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Prologue

Background

For years now, Law Students for Reproductive Justice members have reported inadequate or inappropriate coverage of reproductive rights in their Constitutional Law classes. For the vast majority of law students, this required course offers the only chance during law school to be exposed to this particular body of law. In far too many Con Law classes, discussions of reproductive rights law are narrowed to cursory arguments about the wisdom or folly of *Roe v. Wade*. Too often, professors and peers dismiss these cases as errors of judicial overreach that will inevitably be overturned. Nuances of abortion rights are ignored, not to mention other issues of reproductive justice. The narrowing of this rich body of legal thinking and jurisprudence to a yes/no argument on abortion does not promote institutional respect for reproductive justice, nor does it train future lawyers to think beyond simplistic and personalized “pro-life” v. “pro-choice” views. Lawyers who can articulate well-reasoned, passionate defenses of bodily autonomy, privacy, liberty, and equality and induce government action to effectuate those rights are in demand. And, exposure during law school to these concepts and cases is crucial.

Purpose

This brings us to the first of our reasons for creating this primer: to fill in the gaps that might be left by your Con Law coursework and give you a solid foundation from which to continue exploring these topics throughout your school days and beyond.

The second purpose of the primer is to help you stimulate rich classroom discussions. By asking questions based on what you read here, you can engage your professor and classmates in meaningful academic discourse that reaches beyond the bumper stickers and sound bites to legal theory and jurisprudence. As an advocate inside the classroom, you may reach even more people than you do with your on-campus activism. And, you will play the vital role of exposing more future prosecutors, public defenders, law professors, politicians, policymakers, and judges to this significant, and largely misunderstood, body of law. For other tips, read the “Advocacy in Academic Settings” sheet in the Student Coordinator Binder.

Uses

How your chapter uses the primer is up to you. Be creative! At a minimum, Student Coordinators should notify other members about the new tool and how they can access it. One suggestion is to distribute copies of the primer to your members to read. Then, meet over lunch or coffee a few times to discuss the concepts and cases “book club style” before they are covered that semester in Con Law. It may be a great opportunity for 1L members to bond or for more knowledgeable members to mentor those who are newer to the field. No matter how you implement it, after reading and discussing the primer, members of your chapter will enter the classroom equipped to challenge false notions and foster meaningful discussions about reproductive rights.

Structure

The primer features an overview of the evolution of constitutional protections for reproductive autonomy, including in-depth explanations of major cases and summaries of many others (see Appendix B). It also briefly outlines the chief arguments against these constitutional protections, levied mostly against *Roe v. Wade*. The rights to contraception and abortion are dominant— not because these are the only important reproductive rights but because the central legal debates have swirled around state and federal laws restricting those rights. Your introductory Con Law course will probably touch on these issues and only go beyond them if you

are very lucky. The primer was written with brevity and digestibility in mind; thus, it will likely raise more questions than it answers.

Other Resources

Should your curiosity be piqued and you wish to keep exploring, check out LSRJ's Model Curriculum and Resource Guide at www.LSRJ.org. You can also join your LSRJ peers who are campaigning throughout the country for new courses in reproductive rights and the law. The LSRJ National Office can connect you to them and give you assistance throughout the process.

Thanks for reading and good luck!

Law Students for Reproductive Justice

Acknowledgements

Law Students for Reproductive Justice thanks the author of the Constitutional Law Primer, Priscilla J. Smith (Visiting Fellow, Yale Law School, Information Society Project; Fellow, Roosevelt House Initiative on Women and Public Policy), for her passion and dedication to this project. We appreciate the reliable research assistance of 2007 summer interns Jennifer Lunsford and Alison Perez. Thanks also go out to 2006 summer interns Sabrina Andrus, Madeleine Green, Tatum Hunter, and Joanne Suk for their work on the primer in its original concept.

I. Introduction

Below you will find an overview of the evolution of the rights to abortion and contraception in the major cases from *Roe v. Wade* to *Gonzales v. Carhart* (Part II); an outline of major arguments against constitutional protections and some rebuttals to those arguments (Part III); an outline of some doctrinal sources of the right to reproductive autonomy whether grounded in a liberty analysis or an equality analysis (Appendix A); and shorter descriptions of the most important Supreme Court cases from early recognition of the right to privacy to the present (Appendix B).

II. Evolution of the Rights to Abortion and Contraception

A. The Rise: Forerunners to *Roe*

The development of the right to reproductive autonomy can be seen as a process of modest incrementalism. Ideas of individual liberty, developed before the founding of the United States, evolved to include the freedom to control family life first,¹ and only to apply to women and their reproductive autonomy later as women began to be included in the country's idea of equal citizenship and to see their own liberty protected under the equal protection clause. See *Reed v. Reed*, 404 U.S. 71 (1971) (holding only two years before *Roe* that an Idaho statute giving preference to men in determinations of those entitled to administer the estate of those who die intestate violated the Fourteenth Amendment's equal protection clause).

Notably, the ruling in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the first case to protect access to contraception, was limited to access for married couples. Even in *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (*Baird II*), decided just one year after *Reed*, in which the Court struck down a statute prohibiting distribution of contraceptives to an unmarried woman, as a violation of the Equal Protection Clause, the Court avoided the question of whether single people had a fundamental right to contraceptives. The Court held that it did not need to decide that question since prohibition violated the "rational basis" test and was not "rationally related to a valid public purpose." *Id.* at 447 n.7.

Roe v. Wade, coming just one year after *Eisenstadt* then, must be seen in the context of the enormous societal changes taking place during the late 1960s and early 1970s. As you review the case descriptions below and in Appendix B, consider the demands being placed on the Court at that time, the Court's view of individual liberty as expressed in these other cases, and remember the place women occupied in the family, the workplace, and society. Viewed in this historical context, *Roe* represented an enormous breakthrough for women. At the same time, seen in its place alongside the Court's recognition of liberty in other contexts, it is hard to imagine a different ultimate outcome.

B. The Landmark: *Roe*

¹ See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children"); *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) (striking down an Oregon law requiring all "normal children," ages 8-16, to attend public school through the 8th grade because "we think it entirely plain that the Act . . . unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

Just two years after its statement in *Eisenstadt* that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child, the Court was faced with a challenge to Texas’s law criminalizing abortions. The Court held that the right to privacy is broad enough to include protection for the right to abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

In *Roe*, the Court declared the right a “fundamental right,” *id.* at 155; see also *id.* at 152 (“[T]hese decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ . . . are included in this guarantee of personal privacy.”) (citation omitted), and subjected restrictions on the right to “strict scrutiny,” the highest level of constitutional protection. Like all fundamental rights, the right to abortion was not “absolute”; but restrictions on abortion, like restrictions on other fundamental rights, must be “narrowly tailored” to serve a “compelling” state interest. *Id.* at 155.

The Court also limited the state interests that could justify restrictions on the right to terminate a pregnancy. It held that in the period before the fetus is viable, the government could restrict abortion only to protect a woman's health. After viability, however, the government could go so far as to prohibit abortion, but laws must make exceptions that permit abortion when necessary to protect a woman's health or life. *Id.* at 162-65.²

1. Source of Protection

It is important to note that *Roe* is often criticized, indeed scoffed at, for basing the right to privacy in “penumbras” and “shadows” of the Bill of Rights. However, it was *Griswold*, not *Roe*, which based the right to privacy in “penumbras” and “shadows” of the many provisions of the Bill of Rights.

To support the holding in *Roe*, the Court cites its many previous cases that recognized constitutional protection for a right to privacy, such as *Union Pacific v. Botsford*, 141 U.S. 250 (1891), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), *Griswold v. Connecticut*, 381 U.S. 475 (1965), *Eisenstadt v. Baird*, 405 U.S. 92 (1972), and an important dissent by Justice Harlan in *Poe v. Ullman*, 367 U.S. 497 (1961), a pre-*Griswold* right to contraceptives case. *Id.* at 152. For discussion of these cases, see *supra* and Appendix B. However, these cases were not consistent on the doctrinal basis for the right to privacy itself. The Court, therefore, reviewed the potential sources of the right to privacy:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at

² To the criticism that setting a rule at viability was wrong because viability changes, keep in mind that actually, viability has not changed since *Roe* was decided. Then, the Court stated that “Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.” *Id.* at 160. This is in fact still true. The major medical advances have been in the outcomes between 24 and 28 weeks; the percentage of babies born during that time period that survive has increased and medical outcomes have improved. Viability has not moved earlier than 24 weeks.

least the roots of that right in the First Amendment, . . . in the Fourth and Fifth Amendments, . . . in the penumbras of the Bill of Rights, . . . in the Ninth Amendment, . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, . . .

