The Due Process Clauses in the United States Constitution are the source of a dizzying array of constitutional doctrines. For example, you have probably already seen in your class on Civil Procedure that the Court has tethered the constitutional requirements of notice before judgment and personal jurisdiction to the Due Process Clauses. And we saw in Chapter 7 how the Court has held that most of the protections in the Bill of Rights have been “incorporated” against state action by virtue of the Due Process Clause of the Fourteenth Amendment.

Notice that the Due Process Clauses refer to “liberty” and “property.” Are the Clauses properly read to create and define rights inhering in those concepts? Or do they simply protect those concepts, elsewhere defined, from deprivation without adequate procedural protections, such as notice and an opportunity to be heard? In this Part, we will focus on two principal doctrines that respond to these questions. “Procedural due process,” which we will consider in Chapter 9, refers to the government’s obligation to provide adequate procedural protections before depriving a person of some important interest. There is little doubt that, if nothing else, the Clauses impose this obligation, although (as we will see) there is much debate about when that obligation is triggered and what procedural protections actually are “due” when it is. The (somewhat oxymoronically named) doctrine of “substantive due process,” which we will consider in this Chapter, concerns the extent to which the “liberty” mentioned in the Due Process Clauses is protected from government deprivation, wholly aside from the fairness of the procedures that the government provides before the deprivation.

Although you might not have realized it at the time, we have already seen examples of both of these due process doctrines. Recall that the Court has held that the Due Process Clause of the Fourteenth Amendment “incorporates” most of the protections of the Bill of Rights. Some of those protections—such as the privilege against self-incrimination or the right to a trial by jury in a criminal case—seem quite clearly to be “procedural” in nature. When the Court held that those provisions of the Fifth and Sixth Amendments apply against the states through the force of the Due Process Clause, it effectively defined the process that is “due” when the state seeks to imprison or otherwise punish a person.

But other rights that the Court has held are incorporated through the Due Process Clause of the Fourteenth Amendment seem more like substantive forms of liberty than elaborations of the process that is due when the government seeks to deprive a person of liberty. As we will see in Chapters 14-17, for example, the First Amendment’s rights of free
speech and free exercise of religion cannot be abridged (except under rare circumstances) by state action, because those protections have been incorporated through the Due Process Clause. But those rights now exist against state action wholly aside from the fairness of the procedure that the state supplies before it seeks to abridge them. (The state cannot, for example, imprison you solely because it disagrees with your political views, even if it provides you with a fair trial to show what views you actually hold.) These incorporation decisions effectively defined the “liberty” mentioned in the Due Process Clause, and in that sense were a form of “substantive due process.” In this Chapter, we consider just how far that doctrine extends.

As we saw in Chapter 7, the doctrine of incorporation was very controversial, at least for a time in the middle of the twentieth century. But even assuming that the Court was correct to conclude that the Due Process Clause applies the explicit protections for substantive liberty in the Bill of Rights—including the rights to free speech and free exercise of religion in the First Amendment—to state action, it does not necessarily follow that the Due Process Clause of the Fourteenth Amendment also protects forms of liberty that are not expressly enumerated in the constitutional text. Whether it does will be the focus of this Chapter.

A. Substantive Due Process and Economic Liberty

In Chapter 18, we will see that the Constitution provides some explicit protections for economic liberty. The Contract Clause limits the authority of states to “impair[] the Obligation of Contracts,” and the Takings Clause imposes some constraints on the authority of the federal government (and, the Court has held, through incorporation the authority of the states) to take private property. Does the reference in the Due Process Clauses to “liberty” and “property” suggest broader protections for economic liberty?

The doctrine of substantive due process—and, in particular, the theory that the Due Process Clauses protect economic rights—is generally thought to have originated in the Court’s infamous decision in Dred Scott v. Sandford, 60 U.S. 393 (1857). See David P. Currie, The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-64, 1983 Duke L.J. 695, 735-36, and nn. 255-64. In that case, the Court considered the claim of a slave that he became free upon residing in the free state of Illinois and the free territory of Wisconsin, where he had been sent by his owner. In the course of its decision, the Court held that the Missouri Compromise, which abolished slavery in some of the territories, was unconstitutional. One part of its reasoning (the importance of which scholars debate) was the following:

We will consider the Court’s decision in Dred Scott, and in particular its role in the Constitution’s evolution in its treatment of racial discrimination, in Chapter 11.
The rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

Does this genesis of the doctrine of substantive due process taint it by association? Or are there good reasons to read the Due Process Clauses to protect (and define) a class of liberty and property that cannot be deprived even after a fair proceeding?

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**Lochner v. New York**

198 U.S. 45 (1905)

Mr. Justice PECKHAM delivered the opinion of the Court.

[The New York legislature enacted a law that prohibited employees from working in a bakery more than ten hours a day and more than sixty hours a week. Lochner was convicted of permitting an employee to work more than sixty hours during one week of work. He defended on the ground that the statute violated the Due Process Clause of the Fourteenth Amendment.]

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. [Otherwise] the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people. [In] every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his
family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action.

*** Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. *** The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard [the] health of the individuals who are following the trade of a baker. *** To the common understanding the trade of a baker has never been regarded as an unhealthy one. *** Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. *** There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a
lawyer’s, or a physician’s clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one’s living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. *** Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme. *** Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed.

This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. *** It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. *** It seems to us that the real object and purpose [of the challenged law] were simply to regulate the hours of labor between the master and his employees (all being men, Sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution. Reversed.

Mr. Justice HOLMES dissenting.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the
citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics. [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word “liberty,” in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Mr. Justice HARLAN (with whom Mr. Justice WHITE and Mr. Justice DAY concurred) dissenting.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety. Granting, then, that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming [that] such liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? [A] legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. *** If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation.
It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this wise legislation it is not the province of the court to inquire. [In determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the state are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation.

[Justice Harlan cited research that demonstrated that bakers were often sleep deprived because of the long hours that they worked; suffered from bronchial problems because they constantly inhaled flour; were susceptible to disease because of exposure to extremes of heat and cold; and had shorter average life expectancies.] There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours’ steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them. If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States.

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Points for Discussion

a. Substantive Due Process

The Court’s approach in *Lochner* is referred to as substantive due process because it effectively concluded that there is a substantive component to the “liberty” protected by the Due Process Clause that cannot be deprived regardless of the adequacy of the process provided. Critics have chided the Court for ascribing substantive content to that term. Was that Justice Holmes’s criticism? If the critics are correct, then is the Fourteenth Amendment’s reference to “liberty” and “property” surplusage? Or do they refer to property and liberty established by state and federal common-law and statutory law? Without defining those terms, how does the Court even know if the Clause’s protections are triggered?
b. Level of Scrutiny

What level of scrutiny did the Court apply to the challenged statute? Did it hold that a state categorically cannot regulate the number of hours that an employee can work, or instead that a state can do so only under certain circumstances? If the latter, then what might justify such state regulation? Contrast the Court’s approach with Justice Harlan’s approach. In his view, a state regulation must have a legitimate objective and a substantial relation to that objective. Even assuming that the Court’s test is too searching, why should a statute that fails Justice Harlan’s test violate the Due Process Clause? His proposed test, after all, does not turn on the procedure followed in enacting the law. Should the Due Process Clause impose any limits on state legislative or regulatory, as opposed to judicial, action?

c. Judicial Role

We saw in Chapter 2 that any time the Court invalidates a democratically enacted statute, it is presumptively acting in a counter-majoritarian fashion. Assuming (as most have) that the Court’s approach in *Lochner* was problematic, is the problem that the Court was acting in such a fashion? That it was acting in that fashion in order to protect an unenumerated right? Or that the right that the Court chose to protect did not warrant constitutional protection?

In the three decades after *Lochner*, the Court invalidated almost 200 laws and regulations on the ground that they violated economic rights protected by the Due Process Clauses. Most of the invalidated regulation was progressive-era legislation, at the state and federal level, that protected workers or fixed prices. In *Adair v. United States*, 208 U.S. 161 (1908), for example, the Court struck down a federal law that protected the right of employees to organize unions, and in *Coppage v. Kansas*, 236 U.S. 1 (1915), the Court invalidated a similar state law. To be sure, the Court also upheld many such regulations during this period. But there remained significant support on the Court for *Lochner*’s general approach; indeed, even in the cases that upheld state regulation, the reasoning did not always indicate a repudiation of *Lochner*’s approach. In *Muller v. Oregon*, 208 U.S. 412 (1908), for example, the Court upheld an Oregon law that limited the number of hours per day that women could work in factories and laundries. But the Court’s rationale in that case—that “inherent differences between the two sexes” justified the regulation notwithstanding the decision in *Lochner*—was based less on a relaxation of the scrutiny given to regulation of the workplace than it was on a paternalistic view of women.

And not even that rationale always prevailed. In *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), the Court struck down a law enacted by Congress providing for minimum wages for women and children in the District of Columbia. Justice Sutherland, writing for the majority of the Court, declared that the law impermissibly interfered with the “freedom of contract included within the guaranties of the due process clause of the Fifth Amendment.” The Court stated that it was “no longer open to question” that “the right to contract about one’s affairs is a part of the liberty of the individual protected by this clause.”
Court continued: “Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining.” The law was inconsistent with this principle: “The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss.” Although the freedom of contract was “subject to a great variety of restraints,” it was, the Court declared, “the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.” Because the amount of the wage was unrelated to the employee’s health, no such circumstances existed to justify the law. Chief Justice Taft and Justices Holmes and Sanford dissented.

In the 1930s, with the country facing the Great Depression, both the federal government and the states began more aggressively to regulate the market. Pressure built on the Court to change course, which it began to do in the case that follows.

Nebbia v. New York
291 U.S. 502 (1934)

Mr. Justice ROBERTS delivered the opinion of the Court.

[In response to the rapid decline in the price of milk—and the resulting risk that farmers would not seek to produce it—the New York legislature created the Milk Control Board and gave it power to fix minimum and maximum retail prices for milk. The Board issued an order fixing nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store, was convicted of selling milk in violation of the Board’s order after he sold a five-cent loaf of bread and two quarts of milk for eighteen cents. He defended on the ground that the Board’s order violated the Fourteenth Amendment.]
Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest. *** These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. *** But subject only to constitutional restraint the private right must yield to the public need.

The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied ***. Times without number we have said that the Legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty. Tested by these considerations we find no basis in the due process clause of the Fourteenth Amendment for condemning the provisions of the Agriculture and Markets Law here drawn into question.

Mr. Justice McREYNOLDS, [joined by Mr. Justice VAN DEVANTER, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER,] dissenting.
Chapter 8 Substantive Due Process

The statement by the court below that, “Doubtless the statute before us would be condemned by an earlier generation as a temerarious interference with the rights of property and contract [and] with the natural law of supply and demand,” is obviously correct. *** An end although apparently desirable cannot justify inhibited means. [The] Legislature cannot lawfully destroy guaranteed rights of one man with the prime purpose of enriching another, even if for the moment, this may seem advantageous to the public. And the adoption of any “concept of jurisprudence” which permits facile disregard of the Constitution as long interpreted and respected will inevitably lead to its destruction. Then, all rights will be subject to the caprice of the hour; government by stable laws will pass.

Points for Discussion

a. Level of Scrutiny

Did the Court in Nebbia conclude that no liberty protected by the Fourteenth Amendment was implicated by the challenged regulation? Or that the regulation permissibly abridged that liberty? Did it require “exceptional circumstances,” as did the Court in Adkins? Or did it apply a more deferential level of scrutiny?

b. Sign of Change?

If indeed the Court’s approach in Nebbia was different from its approach in Adkins and Lochner, why didn’t the Court simply overrule those cases? If nothing else, Justice Roberts’s papers make clear that he had concluded by 1936 that Adkins and Lochner were misguided. See Felix Frankfurter, Mr. Justice Roberts, 104 U. Pa. L. Rev. 311 (1955). In any event, there is little doubt that a majority of the Court was prepared formally to overrule Adkins and repudiate the Lochner approach.

West Coast Hotel Co. v. Parrish

300 U.S. 379 (1937)

Mr. Chief Justice HUGHES delivered the opinion of the Court.

[A Washington statute required the payment of minimum wages to women and minors. Respondent, an employee of West Coast Hotel, brought suit to recover the difference between the wages she received and those required under state law. West Coast Hotel defended on the ground that the statute violated the Fourteenth Amendment, as interpreted in Adkins. The state Supreme Court upheld the statute.]

We are of the opinion that this ruling of the state court demands on our part a re-examination of the Adkins Case. The importance of the question, in which many states having similar laws are concerned, the close division by which the decision in the Adkins
Case was reached, and the economic conditions which have supervened, and in the light
of which the reasonableness of the exercise of the protective power of the state must be
considered, make it not only appropriate, but we think imperative, that in deciding the
present case the subject should receive fresh consideration.

In each case the violation alleged by those attacking minimum wage regulation for
women is deprivation of freedom of contract. What is this freedom? The Constitution
does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation
of liberty without due process of law. In prohibiting that deprivation, the Constitution
does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has
its history and connotation. But the liberty safeguarded is liberty in a social organization
which requires the protection of law against the evils which menace the health, safety, mor-
als, and welfare of the people. Liberty under the Constitution is thus necessarily subject to
the restraints of due process, and regulation which is reasonable in relation to its subject
and is adopted in the interests of the community is due process. This essential limitation
of liberty in general governs freedom of contract in particular.

