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Cover Page Footnote
I wish to thank Kristi Richardson for proofreading and typing this material.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA v. CASEY: CONSTITUTIONAL PRINCIPLES AND POLITICAL TURBULENCE

*Alan I. Bigel**

I. INTRODUCTION

On June 29, 1992, the final day of its October 1991 Term, the Rehnquist Court addressed the constitutionality of statutory limitations on abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[1] Although the case presented the Court with no new issues, the recent appointments of Justices David Souter[2] and Clarence Thomas,[3] who replaced Justices William Brennan and Thurgood Marshall, respectively, aroused considerable public attention. Both Brennan and Marshall unwaveringly supported broad constitutional protection of abortion[4] and opposed the Rehnquist Court's deference to state and

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1. 112 S. Ct. 2791 (interim ed. 1992).

2. Federal Appeals Court Judge David Souter was confirmed by a vote of 90-9 on October 2, 1990, and sworn in six days later.

3. Federal Appeals Court Judge Clarence Thomas was confirmed by a vote of 52-48 on October 15, 1991, and sworn in on November 1.

4. Both Brennan, who announced his retirement on July 20, 1990, and Marshall, who stepped down on June 28, 1991, dissented from decisions which had the potential to expand federal and state regulation of abortions. Marshall (Brennan was no longer on the Court) dissented in Rust v. Sullivan, 111 S. Ct. 1759 (interim ed. 1991), heard and decided together with New York v. Sullivan, *id.*, which upheld Congress' power to promulgate Title X of the 1970 Public Health Service Act, 42 U.S.C. § 300a-6 (1970). Title X provided that no funds appropriated for family planning clinics "shall be used in programs where abortion is a method of family planning." *Id.* In Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980), Brennan and Marshall dissented from the majority ruling which upheld provisions of the Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979). In part, the Hyde Amendment prohibited the use of federal funds to perform abortions except in cases of rape, incest, or where the life of the woman is endangered. *Id.* Brennan and Marshall also opposed possible state funding restrictions for abortion. Both Justices dissented in Beal v. Doe, 432 U.S. 438 (1977), Maher v. Roe, 432 U.S. 464 (1977), and Poelker v. Doe, 432 U.S. 519 (1977), all of which upheld state discretion to refuse funding for nontherapeutic abortions under the Medicaid program established by Title XIX of the Social Security Act, 42 U.S.C. § 1396 (as amended 1970). Believing that procedural impediments in procuring an abortion would result, both Brennan and Marshall were also unwilling to expand the discretion of physicians performing abortions, as well as the power of states to impose parental notification requirements and waiting periods before a woman may obtain an abortion. *See* Hodgson v. Minnesota, 110 S. Ct. 2926 (interim ed. 1990) (Marshall and Brennan, JJ., concurring in part and dissenting in part); Ohio v. Akron Ctr. for Reprod. Health, 110 S. Ct. 2972 (interim ed. 1990) (Blackmun, Brennan, and Marshall, JJ., dissenting); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (Blackmun, Brennan, and Marshall, JJ., concurring in part and dissenting in

federal regulations on abortion.[5] With Souter and Thomas sitting on the Court, public speculation mounted as to whether a fundamental change in constitutional interpretation might be forthcoming in *Casey*.

Many articles and books have been written on the constitutionality of the right to abortion and the Court's approach to one of the most controversial issues in the late twentieth century.[6] Most of these articles pre-date *Casey* however. This Article attempts to fill that void by first taking a brief foray into the history of the Court's abortion rhetoric,[7] followed by an examination of the Pennsylvania statutes challenged in *Casey* and the lower court decisions.[8] The Article then dissects the lengthy *Casey* decision[9] and the Justices' opinions,[10] and concludes by presenting several issues that remain unresolved or are raised by the Court.[11]

II. THE FOUNDATION OF THE COURT'S PRE-CASEY STANCE ON ABORTION

The debate over a woman's right to an abortion came to the political forefront in the United States following the Supreme Court's 1973

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part); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983) (Blackmun, Brennan, and Marshall, JJ., concurring in part and dissenting in part); H.L. v. Matheson, 450 U.S. 398 (1981) (Marshall and Brennan, JJ., dissenting).

5. *See Rust*, 111 S. Ct. at 1759; *Akron*, 110 S. Ct. at 2972; *Webster*, 492 U.S. at 490.

6. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1989); MARIAN FAUX, ROE V. WADE: THE STORY OF A LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL (1988); STEPHEN M. KRASON, ABORTION: POLITICS, MORALITY, AND THE CHANGE (1984); LAURENCE H. TRIBE, ABORTION, THE CLASH OF ABSOLUTES (1990); Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); John Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Richard Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Philip Heymann & Douglas Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U. L. REV. 765 (1973); Joseph O'Meara, *Abortion: The Court Decides a Non-Case*, 1974 SUP. CT. REV. 337; Michael Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Thomas Polityka, *From* Poe *to* Roe: *A Bickelian View of the Abortion Decision—Its Timing and Principle*, 53 NEB. L. REV. 31 (1974); *Symposium on the Law and Politics of Abortion*, 77 MICH. L. REV. 1569 (1979); Norman Vietra, Roe *and* Doe*: Substantive Due Process and the Right of Abortion*, 25 HAST. L.J. 867 (1974); Comment, *Abortion on Demand in a Post-*Wade *Context: Must the State Pay the Bills?*, 41 FORDHAM L. REV. 921 (1973); Jane Finn, Comment, *State Limitations Upon the Availability and Accessibility of Abortions After* Wade *and* Bolton, 25 KAN. L. REV. 87 (1976); Comment, *In Defense of Liberty: A Look at the Abortion Decisions*, 61 GEO. L.J. 1559 (1973).

7. *See infra* notes 12-57 and accompanying text.

8. *See infra* notes 58-89 and accompanying text.

9. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2803-85 (interim ed. 1992) (in the Supreme Court Reporter, the Justices' opinions total 83 pages).

10. *See infra* notes 90-228 and accompanying text.

11. *See infra* notes 229-277 and accompanying text.

decisions in *Roe v. Wade*[12] and its companion case, *Doe v. Bolton*.[13] Led by Chief Justice Warren Burger, the Court held that the previously recognized constitutional right to privacy[14] "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[15] The Burger Court adhered to this principle in all thirteen cases dealing with abortion decided between 1976 and 1986.[16] Indeed, on June 11, 1986, only six days before Chief Justice Burger announced his decision to retire from the bench, the Court explicitly expressed its

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12. 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

13. 410 U.S. 179, *reh'g denied*, 410 U.S. 959 (1973).

14. As early as 1886, the Court held that the Fourth and Fifth Amendments guaranteed "the sanctities of a man's home and the privacies of life." Boyd v. United States, 116 U.S. 616, 630 (1886). In *Boyd*, the Court suggested that spheres of constitutional protection may exist by implication through the wording and perceived scope of specific constitutional provisions. *Id.* at 635-39. The Fourth Amendment 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, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fifth Amendment provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

In the twentieth century, the Court has recognized a constitutional right to privacy that protects spheres of activity from legislative regulation. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925) (declaring unconstitutional an Oregon law compelling public school attendance for all children between the ages of eight and sixteen); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a Nebraska law prohibiting the teaching of any language other than English earlier than the eighth grade). *But see* Buck v. Bell, 274 U.S. 200 (1927) (upholding a Virginia compulsory sterilization statute). A right to privacy with respect to reproductive freedom was first recognized in Skinner v. Oklahoma, 316 U.S. 535 (1942), which invalidated a statute mandating sterilization of individuals convicted two or more times of "felonies involving moral turpitude." *Id.* at 536. The right to privacy was expanded to protect the rights of married and unmarried individuals to use contraceptives in Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972); minors under sixteen to purchase contraceptives in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); and advertisers to mail literature concerning contraceptive devices in Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983). The Court also recognized a right to privacy in the Ninth Amendment. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); *Griswold*, 381 U.S. 479 (1965). 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." U.S. CONST. amend. IX.

15. *Roe*, 410 U.S. at 153.

16. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Simopoulos v. Virginia, 462 U.S. 506 (1983); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); H.L. v. Matheson, 450 U.S. 398 (1981); Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980); Bellotti v. Baird, 443 U.S. 622, *reh'g denied*, 444 U.S. 887 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood Ass'n of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

support of *Roe* in *Thornburgh v. American College of Obstetricians & Gynecologists.*[17]

Justice William Rehnquist's elevation to the Chief Justice position and the subsequent appointments of Justices Antonin Scalia in 1986 and Anthony Kennedy in 1988 increased the hopes of the pro-life movement that a more conservative Court would overrule, or at least limit, the application of *Roe*. Prior to *Casey*, the Rehnquist Court reviewed state abortion regulations in four[18] cases: *Webster v. Reproductive Health Services*,[19] *Hodgson v. Minnesota*,[20] *Ohio v. Akron Center for Reproductive Health*,[21] and *Rust v. Sullivan.*[22] While the Court adhered to judicial precedents in each case, the tone of the *Webster* and *Rust* decisions suggested a less firm commitment to the underpinnings of *Roe.*[23]

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17. 476 U.S. 747 (1986). In *Thornburgh*, the Court declared: "[a]gain today, we reaffirm the general principles laid down in *Roe* . . . ." *Id.* at 2178. *See generally Akron*, 462 U.S. 416.

