallmark of the totalitarian state. Whether the state compels reproduction or prevents it, "totalitarian limitation of family size . . . is at complete variance with our constitutional concepts." The state's monopoly of force cautions against any official reproductive orthodoxy.

Id.

²³⁵See Griswold, *supra* note 21 at 218. Griswold asserted that:

The Bill of Rights, and its several provisions, cannot be accurately and adequately evaluated unless we keep constantly in mind not merely their bare words but also their moral and ethical content. These provisions came from the hearts of men more rather than from their minds. In that lies much of their strength and their significance.

V. CONCLUSION

America has, from its beginning, valued its heterogeneity, its diversity within unity. Each state retains its sovereignty while participating in a national scheme of government; all persons retain the freedom to construct his or her separate individuality while participating in a community. This system is complex and can be contradictory.²³⁶ As one commentator noted, "living with conflict is not only normal in America, it is the only way to function honestly."²³⁷ For that commentator, "acknowledging and living

Id. See also Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 138 (1989). Moore suggested that:

It may be that liberty is not itself a single value, that there are only liberties, in which event there can be no single, coherent theory of the nature of liberty. Constitutionally, this view would translate into the incorporationist approach, whereby the first eight amendments list the enumerated liberties that qualify as liberty and the ninth amendment references the equally real but unenumerated liberties persons possess because they are persons. Alternatively, perhaps such enumerated and unenumerated liberties are no more than aspects of one single right, a right to be free of unjustified governmental intrusion — Mill's famous view of a general right to liberty.

Id.

²³⁶Yet, is it not right for us, as Americans, to accept:

[T]he paradox of a right invoked by those who would enmesh themselves within society while laying claim to their own personalities; who would reach out to those around them while making intimate associations on their own terms. Our system of ordered liberty values individual autonomy, and any regime that would value individuals must at least tolerate — if not celebrate — diversity among the myriad personalities who breathe life into the abstractions we call liberty and community.

LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1435 (2d ed. 1988). Professor Tribe has argued that whether one is considering a criminal prohibition (as in *Roe*), a decision to expel certain abortions from public facilities (as in *Webster*), or a decision not to fund certain abortions (as in *Harris v. McRae*, 448 U.S. 297 (1979)), the relevant question is not, "did the state physically force pregnancy upon the woman?" *Id.* Rather, the question becomes whether the state's combination of acts and omissions, rules, funding decisions and the like so shaped the legal landscape in which women decide matters bearing on their reproductive lives as to violate the Constitution's postulations of liberty and equality. Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 32 (1989).

²³⁷Roger Rosenblatt, *How to End the Abortion War*, N.Y. TIMES MAGAZINE, Jan. 19, 1992, at 41.

with ambivalence is, in a way, what America was invented to do"; respecting the individual's right to repose in reproductive decisionmaking "is to create but another of the many useful frictions of a democratic society."²³⁸

Every American must retain the freedom to control the direction of his or her individual life; every American has a right to expect repose, freedom from unwanted, unwarranted intrusions on this control. Although the contours of this freedom may be vague, its presence is clear. We may run some risks in recognizing and protecting repose, but risk running characterizes democracy.²³⁹ Let's take a stand — to do otherwise is terrible to contemplate.

²³⁸*Id.*

²³⁹See Leeds, *supra* note 28, at 279-80. Leeds contended that:

[D]ue regard for an individual's reasonable expectations occasionally requires the risk-laden flexible balancing approach. Risks are taken in order to protect the individual from the political malfunction of a democracy run riot. Democracy is not the ultimate end of our government. Rather, it is a means for working out, under law, a reasonable, socially acceptable relationship between individuals' liberties and the community's welfare.

Id. See also Nichol, *supra* note 17, at 1345. Nichol asserted that:

The effort to draw the constitutional line which separates the legitimate activities of the state from the protected realm of individual choice is a continuing part of our heritage. The answers formulated by our forefathers are not sufficient to meet the problems of our day. But when the legitimacy of judicial attempts to draw lines guaranteeing personal sovereignty is called into question, we do well to recall that we claim, as a society, to be dedicated to that task.

Id.