The minimum wage to be paid under the Washington statute is fixed after full consid-
eration by representatives of employers, employees, and the public. It may be assumed
that the minimum wage is fixed in consideration of the services that are performed in the
particular occupations under normal conditions. Provision is made for special licenses at
less wages in the case of women who are incapable of full service. The statement of Mr.
Justice Holmes in the Adkins Case is pertinent: “This statute does not compel anybody to
pay anything. It simply forbids employment at rates below those fixed as the minimum
requirement of health and right living. It is safe to assume that women will not be employed
at even the lowest wages allowed unless they earn them, or unless the employer's business
can sustain the burden.” 261 U.S. at 570. We think that the views thus expressed are
sound and that the decision in the Adkins Case was a departure from the true application
of the principles governing the regulation by the state of the relation of employer and
employed. Those principles have been reenforced by our subsequent decisions. See Nebbia

What can be closer to the public interest
than the health of women and their protection
from unscrupulous and overreaching employ-
ers? And if the protection of women is a legiti-
mate end of the exercise of state power, how can
it be said that the requirement of the payment
of a minimum wage fairly fixed in order to meet
the very necessities of existence is not an admis-
sible means to that end? The Legislature of the
state was clearly entitled to consider the situa-
tion of women in employment, the fact that they
are in the class receiving the least pay, that their
bargaining power is relatively weak, and that
they are the ready victims of those who would
take advantage of their necessitous circumstances. The Legislature was entitled to adopt measures to reduce the evils of the “sweating system,” the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The adoption of similar requirements by many states evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. *** The community is not bound to provide what is in effect a subsidy for unconscionable employers.

Our conclusion is that the case of Adkins should be, and it is, overruled. The judgment of the Supreme Court of the state of Washington is affirmed.

Mr. Justice SUTHERLAND [joined by Mr. Justice VAN DEVANTER, Mr. Justice McREYNOLDS, and Mr. Justice BUTLER, dissenting].

It is urged that the question involved should now receive fresh consideration, among other reasons, because of “the economic conditions which have supervened”; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of living words that apply to every new condition which they include, the statement is quite true. But to say [that] the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise. *** The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. *** If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation—and the only true remedy—is to amend the Constitution.
Points for Discussion

a. The Basis of the Decision

Did the Court depart from *Adkins* because that case simply interpreted the Constitution incorrectly? Or because circumstances had changed sufficiently—with the onset of the Great Depression—that the government's interest in regulating was suddenly substantially more compelling? If the latter, would the Court have overruled *Adkins*, or merely distinguished it?

b. Level of Scrutiny

Is the holding in *West Coast Hotel* that the liberty protected by the Due Process Clause does not embrace a freedom to contract? Or that the government may abridge that constitutionally protected freedom as long as the regulation reasonably relates to some legitimate governmental interest?

c. Parallel Developments

At the same time that the Court was deciding finally to depart from *Lochner*’s approach, the Court was beginning to recognize broad congressional power to regulate pursuant to the Commerce Clause. Recall from Chapter 3 that in *Jones & Laughlin Steel* and *Darby* the Court effectively applied the rational-basis test—essentially the same test that the Court applied in *West Coast Hotel*—to determine whether a statute fell within Congress's power to regulate pursuant to that clause. Recall as well that in early 1937 President Roosevelt announced his “Court-packing plan,” which would have added a new seat on the Court for every Justice over age 70 who stayed on the bench, until the Court included fifteen members. If adopted, the plan would have enabled Roosevelt to dilute the votes of the members of the Court who were most committed to the *Lochner* line of cases (and to a narrow view of federal power). By the time of his proposal, the Court had already issued its decisions in *West Coast Hotel*, and two months after Roosevelt announced the proposal it issued its decision in *Jones & Laughlin Steel*.

The Court’s decision in *West Coast Hotel* signaled that the Court would no longer searchingly review ordinary social and economic regulation. But did that mean that such regulation would not be subject to any scrutiny under the Due Process Clause at all? In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court upheld a federal statute that prohibited the shipment in interstate commerce of skim milk mixed with some fat or oil other than milk fat. The Court rejected the defendant’s argument that the statute violated the Due Process Clause of the Fifth Amendment, reasoning that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” This approach came to be known as “rational-basis review.” As we will see shortly, rational-basis review is a very deferential form of judicial scrutiny.

The Court noted, however, that such a deferential approach might not always be
appropriate. In footnote 4 of the opinion—perhaps the most famous footnote in Supreme Court history—Justice Stone stated:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. [The Court cited cases concerning “restrictions upon the right to vote,” “restraints upon the dissemination of information,” “interferences with political organizations,” and “prohibition of peaceable assembly.”] Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510 (1925), or national, Meyer v. Nebraska, 262 U.S. 390 (1923), or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428 (1803).

Footnote 4 suggested that heightened judicial scrutiny might be warranted when regulation “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.” This has come be known as the “political process” rationale for heightened judicial scrutiny of regulation. Why might judicial intervention be more justified in such cases? Does the footnote 4 approach properly respond to the defects of the Court’s approach in the Lochner era? Does it correctly identify those cases that call for more aggressive judicial intervention?

If nothing else, the Court made clear in subsequent cases that judicial scrutiny under the Due Process Clause would be quite deferential when ordinary social and economic regulation is at issue. Consider the case that follows.

Williamson v. Lee Optical Co.

348 U.S. 483 (1955)

Mr. Justice DOUGLAS delivered the opinion of the Court.

[An Oklahoma statute prohibited any person not licensed as an optometrist or ophthalmologist from fitting, duplicating, or replacing lenses without a written prescription from a licensed ophthalmologist or optometrist. After an optician challenged the provision, the District Court held that the ban on fitting without a prescription was not “reasonably and rationally related to the health and welfare of the people,” and that the ban on duplication without a prescription was “neither reasonably necessary nor reasonably related to the end sought to be achieved.”]

In practical effect, [the challenged statute] means that no optician can fit old glasses into new frames or supply a lens ***. The Oklahoma law may exact a needless, wasteful
requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. It appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription. It also appears that many written prescriptions contain no directive data in regard to fitting spectacles to the face. But in some cases the directions contained in the prescription are essential, if the glasses are to be fitted so as to correct the particular defects of vision or alleviate the eye condition. The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses. Likewise, when it is necessary to duplicate a lens, a written prescription may or may not be necessary. But the legislature might have concluded that was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or diseases, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert. To be sure, the present law does not require a new examination of the eyes every time the frames are changed or the lenses duplicated. *** But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. [Reversed in relevant part.]
ally always results in a conclusion that the challenged regulation is valid. The Court has stated, for example, that “[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws,” regardless of whether the laws are “wise or unwise.” Ferguson v. Shrupa, 372 US. 726, 730-32 (1963).

Should the Court have any role to play in reviewing regulation for rationality? Why does such a requirement flow from the Due Process Clause? Conversely, is rational-basis review unduly deferential to legislative action? Does the Court’s approach in Williamson amount effectively to judicial abdication?

b. “Legitimate Governmental Interest”

Notice that the Court in Williamson several times referred to what the legislature “might have concluded.” Under rational-basis review, a court generally will not seek to determine the legislature’s actual objective in enacting the challenged statute, but instead will judge it in light of possible objectives that the legislature might have sought to accomplish. See, e.g., U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980). Indeed, courts will accept governmental interests that may well not have been on the minds of any of the legislators but that the government can articulate post hoc for the purposes of litigation. See, e.g., Schweiker v. Wilson, 450 U.S. 221 (1981).

Suppose that there had been strong evidence that the legislature had enacted the statute at issue in Williamson in order to create a monopoly for optometrists and ophthalmologists, after lobbyists for those professions showered the legislators with campaign contributions. Would it still be relevant that the statute arguably advances other legitimate governmental interests? Should the Court at least have inquired in Williamson whether the actual legislative objective was legitimate?

c. “Reasonably Related”

Even assuming that the statute at issue in Williamson was designed to serve the interests that the Court identified, it was not a particularly effective measure to accomplish those ends, as it was both under- and over-inclusive. It was under-inclusive because, to the extent that the statute was designed to promote frequent eye exams, it did not actually require optometrists and ophthalmologists to conduct such exams when they fitted, duplicated, or replaced lenses. And it was over-inclusive because, to the extent that the statute was designed to ensure proper medical guidance to opticians, the prescription requirement applied even when the optician was merely duplicating an existing pair of lenses, which presumably had been prepared on the basis of a prescription. Yet the Court stated that “the law need not be in every respect logically consistent with its aims to be constitutional.” Under this approach, is it possible to imagine a state regulation that would fail this prong of the rational-basis test?
A. Substantive Due Process and Fundamental Rights

Notwithstanding the support of a few hearty commentators, *Lochner* has been subject to virtually universal condemnation. But what exactly was wrong with the decision and the approach that it embodied? Is it that any judicial protection of rights not enumerated in the Constitution is tantamount to impermissible judicial legislation that reflects the judges’ individual policy preferences rather than constitutional law as actually embodied in the Constitution’s text? Or is the problem with *Lochner* not that it involved judicial protection for unenumerated rights, but rather that “the Court chose the wrong values to enforce, wrong in the sense that complete laissez-faire capitalism was neither required by the historical understanding of ‘liberty,’ nor did it meaningfully enhance the freedom of the vast majority of Americans in the industrialized age”? Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 65-67 (1991). Or is the problem simply that most modern commentators have different values? Consider what the cases that follow suggest about the defect (if any) of *Lochner*.

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Perspective and Analysis

For the last seventy years, most commentators have criticized *Lochner* and the use of substantive due process to protect economic rights. Professor Richard Epstein, however, has argued for a return to *Lochner*’s approach:

*Lochner* may well have given too much scope to the police power ***. [The police power] does not sanction wholesale interference with financial arrangements, such as is mandated by a minimum-wage law. These statutes can impose heavy burdens upon both employer and employee for the benefit of parties who are strangers to the relationship—organized labor, for example, whose members are in competition with nonunion workers. To uphold minimum-wage legislation may be to invite, in the name of the police power, the very rent-seeking that any theory of limited government is designed to avoid.


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Are “economic” rights any different from other forms of liberty that we have come to prize? The following section takes up that question.

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B. Substantive Due Process and Fundamental Rights

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1. Prelude

*Lochner* and the cases that we considered earlier in this Chapter concerned economic liberties, such as the freedom to contract. During the *Lochner* era, the Court also decided several cases that found protection in the Due Process Clauses for other forms of liberty, as well. In *Meyer v. Nebraska*, 262 U. S. 390 (1923), for example, the Court overturned the conviction of a parochial school teacher for violating a law prohibiting teaching in any language other than English. The Court stated that the liberty protected by the due process clause “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, 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.” The Court held that the state had shown no justification for interference 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.” The following case, also decided during the *Lochner* era, elaborated on this view of the Due Process Clause.

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**Pierce v. Society of the Sisters**

268 U.S. 510 (1925)

Mr. Justice McREYNOLDS delivered the opinion of the Court.

[Two private schools in Oregon—one a parochial school and the other a non-parochial school—challenged an Oregon law that required children between 8 and 16 years old to attend public school.]

The inevitable practical result of enforcing the act under consideration would be destruction of appellees’ primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of *Meyer v. Nebraska*, 262 U. S. 390 (1923), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children

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*Food for Thought*

The plaintiffs in *Pierce* were private schools that were affected by the challenged law. But according to the Court, the “right” invaded by the statute belonged to the parents of the children that the schools hoped to enroll. Should the Court have concluded that these plaintiffs lacked standing to assert the rights of others? Or did the Court conclude that the schools have a protected right, as well?
under their control. As often heretofore pointed out, 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. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate. ***

Points for Discussion

a. Level of Scrutiny

The Court appeared to hold that the Act had no reasonable relation to any legitimate state interest. What do you think the state's purpose was in enacting the statute? Is that purpose obviously illegitimate? If not, how could the statute fail the test that the Court proposed? Is the Court's real point that there are some rights that are simply beyond the competency of the state to regulate, regardless of how “reasonable” the regulation is? Or is it instead that it would take a much more compelling state interest to justify the abridgment of those rights?

b. Fundamental Right

What is the “fundamental theory of liberty” to which the Court referred? Where does it come from? Would this theory of liberty permit the state to require all children to receive schooling, regardless of the setting in which they receive it? If so, why is it problematic to require that all children be educated in public schools?

c. Lochner Redux?

Justice McReynolds wrote the opinion in Pierce (and Meyer) during the Lochner era. (Indeed, we saw earlier in this Chapter, in his dissent in Nebbia and his position in West Coast Hotel, that Justice McReynolds was deeply committed to the Lochner line of cases.) Is there a difference between concluding that the Due Process Clause protects economic liberties such as the freedom to contract, on the one hand, and other forms of personal liberty, such as the right to make choices about child-rearing, on the other? If Lochner is indefensible, then is Pierce necessarily indefensible, too?
Recall that the Court effectively overruled *Lochner* in 1937 in *West Coast Hotel*. In so doing, did the Court also completely repudiate the view that the Due Process Clause protects some substantive definition of liberty wholly aside from the fairness of the process that precedes its deprivation?

In the case that follows, the Court relied on the Equal Protection Clause to invalidate a state law providing for the forced sterilization of felons convicted for the third time of crimes involving “moral turpitude.” The Court had previously upheld a statute providing that “the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives” held in state institutions. In *Buck v. Bell*, 274 U.S. 200 (1927), Justice Holmes, writing for the Court, rejected the argument that forced sterilization can never be justified:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. *** Three generations of imbeciles are enough.***

Justice Holmes rejected the petitioner’s equal protection claim as the “usual last resort of constitutional arguments.” We will consider the Equal Protection Clause, which generally speaking prohibits some forms of government classification, in Chapters 10-12. For the time being, consider whether the Court’s conclusion in the case that follows is really about the government’s general obligation to treat similarly situated persons the same, or is instead about individual liberty that cannot be abridged even when done even-handedly.