18. A case dealing with Illinois' regulation of abortion clinics was settled before the Court heard oral arguments. Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988), *juris. postponed*, 492 U.S. 916 (1989). In Hartigan v. Zbaraz, 484 U.S. 171 (1987), *reh'g denied*, 484 U.S. 1082 (1988), the Court, in a 4-4 memorandum opinion, affirmed a lower federal court decision striking down an Illinois statute prohibiting the procurement of an abortion by a minor. *Id.* at 171.

19. 492 U.S. 490 (1989).

20. 110 S. Ct. 2926 (interim ed. 1990).

21. 110 S. Ct. 2972 (interim ed. 1990).

22. 111 S. Ct. 1759 (interim ed. 1991).

23. Relying on its precedents in Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476 (1983), Akron v. Akron Ctr. for Reprod. Health, Inc. 462 U.S. 416 (1983), Bellotti v. Baird, 443 U.S. at 622, *reh'g denied*, 444 U.S. at 887 (1979), and Planned Parenthood Ass'n of Cent. Mo. v. Danforth, 428 U.S. at 52 (1976), all of which prohibited another person from exercising an absolute veto over a minor's decision to have an abortion, the Court in *Hodgson* and *Akron* upheld state statutes requiring some form of parental notification before an unemancipated minor received an abortion. The Minnesota statute challenged in *Hodgson* mandated a 48-hour waiting period and two-parent notification, except no notification was required in cases where the minor proved she was a victim of sexual abuse. *Hodgson*, 110 S. Ct. at 2931-32 & n.4 (citing MINN STAT. ANN. § 144.343, subd. 2 (1988)). In the event these requirements were permanently restrained or enjoined by judicial decree, the statute further provided that a minor could only receive an abortion without notification if a judge determined that the minor was mature and capable of giving consent (the "judicial bypass option"); otherwise, the minor still needed the consent of both parents. *Id.* at 2932-33 & n.9 (citing MINN. STAT. ANN. § 144.343, subd.6 (1988)). The *Hodgson* majority held that, without the judicial bypass option, two-parent notification was unconstitutional. *Id.* at 2969-70. Hence, the mandatory two-parent notification was nullified by the Court, except in cases where a minor was unable to obtain the judicial bypass. *Id.* The 48-hour waiting period was held constitutional. *Id.* at 2944.

In *Akron*, the Court upheld a proposed Ohio statute that made it a crime for a physician to perform an abortion on a minor without notifying one of the minor's parents, unless the minor obtained a judicial bypass. *Akron*, 110 S. Ct. at 2977-84 (citing OHIO H.B. 319 (1988)). Under the legislation, a judicial bypass could be granted only if the minor presents clear and convincing proof that: (1) she has sufficient maturity and information to make the decision; (2) one of her parents has engaged in a pattern of abuse; or (3) that notice is not in her best interests. *Id.* at 2977 (citing OHIO H.B. 319 (1988)). Following the Court's decision, the proposed legislation became law. OHIO REV. CODE ANN. §§ 2151.85, 2505.073, 2919.12 (Baldwin 1993).

In *Webster*, the Court addressed the constitutionality of a Missouri statute which stated in its preamble that "[t]he life of each human being begins at conception"; that "unborn children have protectable interests in life, health, and well-being"; and that all state laws shall be construed to provide constitutional protections for the unborn.[24] In keeping with *Roe*, the Court might have held that the statute erected psychological impediments to women seeking to procure an abortion. Instead, it held that Missouri's preamble was an "abstract" statement having no bearing on the regulation of abortion.[25] Moreover, although the *Webster* Court relied on the pronouncement in *Roe* that a state has "important and legitimate" interests in protecting "the potentiality of human life,"[26] the Court held that it was reasonable for Missouri to: (1) require physicians to conduct "such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child," in instances where it is believed the woman is at least twenty weeks pregnant;[27] (2) prohibit the use of public employees and facilities to perform or assist an abortion, not necessary to save the life of the mother;[28] and (3) censure speech in public facilities "encouraging or counseling a woman to have an abortion not necessary to save her life."[29]

In *Rust*, the Court addressed the constitutionality of Department of Health and Human Services regulations to Title X of the Public Health Service Act of 1970 ("the PHSA").[30] Congress enacted Title X in an effort to provide "federal funding for family-planning services."[31] The PHSA authorizes the Secretary of Health and Human Services ("the Secretary") to distribute these funds through grants and government contracts in order to establish "voluntary family planning projects," and to promulgate regulations for such distribution.[32] The PHSA further provides that "[n]one of the funds appropriated . . . shall be used in programs where abortion is a method of family planning."[33]

In 1988, the Secretary promulgated new regulations that imposed three conditions on federal grants to family planning clinics: (1) the clinics could not counsel patients on the use of abortion as a method of

24. 492 U.S. 490, 501 (1989) (quoting MO. REV. STAT. §§ 1.205-1(1),(2) (1986)).
25. *Id.* at 507 (quoting Tyler v. Judges of Court of Registration, 179 U.S. 405, 409 (1900)).
26. Roe v. Wade, 410 U.S. 113, 162, *reh'g denied*, 410 U.S. 959 (1973).
27. *Webster*, 492 U.S. at 515 (quoting MO. REV. STAT. § 188.029 (1986)).
28. *Id.* at 511.
29. *Id.* at 511 (quoting MO. REV. STAT. § 188.205 (1986)).
30. 42 U.S.C. §§ 300 to 300a-6 (1993).
31. Rust v. Sullivan, 111 S. Ct. 1759, 1764 (interim ed. 1991).
32. *Id.* (citing 42 U.S.C. §§ 300(a), 300a-4 (1988)).
33. 42 U.S.C. § 300a-6 (1993).

family planning;[34] (2) the clinics could not "encourage, promote, or advocate abortion as a method of family planning";[35] and (3) the clinics were required to be " 'physically and financially separated' from prohibited abortion activities."[36] In *Rust*, the Court might have declared that restricting the content of communication in family planning clinics undermined the ability of women to become apprised of their constitutionally protected rights. Instead, the Court held that the regulations must be construed as an exercise of the Secretary's delegated authority to ensure that "the limits" of Title X are enforced, and that "the limits" evidenced Congress' power to make appropriations apart from its possible effect on an individual's ability to partake in a constitutionally protected activity.[37]

The Court's tolerance of the *Webster* and *Rust* restrictions[38] on abortion indicated its willingness to limit *Roe*. While the pronouncements put forward in *Roe* were left "undisturbed,"[39] the Rehnquist Court's failure to clarify the applicability of *Roe* to diverse statutory provisions or to articulate a coherent principle on the constitutionality of abortion[40] served to intensify public focus on the possible significance of the *Casey* ruling.

Uncertainty over the constitutional status of *Roe* was also a prominent consideration prior to *Casey* in light of the prior positions taken by several members of the Court. While no one explicitly stated that the right to abortion was prima facie unconstitutional, several Justices expressed disapproval with *Roe*. Justice White, who dissented in *Roe*,[41] declared in *Thornburgh v. American College of Obstetricians and Gynecologists* that "the time has come to recognize that [*Roe*] . . . 'departs from a proper understanding' of the Constitution and to overrule it."[42] White did not argue that abortion is unconstitutional; he maintained that the Court in *Roe* failed to articulate a clear meaning of the right to privacy[43] and likewise neglected to do so in subsequent cases.[44]

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34. *Rust*, 110 S. Ct. at 1765.

35. *Id.* (quoting 42 C.F.R. § 59.10(a) (1989)).

36. *Id.* at 1766 (citing 42 C.F.R. §§ 59.8(a)(1),(2) (1989)).

37. *Id.* at 1772.

38. The Department of Health and Human Services regulations at issue in *Rust* were subsequently lifted by the Clinton Administration.

39. Webster v. Reprod. Health Servs., 492 U.S. 490, 521 (1989).

40. For example, the Court might have explained why deference to state policymaking prerogatives was less compelling in Hodgson v. Minnesota, 110 S. Ct. 2926 (1990), than in *Webster*, where the Court left undisturbed statements in Missouri's preamble which erected potentially greater restrictions on the ability to procure an abortion. 492 U.S. 490 (1989).

41. 410 U.S. 113, 221-23 (White, J., dissenting), *reh'g denied*, 410 U.S. 959 (1973).