Id. at 152-53 (citations omitted). The Court then notes that the right to privacy has been extended to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.

Id. at 152-53 (emphasis added).

The plaintiff in Roe had argued that there were three possible bases for constitutional protection of a pregnant woman's right to choose to terminate her pregnancy:

[T]he concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut*, ; *Eisenstadt v. Baird*, (1972); *id.*, (White, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut* (Goldberg, J., concurring).

Id. at 129. In response, the Court acknowledged that it had in the past grounded a constitutional right to privacy in these three separate aspects of the Constitution, distinguishing between, among others, the penumbras of the Bill of Rights, relied on by *Griswold v. Connecticut*; the Ninth Amendment, relied on by Justice Goldberg in concurrence in *Griswold*, *id.* at 486 (Goldberg, J., concurring) and the concept of liberty guaranteed by the first section of the Fourteenth Amendment, citing *Meyer v. Nebraska*, but indicated a clear preference for the liberty right found in the Due Process Clause of the Fourteenth Amendment. As the Court wrote:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153 (emphasis added). Note that the Court does not even reference *Griswold's* penumbra analysis in this final sentence setting out what it feels are the two possible bases of the right. *Id.* Note also that Justice Stewart expands on the doctrinal basis adopted by the Court, advocating in concurrence that the right to abortion should have been grounded directly in the liberty right, without the intermediary "right to privacy."

2. The Trimester System and Balancing Rights

As noted above, the Court did not grant what it called an "absolute" right to the pregnant woman. *Id.* at 153. Instead, as with all fundamental rights, the Court balanced the individual liberty at stake against the state's claimed interests in the restrictions. In its balancing, the Court recognized the changing nature of pregnancy, both in terms of the seriousness of the condition itself, the medical complications that can occur during pregnancy, and the relative risks faced by women who carry to term versus those who choose to terminate their pregnancies early. For all the criticism of the trimester framework, the framework recognized a fact, still true

today, which is that the medical complexities of abortion procedures, the risks associated with pregnancy, and important facts of fetal development correspond closely with the transitions from trimester to trimester:

At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions.

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

Id. at 153-54. Thus, the Court holds that:

The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. . . [citation omitted]. The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Id. at 159.³

³ Note that in dissent in *Thornburgh*, Justice White uses Roe's phrase, "[t]he pregnant woman cannot be isolated in her privacy" to support his claim that the existence of the fetus makes everything different and to argue that the restrictions on the right should never have been subjected to heightened scrutiny. He differentiates between *Griswold* and *Roe* on this basis:

[T]hat the abortion decision, like the decisions protected in *Griswold*, *Eisenstadt*, and *Carey*, concerns childbearing (or, more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is "fundamental." That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself.

Thornburgh, 476 U.S. at 792-93 n.2 (White, J., dissenting). In concurrence, Justice Stevens responds, taking Justice White to task for his failure to recognize the strength and independence of the woman's liberty interests in abortion. *Id.* at 776 (Stevens, J., concurring) ("There may, of course, be a significant difference in the strength of the countervailing state interest [with respect to restrictions on contraception versus restrictions on abortion], but I fail to see how a decision on childbearing becomes less important the day after conception than the day before. Indeed, if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the postconception decision that is the more serious."). The debate is instructive for understanding many of the contemporary debates as well.

The Court makes three observations in rejecting the argument that the fetus is entitled to a right to life under the Fourteenth Amendment: 1) “throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today,” *id.* at 158; 2) none of the states have criminal abortion statutes that would comply with the Fourteenth Amendment if this were true since none of them prohibit all abortions, *id.* at 157 n.54; and 3) “in nearly all the [circumstances in which the word ‘person’ is used in the Constitution], . . . the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application,” *id.* at 157. The Court holds, therefore, that “[a]ll this, . . . persuades us that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.” *Id.* at 158.

The Court then examines the state’s contention that, “apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and . . . therefore, the State has a compelling interest in protecting that life from and after conception.” The Court refuses to find that “life” begins at conception, noting briefly, “the wide divergence of thinking on this most sensitive and difficult question.” *Id.* at 160.

The state’s interests, the Court held, are “separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes ‘compelling.’” *Id.* at 162-63. As a result, the Court held:

- With respect to the State's important and legitimate interest in the health of the mother, the “compelling” point, in the light of present medical knowledge, is at approximately the end of the first trimester. . . because . . . until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health . . . ;
- [F]or the period of pregnancy prior to this “compelling” point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State;
- With respect to the State's important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 162-65.

3. Whose Right is It?

One aspect of the decision that is regrettable is the limited nature of the Court's analysis of the impact of denying the right to abortion to a woman. In fact, the Court mostly describes the right as belonging to the physician, rather than to the woman at all:

For the period prior to the point at which the state's interest in potential life becomes compelling, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Id. at 163 (emphasis added).

For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

Id. at 164 (emphasis added). Until the point at which state interests become compelling, the Court writes:

[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

Id. at 166 (emphasis added). The only discussion in the majority opinion about the harm to women follows:

[T]he detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id. at 152-53 (emphasis added).⁴

4. On Liberty v. Privacy

⁴ But see id. at 170 (Stewart, J., concurring) (quoting *Abele v. Markle*, 351 F.Supp. 224, 227 (D.C.Conn.1972)) (describing impact of pregnancy, birth and child-rearing on women as "of a far greater degree of significance and personal intimacy than the right[s] . . . protected in *Pierce* . . . or . . . *Meyer* . . .").

Consider whether the mistake in *Roe* was insisting on grounding the right to abortion in a right to privacy which itself was grounded in the liberty right protected by the Fourteenth Amendment, rather than relying directly on the liberty right. Justice Stewart's concurrence makes this argument, stating that the "right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment." 410 U.S. at 170 ("There is no constitutional right of privacy, as such.") (Stewart, J., concurring). The concurrence is worth reading for help in clarifying these distinctions. For example, he argues that:

In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. *Board of Regents v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. [citations omitted].

Id. at 168.

C. The Erosion: Immediate post-*Roe* Limitations on the Right

Even before *Roe*, the strength of the anti-abortion movement had grown considerably and had been successfully targeting state legislatures to prevent a further erosion of criminal prohibitions. Immediately after *Roe*, it set its sights on the Supreme Court. At first the Court responded with strength to these attacks, striking down a ban on a second-trimester method of abortion (saline abortions), a spousal consent requirement and a one-parent consent provision in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). But shortly thereafter, the initial promise of *Roe* began to erode, first for minors, see *Bellotti v. Baird*, 443 U.S. 622 (1979) (setting standards to allow parental involvement requirements as long as a process for obtaining a waiver from those requirements was in place), and then for low-income women, see *Harris v. McRae* 448 U.S. 297 (1980) (upholding Hyde Amendment prohibiting federal funding for abortions in the Medicaid program).

In the early to mid-1980s, in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) and *Thornburgh v. ACOG*, 476 U.S. 747 (1986), the Court struck down mandatory delay and biased counseling provisions, holding that they interfered with the relationship between physicians and patients. These cases perhaps represented the apex of constitutional protections under *Roe*, but Justice O'Connor dissented in *Akron* arguing for a new standard – the "undue burden" standard – to govern review of abortion restrictions. *Akron*, 462 U.S. at 461-62; see also *Thornburgh*, 476 U.S. at 814. Just three years later, in *Webster v. Repro. Health Services*, 492 U.S. 490 (1989), Chief Justice Rehnquist wrote an opinion declining to consider directly whether *Roe* should be overturned but calling on states to enact bans on abortion to challenge *Roe* directly. When *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), was argued just three years later, therefore, many feared *Roe* would be overturned completely.

D. The Shift: *Casey* – "Undue Burden" and "Substantial Obstacle"

When the Court issued its decision in *Casey* three years later, many choice supporters were relieved

that the Court had not completely overturned Roe. However, the harm done by Casey was significant. The Court abandoned Roe's strict scrutiny standard in a plurality opinion issued by Justices O'Connor, Kennedy and Souter. Although the Court said it was not overturning Roe's central premise that abortion is a fundamental right, the Casey decision adopted a version of the "undue burden" standard Justice O'Connor had advocated in the 1980s, see *supra*, opening the door to a host of state and federal criminal restrictions designed to steer women away from abortion and to promote the rights of the fetus throughout pregnancy.