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**Skinner v. Oklahoma**

316 U.S. 535 (1942)

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring. [The Oklahoma Habitual Criminal Sterilization Act] defines an “habitual criminal” as a person who, having been convicted two or more times for crimes “amounting to felonies involving moral turpitude,” is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. Machinery is provided for the institution by the Attorney General of a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile. *** If [after notice and an opportunity to be heard] the court or jury finds that the defendant is an “habitual criminal” and that he “may be rendered sexually sterile without detriment to his or her general health,” then the court “shall render judgment to the effect
that said defendant be rendered sexually sterile.” [The Act also] provides that “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.”

[Between 1926 and 1934, petitioner was convicted once of stealing chickens and twice of robbery with fire arms. In 1936, the Attorney General instituted proceedings against him, and the Oklahoma Supreme Court ultimately affirmed a judgment directing that the petitioner be sterilized.]

Several objections to the constitutionality of the Act have been pressed upon us. It is urged that the Act cannot be sustained as an exercise of the police power in view of the state of scientific authorities respecting inheritability of criminal traits. It is argued that due process is lacking because under this Act, unlike the act upheld in *Buck v. Bell*, 274 U.S. 200 (1927), the defendant is given no opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring. It is also suggested that the Act is penal in character and that the sterilization provided for is cruel and unusual punishment and violative of the Fourteenth Amendment. We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment.

We do not stop to point out all of the inequalities in this Act. A few examples will suffice. *** A clerk who appropriates over $20 from his employer’s till and a stranger who steals the same amount are [both] guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. *** Whether a particular act is larceny by fraud or embezzlement [turns] not on the intrinsic quality of the act but on when the felonious intent arose.

[If] we had here only a question as to a State’s classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised. *** For a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining “its restrictions to those classes of cases where the need is deemed to be clearest.” *Miller v. Wilson*, 236 U.S. 373, 384 (1915). ***

But [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. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, 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.

When 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 invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. *** We have not the slightest basis for inferring that [Oklahoma’s line between larceny by fraud and embezzlement] has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. *** The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. *** If such a classification were permitted, [a common-law distinction] could readily become a rule of human genetics. Reversed.

Mr. Chief Justice STONE concurring.

I concur in the result, but I am not persuaded that we are aided in reaching it by recourse to the equal protection clause. If Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none.

*** I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.

Although petitioner here was given a hearing to ascertain whether sterilization would be detrimental to his health, he was given none to discover whether his criminal tendencies are of an inheritable type. Undoubtedly a state may, after appropriate inquiry, constitution-
ally interfere with the personal liberty of the individual to prevent the transmission by
now we have not been called upon to say that it may do so without giving him a hearing
and opportunity to challenge the existence as to him of the only facts which could justify
so drastic a measure.

Mr. Justice JACKSON, concurring.

There are limits to the extent to which a legislatively represented majority may conduct
biological experiments at the expense of the dignity and personality and natural powers
of a minority—even those who have been guilty of what the majority define as crimes.
But this Act falls down before reaching this problem, which I mention only to avoid the
implication that such a question may not exist because not discussed. On it I would also
reserve judgment.

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**Points for Discussion**

**a. Historical Context**

This case was decided in 1942, when the United States was beginning to learn about
the extent of the atrocities that were being committed by the Nazis in Germany in the name
of “eugenics” and the “science” of racial purity and superiority. Until this point, however,
eugenics—that is, the “science” of improving the hereditary qualities of a race or breed by
controlling reproduction—was not the subject of universal disapproval, and in fact had the
support of prominent figures such as Woodrow Wilson. The Court made no reference in
its opinion to events abroad. But would it have been appropriate for the Court to consider
the Nazi example in construing the Constitution in 1942?

**b. Other Possible Bases for the Decision**

The Court appeared to indicate that it is not the enforced sterilization of criminals per
se that is unconstitutional, but rather the different treatment accorded to persons convicted
of similar crimes. Should the Court have concluded—as the petitioner argued—that ster-
ilization is a cruel and unusual punishment in violation of the Eighth Amendment? Or
that it violates a protected liberty interest in reproduction? Was the Court’s decision really
based on the Equal Protection Clause?

**c. Precedent**

The Court in *Skinner* did not purport to overrule *Buck*. Instead, it stated:

“In *Buck v. Bell*, the Virginia statute was upheld though it applied only to feebleminded persons
in institutions of the State. But it was pointed out that “so far as the operations enable those
who otherwise must be kept confined to be returned to the world, and thus open the asylum
to others, the equality aimed at will be more nearly reached.” 274 U.S. at 208. Here there is no
such saving feature. Embezzlers are forever free. Those who steal or take in other ways are not.”
Is this a sensible ground for distinguishing *Buck*? Are Chief Justice Stone’s grounds for distinguishing *Buck* any more convincing?

d. Procedural vs. Substantive Due Process

Chief Justice Stone reasoned that the Oklahoma statute failed to accord adequate procedural protection to persons subject to the penalty of sterilization. We discuss arguments of this kind—usually called, somewhat redundantly, “procedural due process” arguments—in Chapter 9. Justice Jackson suggested that the statute might have been constitutionally problematic even if more process had been afforded, and wholly aside from any classifications that the statute created. There are hints of this view in the Court’s opinion, as well. Putting aside for a moment the equal protection rationale, which view is a more defensible basis for the decision?

2. Contraception and Abortion

*Skinner* at least suggested that, notwithstanding the repudiation of *Lochner*, the Court might continue to interpret the Due Process Clauses to protect some substantive spheres of liberty. In the cases that follow, the Court considered claims of personal autonomy in intimate relationships.

**Griswold v. Connecticut**

381 U.S. 479 (1965)

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven. *** They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. *** [They were convicted and fined $100 as accessories to the violation of § 53-32 of the General Statutes of Connecticut, which provides: “Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.” The state appellate courts affirmed the convictions notwithstanding appellants’ claim that the statute as applied violated the Fourteenth Amendment.]

[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish*. 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.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet by *Pierce v. Society of Sisters*, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. State of Nebraska*, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach. *** Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. 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.” *** We have had many controversies over these penumbral rights of “privacy and repose.” See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to
state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.” *NAACP v. Alabama*, 377 U.S. 288, 307 (1964). 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.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. [Reversed.]

Mr. Justice GOLDBERG, whom THE CHIEF JUSTICE and Mr. Justice BRENNAN join, concurring.

I agree with the Court that Connecticut’s birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that “due process” as used in the Fourteenth Amendment includes all of the first eight Amendments ***, I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court’s opinion, and by the language and history of the Ninth Amendment. *** This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected. In presenting the proposed Amendment, Madison said:

“It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of [the proposed Ninth Amendment].” I Annals
While this Court has had little occasion to interpret the Ninth Amendment, “it cannot
be presumed that any clause in the constitution is intended to be without effect.” Marbury
v. Madison, 1 Cranch 137, 174 (1803). *** To hold that a right so basic and fundamental
and so deep-rooted in our society as the right of privacy in marriage may be infringed
because that right is not guaranteed in so many words by the first eight amendments to the
Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.

[I] do not mean to imply that the Ninth Amendment is applied against the States by
the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an indepen-
dent source of rights protected from infringement by either the States or the Federal Gov-
ernment. Rather, [the] Ninth Amendment simply shows the intent of the Constitution’s
authors that other fundamental personal rights should not be denied such protection or
disparaged in any other way simply because they are not specifically listed in the first eight
constitutional amendments.

In determining which rights are fundamen-
tal, judges are not left at large to decide cases in
light of their personal and private notions.
Rather, they must look to the “traditions and
collective conscience of our people” to deter-
mine whether a principle is “so rooted there as
to be ranked as fundamental.” Snyder v. Massa-
chusetts, 291 U.S. 97, 105 (1934). The inquiry
is whether a right involved is of such a character
that it cannot be denied without violating those
“fundamental principles of liberty and justice
which lie at the base of all our civil and political
institutions.” Powell v. State of Alabama, 287
U.S. 45, 67 (1932).

I agree fully with the Court that, applying
these tests, the right of privacy is a fundamental
personal right, emanating “from the totality
of the constitutional scheme under which we
live.” *** [W]here fundamental personal lib-
erties are involved, *** “the State may prevail
only upon showing a subordinating interest
which is compelling,” [and by showing that
the] law is “necessary, and not merely rationally
related to, the accomplishment of a permis-
sible state policy.” Although the Connecticut
birth-control law obviously encroaches upon a
fundamental personal liberty, the State [has not
met this standard.]
Chapter 8 Substantive Due Process

Mr. Justice HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court’s opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers BLACK and STEWART in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values “implicit in the concept of ordered liberty,” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, 367 US. 497 (1961), I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

[Justices Black and Stewart rest on] the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to “interpretation” of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the “vague contours of the Due Process Clause.” *Rochin v. People of State of California*, 342 U.S. 165, 170 (1952). While I could not more heartily agree that judicial “self restraint” is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. “Specific” provisions of the Constitution, no less than “due process,” lend themselves as readily to “personal” interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed “tune with the times.” Judicial self-restraint *** will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

Mr. Justice WHITE, concurring in the judgment.

An examination of the justification offered [for the statute] cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demands the marriage relationship. [S]uch statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause.
The State claims but one justification for its anti-use statute. *** The statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal. *** I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. *** Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. *** At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

Mr. Justice BLACK, with whom Mr. Justice STEWART joins, dissenting.

There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional. *** The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." *** "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. *** I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." If these formulas based on "natural justice," or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of
what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.

The Ninth Amendment was *** passed, not to broaden the powers of this Court or any other department of “the General Government,” but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. *** This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. So far as I am concerned, Connecticut’s law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

Mr. Justice STEWART, whom Mr. Justice BLACK joins, dissenting.

I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual’s moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual’s choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law. *** There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due
As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. *** The Ninth Amendment, like its companion the Tenth, which this Court held “states but a truism that all is retained which has not been surrendered,” United States v. Darby, 312 U.S. 100, 124 (1941), was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. *** If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

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**Points for Discussion**

**a. “Penumbras”: Justice Douglas’s View**

According to Justice Douglas, what is the constitutional source of the right that is protected in *Griswold*? According to his theory, is the right “enumerated” or “unenumerated”? How far do the penumbras of the rights that are enumerated in the Constitution extend?

**b. Due Process: Justice Harlan’s View**

Even though the Constitution contains some provisions that protect privacy, is it an over-generalization to conclude from these provisions that the Constitution protects privacy as a general matter? In his concurrence in *Griswold*, Justice Harlan referred to his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), which involved a challenge to the same Connecticut statute at issue in *Griswold*. The Court in that case declined to reach the merits, concluding that, because there was no showing that the statute would actually be enforced against the plaintiffs, the case was not justiciable. Justice Harlan disagreed and accordingly reached the merits. He stated:

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. No formula could serve as a substitute, in this area, for judgment and restraint. This “liberty” is [a] rational continuum which, broadly speaking, includes a freedom from all substantial arbi-
try impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

I think the sweep of the Court’s decisions, under both the Fourth and Fourteenth Amendments, amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character. *** [I]t is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations. [T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

Since, as it appears to me, the statute marks an abridgment of important fundamental liberties protected by the Fourteenth Amendment, it will not do to urge in justification of that abridgment simply that the statute is rationally related to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required. *** [C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut’s moral policy, has seen fit to effectuate that policy by the means presented here.

In Justice Harlan’s view, the Due Process Clause protects liberty as defined by the nation’s traditions, which he describes as “living.” Does he mean by this that the meaning of “liberty” changes from generation to generation? Is it possible that the liberty that he found in Poe (and Griswold) will not be constitutionally protected in the future?

c. Due Process and the Role of the Ninth Amendment: Justice Goldberg’s View

The Ninth Amendment states: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” Justices Goldberg and Black disagreed on the weight and meaning of this Amendment. Justice Black asserted that the Amendment was never intended to create judicially enforceable rights. Did Justice Goldberg suggest that the Ninth Amendment itself creates enforceable rights? If not, what did he think it adds to the analysis? And if the Ninth Amendment does not itself create rights, where do they come from? Are they created by the limitation on federal powers?

Justice Stewart compared the Ninth Amendment to the Tenth Amendment, which we considered in Chapter 3, and he concluded that it was merely designed to confirm the enumeration. Is this a plausible reading of the Ninth Amendment’s text? Conversely, for Justice Goldberg’s view to be plausible, must he conclude that the Ninth Amendment applies to the states through the Fourteenth Amendment?
d. Contraception and Marriage

*Griswold* specifically addressed the rights of married persons to be free from governmental interference with their decisions regarding contraception. Indeed, Justices Douglas, Harlan, and White relied explicitly on the marital relationship in identifying the right at issue. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), decided seven years later, the Court invalidated a statute that permitted the distribution of contraceptives only to married—and thus not to unmarried—persons. Although the Court relied on the Equal Protection, rather than the Due Process, Clause, it suggested that the right at issue in *Griswold* did not exist solely by virtue of marriage:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. 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.

Does the Court’s decision in *Eisenstadt* suggest that *Griswold* was about more than simply marital privacy? Or was *Eisenstadt* an impermissible extension of *Griswold*?

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**Roe v. Wade**

410 U.S. 113 (1973)

Mr. Justice BLACKMUN delivered the opinion of the Court.