42. 476 U.S. 747, 788 (1986) (White, J., dissenting).

43. *Id.* at 796 (White, J., dissenting).

44. *Id.* (White, J., dissenting).

White argued for clarity, not for relinquishment of the constitutional right to abortion.[45] Then Justice Rehnquist, in his dissent in *Roe*,[46] maintained that the Court's position could not be reconciled with the original intention of the Fourteenth Amendment[47] or the meaning of "liberty" in its Due Process Clause.[48]

Justice Scalia, who joined the Court in 1986, has been the Court's most outspoken opponent of *Roe*. In *Ohio v. Akron Center for Reproductive Health*,[49] Scalia wrote that "the Constitution contains no right to abortion."[50] Scalia did not argue that abortion could never be constitutional; he insisted that the states are not constitutionally commanded to provide it.[51] Scalia advocated total state discretion, free from judicial interference, to formulate policy on this subject.[52] Justice O'Connor, who joined the Court in 1981, has maintained that the constitutional standards developed in *Roe* are unworkable and inflexible.[53] Justice Kennedy, who took his seat on the Court in 1988, joined the plurality in *Webster* which declared that "[t]he key element of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution"[54] and maintained that "[n]othing in the Constitution requires states to enter or remain in the business of performing abortions."[55]

Thus, while no Justice advocated renunciation of abortion as a constitutional option, five Justices wished to reexamine the *Roe* pronouncements when *Planned Parenthood of Southeastern Pennsylvania v. Casey*[56] was argued. This desire, coupled with the recent additions of Justices Souter and Thomas, whose views on abortion were unknown,[57]

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45. *Id.* (White, J., dissenting).

46. 410 U.S. 113, 171-77 (Rehnquist, J., dissenting), *reh'g denied*, 410 U.S. 959 (1973).

47. The Fourteenth Amendment in pertinent part provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

48. *Roe*, 410 U.S. at 172-73 (Rehnquist, J., dissenting).

49. 110 S. Ct. 2972 (interim ed. 1990).

50. *Id.* at 2984 (Scalia, J., concurring).

51. *Id.*

52. *Id.* For an elaboration of this position, see Webster v. Reprod. Health Servs., 492 U.S. 490, 532-37 (1989) (Scalia, J., concurring).

53. *See* Hodgson v. Minnesota, 110 S. Ct. 2926, 2949-51 (interim ed. 1990) (O'Connor, J., concurring); *Webster*, 492 U.S. at 522-31 (1989) (O'Connor, J., concurring); *Thornburgh*, 476 U.S. at 814-33 (1986) (O'Connor, J., dissenting); Simopoulos v. Virginia, 462 U.S. 506, 519-20 (1983) (O'Connor, J., concurring); Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in part and dissenting in part); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 452-75 (1983) (O'Connor, J., dissenting). For an analysis of O'Connor's position on abortion, see Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing For An Audience Of One*, 138 U. PA. L. REV. 119 (1989).

54. *Webster*, 492 U.S. at 518.

55. *Id.* at 510.

56. 112 S. Ct. 2791 (interim ed. 1992).

57. Both Souter and Thomas refused to discuss their views on abortion during their confirmation hearings. *See Excerpts From Senate's Hearings on the Souter Nomination*, N.Y. TIMES,

raised concerns whether the *Casey* Court, in keeping with *Webster*, would continue to defer to state discretion or whether a majority would vote to overturn *Roe*.

III. THE LAW AND THE LOWER COURTS IN CASEY

A. The Pennsylvania Abortion Control Act

In *Casey*, five abortion clinics and one physician brought suit challenging five provisions of the Pennsylvania Abortion Control Act of 1982 ("the Act").[58] Seeking declaratory and injunctive relief, the petitioners maintained that several sections of the Act were facially unconstitutional.[59]

Two sections of the Act focus on the consent of the woman's spouse or parents. Section 3209 requires a woman, with certain exceptions,[60] to notify her spouse that she will have an abortion and to furnish the physician performing the abortion a signed statement that her spouse was so informed.[61] Section 3206 required that, except in the case of a medical emergency,[62] a physician requested to perform an abortion on an unemancipated minor must obtain the "informed consent" of one of her parents or her guardian.[63] If the minor is unable to obtain such consent or chooses not to confront her parents or guardian, the court of common pleas in the judicial district where the minor resides must authorize a physician to perform the abortion "if the court determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion . . . ."[64] If the court finds

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Sept. 15, 1990, at A10; Neil A. Lewis, *The Thomas Hearings: Thomas Declines Requests by Panel for Abortion View*, N.Y. TIMES, Sept. 11, 1991, at A1. Souter did join Rehnquist's majority opinion in Rust v. Sullivan, 111 S. Ct. 1759, 1764 (interim ed. 1991), which did not directly address the constitutional underpinnings of *Roe*.

58. 112 S. Ct. at 2803. The Pennsylvania Abortion Contol Act is codified at 18 PA. CONS. STAT. ANN. §§ 3203-3220 (1983 & Supp. 1992).

59. *Casey*, 112 S. Ct. at 2803. The sections of the Act in question were: 3205, 3206, 3707(b), 3209, 3214(a), and 3214(f). *Id.*

60. 18 PA. CONS. STAT. ANN. § 3209(b). Under section 3209(b), spousal notice is excepted if the woman provides her physician with a certified statement that: (1) the spouse is not the child's father; (2) the spouse could not be located after a "diligent effort"; (3) the pregnancy is the result of spousal sexual assault already reported to a law enforcement agency; or (4) notifying her spouse places the woman at risk of serious bodily injury by the spouse. *Id.*

61. *Id.* § 3209(a).

62. The Act defined "medical emergency" as:

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

Id. § 3203.

63. *Id.* § 3206(a).

64. *Id.* § 3206(c).

that the minor is not mature and capable of making this decision, the court must assess whether the abortion is in the minor's "best interests."[65] If so, then the court must authorize the physician to perform the abortion.[66]

The remaining sections concern the information a physician is required to give or disclose to the woman. Section 3205 requires the treating or referring physician to orally inform the woman, at least twenty-four hours prior to the abortion, of the nature of the procedure;[67] of "the probable gestational age of the unborn child at the time the abortion is to be performed";[68] of "the medical risks associated with carrying her child to term";[69] and of her option to receive, along with her written certification of its having been offered, "printed materials which describe the unborn child and list agencies which offer alternatives to abortion,"[70] as well as the availability of medical benefits for "prenatal care, childbirth, and neonatal care."[71] Sections 3207(b), 3214(a), and 3214(f) require a physician who performed an abortion to explain, in writing, the type of procedure performed, whether the woman had prior pregnancies and prior abortions, and the basis for the medical judgment that a serious threat to the woman's life or health necessitated performing the abortion.[72]

B. The District Court Decision

The District Court for the Eastern District of Pennsylvania issued a preliminary injunction against enforcement of the aforementioned regulations.[73] Following a three-day bench trial, all of the provisions were held unconstitutional, and the district court issued a permanent injunction against enforcement of the statutes by the state of Pennsylvania.[74] A few of the district court's comments regarding the enjoined statutory provisions are noteworthy. The district court objected to the imprecise wording of section 3203, which defined "medical emergency,"[75] and singled out a few medical conditions which it maintained

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65. *Id.* § 3206(d).
66. *Id.*
67. *Id.* § 3205(1)(i).
68. *Id.* § 3205(1)(ii).
69. *Id.* § 3205(1)(iii).
70. *Id.* § 3205(2)(i).
71. *Id.* § 3205(2)(ii).
72. *Id.* §§ 3207(b), 3214(a),(f).
73. Planned Parenthood of Southeastern Pa. v. Casey, 744 F. Supp. 1323, 1325 (E.D. Pa. 1990), *aff'd in part and rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (interim ed. 1992).
74. *Id.* at 1396-97.
75. See *supra* note 60.

would not come under its provisions.[76] Section 3205 was also struck down because, in the district court's estimation, the twenty-four hour waiting period imposed financial burdens and traveling inconveniences on women[77] and subjected them to "the harassment and hostility of anti-abortion protestors demonstrating outside a clinic . . . ."[78] After appraising section 3209, the district court maintained that requiring a married woman to obtain consent of her husband (except in cases of "medical emergency")[79] prior to having an abortion would likely discourage the individual from terminating pregnancy for fear of physical or psychological abuse and concern for the safety of children.[80] Finally, the district court claimed that the provision requiring physicians to reveal their identity on reports to be furnished for each abortion performed[81] may subject doctors to harassment, and was not needed to fulfill the State's objective of enhancing scientific knowledge of abortion.[82] The district court's ruling was subsequently appealed to the Third Circuit.