1. Reaffirming Roe

The Court wrote:

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

Id. at 846. Under this framework, the Court struck down a spousal notice provision, but upheld a mandatory delay and biased counseling provision, indicating for the first time that the state could attempt to "dissuade" women from choosing abortion, as long as the information it gave was "truthful and not misleading." As a result, mandatory delay and biased counseling laws proliferated throughout the country. Some aspects of them could be challenged but mostly these laws were upheld by the lower courts.

2. Defining "Undue Burden"

An "undue burden" is a restriction that has the purpose or effect of placing a substantial obstacle in the woman's path. In adopting the undue burden analysis, the plurality pointed to previous uses of the term "unduly burdens" in the Court's abortion cases, admitting that the term had been used inconsistently. *Id.* at 876 ("The concept of an undue burden has been utilized by the Court as well as individual Members of the Court, including two of us, in ways that could be considered inconsistent."). The standard they were adopting to which they "intended to adhere" was defined as follows:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Id. at 877. But one can also argue (as many defending state restrictions on abortions have) that what the Court considered an undue burden, a substantial obstacle, was very limited. Consider this quote:

Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874.

3. Rejecting Trimester Framework and Expanding State Interest to Ensure Decision is Informed

The Casey plurality saw cases like *Danforth*, *Akron* and *Thornburgh* as going too far and ignoring the state's interest in potential life. The Court claimed to simply be reemphasizing an interest that *Roe* itself recognized, an interest to which the Court later gave short shrift. Id. at 871. However, the Court also admitted that the trimester framework, adopted in *Roe*, conflicted with the interest it would set forth, and abandoned the trimester framework altogether.

We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. See *Webster v. Reproductive Health Services*, 492 U.S., at 518, 109 S.Ct., at 3056-3057 (opinion of Rehnquist, C.J.); *id.*, at 529, 109 S.Ct., at 3063 (O'Connor, J., concurring in part and concurring in judgment) (describing the trimester framework as "problematic"). Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced in that case.

Id. at 873.

4. Limiting the State Interest in Potential Life

Note that the Court appears to limit the state interest in protecting potential life to circumstances where the means chosen by the State to further the interest in potential life is "calculated to inform the woman's free choice, not hinder it." Id. at 877. Again, the Court writes:

[E]ven in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term . . . It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.").

Id. at 873 (emphasis added).

5. Affirming the Need for a Health Exception

The Court upheld the medical emergency provision in the statute, but only by incorporating the Court of Appeals' broad interpretation of the provision to include serious health conditions that otherwise might not be considered "medical emergencies" under the statutory definition. *Id.* at 880 ("While the definition could be interpreted in an unconstitutional manner, the Court of Appeals construed the phrase 'serious risk' to include those circumstances.). The Court thus continued a long line of decisions requiring that abortion regulations not threaten women's life or health. *Id.* at 879. In quoting the Third Circuit decision, though, the Court, perhaps unintentionally, injected the word "significant" into the health debate.

[The Third Circuit] stated: '[W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman.' *Ibid.*

Id. at 880.

6. Recognizing Women's Equality

Ironically, though the Court seriously restricted the rights to abortion, the Court in *Casey* also recognized the necessity of abortion to women's equality, something *Roe* had not done:

For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, e.g., R. Petchesky, *Abortion and Woman's Choice* 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

Id. at 856. This has opened up much more discourse about whether the right to abortion would have been better protected under a sex equality analysis.

7. Upholding Stare Decisis

The decision includes a very long section applying principles of stare decisis to decide whether to overrule *Roe*. In the end, it was this analysis that saved *Roe*. As the plurality writes:

[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*. We turn now to that doctrine.

Id. at 853

The holding was based in great part on stare decisis, and begins, famously, with the sentence, "Liberty finds no refuge in a jurisprudence of doubt," *id.* at 844, widely thought to have been penned by Justice Kennedy.

E. The Ban: Carhart I and II

Beginning in the mid-1990s, anti-abortion advocates began a nationwide campaign to ban something they called “partial-birth abortion.” The campaign was designed to weaken abortion jurisprudence by striking at two of its bedrock principles: the viability line and the requirement that abortion restrictions must never put women’s health in jeopardy; the woman’s health must always remain the “physician’s paramount consideration.” *Thornburgh v. ACOG*, 476 U.S. 747, 768-69 (1986) (striking statute because it did not require that maternal health was doctor’s paramount consideration).

To reach its goals, the campaign depended on two myths. The first was that the term “partial-birth abortion” referred to a specific procedure. In fact, the term itself was developed as part of the campaign and has no medical meaning; it means only what it is defined to mean in the latest statute under consideration. The second myth was that “partial-birth” has something to do with abortions taking place at birth, in other words, at full term or at least “post-viability.” Though easily disproved (the laws had no gestational limits and used broad language that could apply to abortions starting at least early in the second trimester), this myth, coupled with the drawings of babies born at full term used to advocate for the bills in advertising and legislative advocacy, was so powerful that after 10 years of correcting this notion in courts and in the press, the belief that “partial-birth abortions” equal “post-viability” abortions is still prevalent.

In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court struck down a Nebraska statute that was part of the first wave of state statutes banning so-called “partial-birth abortions” for two reasons. First, the Court held that the statute was unconstitutional because it would ban dilation and evacuation (D&E)⁵ abortions which account for approximately 90% of all second-trimester abortions, and not just “intact D&E” abortions as Nebraska claimed.

Second, the Court also struck the statute for its failure to contain any provision that would allow physicians to perform banned procedures where necessary to protect the health of women seeking abortions. *Id.* at 937-38. The Court held that where the evidence was divided on whether banning a particular method of abortion would endanger women’s health, and as long as there was strong proof⁶ that the woman’s health would be endangered, the Court would require an exception to allow the procedure where it was “‘necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.’” *Id.* at 938 (quoting *Casey* at 879). The Court explained:

[T]he uncertainty means a significant likelihood that those who believe that [intact D&E] is a safer abortion method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences. If they are wrong, the exception will simply turn out to have been unnecessary.

⁵ A dilation and evacuation abortion is a surgical procedure used starting at approximately 14 weeks in pregnancy. Forceps and suction devices are used to remove the fetus from the uterus and fetal disarticulation usually, but not always, occurs. Most physicians attempt to remove the fetus as intact as possible. An “intact D&E” is a variant of the procedure in which doctors attempt to remove the fetus completely intact.

⁶ The proof, the Court held, must include “substantial medical authority,” and cited the qualifications of the experts and the opinion of the American College of Obstetricians and Gynecologists as constituting that authority. *Id.* at 938.

Id. at 937. This rule could be thought of as the “tie goes to the woman” rule.

1. Congress Responds to the Court

Dissatisfied with the result in *Stenberg*, Congress, just three years later, enacted its own ban, the Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (“the federal abortion ban” or “the Act”) (codified at 18 U.S.C. § 1531). Rather than enacting a law that conformed to *Stenberg*, Congress sought to overturn that ruling, making findings in the Act that criticized factual findings of numerous federal district courts.

The Act’s chief Senate sponsor, former Senator Santorum, directed his comments to the Court: “I hope the Justices read this record because I am talking to you. . . . [T]here is no reason for a health exception.” 149 Cong. Rec. S3456, S3486 (daily ed. Mar. 11, 2003). In the Act, Congress demanded that the Court defer to Congress’s findings, namely, that “partial-birth abortion is never necessary to preserve the health of a woman” and actually “poses significant health risks.” See Act §§ 2(5)-(7), Appendix to Petitioners’ Brief 2a-3a.

2. The Court Responds to Congress

In 2007, when a newly constituted Court – Justice Alito having replaced Justice O’Connor⁷ – considered the constitutionality of the federal ban in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the Court abruptly changed course. It held that, unlike the Nebraska law, the federal ban could be interpreted as a ban on “intact D&E” that it claimed would leave “most” non-intact D&Es unrestricted. It held that the law did not, therefore, pose a “substantial obstacle” to women seeking second trimester abortions. *Carhart*, 127 S. Ct. at 1629.⁸ In the 5-4 decision written by Justice Kennedy, the Court also ignored the findings of the two district courts before it – and the numerous district courts in previous opinions – which found that intact D&E procedures were significantly safer than non-intact procedures, and upheld the ban despite its lack of a health exception. Id. at 1636-38. In the process, the Court overruled the *Stenberg* “tie goes to the woman” rule.⁹ With even more evidence of “substantial medical authority,” and an even more “significant body of medical opinion” supporting plaintiffs than was in front of the *Stenberg* Court, and remarkably weak evidence disagreeing, see *Carhart*, 127 S. Ct. at 1642-46 (Ginsburg, J., dissenting), the Court held that “medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.”¹⁰ Id. at 1637 (emphasis added). Now,

⁷ Chief Justice Roberts also replaced Chief Justice Rehnquist but this is considered a wash, given that their votes in abortion cases are likely to be the same.