[Texas law makes] it a crime to “procure an abortion,” as therein defined, or to attempt one, except with respect to “an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” Similar statutes are in existence in a majority of the States. [A woman alleging that she wished to terminate her pregnancy by an abortion performed by a licensed physician, and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions, filed suit to challenge the law. A separate action was instituted by a married couple who alleged that the woman suffered from a condition that made pregnancy dangerous to her health, that their physician had counseled them not to use birth control, and that they would wish to seek an abortion if she became pregnant. The Court first engaged in a lengthy discussion of the history of legal treatment of abortion, observing that it “perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws [derive] from statutory changes effected, for the most part, in the latter half of the 19th century.” The Court then proceeded to the “main thrust” of the plaintiffs’ argument.]

The Constitution does not explicitly mention any right of privacy. In a line of deci-
sions, however, [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 least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 484-485 (1965); in the Ninth Amendment, id. at 486; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S. 438, 453-454 (1972); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

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. The 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.

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. *** Where certain “fundamental rights” are involved, the Court has held that regulation limiting these rights may be justified only by a “compelling state interest,” Kramer v. Union Free School District, 395 U.S. 621, 627 (1969), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. Griswold, 381 U.S., at 485.
The appellee and certain amici argue that the fetus is a “person” within the language and meaning of the Fourteenth Amendment. *** If this suggestion of personhood is established, the appellant’s case, of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment. *** The Constitution does not define “person” in so many words. Section 1 of the Fourteenth Amendment contains three references to “person.” *** “Person” is [also] used in other places in the Constitution [b]ut in nearly all these instances, the use of the word is such that it has application only postnatally. All this *** persuades us that the word “person,” as used in the Fourteenth Amendment, does not include the unborn.

**Food for Thought**

If the Court had accepted Texas’s argument that the fetus is a “person” entitled to protection under the Fourteenth Amendment, would the provision in Texas law permitting abortions for the purpose of saving the life of the mother have been constitutional?

[However, the] State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and [it] has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes “compelling.”

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. This is so because of the now-established medical fact [that] 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. *** This means, on the other hand, that, for 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.

Measured against these standards, [the Texas law] sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, “saving” the mother’s life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

To summarize and to repeat: *** (a) 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. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

[Our] decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

Mr. Justice STEWART, concurring.

In 1963, this Court, in Ferguson v. Skrupa, 372 U.S. 726 (1963), purported to sound the death knell for the doctrine of substantive due process ***. Barely two years later, in Griswold, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in Skrupa, the Court’s opinion in Griswold understandably did its best to avoid
reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet, the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the “liberty” that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Furman* cases decided under the doctrine of substantive due process, and I now accept it as such.

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. *** Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *** As recently as last Term, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), we recognized “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.” That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.

Mr. Justice REHNQUIST, dissenting.

I have difficulty in concluding, as the Court does, that the right of “privacy” is involved in this case. *** A transaction resulting in an [abortion] is not “private” in the ordinary usage of that word. *** If the Court means by the term “privacy” no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of “liberty” protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with [Justice STEWART that “liberty”] embraces more than the rights found in the Bill of Rights. But that liberty 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 (1955). [T]he 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.

As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard
will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "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). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment. *** By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion. *** The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

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Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, dissenting.

The Court apparently values the convenience of the pregnant woman more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In

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**Food for Thought**

As an originalist matter, does the fact that the framers or ratifiers of a constitutional provision expected it to permit a particular practice necessarily demonstrate that the practice is constitutional? If so, as we will see in Chapter 11, the Court's decision in *Brown v. Board of Education* that school segregation is unconstitutional might, as some have argued, be indefensible on originalist grounds. But some originalists have responded that there is a difference between the original "meaning" of a constitutional provision and the original "expected application" of the provision, and that only the former is binding. See Michael W. McConnell, *The Importance of Humility in Judicial Review*, 65 Ford. L. Rev. 1269, 1284 (1997); Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comm. 291 (2007).

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In *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe*, the Court invalidated a Georgia statute regulating abortions. Justice White's opinion was filed in response to both cases.

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a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court’s exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing women and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.

[Justice DOUGLAS’s concurring opinion is omitted.]

Points for Discussion

a. Due Process

In his opinion for the Court, Justice Blackmun declared that the right of privacy is “founded in the Fourteenth Amendment’s concept of personal liberty”—that is, that the right is one protected by substantive due process. What does this mean for the “penumbras” approach that Justice Douglas advanced for the Court in Griswold? In fact, Justice Douglas issued a concurring opinion in Roe (and in a companion case) that asserted that the right at issue was “peripheral” to other rights specified in the Constitution. No other member of the Court joined his opinion.

b. The Trimester Framework

The Court determined that the right of a woman to choose an abortion depends on timing. Under Roe, in the first trimester of pregnancy, the state cannot ban abortion. In roughly the third trimester—the stage subsequent to “viability”—the state can prohibit abortion except where necessary to preserve the life or health of the mother. The Court also stated that in the second trimester, the state can regulate abortion “in ways that are reasonably related to maternal health.” Where did this framework come from? Is it a sensible interpretation of the Due Process Clause? Is it the best interpretation?

c. Constitutional Interpretation or Judicial Legislation?

A familiar refrain in cases involving substantive due process claims is that the Court is engaging in so-called “judicial legislation.” Concerns about “judicial activism” and the separation of powers are obviously not unique to Due Process Clause cases; recall, for instance, Justice Scalia’s criticisms of the Dormant Commerce Clause Doctrine, which we considered in Chapter 4. Nor is reliance on the implications from broad constitutional text unusual; consider the Court’s decisions in New York v. United States and Printz v. United States, which we considered in Chapter 3 and which concluded that “structural” postulates prohibit Congress from compelling the states to enact or administer federal regulatory programs.

Are Griswold and Roe any more problematic than the countless other instances in which the Court has interpreted vague constitutional provisions to be rights-creating? If so, why?
d. History and Debate

In a section of the opinion omitted here, the Court engaged in a lengthy discussion of the history of abortion, including philosophical, medical, and legal issues debated in the West over the last 2000 years. Why did the Court believe that this discussion was necessary to the constitutional analysis?

The debate over abortion obviously did not end with the Court's decision in *Roe*, as some of the Justices apparently believed that it would. Does the continuing debate tend to justify the Court's decision, or instead undermine it?

The Court's decision in *Roe* was not the last word on the subject. In the two decades after the decision, the Court decided many cases concerning the right to an abortion. But the Court continued to be divided; some members of the Court asserted that *Roe* should be overruled. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 797 (1986) (White, J., dissenting). After several appointments to the Court by President Reagan, who had pledged to appoint Justices who would overrule *Roe*, many people believed that the Court was poised to do just that. And indeed, some of those Justices explicitly wrote in favor of overruling *Roe*. See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Scalia, J., concurring in part and concurring in the judgment).

The Court, however, declined to do so in the case that follows. In it, the Court reviewed a Pennsylvania statute that limited the right to an abortion in several ways, including requiring a 24-hour waiting period before a woman could obtain an abortion; requiring spousal consent before a woman could obtain an abortion; requiring parental consent for minors who sought abortions; and requiring abortion clinics to report information to the state about abortions performed. (The statute also prohibited “sex-selection” abortions, but the petitioners did not challenge that section. Can you think of why they did not?)

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**Planned Parenthood of Southeastern Penn. v. Casey**

505 U.S. 833 (1992)

Justice O’CONNOR, Justice KENNEDY, and Justice SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, V-A, V-C, and VI, an opinion with respect to Part V-E, in which Justice STEVENS joins, and an opinion with respect to Parts IV, V-B, and V-D.

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages, that definition of liberty is still questioned. Joining the respondents as amicus curiae, the United States, as it has done in five other cases in the last decade, again asks us to overrule
After considering the fundamental constitutional questions resolved by Roe, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed.

II

Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, since Mugler v. Kansas, 123 U.S. 623, 660-661 (1887), the Clause has been understood to contain a substantive component as well, one “barring certain government actions regardless of the fairness of the procedures used to implement them.” Daniels v. Williams, 474 U.S. 327, 331 (1986). As Justice Brandeis (joined by Justice Holmes) observed, “[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” Whitney v. California, 274 U.S. 357, 373 (1927) (concurring opinion).

It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view. *** It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia, 388 U.S. 1, 12 (1967). *** Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. *** It is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about family and parenthood, see Eisenstadt; Loving; Griswold; Skinner; Pierce; Meyer, as well as bodily integrity, see, e.g., Washington v. Harper, 494 U.S. 210, 221-222 (1990).

The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state
policy choices with which we disagree; yet neither does it permit us to shrink from the
duties of our office.

Men and women of good conscience can disagree, and we suppose some always shall
disagree, about the profound moral and spiritual implications of terminating a pregnancy,
even in its earliest stage. Some of us as individuals find abortion offensive to our most basic
principles of morality, but that cannot control our decision. Our obligation is to define the
liberty of all, not to mandate our own moral code. The underlying constitutional issue is
whether the State can resolve these philosophic questions in such a definitive way that a
woman lacks all choice in the matter, except perhaps in those rare circumstances in which
the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.

Our law affords constitutional protection to personal decisions relating to marriage,
procreation, contraception, family relationships, child rearing, and education. *** These
matters, involving the most intimate and personal choices a person may make in a lifetime,
choices central to personal dignity and autonomy, are central to the liberty protected by the
Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of exis-
tence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of person-
hood were they formed under compulsion of the State.

Though the abortion decision may originate within the zone of conscience and belief,
it is more than a philosophic exercise. Abortion [is] an act fraught with consequences for
others: for the woman who must live with the implications of her decision; for the persons
who perform and assist in the procedure; for the spouse, family, and society which must
confront the knowledge that these procedures exist, procedures some deem nothing short of an
act of violence against innocent human life; and, depending on one’s beliefs, for the life or poten-
tial life that is aborted. Though abortion is
conduct, it does not follow that the State is
entitled to proscribe it in all instances. That is
because the liberty of the woman is at stake in a
sense unique to the human condition and so
unique to the law. The mother who carries a
child to full term is subject to anxieties, to
physical constraints, to pain that only she must
bear. That these sacrifices have from the begin-
ing of the human race been endured by woman
with a pride that ennobles her in the eyes of oth-
ers and gives to the infant a bond of love cannot
alone be grounds for the State to insist she make

Food for Thought

The Court seems to suggest here that the Constitution protects a con-
ception of liberty that is largely at
 odds with the visions that has been
“dominant” in “our history and cul-
ture.” Even assuming, as the Court
states, that the Constitution protects
unenumerated “fundamental rights,”
how can the Court define those
rights to be largely in conflict with
widely held views about the limits
on personal liberty? Is the Court’s
approach consistent with Justice
Harlan’s approach in Griswold and
Poe?
the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

While we appreciate the weight of the arguments [that] Roe should be overruled, the reservations any of us may have in reaffirming the central holding of Roe are outweighed by the explication of individual liberty we have given combined with the force of stare decisis. We turn now to that doctrine.

III

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. [N]o judicial system could do society’s work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of stare decisis is not an “inexorable command,” and certainly it is not such in every constitutional case. *** While [Roe] has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume Roe’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left Roe’s central holding a doctrinal remnant; Roe portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips. Within the bounds of normal stare decisis analysis, then, and subject to the considerations on which it customarily turns, the stronger argument is for affirming Roe’s central holding, with whatever degree of personal reluctance any of us may have, not for overruling it.

In a less significant case, stare decisis analysis could, and would, stop at the point we have reached. But the sustained and widespread debate Roe has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed. Only two such decisional lines from the past century present themselves for examination, and in each instance the result reached by the Court accorded with the principles we apply today.

The first example is that line of cases identified with Lochner v. New York, 198 U.S. 45 (1905). [By 1937, it] seemed unmistakable to most people [that] the interpretation of contractual freedom protected in [Lochner] and its progeny] rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. *** The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history’s demon-
stration of their untruth not only justified but required the new choice of constitutional principle that West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), announced.

The second comparison that 20th century history invites is with the cases employing the separate-but-equal rule for applying the Fourteenth Amendment’s equal protection guarantee. They began with Plessy v. Ferguson, 163 U.S. 537 (1896), holding that legislatively mandated racial segregation in public transportation works no denial of equal protection, rejecting the argument that racial separation enforced by the legal machinery of American society treats the black race as inferior. *** But [by 1954, when the Court decided Brown v. Board of Education, 347 U.S. 483 (1954), it was clear] that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal.

West Coast Hotel and Brown each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. *** In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court’s constitutional duty. Because the cases before us present no such occasion it could be seen as no such response. Because neither the factual underpinnings of Roe’s central holding nor our understanding of it has changed ***, the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.

[O]verruling Roe’s central holding [would also] seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. *** As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy, [which] depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

Food for Thought

Was it really only the understanding of markets and the facts of economic life that changed in the three decades before 1937, or the understanding of the effects of segregation that changed in the half century before 1954, that explain the Court’s decisions in West Coast Hotel and Brown? Don’t social and moral shifts that made the old decisions unpalatable help to explain those decisions? Or even a change in the composition of the Court itself? How might a different view of these cases have affected the application of stare decisis to Roe?
Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution. The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question. *** It is therefore imperative to adhere to the essence of *Roe*’s original decision, and we do so today.

IV

From what we have said so far it follows that it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy. We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman’s liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.

We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. *** Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. [In addition,] the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. *** The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe*. It is a rule of law and a component of liberty we cannot renounce.
Yet it must be remembered that *Roe* speaks with clarity in establishing not only the woman's liberty but also the State's "important and legitimate interest in potential life." *** A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life. The trimester framework *** misconceives the nature of the pregnant woman's interest [and] in practice it undervalues the State's interest in potential life, as recognized in *Roe*. *** Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.

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.

We give this summary: [T]hroughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right. As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability. [And] "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*.

These principles control our assessment of the Pennsylvania statute [at issue in this case], and we now turn to the issue of the validity of its challenged provisions.