C. *The Third Circuit Steps Back*

The Court of Appeals for the Third Circuit affirmed in part and reversed in part.[83] Except for section 3209's spousal notification requirement, the Third Circuit upheld all of the regulations in question.[84] Among the findings made by the Third Circuit, Judge Walter Stapleton, who wrote the opinion, maintained that section 3203 prudently sought to maximize safety precautions for pregnant women facing an acute "medical emergency."[85] In light of section 3203's provision allowing a physician to perform an immediate abortion when faced with a "medical emergency,"[86] Judge Stapleton reasoned that the other statutory requirements, including section 3205's mandatory twenty-four hour waiting period, could be avoided and that the delay did not pose a significant health risk.[87] In addition, Judge Stapleton held that provisions stipulating reporting requirements on facilities performing abor-

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76. *Casey*, 744 F. Supp. at 1377-78. The enumerated conditions included "preeclampsia, inevitable abortion, and premature[ly] ruptured membrane." *Id.*

77. *Id.* at 1378-79.

78. *Id.* at 1351.

79. *See supra* note 62.

80. *Casey*, 744 F. Supp. at 1385-86.

81. 18 PA. CONS. STAT. § 3214(a)(1) (1983 & Supp. 1992).

82. *Casey*, 744 F. Supp. at 1392.

83. Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682, 719 (3d Cir. 1991), *aff'd in part and rev'd in part*, 112 S. Ct. 2791 (interim ed. 1992).

84. *Id.*

85. *Id.* at 701.

86. *See supra* note 62.

87. *Casey*, 947 F.2d at 706-07.

tions were not unreasonable.[88] Subsequently, the United States Supreme Court granted certiorari in the case.[89]

III. The Supreme Court's Casey Decision and Rationale

A. *The Joint Majority Opinion*

For the first time since 1958,[90] a majority opinion was signed by more than one individual. Justices O'Connor, Kennedy, and Souter, in a joint opinion on behalf of a five-member majority,[91] discussed at length the reasoning adopted in *Roe* and the constitutional principles on which it was based.[92] Additionally, the joint majority discussed the importance of adhering to stare decisis;[93] the evolution of interpretations of constitutional provisions;[94] the reluctance to overturn precedents which have become woven into the fabric of American life;[95] and a desire not to risk eroding public support of the institutional integrity of the Court.[96] Finally, the joint majority addressed the constitutionality of contested provisions of the Pennsylvania statute.[97]

At the outset, the joint majority appeared exasperated that the Court was being asked by the federal government, "as it had done in five other cases in the last decade, again . . . to overrule *Roe*."[98] After enumerating the challenged provisions of the Pennsylvania statute,[99] the joint majority commenced to explain why it would conclude that "the essential holding of [*Roe*] should be retained and once again reaffirmed."[100]

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88. *Id.* at 715-17.

89. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (interim ed. 1992).

90. In Cooper v. Aaron, 358 U.S. 1 (1958), each of the nine Justices signed a unanimous ruling disallowing a request by school board officials in Little Rock, Arkansas, to delay implementation of desegregation.

91. Justices Stevens and Blackmun wrote opinions concurring and dissenting in part. *See infra* notes 148-67 and accompanying text.

92. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2804-08 (interim ed. 1992).

93. *Id.* at 2808-16.

94. *Id.* at 2804-08.

95. *Id.* at 2808-14.

96. *Id.* at 2814-16.

97. *Id.* at 2822-33.

98. *Id.* at 2803. The United States Government previously petitioned to overrule *Roe* in Rust v. Sullivan, 111 S. Ct. 1759 (interim ed. 1991); Hodgson v. Minnesota, 110 S. Ct. 2926 (interim ed. 1990); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983).

99. *Casey*, 112 S. Ct. at 2803.

100. *Id.* at 2804.

The joint majority pointed out that the command of the Fourteenth Amendment[101] encompasses both a procedural element requiring that individuals be tried according to prescribed modes of proceeding,[102] and a substantive component restricting the types of subjects appropriate for legislation.[103] Recognizing that the meaning of "due process of law" is ambiguous,[104] the joint majority discussed previously rejected interpretations of due process in a series of cases dating back "at least 105 years" that confined the scope to "the express provisions of the first eight amendments to the Constitution"[105] or "only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified."[106] Since the early 1920s,[107] the Court has recognized that the Fourteenth Amendment protects "a realm of personal liberty which the government may not enter" concerning an individual's expectation of privacy.[108] According to the joint majority, the Fourteenth Amendment's protection of personal liberty touches on "choices central to personal dignity and autonomy,"[109] and must be construed as a component of the constitutional right to privacy previously held by the Court as applicable to the area of reproductive freedom.[110]

The joint majority pointed out that the complexities of constitutional interpretation made it impossible to adjudicate legal issues with scientific precision.[111] Thus, to endeavor from making decisions which might "mandate our own moral code,"[112] the need to follow precedent

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101. *Id.*; *see supra* note 47.

102. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Washington v. Texas, 388 U.S. 14 (1967); Parker v. Gladden, 385 U.S. 363 (1966); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949); *In re* Oliver, 333 U.S. 257 (1948); Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908); Maxwell v. Dow, 176 U.S. 581 (1900); Hurtado v. California, 110 U.S. 516 (1884); Davidson v. New Orleans, 96 U.S. 97 (1878).

103. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Muller v. Oregon, 208 U.S. 412 (1908); Lochner v. New York, 198 U.S. 45 (1905); Holden v. Hardy, 169 U.S. 366 (1898); Allgeyer v. Louisiana, 165 U.S. 578 (1897); Mugler v. Kansas, 123 U.S. 623 (1887).

104. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2804-05 (interim ed. 1992).

105. *Id.*

106. *Id.*

107. *See supra* note 14.

108. *Casey*, 112 S. Ct. at 2805.

109. *Id.* at 2807.

110. *Id.*; *see supra* note 14.

111. *Casey*, 112 S. Ct. at 2806.

112. *Id.*

was compelling.[113] The joint majority also recognized that the rule of stare decisis is not "an 'inexorable command,' and certainly it is not such in every constitutional case."[114] It is based on "prudential and pragmatic considerations," compelling the Court "to gauge the respective costs of reaffirming and overruling a prior case."[115] After citing decisions that overturned precedent existing only a few years,[116] as well as for many decades,[117] the joint majority noted that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[118] In other words, while "a respect for precedent is, by definition, indispensable,"[119] it would be appropriate to disregard stare decisis where significant changes in social and economic life have rendered obsolete the principles on which earlier rulings were based.[120]

With regard to abortion, the joint majority insisted that no such transformation had occurred;[121] the principle in *Roe*[122] reaffirmed a right of "personal autonomy and bodily integrity."[123] This right, when applied, may engender conflicting viewpoints without making its fundamental constitutional protection "a doctrinal anachronism" based on "premises of fact [which] have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed."[124] Thus, the joint majority maintained that assessing abortion regulations in light of evolving technological and medical advances had no bearing on the continuing validity of the underlying premise of *Roe*, which had "in no sense proven 'unworkable.' "[125]

The challenged Pennsylvania statutory provisions raised competing claims concerning a woman's decision to terminate her pregnancy and

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113. *Id.*

114. *Id.* at 2808.

115. *Id.*

116. *See* Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); South Carolina v. Gathers, 490 U.S. 805, *reh'g denied*, 492 U.S. 938 (1989), and Booth v. Maryland, 482 U.S. 496, *reh'g denied*, 483 U.S. 1056 (1987), *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (interim ed. 1991).

117. *See* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by*, Brown v. Board of Educ., 347 U.S. 483 (1954), and its companion case, Bolling v. Sharpe, 347 U.S. 497 (1954).

118. *Casey*, 112 S. Ct. at 2814.

119. *Id.* at 2808.

120. The joint majority discusses this principle of stare decisis in connection with profound changes in economic and racial relations during the first half of the twentieth century. *See id.* at 2812-15.

121. *Id.* at 2814-16.

122. *See supra* notes 14-15 and accompanying text.

123. *Casey*, 112 S. Ct. at 2810.

124. *Id.* at 2809.