⁸ The Court also held that the Act was not unconstitutionally vague. 127 S. Ct. at 1628-29.

⁹ In a bizarre attempt to distance itself from the *Stenberg* holding, the Court tries to pass off *Stenberg*’s holding as merely the plaintiffs’ “interpretation” of *Stenberg* by quoting the respondents quoting *Stenberg*, as follows:

. . . relying on the Court’s opinion in *Stenberg*, respondents contend that an abortion regulation must contain a health exception “if ‘substantial medical authority supports the proposition that banning a particular procedure could endanger women’s health.’”

Carhart, 127 S. Ct. at 1638 (quoting Brief for Respondents in No. 05-380, p. 19 (quoting 530 U.S. at 938)).

¹⁰ The Court’s limitation of this ruling to a “facial attack,” see *Carhart*, 127 S. Ct. at 1636 (“Act can survive this facial attack” “when this medical uncertainty persists”) leaves open the possibility that the Court would resolve a similar evidentiary “tie” in the woman’s favor if faced with one in an as-applied challenge.

the tie goes to the State.

3. Causes for Concern

The most disturbing segment of the Carhart opinion¹¹ is the Court's examination of whether the Act imposes an undue burden because "its purpose . . . is to place a substantial obstacle in the path of a woman seeking a [previability] abortion," see Carhart, 127 S. Ct. at 1632 & 1632-1635, in which the Court expounds at great length about the government's ability to "use its voice and its regulatory authority to show its profound respect for the life within the woman." Id. at 1633. This aspect of the decision provoked horrified reaction because it seemed to accept a great anti-abortion myth, that abortion harms women^{12 13} by causing "severe depression and loss of esteem," id. at 1634. And it caused great concern and offense with its use of terms like "infant life," and "child assuming the human form" to describe the fetus. Carhart, 127 S. Ct. at 1634. Cf. Roe, 410 U.S. 113, 156-160 (1973) (declining to adopt one theory of life and recognizing the importance of the judiciary showing respect for the "wide divergence of thinking on this most sensitive and difficult question"). Finally, it was soundly criticized for its justification of a total ban of a procedure on the basis that women do not receive enough information about the procedure. Id. at 1633-34 (stating the ban "furtheres the Government's objectives" because there is a "lack of information concerning the way the fetus will be killed").

4. Reassurances

Despite the dangerous aspects of the opinion, strong arguments can be made that Carhart eliminates neither the core decision-making aspect of the right to abortion, nor the rule that a State may not restrict access to abortions that are "necessary, in appropriate medical judgment,

The problem is that few women and doctors have the time, much less the inclination or ability, to bring their case before the Supreme Court when faced with a difficult medical diagnosis, such as a bleeding placenta previa, or chorioamnionitis (infection of the uterine lining).

¹¹ There is much to be disturbed by in the opinion. See, e.g., Priscilla J. Smith, "A Restrained View," Balkinization (April 26, 2007) ("Restrained"); Priscilla J. Smith, "More or Less Restraint," Balkinization (May 9, 2007) both available at <http://balkin.blogspot.com/search?q=priscilla+Smith+and+carhart>; see also Michael Dorf, "Gonzales v. Carhart and Vasectomies," Dorf on Law (May 6, 2007); see generally Commentary on Balkinization by Jack Balkin, Marty Lederman, Andrew Koppelman, and Mark Graber, available at <http://balkin.blogspot.com/search?q=Carhart>.

¹² For a discussion of the woman-protective, anti-abortion campaign, see generally Reva Siegel, *The New Politics of Abortion: an Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. Ill. L. Rev. 991 ("New Politics"), in the face of the many studies examining these claims and rejecting them outright. See Carhart, 127 S. Ct. at 1648 & n.7 (Ginsburg, J., dissenting) ("neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have . . .") (quoting Cohen, *Abortion and Mental Health: Myths and Realities*, 9 Guttmacher Policy Rev. 8 (2006)).

¹³ Consider why the discussion of the "abortion harms women" claims are in the case at all. Plaintiffs' "substantial obstacle" undue burden claim was based, as indicated above, on the claim that the prohibition would prevent physicians from performing the non-intact D&E, the procedure used for approximately 90% of second-trimester abortion; there was no "purpose prong" claim for the Court to "reject." Id. at 1632 ("we reject this further facial challenge to [the Act's] validity"). The Court clearly went out of its way to add this discussion.

for preservation of the life or health of the mother.”¹⁴ One could also argue that Carhart’s recognition of a state interest in preventing women from regretting their abortions is unique, limited to these facts alone where, the Court presumes, women would discover only after the fact, that they had had an abortion by intact D&E. At the least, the state interest cannot serve to justify bans on abortions for which there are no “substitutes.” *Gonzales v. Carhart*, 127 S. Ct. at 1633.

Notably, the Court also wrote that it was “assum[ing]” long-standing principles of abortion jurisprudence “for the purposes of this opinion,” *id.* at 1626, rather than reaffirming them. This seems designed to undermine the principles and create a sense of temporariness.

5. Prompts and Provocations

Justice Ginsburg provides what may be a silver lining in dissent with three other Justices joining, where she bemoans the decision and describes the right as central to notions of autonomy and equality:

[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.

Id. at 1641.

III. Criticisms of *Roe v. Wade* and Constitutional Protection for the Right to Abortion and Some Responses

Scholarly opposition to constitutional protection for the right to abortion generally falls into two overlapping categories. First, there are those who argue that the judiciary is the wrong avenue for protection of reproductive rights, and that the issue is more appropriately left to the legislative arena. Second, there are those who believe that abortion is immoral, and the fetus is a living human being who should be protected by the constitutional right to life. Some of those in the second group support their argument in part by reference to the arguments made by the first group. Scholars in both groups also attack *Roe* for poor judicial reasoning.

Many of the arguments made by those in the first group place *Roe* at the center of a much larger discussion about how to resolve what has been called the dilemma of Madisonian Democracy. See, e.g., Paul Brest, *The Fundamental Rights Controversy: the Essential Contradictions of Normative Constitutional Scholarship*, 90 *Yale L. J.* 1063, 1096 (1981). A Madisonian democracy is not purely democratic, in the sense that it is not completely majoritarian. Instead,

¹⁴ One could argue that women’s health can’t be the physician’s paramount consideration where health considerations that are less than “significant” in Justice Kennedy’s view can’t be doctor’s concern. However, in Justice Kennedy’s view, the health rule never protected what he called in the past “marginal” threats to health. See Stenberg, 530 U.S. 914, 967 (2000) (“[w]here the difference in physical safety is, at best, marginal, the State may take into account the grave moral issues presented by a new abortion method.”) (Kennedy, J., dissenting); *id.* at 968 (“Unsubstantiated and generalized health differences which are, at best, marginal, do not amount to a substantial obstacle to the abortion right.”) (Kennedy, J., dissenting). The holding dictated by him in *Carhart* that does not protect what he thinks of as health differences that are, “at best, marginal” does not, therefore, eliminate the rule that the woman’s health must be the physician’s paramount consideration. It does mean that if Justice Kennedy remains the deciding vote, plaintiffs will have to prove that regulations impose significant health differences.

there are some areas of life which the majority should not control, including individual freedom. As noted conservative Professor Robert Bork agrees, “coercion by the majority in these aspects of life is tyranny.” *Id.* (quoting Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L. J.* 1, 2-3 (1971)). The question, though, is how to determine which areas of life should be protected from the majority.

A. Originalism

One of the most common criticisms of *Roe* is that it recognized a right that the Founders never meant to protect. Allowing the Court to define the notion of “liberty” protected under the Due Process Clause in accordance with current notions of freedom and viewing the Constitution as a “living” document, these scholars argue, is unprincipled, undemocratic, and leaves constitutional protections up to the whims of the “activist” judge. Instead, these scholars claim, the Constitution should be held to protect only those rights it specifically “enumerates” or those that were within the “original understanding” of those who drafted and ratified the document. See generally Richard Fallon, Jr., *How to Choose a Constitutional Theory*, 87 *Cal. L. Rev.* 535, 541-2 (1999) (outlining types of theoretical approaches).