V

[Section VA is omitted.]

B

Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the "probable gestational age of the unborn child." *** In attempting to ensure that a woman apprehend the full consequences
of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. *** [R]equiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.

Whether the mandatory 24-hour waiting period is nonetheless invalid because in practice it is a substantial obstacle to a woman’s choice to terminate her pregnancy is a closer question. The findings of fact by the District Court indicate that because of the distances many women must travel to reach an abortion provider, the practical effect will often be a delay of much more than a day because the waiting period requires that a woman seeking an abortion make at least two visits to the doctor. As a result, the District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be “particularly burdensome.” 744 F. Supp. 1323, 1352 (E.D. Pa. 1990).

These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden. We do not doubt that, as the District Court held, the waiting period has the effect of “increasing the cost and risk of delay of abortions.” *** Yet, as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest. *** A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.

C

Pennsylvania’s abortion law provides, except in cases of medical emergency, that no physician shall perform an abortion on a married woman without receiving a signed statement from the woman that she has notified her spouse that she is about to undergo an abortion. The woman has the option of providing an alternative signed statement certifying that her husband is not the man who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notifying her husband will cause him or someone else to inflict bodily injury upon her. A physician who performs an abortion on a married woman without receiving the appropriate signed statement will have his

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**Food for Thought**

What weight, if any, should the Court accord the father's interest in the choice whether to carry a pregnancy to term? Is that right constitutionally protected? What would be the consequences of recognizing such a right?
or her license revoked, and is liable to the husband for damages.

The District Court [made] detailed findings of fact regarding the effect of this statute [including that mere] “notification of pregnancy is frequently a flashpoint for battering and violence within the family.” These findings are supported by studies of domestic violence. *** In well-functioning marriages, spouses discuss important intimate decisions such as whether to bear a child. But there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion. *** The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion.

We recognize that a husband has a “deep and proper concern and interest [in] his wife’s pregnancy and in the growth and development of the fetus she is carrying.” [But it] is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother’s liberty than on the father’s. *** For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over his wife’s decision. [The] women most affected by this law—those who most reasonably fear the consequences of notifying their husbands that they are pregnant—are in the gravest danger.

The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. *** A State may not give to a man the kind of dominion over his wife that parents exercise over their children. [The spousal notification requirement] embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. [The spousal notification provision is invalid.]

D

We next consider the parental consent provision. Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent ***. Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure. Ohio v. Akron Center for Reproductive Health, 497 U.S., 502, 510-519 (1990).
Under the recordkeeping and reporting requirements of the statute, every facility which performs abortions is required to file a report [including, for each abortion performed, the identity of the physician; the woman's age; the number of prior pregnancies and prior abortions she has had; gestational age; and similar information.] The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice. At most they might increase the cost of some abortions by a slight amount. While at some point increased cost could become a substantial obstacle, there is no such showing on the record before us.

VI

Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. *** Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.

Justice STEVENS, concurring in part and dissenting in part.

[Justice Stevens would have concluded that the 24-hour waiting period required by the Pennsylvania statute was unconstitutional.] While there are well-established and consistently maintained reasons for the Commonwealth to view with skepticism the ability of minors to make decisions, none of those reasons applies to an adult woman's decision-making ability. *** Part of the constitutional liberty to choose is the equal dignity to which each of us is entitled. A woman who decides to terminate her pregnancy is entitled to the same respect as a woman who decides to carry the fetus to term. The mandatory waiting period denies women that equal respect.

Justice BLACKMUN, concurring in part, concurring in the judgment in part, and dissenting in part.

Three years ago, [four] Members of this Court appeared poised to [overrule Roe]. All that remained between the promise of Roe and the darkness [was] a single, flickering flame. *** But now, just when so many expected the darkness to fall, the flame has grown bright. I do not underestimate the significance of today's joint opinion. Yet I remain steadfast in my belief that the right to reproductive choice is entitled to the full protection afforded by this Court [in Roe]. And I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light.

[Compelled continuation of a pregnancy infringes upon a woman's right to bodily integrity by imposing substantial physical intrusions and significant risks of physical harm. [In addition,] when the State restricts a woman's right to terminate her pregnancy, it deprives a woman of the right to make her own decision about reproduction and fam-
ily planning—critical life choices that this Court long has deemed central to the right to privacy. A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. *** By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. [The] assumption [that] women can simply be forced to accept the “natural” status and incidents of motherhood [appears] to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause.

Strict scrutiny of state limitations on reproductive choice still offers the most secure protection of the woman's right to make her own reproductive decisions, free from state coercion. [T]he*** Roe framework is far more administrable, and far less manipulable, than the “undue burden” standard adopted by the joint opinion. [Applying this standard, Justice Blackmun would have concluded that the provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information were unconstitutional.]

In one sense, the Court's approach is worlds apart from that of THE CHIEF JUSTICE and Justice SCALIA. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote. I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice SCALIA, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

In our view, authentic principles of stare decisis do not require that any portion of the reasoning in Roe be kept intact. [Erroneous] decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that “depar[t] from a proper understanding” of the Constitution. [S]urely there is no requirement, in considering whether to depart from stare decisis in a constitutional case, that a decision be more wrong now than it was at the time it was rendered.

[The] joint opinion [argues that Roe] is exempt from reconsideration under established principles of stare decisis in constitutional cases [because the Court must] take special care not to be perceived as “surrendering to political pressure” and continued opposition. This is a truly novel principle, one which is contrary to both the Court's historical practice and to the Court's traditional willingness to tolerate criticism of its opinions. Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, unless opposition to the
original decision has died away. ***

The end result of the joint opinion’s paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman’s right to abortion—the “undue burden” standard. *** Despite the efforts of the joint opinion, the undue burden standard presents nothing more workable than the trimester framework which it discards today. Under the guise of the Constitution, this Court will still impart its own preferences on the States in the form of a complex abortion code.

[W]e think that the correct analysis is [as follows:] A woman’s interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest. *** [Under this approach, the dissent would have concluded that all of the provisions in the Pennsylvania statute are constitutional.]

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

The States may, if they wish, permit abortion on demand, but the Constitution does not require them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. [The issue in this case is] not whether the power of a woman to abort her unborn child is a “liberty” in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion not because of anything so exalted as my views concerning the “concept of existence, of meaning, of the universe, and of the mystery of human life.” Rather, I reach it [because] of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

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

[The joint opinion insists that the Court will apply “reasoned judgment.”] The emptiness of the “reasoned judgment” that produced Roe is displayed in plain view by the fact that, after more than 19 years of effort by some of the brightest (and most determined) legal minds in the country, after more than 10 cases upholding abortion rights in this Court, and after dozens upon dozens of amicus briefs submitted in these and other cases, the best the Court can do to explain how it is that the word “liberty” must be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.

[The joint opinion states,] “Liberty finds no refuge in a jurisprudence of doubt.” One might have feared to encounter this august and sonorous phrase in an opinion defending
the real *Roe v. Wade*, rather than the revised version fabricated today by the authors of the joint opinion. The shortcomings of *Roe* did not include lack of clarity: Virtually all regulation of abortion before the third trimester was invalid. But to come across this phrase in the joint opinion—which calls upon federal district judges to apply an “undue burden” standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear. *** Reason finds no refuge in this jurisprudence of confusion.

The Court’s reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the “central holding.” It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. ***

The Court’s description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, resolve the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve. *** *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any Pax Roeana, that the Court’s new majority decrees.

I cannot agree with, indeed I am appalled by, the Court’s suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—against overruling, no less—by the substantial and continuing public opposition the decision has generated. *** But whether it would “subvert the Court’s legitimacy” or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening. *** In truth, I am as distressed as the Court is [about] the “political pressure” directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. *** The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to the cause of it. That cause permeates today’s opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls “reasoned judgment,” which turns out to be nothing but philosophical predilection and moral intuition.

There is a poignant aspect to today’s opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court.

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. *** There seems to be on his
face, and in his deep-set eyes, an expression of profound sadness and disillusionment. ***
I expect that two years earlier he, too, had thought himself “call[ing] the contending sides
of national controversy to end their national division by accepting a common mandate
rooted in the Constitution.” It is no more realistic for us in this litigation, than it was for
him in that, to think that an issue of the sort they both involved—an issue involving life
and death, freedom and subjugation—can be “speedily and finally settled” by the Supreme
Court. [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by
banishing the issue from the political forum that gives all participants, even the losers, the
satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid
national rule instead of allowing for regional differences, the Court merely prolongs and
intensifies the anguish. We should get out of this area, where we have no right to be, and
where we do neither ourselves nor the country any good by remaining.

Points for Discussion

a. The Role of Stare Decisis

Why does stare decisis play such a prominent role in the decision in Casey? In a portion
of his dissent omitted here, Chief Justice Rehnquist stated that the joint opinion followed
Roe even though it could not “bring itself to say that Roe was correct as an original mat-
ter.” Is his characterization of the joint opinion correct? If so, does that undermine the
plurality’s approach? Would stare decisis have any force if it applied only to cases that were
correctly decided?

The various opinions differed in their approaches to interpreting the Constitution.
Does the force of stare decisis vary depending upon the interpretive methodology that the
Court employs? For an originalist, can stare decisis vindicate a decision that is otherwise
inconsistent with the original meaning? For a non-originalist, can stare decisis freeze con-
stitutional meaning, ensuring that the Constitution does not “evolve”?

b. When Can a State Regulate Abortions?

After Casey, what types of restrictions can a state impose on the right to an abor-
tion? Look carefully at the votes for each section of the joint opinion. Section IV, which
announces the undue burden standard and the rejection of Roe’s trimester framework,
attracted the votes of only three Justices. Is the undue burden standard now the governing
standard? In decisions that do not command five votes for any one approach, generally
only the most narrow ground for decision is entitled to binding force. What was the most
narrow ground for the Court’s conclusions for each challenged provision of the statute?

In assigning binding force to the various opinions in Casey, is it relevant that some
of the Justices are no longer on the Court? (Since the decision, Chief Justice Rehnquist
and Justices Blackmun and White have passed away, and Justices O’Connor, Stevens, and
Souter retired.) If so, how?
c. “Undue Burden”

What exactly is an “undue burden”? Is Justice Scalia correct in suggesting that it is an empty standard that invites judges to impose their own views of public policy and morality? Does the plurality’s application of the standard provide any guidance about its content, and about how it should be applied in the future? If so, does it rebut Justice Scalia’s criticism or validate it?

d. Abortion and Gender Equality

Justice Stevens asserted in his separate opinion that the 24-hour waiting period was unconstitutional because it denied women equal “dignity” and “respect.” Similarly, the plurality concluded that the spousal notification provision was invalid for this reason. Justice Blackmun went further, asserting that, as a general matter, restrictions on the right to an abortion presume that “women can simply be forced to accept the ‘natural’ status and incidents of motherhood,” a “conception of women’s role that has triggered the protection of the Equal Protection Clause.”

If nothing else, it seems difficult to dispute that the most immediate burdens of laws restricting access to (or prohibiting) abortions fall on women, who have to carry a fetus to term. Should laws regulating abortion be viewed as a form of gender discrimination subject to heightened scrutiny under the Equal Protection Clause? The most immediate benefits are, of course, to the fetus. On this point, consider the argument that then-Judge Ginsburg advanced seven years before the decision in *Casey*:

“The conflict, however, is not simply one between a fetus’ interests and a woman’s interests, narrowly conceived, nor is the overriding issue state versus private control of a woman’s body for a span of nine months. Also in the balance is a woman’s autonomous charge of her full life’s course—as Professor Karst put it, her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen.”


*Casey*, like *Roe* before it, did not succeed in ending political controversy over the subject of abortion, and states continued to seek to impose limits on abortion. In *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court, in a 5-4 decision, invalidated a Nebraska law that banned one form of “dilation and evacuation” abortions (often called “partial-birth abortions” by opponents of the procedure) without providing an exception in cases where necessary to preserve the mother’s health. Justice Breyer, who wrote for the Court, accepted the District Court’s finding that medical evidence demonstrated that the procedure was
sometimes necessary to protect the health of the mother. Justice Breyer also noted that the law’s definition of the banned procedure was sufficiently imprecise that it might be invoked to prosecute doctors who performed other procedures. Applying Casey’s undue burden standard, the Court invalidated the statute. Justices Stevens and Ginsburg wrote separately to express their support for the central holding of Roe. Justice O’Connor wrote separately to suggest that a more carefully drawn statute might survive scrutiny under the undue burden standard. And Justice Kennedy, who had been one of the authors of the joint opinion in Casey, dissented, as did Chief Justice Rehnquist and Justices Scalia and Thomas.

Not long after the Court’s decision in Stenberg, Congress enacted a law banning the same procedure that was banned by the Nebraska statute at issue in Stenberg. The Court considered that statute in the case that follows.

Gonzales v. Carhart
Justice KENNEDY delivered the opinion of the Court.

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act), 18 U.S.C. § 1531. *** The surgical procedure referred to as “dilation and evacuation” or “D & E” is the usual abortion method in [the second] trimester. *** The abortion procedure that was the impetus for the numerous bans on “partial-birth abortion,” including the Act, is a variation of this standard D & E. [For] discussion purposes this D & E variation will be referred to as intact D & E. The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes [of the forceps]. *** In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. [Intact D & E often involves the evacuation of the fetus’s skull contents before the removal of the fetus from the patient.]

[The statute made it a crime for any physician knowingly to perform the banned procedure and “thereby [to kill] a human fetus,” and provided that a person convicted under the statute could be fined or imprisoned for up to two years. The ban did “not apply to a partial-birth abortion that is necessary to save the life of a mother,” but did not include an exception to protect the health of the mother. Physicians and abortion advocacy groups filed separate suits challenging the constitutionality of the statute on its face.]