125. *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

the state's alleged obligation to regulate it. The "central holding in *Roe*"[126] is that viability is the best point to reconcile the woman's desire to terminate pregnancy with the state's interest in preserving her life or health as well as the "potentiality of human life."[127] This holding has not been rendered constitutionally obsolete even though the determined moment of viability will change with advances in neonatal care. To accommodate this inevitable development, the joint majority abandoned the trimester framework established in *Roe*.[128] Under *Roe*, in the first trimester, when abortion is "relatively safe," the state may not interfere with the woman's decision to terminate pregnancy.[129] By the third trimester, however, a state may prohibit abortion based on its interest in protecting the woman's health and the life of the viable fetus.[130] According to the joint majority, the trimester framework is "rigid"[131] in that it does not clearly recognize a state's interest in "previability regulation aimed at the protection of fetal life."[132] This is particularly true in the second trimester, when "the risk to the woman increases" and the state acquires an interest in the woman's health.[133] In other words, the joint majority objected that the trimester framework seeks to divide pregnancy into segments under which either the woman or the state allegedly has more compelling interests without recognizing that the woman's liberty and the state's interests in "protecting prenatal life" and safeguarding her well-being are ongoing.[134]

To ensure maximum flexibility for preserving the interests of both parties, the joint majority established an "undue burden" test: "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."[135] While a state "may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability,"[136] it retains "a substantial . . . interest in potential life throughout pregnancy"[137] and may choose to enact a wide range of measures designed, at any point, "to ensure that the woman's choice is informed [and] . . . to persuade

126. *Id.* at 2811.
127. Roe v. Wade, 410 U.S. 113, 162, *reh'g denied*, 410 U.S. 959 (1973).
128. *Casey*, 112 S. Ct. at 2818.
129. *Roe*, 410 U.S. at 149.
130. *Id.* at 160-63.
131. *Casey*, 112 S. Ct. at 2817.
132. *Id.* at 2818.
133. *Roe*, 410 U.S. at 150.
134. *Casey*, 112 S. Ct. at 2818-20.
135. *Id.* at 2820.
136. *Id.* at 2821.
137. *Id.* at 2820.

the woman to choose childbirth over abortion."[138] As long as "the purpose or effect" of a law is not "to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability," it will be considered a valid exercise of state power to regulate the exercise of a pregnant woman's constitutionally protected right.[139] Of the five challenged provisions of the Pennsylvania statute, the joint majority held that only the spousal notification requirement placed an undue burden on the pregnant woman.[140] For example, examining studies on the rising incidence of battered women and child abuse,[141] the joint majority reasoned that section 3209 would impose a great burden on women estranged from their husbands, and, in effect, would place a substantial obstacle on pregnant women in the previability stage of a pregnancy.[142] The joint majority, however, upheld the parental notification provision.[143]

In an effort to quell potential criticism of the Court's failure to overrule *Roe*, the joint majority also elaborated on the role of the Court in American society.[144] The joint majority wrote that, unlike the political branches, which derive support by ballot, the justices over time must cultivate public confidence in the Court by making decisions "grounded truly in principle" apart from prevailing "social and political pressures."[145] To enhance respect for the law and facilitate order and continuity in human behavior through each generation, the joint majority asserted that the Court must avoid overturning precedent "in the absence of the most compelling reason to reexamine a watershed decision . . . ."[146] After noting the significant impact that the *Roe* decision has had on the social and economic life of the nation, the Court concluded that a decision to overrule its "essential holding" would inflict "profound and unnecessary damage to the Court's legitimacy."[147]

B. Opinions Concurring in Part And Dissenting in Part

1. Justice Stevens

In his brief opinion, Justice Stevens agreed that the constitutional protection of the right to abortion is too firmly interwoven into both a

138. *Id.* at 2821.
139. *Id.*
140. *Id.* at 2831.
141. *Id.* at 2826-31.
142. *Id.*
143. *Id.* at 2832-33.
144. *Id.* at 2814-16.
145. *Id.* at 2814.
146. *Id.* at 2815.
147. *Id.* at 2816.

line of judicial precedents establishing a right to privacy and the social fabric of society to be withdrawn.[148] He also acknowledged that abortion legislation seeks to reconcile "the woman's constitutional liberty interest" with the state's interest "in protecting potential life."[149] Stevens wrote, however, that declaring that the state has an interest does not clarify "when, if ever, [it] outweighs the pregnant woman's interest in personal liberty."[150]

Although Stevens supported use of an "undue burden" test to assess the constitutionality of legislative measures, he argued that the joint majority improperly applied it to some of the statutory provisions being challenged.[151] In addition, while the Court has acknowledged a state's interest in safeguarding maternal health by upholding regulations designed to better inform a woman of her options and to protect her life and physical well-being, Stevens maintained that the Court has never supported provisions which in effect "prejudice a woman's choice" by furnishing incomplete information or mandating procedures which are likely to discourage abortion.[152] Thus, Stevens agreed with the joint majority's holding that provisions requiring a physician to inform the woman of the medical risks of abortion "*enhance*, rather than skew, the woman's decisionmaking,"[153] but that requiring a physician to provide the woman materials persuading her not to have an abortion would coerce women to carry a pregnancy to term.[154] Stevens concluded his opinion by arguing that the remaining challenged provisions, including the twenty-four hour waiting period, the requirement that the woman be counseled on the alternatives to abortion, and the availability of medical assistance and child support payments, would in effect influence a woman's choice at a critical point in the decision process and, therefore, were unconstitutional.[155]

2. Justice Blackmun

Justice Blackmun's opinion is characterized by feelings of relief that the joint majority reaffirmed the constitutional protection of abor-

148. *Id.* at 2838 (Stevens, J., concurring in part and dissenting in part) (referring to "the concept of liberty and the basic equality of men and women").

149. *Id.* at 2840 (Stevens, J., concurring in part and dissenting in part).

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

151. *Id.* at 2842-43 (Stevens, J., concurring in part and dissenting in part).

152. *Id.* at 2841 (Stevens, J., concurring in part and dissenting in part) (citing Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983); Planned Parenthood Ass'n of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975); Roe v. Wade, 410 U.S. 113 (1973)).

153. *Id.* (Stevens, J., concurring in part and dissenting in part).

154. *Id.* (Stevens, J., concurring in part and dissenting in part).

155. *Id.* at 2843 (Stevens, J., concurring in part and dissenting in part).

tion established in *Roe* and apprehension that possible changes in the future make-up of the Court may bring about its repudiation.[156] Blackmun approved the joint majority's insistence that a state may not intimidate a woman into making a decision on whether to terminate pregnancy, but he contested the "undue burden" test because it insufficiently safeguarded this objective.[157] Blackmun asserted that *Roe*'s trimester framework and the fact that the only permissible restrictions on the right to privacy are those which the state can show to be "both necessary and narrowly tailored to serve a compelling governmental interest"[158] provide "the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion," and should remain intact.[159] Applying this strict scrutiny test, Blackmun insisted that all provisions of the challenged statute were invalid because they precluded a woman from making an independent decision on the continuation or termination of a pregnancy and could not be shown to enhance any state objectives in safeguarding the health and well-being of the woman.[160]

Blackmun concluded his opinion with a resounding criticism of Chief Justice Rehnquist's dissent.[161] Blackmun wrote: "If there is much reason to applaud the advances made by the joint [majority] today, there is far more to fear from [the Chief Justice's] opinion."[162] Blackmun attacked Rehnquist's "narrow conception of individual liberty and [stare decisis]" and his use of a rational basis test in abortion cases.[163] Blackmun feared that Rehnquist's test would enable a state to cleverly phrase legislation resulting in the erosion of a pregnant woman's liberty.[164] This potential legislative manipulation was contrary to Blackmun's belief that "there are certain fundamental liberties that are not

156. *Id.* at 2854-55 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

157. *Id.* at 2848 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

158. *Id.* at 2847 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

159. *Id.* at 2847-48 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

160. *Id.* at 2850-53 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

161. *Id.* at 2853-55 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

162. *Id.* at 2853 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

163. *Id.* at 2853-54 (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part); *see infra* notes 168-208 and accompanying text for a discussion of Chief Justice Rehnquist's opinion.

164. *Id.* at 2854 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

to be left to the whims of an election."[165] These protections embrace "'a realm of personal liberty which the government may not enter.'"[166] Accordingly, Blackmun asserted that both the trimester framework and the strict scrutiny test elucidated in *Roe* best ensure that this constitutional guarantee will be preserved.[167]

3. Chief Justice Rehnquist

Chief Justice Rehnquist's opinion, joined by Justices White, Scalia, and Thomas, analyzed the constitutional principles espoused in *Roe*, the Court's understanding of privacy as elucidated in precedents, and the role of stare decisis. Rehnquist argued that the joint majority misinterpreted the holding in *Roe* and, due in part to contradictory positions taken in cases dealing with abortion, that the joint majority failed to follow stare decisis.[168]

While acknowledging that earlier cases established an interpretation of liberty protected by the due process clause of the Fourteenth Amendment,[169] which "extends beyond freedom from physical restraint," Rehnquist insisted that the right to privacy was not "all-encompassing."[170] According to Rehnquist, abortion decisions, which "'involve[] the purposeful termination of potential life,'"[171] are qualitatively different from child-rearing, "marriage, procreation, and contraception" decisions.[172] The joint majority, argued Rehnquist, improperly applied precedents to the subject of abortion in *Roe*.[173] He therefore disagreed with the joint majority that the already recognized constitutional right to privacy is sufficiently broad to encompass abortion.[174]

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165. *Id.* (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

166. *Id.* at 2844 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Casey*, 112 S. Ct. at 2805)).