Some Responses:

- Within an originalist framework, one can argue that abortion may well have been within the “original understanding” of the Founders. Abortion was legal until “quickening” (approximately 20 weeks of pregnancy), until the 1860s when a movement to criminalize abortion spearheaded by the American Medical Association resulted in criminal bans on abortion throughout the country.
- As Richard Fallon points out, “originalists candidly admit [that] originalist principles cannot explain or justify much of contemporary constitutional law.” Fallon at 547-48. Review Justice Harlan’s dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), *supra*, for examples of areas where the Court has gone beyond “enumerated rights” and interpreted Constitutional provisions more broadly. As Harlan wrote:

However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights “which are . . . fundamental; which belong . . . to the citizens of all free governments,” . . . for “the purposes (of securing) which men enter into society,” . . . Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights. . . . Indeed the fact that an identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government, suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.

Poe v. Ullman, 367 U.S. at 542 (citations omitted).

B. Representation Reinforcement Theory

Another text-based theory that is somewhat broader than originalism is John Hart Ely's "representation reinforcement theory." Ely argues that the text of the Constitution allows some identification of rights from outside the Constitution's text, both because some specific provisions allow judges to do so and because the original understanding of others was that they were open-ended. However, he warns that judges should not stray far from the text and are better off leaving controversial issues to legislatures. See Fallon, 87 Cal. L. Rev. at 542. Ely wrote one of the first articles criticizing Roe on this basis. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973).

This argument is just another version of the argument made by then-Justice Rehnquist in dissent. Rehnquist agreed that the liberty protected by the Fourteenth Amendment embraces more than the rights found in the Bill of Rights. He stated, though, that:

[L]iberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson*, supra. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

Roe, 410 U.S. at 173.

C. Backlash from Roe

Some progressives have jumped on this bandwagon, claiming to be "pro-choice," but arguing that backlash to Roe has hurt the progressive movement generally and that Roe put to a halt a reform movement that was sweeping through the state legislatures. Their argument is that if only the Court had left the issue to the people, women would be protected, the abortion issue would not be so divisive and the right would not have gained strength from opposition to Roe. Sanford Levinson and Jack M. Balkin Debate, *Legal Aff. Debate Club*, Nov. 28, 2005, at http://www.legallaaffairs.org/webexclusive/debateclub_ayotte1105.msp.

Some responses:

- Professors Robert Post and Reva Siegel have written a powerful article arguing that "backlash" against Roe was part of a normal and healthy democratic process, one they call "democratic constitutionalism," not a sign that Roe was wrongly decided. Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373 (2007). They also point out that *Brown v. Board of Educ.* also caused a great deal of backlash. In summary, the authors argue that in the case of both Roe and Brown, the Court's actions engendered great public debate which became part of the political process. The public expresses its approval or disapproval with judicial decisions which impacts the electoral process and therefore judicial appointment. This is, they posit, the way the Founders meant it to work.

- Justice Harlan addressed this idea, again in *Poe v. Ullman*:

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 postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Poe v. Ullman, 367 U.S. at 542.

- Historians have also undermined the idea that the pro-choice movement was on its way to winning legislative protections for abortion in a significant number of states. The early successes of the pro-choice movement had stalled.
- Historians have also disproved the argument that *Roe* itself galvanized the right wing. Instead, the anti-choice movement, led at the time by the Catholic Church, had organized in full force in opposition to the movement to liberalize abortion laws in the state legislatures.
- Others have argued that entrenched precedent becomes a part of the Constitution because it reflects “widely shared and enduring values and assumptions.” Fallon at 546 (discussing Bruce Ackerman’s “practice-based theory”).

D. Sex Equality Analysis Through Equal Protection or Liberty/Dignity/Autonomy Frame

Consider asking your Constitutional Law professor whether the right would have been more properly protected under a sex equality analysis. Of course, this will not work if your professor opposes constitutional protection because s/he believes that the fetus is a person whose “right to life” should be protected under the Constitution.

Some scholars who support constitutional protections for the right to abortion argue that the right is better protected under the Fourteenth Amendment’s protections for equality or under developing rights to sexual liberty, rather than under the privacy analysis used in *Griswold*. An excellent summary of these arguments can be found in Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 *Emory L.J.* 815 (2007). As Siegel explains,

[A] sex equality analysis of reproductive rights views the social organization of reproduction as playing a key role in determining women’s status and welfare and insists—custom notwithstanding—that government regulate relationships at the core of the gender system in ways that respect the equal freedom of men and women. Whatever sex role differences in intimate and family relations custom

may engender, government may not entrench or aggravate these role differences by using law to restrict women's bodily autonomy and life opportunities in virtue of their sexual or parenting relations in ways that government does not restrict men's. On this view, laws imposing gender-specific burdens on women's sexual and parenting relations are constitutionally suspect. The longstanding tradition of imposing such burdens on women does not strengthen the law's claim to constitutional legitimacy and may instead weaken it.

Id. at 815-16. Justice Ginsburg, who was one of the first to advocate for a sex equality approach in this area, discussed this alternate grounding in her dissent in *Gonzales v. Carhart*, *supra* (joined by three other Justices).

Theoretically, the right could be enforced through a number of different constitutional frameworks. The most likely would be either through an equality analysis that was considered part of a substantive due process liberty claim or as part of an Equal Protection Clause claim.

E. Balancing the Interests of the Fetus and the Woman

If opposition to *Roe* is expressed as an improper balancing of the interests of the woman and the interests of the fetus, you can provoke discussion of how the interests should be balanced, viz., the woman's interest in her own bodily integrity, health and decisional autonomy, as against the interest in the zygote and the fetus at varying stages of gestation. One outgrowth of this argument has been the strengthening of the State's interest in protecting potential life, both in *Casey* and most recently in *Gonzales v. Carhart*. Consider whether the real problem has been an insufficient understanding of the woman's liberty interest: the importance of her ability to decide whether to be a parent and the ability to decide how to raise a child; the significant impact of pregnancy on a woman's health; the importance of control of a woman's reproduction to her sense of self and her economic and social status.

Some responses:

- A fetus does not have legal personhood and is, therefore, not accorded the rights of a person under the Constitution.
 - And assuming, *argüendo*, that a fetus were considered a person and did have rights derived from the Constitution, that does not mean it would or should trump the rights of the woman.
- Courts do not compel people to put their own health or lives in danger in order to save other people.
 - For example, a parent who is a bone marrow transplant match cannot be compelled to undergo the procedure in order to save a child's life.
 - Therefore, even if the fetus is considered a person, an adult woman should not be forced to surrender her own liberty interests in order to bring the fetus to full term.
- As the Court in *Roe* wrote persuasively, there are many different religious, medical and ethical views of the beginning of life. The Court should not step in to adopt one view of the matter, thus negating others views.

IV. Conclusion

This primer summarized the evolution of constitutional protection for reproductive autonomy, as well as major criticisms thereof. Used wisely, this tool will help you stimulate robust classroom discussions, challenge common assumptions and misrepresentations of Roe, and deepen your understanding of a crucial and often under-covered body of constitutional law.

Appendix A: Doctrinal Sources of the Rights to Privacy, Liberty, and Equality

1. The Law of England

In interpreting the U.S. Constitution, some consider sources discussing English law shortly before the American Revolution. For sources that could be considered to support a liberty right to reproductive autonomy, consider Sir William Blackstone's Commentaries on the Laws of England, first published over 1765–1769, in which he described the “absolute rights” or “liberties” of the “Englishman” as comprising three principles: the right of personal security; the right of personal liberty; and the right of private property. William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, Vol. 1 at 123, 125 (University of Chicago Press 1979). Blackstone wrote: “the right of personal security consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation,” *id.* at 125, and “preservation of a man’s health from such practices as may prejudice or annoy it,” *id.* at 130.

Blackstone also discusses the right to life in relation to the status of the fetus recognizing that abortion was illegal at ancient law after “quickening” of the fetus (which was generally described as the point at which the woman feels fetal movement, which can occur sometime around 4-5 months into the pregnancy). Interestingly, according to Blackstone the crime was not considered murder but the lesser crimes of homicide or manslaughter. Blackstone also claims that at the time he wrote the Commentaries, abortion after quickening was “not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor.” *Id.* at 126-27.

2. The United States Constitution

- a. The First Amendment to the U.S. Constitution, ratified in 1791, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- b. The Fourth Amendment to the U.S. Constitution, ratified in 1791, provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . . but upon probable cause . . .”

- c. The Fifth Amendment to the U.S. Constitution, ratified in 1791, provides:

“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”

- d. The Ninth Amendment to the U.S. Constitution, ratified in 1791, provides:

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

- e. The Thirteenth Amendment to the U.S. Constitution, ratified in 1865, provides:

“Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the part shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.