In 2003, after this Court’s decision in Stenberg, Congress passed the Act at issue here. The Act responded to Stenberg in two ways. First, Congress made factual findings. *** Congress found, among other things, that “[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion [is] a gruesome and inhumane procedure that is never medically necessary and should be prohibited.” Second, and more relevant here, the Act’s language differs from that of the Nebraska statute struck down in Stenberg.
Chapter 8 Substantive Due Process

The principles set forth in the joint opinion in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), did not find support from all those who join the instant opinion. Whatever one's views concerning the Casey joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals. *** We now apply Casey's standard to the cases at bar.

The Act punishes “knowingly perform[ing]” a “partial-birth abortion.” § 1531(a). It defines the unlawful abortion in explicit terms. First, the person performing the abortion must “vaginally delive[r] a living fetus.” § 1531(b)(1)(A). *** Second, the Act's definition of partial-birth abortion requires the fetus to be delivered “until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother.” § 1531(b)(1)(A). *** Third, to fall within the Act, a doctor must perform an “overt act, other than completion of delivery, that kills the partially delivered living fetus.” § 1531(b)(1)(B). *** Fourth, the Act contains scienter requirements concerning all the actions involved in the prohibited abortion.

A review of the statutory text discloses the limits of its reach. The Act prohibits intact D & E [and] does not prohibit the D & E procedure in which the fetus is removed in parts. *** [In contrast, the] statute in Stenberg prohibited “deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child.” The Court concluded that this statute encompassed D & E because “D & E will often involve a physician pulling a ‘substantial portion’ of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus.” 530 U.S. at 939. Congress, it is apparent, responded to these concerns ***.

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional “if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” Casey, 505 U.S. at 878. *** The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this [facial] challenge to its validity.

The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. [Congress made findings that assert that the] Act expresses respect for the dignity of human life [and that Congress was concerned] with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. [See Congressional Findings (14), in notes following 18 U.S.C. § 1531.] There can be no doubt the government “has an interest in protecting the integrity and ethics of the medical profession.”

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.
The Act’s ban on abortions that involve partial delivery of a living fetus furthers the Government’s objectives. No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a “disturbing similarity to the killing of a newborn infant,” and thus it was concerned with “draw[ing] a bright line that clearly distinguishes abortion and infanticide.” The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. Washington v. Glucksberg, 521 U.S. 702 (1997).

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow. In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. *** It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form. *** In sum, we reject the contention that the congressional purpose of the Act was “to place a substantial obstacle in the path of a woman seeking an abortion.”

[The] prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it “subject[ed] [women] to significant health risks.” *** There is documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women. *** The question becomes whether the Act can stand
This is not the first time in this opinion that Justice Kennedy referred to precedent that the Court “assume[s]” to be controlling. Why does he use such an unusual verbal formulation?

Take Note

does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The 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.

[An as-applied challenge] is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

Justice THOMAS, with whom Justice SCALIA joins, concurring.

I join the Court’s opinion because it accurately applies current jurisprudence, including Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). I write separately to reiterate my view that the Court’s abortion jurisprudence, including Casey and Roe v. Wade, 410 U.S. 113 (1973), has no basis in the Constitution. I also note that whether the Act constitutes a permissible exercise of Congress’ power under the Commerce Clause is not before the Court. The parties did not raise or brief that issue; it is outside the question presented; and the lower courts did not address it.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

Today’s decision is alarming. It refuses to take Casey and Stenberg seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in Casey, between previability and postviability abortions. And, for the first time since Roe, the Court blesses a prohibition with no exception safeguarding a woman’s health.

Take Note

Make the Connection

Although the Court and Justice Thomas did not address the question, was the Act a valid exercise of Congress’s power under the Commerce Clause? Is the connection between interstate commerce and abortion practices less attenuated than the relationship between interstate commerce and violence against women, which was at issue in United States v. Morrison? (We considered Morrison in Chapter 3.) Why do you suppose the respondents here chose not to attack the Act on these grounds?

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In *Stenberg*, we expressly held that a statute banning intact D & E was unconstitutional in part because it lacked a health exception. 530 U.S. at 930, 937. *** In 2003, a few years after our ruling in *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act—without an exception for women's health.\(^1\) The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. Many of the Act's recitations are incorrect. *** Congress claimed there was a medical consensus that the banned procedure is never necessary. But the evidence “very clearly demonstrate[d] the opposite.” *Planned Parenthood Fed. of Am. v. Ashcroft*, 320 F.Supp.2d 957, 1025 [(N.D. CA 2004)]. Similarly, Congress found that “[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures.” But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations.

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. *** Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress’ findings as unreasonable and not supported by the evidence. *** The District Courts’ findings merit this Court’s respect.

Today's ruling, the Court declares, advances [the] Government’s “legitimate and substantial interest in preserving and promoting fetal life.” But the Act scarcely furthers that interest. The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. *** Ultimately, the Court admits that “moral concerns” are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government’s interest in preserving life. [T]he Court invokes an anti-abortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from “[s]evere depression and loss of esteem.” *** The solution the Court approves [is] not to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. *** This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited.

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\(^1\) The Act’s sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*. See, e.g., 149 Cong. Rec. 5731 (2003) (statement of Sen. Santorum) (“Why are we here? We are here because the Supreme Court defended the indefensible. We have responded to the Supreme Court.”). See also 148 Cong. Rec. 14273 (2002) (statement of Rep. Linder) (rejecting proposition that Congress has “no right to legislate a ban on this horrible practice because the Supreme Court says [it] cannot”).
The Court’s hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label “abortion doctor.” A fetus is described as an “unborn child,” and as a “baby.” *** And, most troubling, *Casey*’s principles, confirming the continuing vitality of “the essential holding of *Roe*,” are merely “assume[d]” for the moment, rather than “retained” or “reaffirmed,” *Casey*, 505 U.S. at 846.

The Court’s allowance only of an “as-applied challenge in a discrete case” jeopardizes women’s health and places doctors in an untenable position. Even if courts were able to carve-out exceptions through piecemeal litigation for “discrete and well-defined instances,” women whose circumstances have not been anticipated by prior litigation could well be left unprotected. In treating those women, physicians would risk criminal prosecution, conviction, and imprisonment if they exercise their best judgment as to the safest medical procedure for their patients. The Court is thus gravely mistaken to conclude that narrow as-applied challenges are “the proper manner to protect the health of the woman.”

[T]he Act, and the Court’s defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives.

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**Points for Discussion**

**a. Federal Action and the Due Process Clause**

The Court in *Roe* and *Casey* concluded that the right to an abortion derives from the Due Process Clause of the Fourteenth Amendment, which limits state action. *Carhart*, however, concerned the constitutionality of a federal statute. The Court did not specifically identify the provision of the Constitution on which the respondents’ challenge was based. The Court of Appeals, however, declared that “the Due Process Clause of the Fifth Amendment is textually identical to the Due Process Clause of the Fourteenth Amendment, and both proscribe virtually identical governmental conduct.” Should the Court interpret the Fifth Amendment’s Due Process Clause to protect the same rights that it has held are protected by the Fourteenth Amendment’s Due Process Clause?

**b. Undue Burden**

What does Justice Kennedy’s approach in *Carhart* signal about the meaning of the undue burden test? Can Congress (or a state) ban any single procedure—without providing an exception for the health of the mother—as long as it leaves available some other
procedure? What if there are government-imposed limits on the availability of that other procedure, as well?

c. The Future of the Right to an Abortion

The Court declared that Congress has a “legitimate and substantial interest in preserving and promoting fetal life” and a legitimate interest in “promot[ing] respect for life, including life of the unborn.” The Court also noted, however, that the banned abortion procedure was challenged as imposing an undue burden on pre-viability abortions. Under Roe and Casey, does the government have a substantial (or compelling) interest in protecting actual fetal life before the point of viability? If not, then does Carhart signal that the Court now believes that the government can act to protect fetal life before viability? If so, what does that suggest about the enduring viability of Roe and Casey?

The Court also reasoned that the government has a legitimate interest in seeking to protect women from the psychological effects of the decision to have an abortion. Is there a logical stopping point for the implications of this concern? Wouldn’t it justify bans on all forms of abortion, at all stages of pregnancy? Does the decision in Carhart signal that the Court is poised to overrule Roe and Casey? Or simply that the particular procedure at issue raised unique concerns?

3. Marriage and Family

We began this section on fundamental rights by considering the Court’s decision in Pierce, which held that the Due Process Clause protects the right of parents to direct the education and upbringing of their children. Pierce, then, concerned the parent-child relationship, which of course is an important part of the family relationship. Similarly, the Court in Griswold considered another aspect of the family relationship. Recall that in Griswold, the Justices who voted to invalidate Connecticut’s ban on contraceptives all invoked the marriage relationship in giving content to the protected right. Justice Douglas referred to the “privacy surrounding the marriage relationship”; Justice Goldberg found a right of “marital privacy”; Justice White focused on the “freedom of married persons”; and Justice Harlan (in his separate opinion in Poe) was concerned with “intimacy” in the “institution of marriage.”

To be sure, the Court made clear shortly after its decision in Griswold that its view of the liberty protected by the Due Process Clause extended to intimate relationships outside of marriage, as well. But clearly the Court has long viewed family relationships as particularly deserving of protection under the Due Process Clause. Just how far does this constitutional protection for marital or family relationships extend?
Chapter 8 Substantive Due Process

Loving v. Virginia

388 U.S. 1 (1967)

Mr. Chief Justice WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. [In October 1958, a grand jury in the Circuit Court of Caroline County] issued an indictment charging the Lovings with violating Virginia’s ban on interracial marriages. [After the Lovings pleaded guilty, the trial judge suspended their one-year sentence] on the condition that the Lovings leave the State and not return to Virginia together for 25 years. [Five years later they challenged Virginia’s anti-miscegenation statute, but the Supreme Court of Appeals of Virginia held that it was constitutional.]

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in Naim v. Naim, 197 Va. 80, as stating the reasons supporting the validity of these laws. In Naim, the state court concluded that the State’s legitimate purposes were “to preserve the racial integrity of its citizens,” and to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride,” obviously an endorsement of the doctrine of White Supremacy. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

[The Court first held that the Virginia law violated the Equal Protection Clause. We will consider that portion of the Court’s opinion in Chapter 11.]

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of
happiness by free men.

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State. These convictions must be reversed.

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Points for Discussion

a. Due Process and Equal Protection

What was the basis for the Court's conclusion in the portion of the opinion excerpted here? As we will see in Chapter 11, the state presumptively violates the Equal Protection clause when it classifies on the basis of race, even when no constitutionally protected "right" is at issue; for example, it would violate the Equal Protection Clause to make driver's licenses available only to whites, even though there is no constitutional right to a driver's license. But the Court in *Loving* also stated that to deny the “fundamental freedom” to marry on the basis of an invidious racial classification “deprive[s] all the State's citizens of liberty without due process of law.”

What is the scope of this right to marry? State-law restrictions on the right to marry, after all, are commonplace; virtually every state prohibits marriages between siblings, marriages involving a person younger than a certain age, and marriages to more than one person simultaneously. These prohibitions are plainly different from the one at issue in *Loving*, which involved an invidious racial classification, but they suggest that the “right” to marry is far from absolute. Just how far does the right extend?

b. Level of Scrutiny

What level of scrutiny did the Court apply to the Virginia statute? The Court stated that “the freedom to marry [a] person of another race [cannot] be infringed by the State,” but did it mean that no state interest, no matter how compelling, could justify an infringement on the general freedom to marry? Was the Court applying strict scrutiny? Did it conclude that Virginia's interest in upholding the statute was illegitimate, and thus that the law was invalid? If so, does that mean that a state need advance only a legitimate—as opposed to a compelling—interest to justify regulation of marriage (absent invidious racial discrimination)? Should the Court apply strict scrutiny to all limitations on the right to marry?
c. Subsequent Developments

The Court addressed some of these questions in subsequent cases. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court reviewed a Wisconsin statute that required a court’s permission for a person who was already under an obligation to pay child support to obtain a marriage license. In order to be granted permission to marry, the individual had to show that he or she was paying the support and that the child was not likely in the future to be put in public charge. The Court invalidated the statute, relying in part on *Loving* and earlier Due Process cases. The Court observed that “[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.” The Court acknowledged that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed,” but concluded that more searching scrutiny was warranted for regulations, such as the one at issue, that “interfere directly and substantially with the right to marry.” Although the Court assumed that the State’s interests in counseling parents and providing for children were sufficiently important, the Court held that the ends employed by the State were not necessary to advancing those interests.

Are the rights protected in *Loving* and *Zablocki* uniquely related to the institution of marriage? Recall the Court’s decision in *Pierce*, which involved parental rights. What protection does the Due Process Clause provide for other familial arrangements?

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court held that a city ordinance that used a narrow definition of family to dictate who could live together under one roof was unconstitutional as applied to a grandmother who shared a home with two grandsons who were not siblings. The Court rejected the city’s argument that the Constitution’s protections for family relationships extend only to nuclear families, concluding that regulations that “intrude on choices concerning family living arrangements” warrant heightened review. In a dissent, Justice Stewart asserted that equating the interests of a group of people who wish to live together with “the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.”

The Court has also had occasion to revisit the Constitution’s protection for parents’ child-rearing decisions, an issue that the Court had long ago addressed in *Pierce*. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court reiterated that parents have a “fundamental” right “to make decisions concerning the care, custody, and control of their children.” The Court held that a Washington statute that allowed the court to give visitation rights to anyone if it was found to be in the best interests of the child was unconstitutional as applied to the petitioner, a mother who sought to limit the extent to which her children’s paternal grandparents could visit her children after their father died.