167. *Id.* at 2847-50 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

168. *Id.* at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justices White, Scalia, and Thomas joined Chief Justice Rehnquist's opinion.

169. *See supra* note 14.

170. *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

171. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting Harris v. McRae, 448 U.S. 297, 325 (1980)).

172. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

173. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

174. *Id.* at 2859-60 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). *See* Roe v. Wade, 410 U.S. 113, 153, *reh'g denied*, 410 U.S. 959 (1973); *see supra* notes 12-15 and accompanying text.

Rehnquist also refused to find that the right to abortion is fundamentally protected.[175] While he did not repudiate the concept that fundamental constitutional rights exist, Rehnquist pointed out that state practices at the time the Fourteenth Amendment was adopted negated the view "that the right to terminate one's pregnancy is 'fundamental.' "[176] He argued that the Court in *Roe* was "mistaken" in designating abortion a fundamentally protected right.[177] In *Roe*, the Court stated that the right to terminate pregnancy "is not unqualified and must be considered against important state interests in regulation."[178] The Court's subsequent disagreement in seeking to reconcile the interests of the pregnant woman and the state made necessary a reexamination of the nature and scope of constitutional protection in the area of abortion.[179] Hence, Rehnquist argued at length that the joint majority's interpretation of stare decisis improperly addressed the applicability in *Casey* of constitutional pronouncements set forth in *Roe*.[180]

Rehnquist argued that stare decisis is not a " 'universal, inexorable command.' "[181] Rather, "when it becomes clear that a prior constitutional interpretation is unsound," it is necessary "to reexamine the question."[182] Unlike the joint majority opinion, which held that the application of a previously recognized constitutional right to privacy concerning abortion in *Roe* was not misplaced and ought to channel the Court's ongoing examination of the subject,[183] Rehnquist maintained

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175. *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). As early as 1873, the Court indicated that there exist "fundamental" protections which "belong of right to the citizens of all free governments." The Slaughterhouse Cases, 83 U.S. 36, 76 (1873) (quoting Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230)). The Court later recognized a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); *see also* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (declaring that a right will be considered fundamental if it is "implicit in the concept of ordered liberty").

176. *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Rehnquist pointed out that, when the Fourteenth Amendment was ratified "in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion [and] . . . 21 of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided . . . ." *Id.*

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

178. Roe v. Wade, 410 U.S. 113, 154, *reh'g denied*, 410 U.S. 959 (1973).

179. *Casey*, 112 S. Ct. at 2856-60 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

180. *Id.* at 2860-67 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

181. *Id.* at 2861 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting)).

182. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

183. *See supra* notes 96-147 and accompanying text.

that *Roe* "was wrongly decided [and] . . . can and should be overruled . . . ."[184] Concluding that the Court in *Roe* misinterpreted the meaning of "liberty" as protected by the Due Process Clause of the Fourteenth Amendment, Rehnquist argued that the Court needed to abandon precedent.[185] He vigorously objected to an application of stare decisis based not on prior interpretation of constitutional provisions but, rather, on the Court's perception of public reaction to the retention or renunciation of constitutional protections.[186]

Rehnquist examined occasions when the Court had overturned precedent[187] and emphasized that they were based on a belief that an earlier construction of a constitutional provision had been incorrect.[188] This reason, he insisted, is the only proper justification to reject stare decisis.[189] Every ruling, Rehnquist argued, engenders public controversy, but the Court has neither the ability to gauge this prospect nor the responsibility to seek to assimilate it into its adjudication.[190] Rehnquist further objected that the joint majority, "[w]hile purporting to adhere to precedent . . . instead revises it"[191] by claiming to follow the holding in *Roe* while "casually uproot[ing] and dispos[ing] of that same decision's trimester framework."[192] Rehnquist argued that there is no more evidence that the trimester framework has become less firmly integrated into the social fabric of American life than there is evidence to indicate that overruling *Roe* will cataclysmically disrupt allegedly established social expectations.[193] Rehnquist also emphasized that the joint majority improperly compared *Roe* to the 1954 case of

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184. *Casey*, 112 S. Ct. at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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

186. *Id.* at 2862 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

187. *Id.* at 2862-64 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). *See supra* cases cited in notes 117-118; *see also* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transp. Auth., 469 U.S. 528 (1985); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

188. *Casey*, 112 S. Ct. at 2863 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

189. *Id.* at 2863-64 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

190. *Id.* at 2860-64 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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

192. *Id.* at 2862 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

193. *Id.* at 2862-63 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

Brown v. Board of Education,[194] which overturned precedent and struck down public school segregation.[195] According to Rehnquist, had the joint majority been consistent in its assertion that stare decisis compelled deference to rulings which have become firmly woven into the social and economic mainstream, it should not have praised the overturning of precedent in *Brown*, which fundamentally altered established patterns of behavior.[196] Rehnquist insisted that the majority's application of stare decisis usurped power by seeking to base the right to abortion on what the joint majority perceived was contemporary public opinion.[197] Finally, Rehnquist criticized the majority's "undue burden" test as unworkable,[198] but he did not perceive the strict scrutiny test to be proper either.[199]

Rehnquist insisted that the position taken in *Webster v. Reproductive Health Services*,[200] which expressed support for state laws bearing a rational relationship to a legitimate governmental interest, can best accommodate the interests of the state and the pregnant woman.[201] Unlike the "undue burden" test, which will "do nothing to prevent 'judges from roaming at large in the constitutional field' guided only by their personal views,"[202] the rational basis standard recognizes that, throughout pregnancy, both the woman and the state will retain interests which will need to be periodically reassessed.[203] Accordingly, Rehnquist concluded that all contested provisions of the Pennsylvania statutes were rational attempts to safeguard state objectives that abortions be performed with medically safe procedures and with knowledge by the pregnant woman of the risks involved.[204] As to whether the spousal notification requirement in section 3209 might discourage women from procuring an abortion, Rehnquist argued that such policy speculation

194. 347 U.S. 483 (1954).

195. *Casey*, 112 S. Ct. at 2864-65 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

196. *Id.* at 2865 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

197. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

198. *Id.* at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

199. *Id.* at 2867 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

200. 492 U.S. 490 (1989).

201. *Casey*, 112 S. Ct. at 2867 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

202. *Id.* at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (Harlan, J., concurring)).

203. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

204. *Id.* at 2867-68 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

was a question for the Pennsylvania Legislature, not the Court, and he held the provision constitutional.[205]

Rehnquist steadfastly argued that the principles advanced in *Roe* were improperly derived from judicial precedents that established a constitutional right to privacy.[206] In view of the Court's inability to articulate a clear position in abortion cases decided after *Roe*, Rehnquist maintained that *Roe* should be overruled and insisted that a reexamination of the right to privacy is needed.[207] Overall, Rehnquist contended that the Court should avoid adjudication based on perceptions of the reasonableness or shrewdness of legislation and that states must be free to devise measures to deal with abortion, consistent with their notions of public policy.[208]

4. Justice Scalia

Justice Scalia's opinion, joined by Justices Rehnquist, White, and Thomas, declared at the outset that states "may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do so."[209] Based on Scalia's analysis, the silence of the Constitution on abortion leaves the decision whether to allow abortions entirely within the discretion of the states.[210] The Court must refrain from acting like a legislative policymaking body by supporting state statutes on abortion irrespective of their perceived reasonableness.[211]

The "undue burden" test, Scalia insisted, is an imprecise standard that will compel the Court to assess abortion regulations according to the Court's subjective notions of desirable public policy.[212] It is an "inherently manipulable" standard which "will prove hopelessly unworkable in practice."[213] According to Scalia, the joint majority advocated this new test by which the legality of abortion legislation is to be as-

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205. *Id.* at 2872 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("The Pennsylvania Legislature was in a [better] position to weigh the likely benefits of the provision against the likely adverse effects . . . .").

206. *Id.* at 2858-59 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

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

208. *Id.* at 2855-56 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

209. *Id.* at 2873 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis in original). Chief Justice Rehnquist and Justices White and Thomas joined Justice Scalia's opinion.

210. *See id.* at 2873-74 (Scalia, J., concurring in the judgment in part and dissenting in part).

211. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

212. *Id.* at 2877-78 (Scalia, J., concurring in the judgment in part and dissenting in part).