“Section 2. Congress shall have power to enforce this article by appropriate legislation.”

f. The Fourteenth Amendment to the U.S. Constitution, ratified in 1868, provides:

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

“Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”

g. The Nineteenth Amendment to the U.S. Constitution, ratified in 1920, provides:

“[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

“[2] Congress shall have power to enforce this article by appropriate legislation.”

Appendix B: Supreme Court Cases Protecting and Restricting Contraception and Abortion

1. Pre-Roe Era

1891 – *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891): In a personal injury case brought against the railroad, the Court rejected a defendant’s attempt to compel the plaintiff to submit to a physical examination. The Court wrote, “no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . .” *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891) (emphasis added).

Note: Although this discussion arises in the context of a personal injury case, not a case about the scope of constitutional protection, it is seen as the first recognition in case law of a right to bodily autonomy.

1923 – *Meyer v. Nebraska*, 262 U.S. 390 (1923): In the early 1920s a Nebraska teacher was charged with violation of a state law prohibiting the teaching of foreign languages to students who failed to pass the eighth grade. The Court held that the law “infringe[d] the liberty guaranteed” by the Due Process Clause of the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Although liberty had not before been defined by the Court “with exactness,” the Court explained that liberty:

[W]ithout doubt, . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. The Court went on to hold that the teacher’s “right . . . to teach [German] and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.” *Id.* at 400. The law was seen as interfering with “the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.” *Id.* at 401.

This 1923 post-*Lochner* Court also went on to state clearly that “[d]etermination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.” *Id.* at 400.

1925 – *Pierce v. Society of Sisters*, 268 U.S. 510 (1925): Just two years later, the Court struck down an Oregon law requiring all “normal children,” ages 8-16, attend public school through the eighth grade. Private schools asserted the rights of parents to choose to send their children to private schools, the rights of the child to influence the choice of school and the rights of schools and teachers to engage in a useful business. *Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925).

Relying on *Meyer* and the liberty interest guaranteed in the Fourteenth Amendment Due Process Clause, the Court held “we think it entirely plain that the Act . . . unreasonably interferes

with the liberty of parents and guardians to direct the upbringing and education of children under their control.” *Id.* at 534-535. The Court applied what it called a “reasonable relationship” review. *Id.* (holding that rights guaranteed by the Constitution “may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state”).

1928 – *Olmstead v. United States*, 277 U.S. 438 (1928): It was Justice Brandeis writing in dissent from a decision involving evidence obtained through wiretaps, who first fully articulated the right to privacy as an aspect of underlying liberties preserved by the people under the Constitution.

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting) (1928) (emphasis added).

Note: This case is frequently quoted as the first true discussion of “privacy” and the “right to be let alone.” Note also that Justice Brandeis recognizes that the right to control your own destiny is essential to the pursuit of happiness.

In response to originalist objections to his stance, he explained that in interpreting the scope of protections guaranteed by the Bill of Rights, in that case specifically the right against search and seizure guaranteed by the Fourth Amendment, and the right against self-incrimination guaranteed by the Fifth Amendment, the Court must look to the underlying purposes of the Bill of Rights, not just to their literal words. He quoted earlier decisions of the Supreme Court where Justices had written that “a principle to be vital must be capable of wider application than the mischief which gave it birth.” *Id.* at 473 (internal quotations omitted).

Justice Brandeis also argues that the founders sought through the Constitution “to protect Americans in their beliefs, their thoughts, their emotions and their sensations.” *Id.* at 478. This is the closest anyone would get to arguing for a right that includes sexuality for many years to come.

1942 – *Skinner v. Oklahoma*, 316 U.S. 535 (1942): In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), a unanimous Court held that forced sterilization of prisoners convicted of two or more felonies involving “moral turpitude” violated the Equal Protection Clause. The Court points out some of “the inequalities in th[e] law,” which, for example, subjects someone convicted of grand larceny twice to the law but not someone convicted of embezzlement twice, even though the nature of the two crimes is intrinsically the same and they otherwise are punishable in the same manner. *Id.* at 539. As the Court writes:

[W]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and

survival of the race. . . [A person subjected to the law is] forever deprived of a basic liberty.

Id. at 541. Finally, the Court holds:

[W]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an [sic] invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Id. at 541. Because it rules on the Equal Protection Clause claim, the Court declines to decide on the procedural due process and cruel and unusual punishment claims. Id. at 538.

Note: This was the first case in which the Court specifically recognized that marriage and procreation are “fundamental,” and “basic civil rights of man.” Id. at 541. The Court explains that application of strict scrutiny to the law’s classifications is essential “in a sterilization law . . . , lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.” Id. at 541.

1961 – *Poe v. Ullman*, 367 U.S. 497 (1961): In this challenge to Connecticut’s laws restricting access to birth control, decided just four years before *Griswold*, the Court avoided the constitutional challenge, holding there was no justiciable controversy because there was no evidence that the plaintiffs were at risk of prosecution. Justice Harlan dissents, providing an eloquent defense of substantive due process protection of liberty, and argues that the liberty interest protects the right to contraception. His dissent addresses many of the arguments that are later levied against *Roe*.

Notes: Justice Harlan rejects the idea that the Due Process Clause is meant to protect only procedural due process, arguing that “due process” has been a broader concept. He then rejects the idea that liberty protects only the specific guarantees of the first eight amendments, pointing out that otherwise the protection of “liberty” would have been superfluous and states that the Court’s concept of due process has been “more flexible.”

Harlan also refutes text-based challenges to liberty protections for reproductive liberty, articulating the idea of a “living” Constitution, as opposed to one that protected only the rights in place at the time it was adopted. In response to the argument that the “living” Constitution is unmoored from democracy, he argues that if a decision “radically departs” from the country’s “traditions,” it “could not long survive,” recognizing democratic involvement in Supreme Court doctrine. Id. at 542-43. For a modern discussion of this dialogue between legislatures and the Courts see Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373 (2007).

Justice Harlan describes the development of liberty interests under the Constitution as a “rational continuum,” of which *Meyer* and *Pierce* are a part. He then argues that “[e]ach new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.” Id. at 543.

1965 – *Griswold v. Connecticut*, 381 U.S. 479 (1965): Four years later, the Court was ready. In an opinion written by Justice Douglas, the Court held that a Connecticut law prohibiting the use of contraception was an unconstitutional intrusion on the rights of married couples. First, the Court distinguished the case from *Lochner v. State of New York*, 198 U.S. 45

(1905), rejecting the argument that the Court would be overstepping its bounds if it overruled the state legislature because of the “intimate relation” involved here:

We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

Id. at 481-82.

As support for its decision, the Court cites *Pierce* and *Meyer* and other cases that recognized rights beyond those specifically delineated in the Constitution. For example, the Court cites interpretations of the right to free speech as including the right to receive information, and the freedom of the entire university community. Id. at 482. The Court points out that “without those peripheral rights,” the specific rights to free speech and a free press would be less secure. Id.

Famously and perhaps unfortunately, the Court then went on to argue that the right to contraception, at least for married people, came from “penumbras” of the specific guarantees of the Bill of Rights. These “penumbras” were:

formed by emanations from those guarantees that help give them life and substance. See *Poe v. Ullman*, 367 U.S. 497, 516-- 522, 81 S.Ct. 1752, 6 L.Ed.2d 989 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

Id. at 484. The Court went on:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Id. at 485-86.

1969 – *Stanley v. Georgia*, 394 U.S. 557 (1969): In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Court reversed a prosecution for possession of obscene material in the privacy of one's own home, holding that the First Amendment protects the right to receive information and ideas and stating that “[t]his right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948), is fundamental to our free society.” Id. at 564.

Note: Importantly, the Court also recognized that the right to receive information took on an added dimension in this case because it involved “mere possession of printed or filmed matter in the privacy of a person's own home.” The Court wrote “[f]or also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy,” thus elevating the right to privacy to “fundamental” status.

1972 – Eisenstadt v. Baird, 405 U.S. 438 (1972) (Baird II): In this case, a non-physician had been convicted under Massachusetts law of exhibiting contraceptives and distributing vaginal foam to an unmarried woman. The Court held that the statute violated the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment, Eisenstadt v. Baird, 405 U.S. 438, 447-448 (1972), because it was not “rationally related to a valid public purpose.” Id. at 447 n.7.

Notes: The Court claimed it was not deciding whether married peoples’ fundamental right to contraceptives extended to unmarried individuals, stating:

[I]f we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold, the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest. . . . But just as in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard.

Id. However, the Court seemed to extend the right when it wrote:

It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id at 453.