But surely the Constitution’s protection for parental rights is not absolute; a parent does not have a right, for example, cavalierly and unnecessarily to subject his child to the risk of serious and imminent injury. How exactly does the Court define the scope of paren-
tal rights? In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court refused to invalidate a California law that established a presumption, which could be rebutted under only very limited circumstances, that a child born to a married woman is a child of the marriage. The petitioner claimed that he was the father of a child in the care of the respondent because of an adulterous liaison that the petitioner had had with respondent’s wife. Although blood tests established a 98% probability that he was in fact the biological father, the California courts, applying the statutory presumption, rejected his claim for paternity and visitation. The Court affirmed, but there was no one opinion that commanded a majority of the Court.

Justice Scalia, in a plurality opinion joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy, began by stating that “[i]n an attempt to limit and guide interpretation” of the Due Process Clause, “we have insisted not merely that [an] interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.” Accordingly, to the plurality “the legal issue in the present case reduces to whether the relationship between persons in the situation of [the petitioner and the child’s mother] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection.” The plurality thought it “impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family *** against the sort of claim [the petitioner] asserts.” The plurality “found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman’s existing marriage with another man.” Justice Scalia then asserted the following in a footnote:

Justice BRENNAN [in dissent] criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally “whether parenthood is an interest that historically has received our attention and protection.” *** We do not understand why, having rejected our focus upon the societal tradition regarding the natural father’s rights vis-à-vis a child whose mother is married to another man, Justice BRENNAN would choose to focus instead upon “parenthood.” Why should the relevant category not be even more general—perhaps “family relationships”; or “personal relationships”; or even “emotional attachments in general”? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent. *** Because [general traditions of the sort consulted by Justice BRENNAN] provide such imprecise guidance, they permit judges to dictate rather than discern the society’s views. *** Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

Justices O’Connor and Justice Kennedy joined all of Justice Scalia’s opinion except for this footnote. Justice O’Connor wrote separately to make clear her view that Justice Scalia’s “mode of historical analysis” for identifying liberty interests protected by the Due Process Clause “may be somewhat inconsistent with our past decisions in this area.” She declined
to “foreclose the unanticipated by the prior imposition of a single mode of historical analysis.”

In dissent, Justice Brennan, joined by Justices Marshall and Blackmun, criticized the plurality’s “pinched conception of the family.” He would have concluded that the petitioner was entitled to more process than that offered by the statutory presumption before his claim of paternal rights could be rejected. Justice Brennan also responded to Justice Scalia’s methodology for identifying liberty interests:

Apparently oblivious to the fact that [tradition] can be as malleable and as elusive as “liberty” itself, the plurality pretends that tradition places a discernible border around the Constitution. The pretense is seductive; it would be comforting to believe that a search for “tradition” involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history. *** [But] the plurality has not found the objective boundary that it seeks. Even if we could agree [on] the content and significance of particular traditions, we still would be forced to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer. The plurality supplies no objective means by which we might make these determinations.

It is ironic that an approach so utterly dependent on tradition is so indifferent to our precedents. *** Throughout our decisionmaking in this important area runs the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of “liberty.” *** In deciding cases arising under the Due Process Clause, therefore, we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized interests. Today’s plurality, however, does not ask whether parenthood is an interest that historically has received our attention and protection; the answer to that question is too clear for dispute. Instead, the plurality asks whether the specific variety of parenthood under consideration—a natural father’s relationship with a child whose mother is married to another man—has enjoyed such protection. *** If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result. [See Eisenstadt; Griswold.]

The plurality’s interpretive method is more than novel; it is misguided. It ignores the good reasons for limiting the role of “tradition” in interpreting the Constitution’s deliberately capacious language. In the plurality’s constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did. *** In construing the Fourteenth Amendment to offer shelter only to those interests specifically protected by historical practice, moreover, the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies. Even if we can agree, therefore, that “family” and “parenthood” are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, “liberty” must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.
The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. This Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.

Points for Discussion

a. Defining “Family”

In each of these cases—Moore, Troxel, and Michael H.—the Court was required to define the “family” and the familial relationships that are protected by the Fourteenth Amendment. Is the plurality’s approach in Michael H. consistent with the Court’s approach in Moore? If not, which is more convincing? What are the implications of the two approaches for other questions about the scope of protection for familial rights? What are the implications for the judicial role in the answers to those questions?

b. Competing Rights

Even assuming that the Court can neatly define the scope of familial rights, how should the Court rule when a case involves competing claims of right? For example, although the Court in Troxel based its analysis on a consideration of the mother’s rights, in his dissent Justice Stevens asserted that the children’s rights were entitled to consideration, as well. (Indeed, one could have argued that the grandparents also had some interest.) Is the substantive protection afforded by the Due Process Clause the same for children as it is for adults? Do children have different or attenuated rights? The Court in Michael H. declined to take up a related issue—“whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.” How would you resolve these questions based on the cases discussed so far in this Chapter?

c. History and the Level of Generality Reprised

In Michael H., Justices Scalia and Brennan debated the appropriate level of generality at which to identify fundamental rights. Justice Scalia reprised the debate, this time with Justice Stevens, in McDonald v. City of Chicago, 130 S.Ct. 3020 (2010). In Justice Stevens’s view, “the liberty safeguarded by the Fourteenth Amendment is not merely preservative in nature but rather is a ‘dynamic concept.’ Its dynamism provides a central means through which the Framers enabled the Constitution to ‘endure for ages to come,’ McCulloch v. Maryland, 4 Wheat. 316, 415 (1819).” He asserted that the “judge who would outsource the interpretation of ‘liberty’ to historical sentiment has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality.”

Justice Stevens offered several reasons for rejecting a “rigid historical test” for determining rights protected by the Due Process Clause. First, he asserted that such an approach “would effect a major break from our case law,” because “our substantive due process
doctrine has never evaluated substantive rights in purely, or even predominantly, historical terms.” Second and “[m]ore fundamentally,” he asserted:

[A] rigid historical methodology is unfaithful to *** the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently “rooted”; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court’s distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty. ***

Although Justice Scalia aspires to an “objective,” “neutral” method of substantive due process analysis, his actual method is nothing of the sort. *** [H]istory is not an objective science, and [its] use can therefore “point in any direction the judges favor.” *** [A] limitless number of subjective judgments may be smuggled into his historical analysis. Worse, they may be buried in the analysis. *** Justice Scalia’s method invites not only bad history, but also bad constitutional law. *** The fact that we have a written Constitution does not consign this Nation to a static legal existence. [I]t is not fidelity to the Constitution to ignore its use of deliberately capacious language, in an effort to transform foundational legal commitments into narrow rules of decision.

Justice Stevens also rejected Justice Scalia’s charge that his “dynamic” approach was a “license for unbridled judicial lawmaking.” He acknowledged that his approach requires judges to “exercise judgment,” because when “answering a constitutional question to which the text provides no clear answer, there is always some amount of discretion.” But he asserted that there are several “constraints on the decisional process.” First, he stated that “liberty” is “capable of being refined and delimited” by the “central values” of “[s]elf-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect.” Second, he stressed “respect for the democratic process”: “If a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate.” Third, the Court can apply “both the doctrine of stare decisis—adhering to precedents, respecting reliance interests, prizing stability and order in the law—and the common-law method—taking cases and controversies as they present themselves, proceeding slowly and incrementally, building on what came before.”

Justice Scalia responded by asserting that Justice Stevens’s approach is “subjective,” and that its claim that courts should “update” the Due Process Clause “basically means picking the rights we want to protect and discarding those we do not.” In Justice Scalia’s view, “[d]eciding what is essential to an enlightened, liberty-filled life is an inherently political, moral judgment—the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence.” He acknowledged that “[h]istorical analysis can be difficult” and “sometimes requires *** making nuanced judgments about which evidence to consult and how to interpret it.” But he asserted that “the question to be decided is not whether the historically focused method is a perfect means of restraining aristocratic judicial Constitution-writing; but whether it is the best means available in an
imperfect world.” In his view, it clearly is, because it is less subjective and more compatible with democracy:

It is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor. *** Moreover, the methodological differences that divide historians, and the varying interpretive assumptions they bring to their work, are nothing compared to the differences among the American people (though perhaps not among graduates of prestigious law schools) with regard to the moral judgments Justice Stevens would have courts pronounce. *** And the Court’s approach intrudes less upon the democratic process because the rights it acknowledges are those established by a constitutional history formed by democratic decisions; and the rights it fails to acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision. Justice Stevens’s approach, on the other hand, deprives the people of that power, since whatever the Constitution and laws may say, the list of protected rights will be whatever courts wish it to be.

Whose view do you find most convincing?

4. Sexuality

In Eisenstadt v. Baird, which we considered in our discussion of Griswold, the Court held that the state cannot prohibit the use of contraceptives by unmarried persons. If the Due Process Clause protects a right of intimate relations between unmarried persons, then how far does that right extend?

In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court, in a 5-4 decision, upheld a Georgia statute that criminalized “sodomy”—defined as acts of oral or anal sex—as applied to the respondent’s homosexual conduct. The Court began by declaring that “[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” Looking to historic prohibitions and the contemporaneous prevalence of anti-sodomy laws throughout the fifty states, the Court concluded that “homosexual sodomy” cannot be considered a fundamental right under the Due Process Clause. It distinguished Griswold and its progeny by noting that “no connection between family, marriage, or procreation [and] homosexual activity [has] been demonstrated.” After concluding that the right to engage in “homosexual sodomy” is not fundamental, the Court applied rational-basis review to the statute. It rejected respondent’s argument that the state’s interest in advancing morality was an insufficient basis for the statute, stating that law in general “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, courts will be very busy indeed.” Chief Justice Burger concurred, stating that “proscriptions against sodomy have very ‘ancient roots.’ Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. *** To hold that the act of homosexual sodomy is somehow protected as a fundamental right
would be to cast aside millennia of moral teaching."

Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented. He declared: "[T]his case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.' Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *** The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."

The Court revisited the holding in Bowers in the case that follows.

Lawrence v. Texas


Justice KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, resided. *** The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace. [The statute under which they were convicted prohibited “deviate sexual intercourse”—which the statute defined as oral or anal sex—“with another individual of the same sex.”] The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court’s holding in Bowers. [The court’s statement of the issue in Bowers] discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married
couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the Bowers Court said: “Proscriptions against that conduct have ancient roots.” Id. at 192. *** At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. *** It was not until the 1970’s that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. [T]he historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in Bowers was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.” Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S.
We think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. This emerging recognition should have been apparent when Bowers was decided.

The sweeping references by Chief Justice Burger [in his concurring opinion in Bowers] to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct [and] Parliament enacted the substance of those recommendations 10 years later. Of even more importance, almost five years before Bowers was decided the European Court of Human Rights held that the laws proscribing [consensual homosexual conduct] were invalid under the European Convention on Human Rights. Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981). Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

Two principal cases decided after Bowers cast its holding into even more doubt. In Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), [we] confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated[:] “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in Bowers would deny them this right.

The second post-Bowers case of principal relevance is Romer v. Evans, 517 U.S. 620 (1996). There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. As an alternative argument in this case, counsel

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**Food for Thought**

With which view of the Due Process Clause is the Court’s emphasis on an “emerging awareness” consistent? With Justice Harlan’s focus on “living” traditions? With Justice Scalia’s focus on historical tradition at the highest level of specificity? At what point does an “emerging awareness” of a particular conception of liberty achieve the status of liberty protected by the Due Process Clause? Is there a way for the Court to recognize changing values and yet not be controlled by the whims of public opinion?

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**Make the Connection**

We will consider Romer, and discrimination on the basis of sexual orientation, in Chapter 11.
for the petitioners and some amici contend that Romer provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether Bowers itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of Bowers has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The foundations of Bowers have sustained serious erosion from our recent decisions in Casey and Romer. When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of Bowers has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment. To the extent Bowers relied on values we share with a wider civilization, it should be noted that the reasoning and holding in Bowers have been rejected elsewhere. The European Court of Human Rights has [not followed] Bowers ***. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. [T]here has been no individual or societal reliance on Bowers of the sort that could counsel against overturning its holding once there are compelling reasons to do so. Bowers itself causes uncertainty, for the precedents before and after its issuance contradict its central holding. *** Bowers was not correct when it was decided, and it is not correct today. *** Bowers v. Hardwick should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be
refused. It does not involve public conduct or prostitution. It does not involve whether
the government must give formal recognition to any relationship that homosexual persons
seek to enter. The case does involve two adults who, with full and mutual consent from
each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners
are entitled to respect for their private lives. The State cannot demean their existence or
control their destiny by making their private sexual conduct a crime. Their right to liberty
under the Due Process Clause gives them the full right to engage in their conduct without
intervention of the government. *** The Texas statute furthers no legitimate state interest
which can justify its intrusion into the personal and private life of the individual.

Justice O’CONNOR, concurring in the judgment.

The Court today overrules Bowers v. Hardwick, 478 U.S. 186 (1986). I joined Bowers,
and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas’
statute banning same-sex sodomy is unconstitutional. Rather than relying on the substan-
tive component of the Fourteenth Amendment’s Due Process Clause, as the Court does, I
base my conclusion on the Fourteenth Amendment’s Equal Protection Clause.