213. *Id.* at 2877 (Scalia, J., concurring in the judgment in part and dissenting in part).

sessed; it, however, did not clearly define the test's terms or satisfactorily explain why it is a more appropriate measure of constitutionality than some other standard.[214]

After briefly examining various standards advanced by the Court in earlier abortion decisions,[215] Scalia argued that none has been able to precisely define and reconcile the interests of the state and the pregnant woman.[216] The issue of abortion, which touches on conflicting views as to what is a fetus, when life begins, and what type of interest is retained by the state in seeking to regulate pregnancy,[217] can only be addressed "by citizens trying to persuade one another and then voting."[218] Scalia added that by "elevating . . . to the national level" an issue which needs to be addressed by states pursuant to parochial perceptions of sound public policy, the Court has erected an "[i]mperial [j]udiciary" under which "unelected, life-tenured judges" formulate standards having "no principled or coherent legal basis."[219]

Scalia maintained that the joint majority's application of stare decisis was "contrived" in that it claimed to preserve the "central holding of *Roe*" while randomly renouncing major components of it.[220] Scalia noted the joint majority's contention that overturning a practice firmly rooted in the fabric of American life may undermine the legitimacy of the Court.[221] In response, Scalia called this contention a "frightening" prospect that could transform the Court from a tribunal intended to interpret constitutional provisions into a mediator of public opinion.[222] This transformation, Scalia insisted, will foster a perception of constitutional adjudication "consist[ing] primarily of making *value judgments*," which would only prolong and intensify "the deep passions this issue arouses . . . ."[223] To avoid damaging the institutional integrity of the Court, Scalia concluded that "[w]e should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."[224]

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214. *Id.* at 2877-79 n.4 (Scalia, J., concurring in the judgment in part and dissenting in part).

215. *Id.* at 2876-77 nn.3-4, 2879 n.5 (Scalia, J., concurring in the judgment in part and dissenting in part).

216. *Id.* at 2878 (Scalia, J., concurring in the judgment in part and dissenting in part).

217. *Id.* at 2875-76 (Scalia, J., concurring in the judgment in part and dissenting in part).

218. *Id.* at 2873 (Scalia, J., concurring in the judgment in part and dissenting in part).

219. *Id.* at 2878, 2882 (Scalia, J., concurring in the judgment in part and dissenting in part).

220. *Id.* at 2881 (Scalia, J. concurring in the judgment in part and dissenting in part).

221. *Id.* at 2881-82 (Scalia, J., concurring in the judgment in part and dissenting in part).

222. *Id.* at 2883-84 (Scalia, J. concurring in the judgment in part and dissenting in part).

223. *Id.* at 2884-85 (Scalia, J., concurring in the judgment in part and dissenting in part).

224. *Id.* at 2885. (Scalia, J., concurring in the judgment in part and dissenting in part).

By joining Chief Justice Rehnquist's opinion, Scalia declared that all of the challenged Pennsylvania statutes should be upheld as a rational attempt to further a legitimate state interest.[225] In his own opinion, Scalia maintained that *Roe* expressed a value judgment on an issue not mentioned in the Constitution,[226] and failed to produce "a settled body of law"[227]—thus, it should be overruled.[228]

IV. ANALYSIS AND IMPLICATIONS

The joint majority endeavored to preserve the right to abortion but did not satisfactorily explain how it is constitutionally protected. The Fourteenth Amendment's command that no state shall "deprive any person of life, liberty, or property, without due process of law"[229] suggests that, consistent with "due process of law," one's liberty may be abridged. Arguably, a state may regulate any sphere of behavior it wishes as long as modes of proceeding are elucidated and carried out. A "due process of law" violation would occur if statutorily specified protections were withheld. This position would affect the mode rather than the content of state action. The joint majority elaborated on the Court's historical tendency to construe the Due Process Clause as a limitation on both the subjects and modes of state regulation.[230] This construction, however, does not yield a coherent position regarding the nature and scope of constitutionally permissible state policy on abortion. The Court needs to explain the relevance of its earlier application of substantive due process to the regulation of abortion if this sphere of activity constitutes liberty "so unique to the law."[231]

The joint majority further sought to link abortion regulation to its prior recognition of a broadly defined constitutional right to privacy.[232] The constitutional legitimacy of establishing a right to privacy was not questioned, and the joint majority made no attempt to define the constitutional ambit of privacy other than asserting that "[i]t is settled now . . . that the Constitution places limits on a [s]tate's right to interfere with a person's most basic decisions about family and parenthood."[233] What kinds of restraints does the Due Process Clause

225. *Id.* at 2855-73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justices White, Scalia, and Thomas joined Chief Justice Rehnquist's opinion.

226. *Id.* at 2874 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist and Justices White and Thomas joined in Justice Scalia's opinion.

227. *Id.* at 2884 (Scalia, J. concurring in the judgment in part and dissenting in part).

228. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

229. U.S. CONST. amend. XIV, § 1.

230. *Casey*, 112 S. Ct. at 2804; *see supra* notes 90-147 and accompanying text.

231. *Casey*, 112 S. Ct. at 2807.

232. *See supra* note 14 and accompanying text.

233. *Casey*, 112 S. Ct. at 2806.

place on the state's discretion to regulate abortion? Is this a policy choice to be resolved within the state's political process, or may the Court compel legislators to take certain factors into account? The joint majority recognized that individuals "of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy" and acknowledged its "obligation . . . not to mandate . . . [its] own moral code."[234] Yet, the joint majority insisted that a state, in enacting abortion legislation, must take into account the suffering and sacrifices endured by a pregnant woman.[235] The joint majority neither indicated how a state is to assess these factors nor explained the constitutional weight to be assigned to the respective interests of the state and the pregnant woman. The joint majority merely asserted that some balance must be evident in statutory provisions.

The joint majority additionally sought to avoid the impression of taking a position in the abortion controversy by invoking stare decisis. There is no constitutional requirement to follow precedent; stare decisis, however, is indispensable to continuity in the law, which enables citizens to regulate their lives.[236] Precedents, the joint majority suggested, have been overturned when changing social and economic attitudes have induced the Court to take a different interpretation of a constitutional provision.[237] The right to terminate a pregnancy was adjudicated in *Roe*, where the Court determined that the right was encompassed by a previously recognized constitutional right to privacy.[238] There has been "[n]o evolution of legal principle"[239] indicating the right to terminate pregnancy should no longer be considered a component of privacy protected from abridgment by the Due Process Clause of the Fourteenth Amendment.

Provisions of the Constitution do not necessarily have the same meaning for each generation. Indeed, as early as 1819, Chief Justice John Marshall proclaimed that the document is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[240] It is inevitable that changes in the political, economic, and social attitudes of the nation will produce evolving perceptions of legal pronouncements. The Constitution neither negates nor impedes this process. It merely divides responsibilities between two levels of government and among different branches to prevent the con-

234. *Id.*
235. *Id.* at 2807.
236. *Id.* at 2808.
237. *Id.* at 2812-14.
238. Roe v. Wade, 410 U.S. 113 (1973); *see supra* note 8 and accompanying text.
239. *Casey*, 112 S. Ct. at 2810.
240. McCulloch v. Maryland, 17 U.S. (4 Wheat) 159, 206 (1819).

centration and the arbitrary exercise of power. A judiciary appointed for life is both the greatest protection and threat to democracy.[241] By confining itself to declaring which level and branch of government is authorized to exercise jurisdiction, the Court, free from the pressures of constituents and a need to bolster electoral support, protects the citizenry from possible aggrandizement of power by the political branches. When the Court, however, bases its decisions on its own perception of prevailing public opinion, it makes a political judgment which the people cannot directly or readily amend. The Court is empowered to interpret provisions of the Constitution.[242] Once it has decided that power resides at the state level, however, the Court must respect the prerogatives adopted to implement state policy to avoid acting as a legislative body. In other words, once the Court has construed "liberty" in the Fourteenth Amendment to embrace a constitutional right to privacy, the states must determine the private spheres of protected human activity and the types of legislation needed to preserve them.

The joint majority did not proceed in this manner. The need to adhere to the "central holding of *Roe*"[243] was attributed to the desire to avoid possible social and economic dislocation. "[P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society . . . ."[244] Dislocation would result if a ruling of two decades were renounced.[245] Every ruling, however, compels individuals to make lifestyle choices, and the Court must objectively interpret constitutional provisions irrespective of the perceived impact of its decisions. In *Casey*, the joint majority explained its reasons for occasionally overturning precedent in areas likely to have a

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241. *But see* THE FEDERALIST No. 78, at 469-72 (Alexander Hamilton) (Wesleyan Univ. Press ed. 1961). Hamilton wrote:

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

Id. at 469.

242. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796). For an analysis of the origins and justification of the Court's power to adjudicate provisions of the Constitution, see ROBERT L. CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1989); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 (1985); HOWARD E. DEAN, JUDICIAL REVIEW AND DEMOCRACY (1966); ALBERT P. MELONE & GEORGE MACE, JUDICIAL REVIEW AND AMERICAN DEMOCRACY (1988); SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986).

243. *Casey*, 112 S. Ct. at 2810.

244. *Id.* at 2809.