2. Roe Era

1973 – Doe v. Bolton, 410 U.S. 179 (1973): Decided the same day as Roe, the court upheld a provision of a Georgia law proscribing abortions except as performed by a duly licensed Georgia physician when necessary in “his best clinical judgment” because continued pregnancy would endanger a pregnant woman's life or injure her health; the fetus would likely be born with a serious defect; or the pregnancy resulted from rape. The Court upheld the law because it held that “health” should be interpreted to include “all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient.” Id. at 192. This, the Court held, “allows the attending physician the room he needs to make his best medical judgment.” Id. (citing United States v. Vuitch, 402 U.S. 62 (1971), in which the Court rejected the argument that the word “necessary” was unduly vague, holding that whether “an abortion is necessary” is a professional judgment that the Georgia physician will be called upon to make routinely).

The Court also struck down procedural requirements of the statute that abortions be conducted in accredited hospitals, requiring the interposition of a hospital abortion committee, requiring confirmation by other physicians, and limiting abortion to Georgia residents.

1973 – *Roe v. Wade*, 410 U.S. 113 (1973): In *Roe*, (described more fully in Section I), the Court struck down a Texas law banning abortions, holding that the right to privacy was broad enough to include the right to abortion. The Court grounded the right to privacy in the liberty protections of the Due Process Clause of the Fourteenth Amendment. As a fundamental right, the Court held that restrictions on the right must be subjected to strict scrutiny. In other words, any restrictions had to be narrowly tailored to serve a compelling state interest.

3. Roe to Casey Era

1976 – *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976): In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court struck down a ban on “saline amniocentesis” abortions after 12 weeks, finding that the banned method was “the one most commonly used nationally by physicians after the first trimester and which is safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth,” and that the ban forced a woman to undergo a method more dangerous to her health than the method outlawed.” *Id.* at 78-79 (holding the regulation unreasonable for protection of maternal health, and “an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks”). The Court also struck down spousal consent and blanket one-parent consent provision on the basis that both unconstitutionally granted a third party “veto power” over the woman’s decision to terminate her pregnancy. *Id.*

On the other hand, the Court upheld a ban on post-viability procedures that made the determination of whether a particular fetus is viable a matter for the judgment of the responsible attending physician. *Id.* at 64 (explaining that any such viability determinations “must be” within physician’s discretion; stating that the statute was in accordance with *Roe*).

In this early decision on a rather benign informed consent statute, the Court also upheld a provision requiring that, “a woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, must certify in writing her consent to the procedure and ‘that her consent is informed and freely given and is not the result of coercion.’” *Id.* at 65.

Note: In evaluating the one-parent consent requirement, the Court held that “[m]inors, as well as adults are protected by the Constitution and possess constitutional rights.” *Id.* at 74. However, the Court appeared to abandon strict scrutiny for restrictions on minors, arguing that they would be valid if they served “any significant state interest . . . that is not present in the case of an adult.” *Danforth*, 428 U.S. at 75.

As to the consent provision, the Court held that:

We could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional. As a consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortion.

Id. at 67.

Perhaps most notable, in rejecting the argument that the word “informed” was vague, the Court reasoned, “[t]o ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.” *Id.* Consider this language when reading the informed consent language upheld in *Casey* and in vogue today.

Given the state of reproductive rights at the time, it appears odd that physicians challenged a post-viability ban giving the physician discretion to determine viability and a consent provision that required only that a woman sign that she did indeed consent to the procedure. Consider a physician’s concern about prosecutorial abuses and a concern about dilution of the right in the first trimester.

Also, consider whether the language holding that the ban was “designed to inhibit, and ha[d] the effect of inhibiting” abortions after 12 weeks was a precursor to the “purpose and effect” language of *Casey*. See *infra*.

1977 – *Carey v. Population Services Int’l*, 431 U.S. 678 (1977): The Court applies the compelling state interest test to strike down a New York law prohibiting distribution of “nonmedical” contraceptives to persons over 16 except through a licensed pharmacist. The Court held the prohibition was unconstitutional not because there was a separate “right of access to contraceptives,” but because “such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing” underlying *Griswold*, *Eisenstadt*, and *Roe*. *Id.* at 688-89.¹⁵ The Court also struck down a provision of the statute that prohibited distribution of contraceptives to persons 16 and under. Four Justices wrote that “[t]he State’s interests in protection of the mental and physical health of the pregnant minor, and in protection of potential life are clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive.” *Id.* at 694-95.

1977 – *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977), all decided on the same day: In all three cases, the Court upheld bans on state and local funding for abortion from Pennsylvania, Connecticut, and the city of St. Louis, respectively. Brennan, with Blackmun and Marshall joining, dissents.

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- In *Maher v. Roe*, 432 U.S. 464, the Court held that the Equal Protection Clause did not require Connecticut to pay for abortions that were “nontherapeutic,” i.e., not medically necessary, even where it paid for childbirth services. Foreshadowing the Court’s decision just three years later in *Harris v. McRae*, 448 U.S. 297 (1980), see *infra*, the Court held that the funding ban was not an invasion of the fundamental right to abortion, stating:

The Connecticut regulation places no obstacles absolute or otherwise in the pregnant woman’s path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut’s decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman’s decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult and in some cases, perhaps, impossible for some women to

¹⁵ The Court also struck down a prohibition of any advertisement or display of contraceptives under the First Amendment.

have abortions is neither created nor in any way affected by the Connecticut regulation.

Maher at 474. The Court then applied the rational basis test and rejected the equal protection argument, holding that the distinction drawn between abortion and childbirth services was rationally related to the “constitutionally permissible” state interest in encouraging normal childbirth. *Id.* at 478-79. The Court also pointed out that the abortion services demanded by plaintiffs were “nontherapeutic” services, whereas the childbirth services provided were medically necessary. *Id.*

- Similarly, in *Poelker v. Doe*, 432 U.S. 519 (1977), the Court held that the refusal of the city of St. Louis to provide publicly financed hospital services for “nontherapeutic” abortions did not deny equal protection, even where it provided such services for childbirth. *Poelker*, 432 U.S. 519, 521.
- In *Beal v. Doe*, 432 U.S. 438 (1977), the Court held that the federal statute establishing the Medicaid program (the federal and state financed program providing healthcare services to low-income people) did not require Pennsylvania to provide funding for nontherapeutic abortions as a condition of participation in the Medicaid program because it was not “unreasonable” under the terms of the statute to further its “strong and legitimate interest in encouraging normal childbirth.” *Beal* 432 U.S. 438, 445-46.

Notes: Consider the funding cases in light of the Court’s earlier recognition in *Carey* that the right to access contraceptives was necessary to exercise the right to use contraceptives.

1979 – *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*): In *Bellotti II*, the Court expands on the standards for evaluating restrictions on minors’ access to abortion, striking down a Massachusetts statute that required a pregnant minor seeking an abortion to obtain the consent of her parents or to obtain judicial approval following notification to her parents. The Court held that states could require parental consent for minors, as long as an alternative hearing was available through which minors could seek a waiver from the requirement if they could prove that they were “mature” or that an abortion was in their “best interests.” These types of parental involvement requirements are currently enforced in 35 states.

The Court also held that the “alternative hearing,” usually referred to today as a judicial bypass, must “be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the “absolute, and possibly arbitrary, veto” that was found impermissible in *Danforth*.” *Id.* at 644.

1980 – *Harris v. McRae*, 448 U.S. 297 (1980): In this case, the plaintiffs challenged the Hyde Amendment, enacted for the first time as a rider to the FY 1977 appropriations bill for the Department of Health and Human Services (then called the Department of Health Education and Welfare). The Hyde Amendment bans federal funding for most abortions in Medicaid and other federal programs and has been renewed annually ever since. Originally the law restricted funding to those abortions necessary to save a woman’s life; in later years funding has sometimes been available for abortions of pregnancies resulting from rape or incest as well.

The Court held that the funding ban did not violate a woman’s right to obtain an abortion because it was not the ban that prevented access to abortion, but rather her preexisting poverty. *Harris v. McRae*, 448 U.S. 297, 316 (1980). The Court writes, “the financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.” *Id.* As it had in *Carey*, the Court rejected the notion that the State has an affirmative duty to provide women with the means to access their reproductive liberties, stating that “the liberty protected by the Due Process Clause . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.” *Id.* at 317-18 (it did not follow from *Roe* that “a

woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices"). But unlike in *Carey*, in this context, the Court failed to recognize that without the ability to access abortions, the right would be a hollow one for low-income women. *Id.*

Having decided that the funding ban did not interfere with a fundamental right and is not based on a suspect classification, the Court then applies the rational basis test to the plaintiffs' equal protection argument. Again, as it had in *Maher*, the Court holds that restricting funding for abortions was not "wholly irrelevant" to the governmental objective of encouraging childbirth over abortion. *Id.* at 322.

In a widely quoted dissent, Justice Brennan, with Justices Marshall and Blackmun joining, charged that the Court misconceived of the manner in which the right to abortion is infringed by state and federal funding bans. The question is not, he states, whether the State has an affirmative obligation to ensure access to abortions or whether the right at issue is a right to guarantee access to abortions. Rather, the issue is "the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose an abortion." *Id.* at 330.

Justice Brennan focuses on "the coercive impact of the congressional decision to fund one outcome of pregnancy – childbirth – while not funding the other – abortion," *id.* at 330 n.4 and considers the ban's consequence, which is "to leave sick women without treatment simply because of the medical fortuity that their illness cannot be treated unless their pregnancy is terminated." *Id.* Viewed this way, the ban "intrudes upon [the right to abortion] for both by design and in effect it serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have." *Id.* As Justice Brennan explains: "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner compel a surrender of all." *Id.* at 337. As he states:

[T]he fundamental flaw in the Court's due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.

Id. at 334.

Justice Stevens filed a separate dissent, joined by Justices Brennan, Marshall and Blackmun, in which he objects to the majority's "sterile" equal protection analysis. Justice Stevens first points out that the challenge in *Harris* was different from those in *Maher*, *Beal* and *Poelker*, in that it challenged the refusal to fund "medically necessary" abortions, rather than the nontherapeutic ones involved in the earlier cases. Here, "[t]he question is whether certain persons who satisfy [the Medicaid eligibility] criteria [including that of medical need] may be denied access to benefits solely because they must exercise the constitutional right to have an abortion in order to obtain the medical care they need." *Id.* at 349 (Stevens J., dissenting). The government, he argues, "must use neutral criteria in distributing benefits. It may not deny benefits to a [n otherwise eligible] person simply because he is a Republican, [or] a Catholic . . . or because he has spoken against a [government] program." The funding ban violates the government's duty to govern "impartially." *Id.* at 357. Justice Stevens also criticizes the majority for its failure to consider the ban's impact on women's health in its rationality argument. The opinion is "doubly erroneous," he writes, because *Roe* stood for the proposition that the state cannot promote its interest in fetal life when a conflict with the pregnant woman's health exists. *Id.* at 351-52 (stating that individual interest in the freedom to elect an abortion and the State interest in protecting maternal health both outweigh the State's interest in protecting potential life prior to viability).

Note: In a separate dissent, Justice Marshall derides the Court's "rigid two-tiered" equal protection approach, stating that the "Constitution requires a more exacting standard of review than mere rationality in cases such

as this one." *Id.* at 341. Moreover, note that none of the dissents described the distinctions at issue as based on gender. What type of analysis do you think should be used to evaluate the plaintiffs' equal protection claim? Consider how the analysis would be different if the claim involved a gender based distinction, viz., between the scope of medically necessary services for women and medically necessary services for men.

1983 – *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983): The Court struck down a second-trimester hospitalization requirement, a parental consent requirement with no bypass, and a mandatory delay provision; but Justice O'Connor dissented and called for a radical erosion of *Roe*. Foreshadowing the plurality opinion in *Planned Parenthood v. Casey*, U.S. 505 U.S. 833, 882 (1992), Justice O'Connor proposed that a lesser standard of constitutional protection, the "undue burden" standard, replace the "strict scrutiny" test for restrictions on abortion:

The "unduly burdensome" standard is particularly appropriate in the abortion context because of the nature and scope of the right that is involved. The privacy right involved in the abortion context "cannot be said to be absolute." *Roe*, supra, 410 U.S., at 154, 93 S.Ct., at 727. "Roe did not declare an unqualified 'constitutional right to an abortion.'" *Maher*, supra, 432 U.S., at 473, 97 S.Ct., at 2382. Rather, the *Roe* right is intended to protect against state action "drastically limiting the availability and safety of the desired service," *id.*, at 472, 97 S.Ct., at 2381, against the imposition of an "absolute obstacle" on the abortion decision, *Danforth*, supra, 428 U.S., at 70-71, n. 11, 96 S.Ct., at 2841- 2842, n. 11, or against "official interference" and "coercive restraint" imposed on the abortion decision, *Harris*, supra, 448 U.S., at 328, 100 S.Ct., at 2694 (*WhiteJ.*, concurring). That a state regulation may "inhibit" abortions to some degree does not require that we find that the regulation is invalid. See *H.L. v. Matheson*, 450 U.S. 398, 413, 101 S.Ct. 1164, 1173, 67 L.Ed.2d 388 (1981).

Acron, at 463-64 (O'Connor, J., dissenting) (emphasis added).

Note: Consider whether the undue burden standard articulated here by Justice O'Connor is more than a rational basis test? As the majority states:

The dissent stops short of arguing flatly that *Roe* should be overruled. Rather, it adopts reasoning that, for all practical purposes, would accomplish precisely that result. The dissent states that "[e]ven assuming that there is a fundamental right to terminate pregnancy in some situations," the State's compelling interests in maternal health and potential human life "are present throughout pregnancy." *Post* at 2508 (emphasis in original). The existence of these compelling interests turns out to be largely unnecessary, however, for the dissent does not think that even one of the numerous abortion regulations at issue imposes a sufficient burden on the "limited" fundamental right, *Post* at 2511, n. 10, to require heightened scrutiny.

Consider whether the undue burden standard adopted in *Casey* is the same standard advocated here. In advocating her new standard, Justice O'Connor points to language in previous decisions using undue burden language. Consider whether this language had the same meaning in those cases as she appears to give it here.

1989 – *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989): The Court upheld a 1986 Missouri statute, which included a declaration of life beginning at conception, a ban on the use of public funds for counseling and on public facilities for providing abortions not necessary to save a woman's life, and a requirement that physicians test for viability of fetuses after 20 weeks gestation. By unanimous vote, the justices declined to address the constitutionality of the public funds provision, accepting Missouri's contention that it would not prohibit publicly employed healthcare providers from counseling patients about abortion

options. By 1989, after the arrival of Justices Kennedy and Scalia and the elevation of William Rehnquist to Chief Justice, there were no longer five votes to preserve reproductive choice as a fundamental constitutional right. This new reality was demonstrated when five justices expressed hostility toward Roe in differing degrees and essentially called for states to pass legislation banning abortion in order to test the law.

1992 – *Planned Parenthood v. Casey*, 505 U.S. 833 (1992): In *Casey*, (described more fully in Section I), the Court reaffirmed the “central principles” of *Roe*, but abandoned the strict scrutiny standard for evaluating restrictions on the right to abortion. In its place, the Court adopted the less protective “undue burden” standard. The Court defined “undue burden” as “a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” The Court upheld a mandatory delay and biased counseling provision that would have been struck down under previous case law, but threw out a spousal notice provision.

4. 21st Century Era

2000 – *Stenberg v. Carhart*, 530 U.S. 914 (2000): In *Stenberg*, (described more fully in Section I), the Court struck down a Nebraska statute that was part of the first wave of state statutes banning so-called “partial-birth abortions” for two reasons. First, the Court held that the statute was unconstitutional because it would ban the dilation and evacuation procedure (“D&E”), which accounted for approximately 90% of second-trimester abortions. It was not limited to the “intact D&E” abortion, a variant of D&E that was rarer. Second, the Court struck the statute for its failure to contain any provision that would allow physicians to perform banned procedures where necessary to protect the health of women seeking abortions. *Id.* at 937-38.

2006 – *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006): In this case, the plaintiffs challenged New Hampshire's parental notification law because it failed to contain an exception to allow a minor to obtain an abortion without notice to her parent when necessary to preserve her health. Rather than simply issuing an injunction to prevent enforcement of the law in its entirety, (striking down the law “on its face”), as the Court had done in numerous past cases including in *Roe* and *Casey*, *supra*, the Court remanded the case to the Court of Appeals for a determination as to whether the court could devise a narrower remedy, in a manner consistent with legislative intent.

2007 – *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007): In *Gonzales*, (described more fully in Section I), the Court reversed course and upheld a federal statute nearly identical to the Nebraska one invalidated in *Stenberg*. First, the Court held that the federal statute was more narrowly drafted and thus would ban only the “intact D&E” procedure, leaving “most” D&Es untouched. More strikingly, the Court upheld the law despite its failure to include a health exception and despite the fact that the record included even more evidence of the ban’s significant impact on health.