245. *Id.*

profound effect on established lifestyle patterns and public opinion.[246] The Court's decisions regarding school segregation,[247] prayer[248] and Bible reading[249] in public schools, and flag[250] and cross burning[251]—to name but a few highly controversial issues—overturned longstanding statutes and strongly polarized local communities. Why was the Court reluctant to overturn *Roe* when it had previously reversed state practices which had also dramatically transformed social expectations? The joint majority pointed out that the Court had overturned precedents in the past, but did not articulate why the need to preserve the constitutional right to abortion was sufficiently compelling to refuse to overturn it. How is the Court to assess whether certain rights are in need of greater protection than others? Is perceived public opinion a legitimate factor to be taken into account in constitutional adjudication?

The joint majority claimed that adherence to stare decisis outweighed "the reservations any of us may have in reaffirming the central holding of *Roe* . . . ."[252] Far from enabling the Court to withdraw from the abortion controversy, however, the "undue burden" test will embroil the justices in the minutiae of state legislation regarding the reasonableness or wisdom of statutory measures. How can the Court know whether a law presents a "substantial obstacle"[253] to a pregnant woman seeking to abort a nonviable fetus? In view of *Casey's* affirmance of the pronouncement in *Roe* that the right to abortion is not absolute and that a state has an interest in the health of the woman and the "potentiality of life,"[254] how is the Court to determine whether a state regulation presents an "undue burden" or is instead a legitimate attempt to safeguard the fetus? In other words, the *Casey* position may render a state regulation permissible under *Roe,* but simultaneously an "undue burden" pursuant to *Casey.*[255] Finally, if the "woman's liberty is not so unlimited . . . that from the outset the State cannot show its concern for the life of the unborn,"[256] why is viability "the earliest point at which the State's interest in fetal life is constitutionally ade-

246. *Id.* at 2812-15; *see also supra* notes 90-147 and accompanying text.

247. Brown v. Board of Educ., 347 U.S. 483 (1954).

248. Lee v. Weisman, 112 S. Ct. 2649 (interim ed. 1992); Engel v. Vitale, 370 U.S. 421 (1962).

249. School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

250. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989).

251. R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (interim ed. 1992).

252. *Casey*, 112 S. Ct. at 2808.

253. *Id.* at 2821. The "substantial obstacle" determination is part of the undue burden test. *See supra* notes 135-40 and accompanying text.

254. *See* Roe v. Wade, 410 U.S. 113, 162, *reh'g denied*, 410 U.S. 959 (1973).

255. *Casey*, 112 S. Ct. at 2820-21.

256. *Id.* at 2816.

quate to justify a legislative ban on nontherapeutic abortions"?[257] The joint majority's retention of *Roe* without applying all of its components[258] did not clearly articulate the kinds of legislation which states may constitutionally enact.

The Court's preservation of the challenged Pennsylvania statutes, except for the spousal notification requirement, was also puzzling. Why was the Court willing to adhere to precedent[259] in striking down the spousal notification provision while upholding a measure to allow at least twenty-four hours to elapse before performing an abortion despite the fact that a similar measure was declared unconstitutional on two prior occasions?[260] Is it appropriate for the Court to strike down a statutory provision based on its perception of contemporary family relationships and its possible effect on a pregnant woman's ability to obtain spousal consent?[261]

In short, the joint majority endeavored to assess constitutionality by avoiding entanglement in competing "social and political pressures."[262] Its ambiguous "undue burden" test, however, will likely make this inevitable. The joint majority's desire to refrain from "undermining the Court's legitimacy"[263] was frustrated by the Court's quest to preserve *Roe* while renouncing its supporting components.[264] Moreover, its explanation of the applicability of stare decisis to the area of abortion is unconvincing in light of its acknowledgment that the Court has previously overturned precedent on issues likely to profoundly affect patterns of social behavior.[265]

The individual *Casey* opinions generally opposed the failure of the Court to furnish coherent guidelines for the states. Justices Stevens and Blackmun feared that states would have more latitude to gradually erode the constitutional right to abortion established in *Roe*.[266] On the other hand, Justices Rehnquist and Scalia expected that the Court

257. *Id.* at 2811.

258. *See id.* at 2817-18; *see also supra* notes 90-147 and accompanying text.

259. *See* Planned Parenthood Ass'n of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976) (holding the spousal consent provision of a Missouri statute unconstitutional).

260. *See Casey*, 112 S. Ct. at 2821-33. Two cases in which the Court struck down waiting periods for abortions are Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) and Akron v. Akron Ctr. for Reprod. Health, Inc. 462 U.S. 416 (1983).

261. *See Casey*, 112 S. Ct. at 2826-31.

262. *Id.* at 2814.

263. *Id.* at 2814-16.

264. *See id.* at 2817-18; *see also id.* at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting the portions of *Roe* that were not saved by the plurality). Chief Justice Rehnquist and Justices White and Thomas joined Justice Scalia's opinion.

265. *Id.* at 2812-16.

266. *See id.* at 2838-55 (Stevens, J., concurring in part and dissenting in part; Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

would increasingly examine abortion statutes based on its perception of the reasonableness of policy objectives.[267]

Justice Stevens did not object to the adoption of an "undue burden" test, which he hypothesized would enable the Court to more flexibly uphold the right to abortion.[268] His insistence, however, that three of the statutory provisions were unconstitutional, which the joint majority upheld, may suggest that he will seek clarification of the "undue burden" standard.[269] Justice Blackmun, on the other hand, wished to retain all of the components of the *Roe* decision.[270] While Stevens appeared willing to consider statutory provisions individually, leaving open the range of discretion a state may exercise, Blackmun insisted that there is a point beyond which state regulation may not extend.[271] Blackmun was convinced that the interests of the state and the woman were clearly delineated in *Roe* and did not need to be redefined.[272]

Unlike Scalia, who did not wish the Court to play any role in a state's decision to regulate or even allow abortion,[273] Rehnquist did not foreclose the possibility of some Court supervision provided that clear constitutional standards are formulated. Rehnquist objected not to the Court's having become involved in abortion litigation but, rather, to the Court's failure to articulate and subsequently implement a coherent constitutional position with respect to the right to privacy.[274] Both Rehnquist and Scalia were willing to uphold all of the challenged statutory provisions.[275] Rehnquist, however, was concerned with the Court's failure to articulate a clear position on federalism,[276] while Scalia was preoccupied with the exercise of judicial power on its face.[277] In other words, the Court's authority to address a particular subject was of paramount importance to Scalia. For Rehnquist, the

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267. *See id.* at 2855-83 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justices White, Scalia, and Thomas joined Chief Justice Rehnquist's opinion.

268. *See id.* at 2842-43 (Stevens, J., concurring in part and dissenting in part).

269. *See id.* at 2841-43 (Stevens, J., concurring in part and dissenting in part).

270. *See id.* at 2847-50 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

271. *See id.* at 2847-49 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

272. *See id.* at 2844-55 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

273. *Id.* at 2885 (Scalia, J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist and Justices White and Thomas joined Justice Scalia's opinion.

274. *See id.* at 2855-67 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justices White, Scalia, and Thomas joined Chief Justice Rehnquist's opinion.

275. *Id.* at 2855, 2873 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). *Id.* at 2885 (Scalia, J., concurring in the judgment in part and dissenting in part).

276. *See id.* at 2858-60 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

277. *See id.* at 2883-85 (Scalia, J. concurring in part and dissenting in part).

manner in which a policy area had been discussed was of central concern.

V. CONCLUSION

The *Casey* decision upheld the constitutional right to abortion established in *Roe*, but it did not formulate clear guidelines for the states to follow in order to protect their interests as well as those of the pregnant woman. The range of positions taken by the Justices calls into question the role to be played by the Court in American society. Should the Court merely seek to preserve the boundaries of federalism and separation of powers and leave the setting of social policy to the political process in each state? Is it appropriate for the Court to prescribe minimum constitutional standards to be followed by the states?

All of the Justices expressed a desire to adjudicate this issue irrespective of contending political, economic, and social viewpoints. The ambiguity of the "undue burden" test will furnish numerous opportunities to interpret state provisions and, invariably, involve the Court in this ongoing debate. Given inevitable changes in personnel, shifts in public opinion, advances in medical technology, and variable election results at the federal and state level, it is difficult to predict what direction the Court might take regarding abortion.[278] While renunciation of abortion as a constitutionally protected right is not foreseeable, the unclear guidelines of the "undue burden" test will likely generate a large quantity of litigation and conceivably result in a reformulation of constitutional standards.

278. For example, the recent announcement by Justice Byron White of his intention to retire at the end of the October 1992 term adds further speculation to the Court's direction because President Clinton, who firmly supports the right to abortion, will be the first Democratic chief executive since Lyndon Johnson to appoint a new Justice to the Supreme Court.