The statute at issue here makes sodomy a crime only if a person “engages in deviate
sexual intercourse with another individual of the same sex.” Tex. Penal Code Ann. §
21.06(a) (2003). Sodomy between opposite-sex partners, however, is not a crime in Texas.
That is, Texas treats the same conduct differently based solely on the participants. ***
The Texas statute makes homosexuals unequal in the eyes of the law by making particular
conduct—and only that conduct—subject to criminal sanction.

Texas attempts to justify its law, and the effects of the law, by arguing that the statute
satisfies rational basis review because it furthers the legitimate governmental interest of the
promotion of morality. *** This case raises a different issue than Bowers: whether, under
the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by
itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not.
Moral disapproval of this group, like a bare desire to harm the group, is an interest that is
insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we
have never held that moral disapproval, without any other asserted state interest, is a suf-
ficient rationale under the Equal Protection Clause to justify a law that discriminates among
groups of persons. Moral disapproval of a group
cannot be a legitimate governmental interest
under the Equal Protection Clause because legal
classifications must not be “drawn for the pur-
pose of disadvantaging the group burdened by
the law.” *** Whether a sodomy law that is
neutral both in effect and application would
violate the substantive component of the Due
Process Clause is an issue that need not be
decided today. I am confident, however, that so
long as the Equal Protection Clause requires a
sodomy law to apply equally to the private con-

Food for Thought

Didn’t the statute upheld in Bowers—which on its face applied both to heterosexual and homosexual
conduct—continue to stand in Georgia? Is it relevant that the Geor-
gia statute was, in practice, enforced only against homosexual conduct?
If so, does it undermine Justice O’Connor’s reasoning here? Or the
Court’s decision in Bowers?
sensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.

A law branding one class of persons as criminal based solely on the State’s moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review. I therefore concur in the Court’s judgment that Texas’ sodomy law banning “deviate sexual intercourse” between consenting adults of the same sex, but not between consenting adults of different sexes, is unconstitutional.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

[In Casey,] when stare decisis meant preservation of judicially invented abortion rights, the widespread criticism of Roe was strong reason to reaffirm it. *** Today, however, the widespread opposition to Bowers, a decision resolving an issue as “intensely divisive” as the issue in Roe, is offered as a reason in favor of overruling it. *** [The Court today has] exposed Casey’s extraordinary deference to precedent for the result-oriented expedient that it is.

Having decided that it need not adhere to stare decisis, the Court still must establish that Bowers was wrongly decided and that the Texas statute, as applied to petitioners, is unconstitutional. *** We have held repeatedly, in cases the Court today does not overrule, that only fundamental rights qualify for [so-called] “heightened scrutiny” protection—that is, rights which are “deeply rooted in this Nation’s history and tradition.” Washington v. Glucksberg, 521 U.S. 702, 721 (1997). All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

[An “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s].”] Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. *** The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court should not impose foreign moods, fads, or fashions on Americans.” Foster v. Florida, 537 U.S. 990, n. (2002) (THOMAS, J., concurring in denial of certiorari).

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable”—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. Bowers held that this was a legitimate state interest. The Court today reaches the opposite conclusion. *** This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.
Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. *** Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. *** Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. [But] persuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else. *** What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change. It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

[Justice THOMAS’s dissenting opinion is omitted.]

Points for Discussion

a. Stating the Issue

The outcome in \textit{Lawrence} turned in part on how the Court chose to frame the issue. Did the case involve the broad question whether government can interfere in personal relationships occurring within the home? Or did it instead involve the narrower question whether the state can prohibit “deviate” sexual acts? Framing it the first way practically guarantees that the case will fall into the sphere of liberty at issue in \textit{Griswold} and \textit{Casey}. Defining it the second way, by contrast, poses a more significant obstacle to petitioners’ claim, particularly if the constitutional protection turns on whether the case involves a fundamental right that is deeply rooted in the Nation’s history. Which is the more appropriate way to conceptualize the issue?
b. Level of Scrutiny

To what level of scrutiny did the Court subject the Texas statute? Was it heightened scrutiny, on the theory that the statute interferes with a fundamental right? The Court stated that the Texas statute furthered “no legitimate state interest.” Does that suggest that the Court was applying rational-basis review? (Justice Scalia thought so.) Does it matter for purposes of this case?

c. Morality as a State Interest

What does it mean to say—as Justice O’Connor (and perhaps the Court) did—that moral disapproval alone is not a legitimate state interest under either the Equal Protection or Due Process Clause? If, for instance, a state passes a law against murder, must it seek a reason for the law outside of the moral disapproval most people feel towards this act of violence? Or is the point that we can conceive of other valid state interests served by the criminalization of murder?

Consider the perspective offered by Justice Blackmun in his dissent in Roper: “Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality.” Is this a valid distinction? Is the line between these types of laws clear? If people disagree as fundamentally about what is publicly acceptable as they do about what is privately acceptable, then does it make sense to allow the majority to dictate public sensibilities but not private sensibilities?

d. Same-Sex Marriage

Near the end of its opinion, the Court stated that the case did “not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” In addition, in a portion of Justice O’Connor’s separate opinion that has been omitted here, she asserted:

That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. *** Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

Justice Scalia responded:

Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapproval of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct ***, what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”?

Shortly after the Court’s decision in Lawrence, the Massachusetts Supreme Judicial Court held that a ban on same-sex marriages violates the state’s constitution. Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003). The Court cited Lawrence and echoed the Court’s language, but it based its decision on state constitutional law. More recently, the California Supreme Court held that a state ban on same-sex marriages violated
the state’s Constitution, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), though the decision was overturned by referendum. Does *Lawrence* compel the conclusion that prohibitions on same-sex marriages violate the United States Constitution, as well?

e. Equal Protection v. Due Process

The Court declined to rely on the Equal Protection Clause, reasoning that such a basis for decision would have suggested that the state could ban private sexual conduct as long as the ban applied equally to heterosexual and homosexual conduct. Is it a realistic fear—given the “emerging awareness” that the Constitution protects intimate sexual conduct—that states would have responded to such a decision by banning an entire class of sexual activity? Why couldn’t the Court, as it had done in *Loving*, invalidate the statute under both the Due Process and Equal Protection Clauses?

Was the Court’s reluctance to rely on the Equal Protection Clause more because of the Court’s unwillingness to conclude that gays and lesbians are entitled to heightened judicial protection under that clause? Keep this question in mind when we take up the subject of Equal Protection—and specifically whether the Clause protects gays and lesbians from discrimination—in Chapter 11.

f. Reliance on Foreign Law

The Court cited a decision of the European Court of Human Rights and noted the approach that other countries have taken to the issue that confronted the Court. Did the Court treat these decisions as authoritative sources of the meaning of the United States Constitution? As persuasive authority? Is such reliance problematic? If so, why? Consider the views that follow.

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**Perspective and Analysis**

Non-ornamental use of foreign decisions undermines the separation of powers and violates the constitutional rules against delegation of federal authority to bodies outside the control of the national government. *** Relying on decisions that interpret a wholly different document [from our Constitution] runs counter to the notion that judicial review derives from the Court’s duty to enforce the Constitution. *** Foreign and international laws, other than treaties ratified by the United States, are not enumerated among the three kinds of law that can be “the supreme Law of the Land.” Therefore, they should not be treated as outcome-determinative in constitutional adjudication.

5. Life

In referring to “life, liberty, [and] property,” do the Due Process Clauses protect a minimum level of personal safety, security, or quality of life? Consider the case that follows.

**DeShaney v. Winnebago County Dept. of Social Services**

489 U.S. 189 (1989)

Chief Justice REHNQUIST delivered the opinion of the Court.

The facts of this case are undeniably tragic. [Notwithstanding indications of child abuse by his father, state officials declined to remove Joshua DeShaney from his father's custody.] In March 1984, [the father] beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. [His father] was subsequently tried and convicted of child abuse. Joshua and his mother brought this action under 42 U.S.C. § 1983 [against] respondents Winnebago County, DSS, and various individual employees of DSS [alleging] that respondents had deprived Joshua of his liberty without due process of law [by] failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known. The District Court granted summary judgment for respondents [and the Court of Appeals affirmed.]
[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government “from abusing [its] power, or employing it as an instrument of oppression.” Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes. Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. *** If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Petitioners contend, however, that even if the Due Process Clause imposes no affirmative obligation on the State to provide the general public with adequate protective services, such a duty may arise out of certain “special relationships” created or assumed by the State with respect to particular individuals. Petitioners argue that such a “special relationship” existed here because the State knew that Joshua faced a special danger of abuse at his father’s hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. Having actually undertaken to protect Joshua from this danger—which petitioners concede

**Food for Thought**

The majority notes that history reveals a purpose to limit the State’s power to deprive individuals of life, liberty, and property. Today, however, many people rely on government services—including social security, welfare, and health care—to ensure “minimal levels of safety and security.” Is increased reliance on the state and changed expectations an argument for reading the Due Process Clause more broadly than in the past? Or is it instead a reason not to expand the protections of the Clause, for fear of effectively making the State the insurer of everyone’s well-being?

If the state is not required to provide a particular service, does it necessarily follow that, once it decides to provide it, the state has no obligation to avoid harms that flow from its provision of the service? Does the greater power always include the lesser power? For purposes of comparison, tort law generally imposes a duty on a person who voluntarily undertakes to protect another to act carefully. See Restatement (Second) of Torts § 323 (1965).
the State played no part in creating—the State acquired an affirmative “duty,” enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so “shocks the conscience” as to constitute a substantive due process violation.

We reject this argument. It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals. In *Estelle v. Gamble*, 429 U.S. 97 (1976), we recognized that the Eighth Amendment’s prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment’s Due Process Clause, requires the State to provide adequate medical care to incarcerated prisoners. *** In *Youngberg v. Romeo*, 457 U.S. 307 (1982), we extended this analysis beyond the Eighth Amendment setting holding that the substantive component of the Fourteenth Amendment’s Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their “reasonable safety” from themselves and others. *** The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the “deprivation of liberty” triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Petitioners concede that the harms Joshua suffered occurred not while he was in the State’s custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.

Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of

Food for Thought

How convincing is the Court’s distinction here, given that Joshua is a child? Did Joshua actually have more freedom to act on his own behalf in his father’s house than he would have in a state institution? Assuming that the Court is correct that ordinarily an affirmative duty to protect under the Due Process Clause arises only when the State limits an individual’s freedom, should a different rule apply when the person at issue is a child who the state knows is the victim of abuse?
Wisconsin, but by Joshua’s father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court’s expansion of the Due Process Clause of the Fourteenth Amendment.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

In a constitutional setting that distinguishes sharply between action and inaction, one’s characterization of the misconduct alleged [may] effectively decide the case. Thus, by leading off with a discussion (and rejection) of the idea that the Constitution imposes on the States an affirmative duty to take basic care of their citizens, the Court foreshadows—perhaps even preordains—its conclusion that no duty existed even on the specific facts before us. This initial discussion establishes the baseline from which the Court assesses the DeShaneys’ claim ***. The Court’s baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights. From this perspective, the DeShaneys’ claim is first and foremost about inaction (the failure, here, of respondents to take steps to protect Joshua), and only tangentially about action (the establishment of a state program specifically designed to help children like Joshua). *** I would begin from the opposite direction. I would focus first on the action that Wisconsin has taken with respect to Joshua and children like him, rather than on the actions that the State failed to take.

Wisconsin has established a child-welfare system specifically designed to help children like Joshua. Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse. The specific facts before us bear out this view of Wisconsin’s system of protecting children. Each time someone voiced a suspicion that Joshua was being abused, that information was relayed to the Department for investigation and possible action. Even more telling than these examples is the Department’s control over the decision whether to take steps to protect a particular child from suspected abuse. While many different people contributed information and advice to this decision, it was up to the people at DSS to make the ultimate decision whether to disturb the family’s current arrangements.

In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had
reported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. *** Through its child-protection program, the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger. These circumstances, in my view, plant this case solidly within the tradition of cases like Youngberg and Estelle.

I would allow Joshua and his mother the opportunity to show that respondents' failure to help him arose, not out of the sound exercise of professional judgment that we recognized in Youngberg as sufficient to preclude liability, but from the kind of arbitrariness that we have in the past condemned.

Justice BLACKMUN, dissenting.

Like the antebellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a “sympathetic” reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, “dutifully recorded these incidents in [their] files.” It is a sad commentary upon American life, and constitutional principles, [that] this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.

Points for Discussion

a. The Nature of Liberty

What was the Court's theory of the form of liberty protected by the Due Process Clause? Consider Judge Posner's theory, which he offered in Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982). The case involved a tort suit by the administrator of the estate of a woman who was murdered by a man who had previously been committed to a state facility after being found not guilty of murder in a different case by reason of insanity. The plaintiff
sued, among others, the state-employed physicians who had approved the release of the man before he committed the murder in question. The court affirmed the district court’s grant of summary judgment. Judge Posner explained:

There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. *** The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Judge Posner acknowledged that “the line between action and inaction” is not always clear. But he declared that “the defendants in this case did not place Miss Bowers in a place or position of danger; they simply failed adequately to protect her, as a member of the public, from a dangerous man.” Do you agree that the Constitution is a “charter of negative liberties”? Why was Judge Posner so certain that it is? Did the Court in *DeShaney* share this view?

b. A Slippery Slope?

Justice Blackmun asserted in dissent that the question presented was an open one. Assuming for a moment that the Due Process Clause could plausibly have been read either to permit or to prevent the petitioners’ claims, which view of the Clause’s protection makes more sense? What would have been the impact of Justice Brennan’s and Blackmun’s view on federal, state, and local governments? Would it have opened the door to suits against policemen, judges, and many other officials alleging that they provided inadequate protection for life and liberty? If so, such suits could be very costly for public servants and might affect their judgment while on the job, not to mention their willingness to take the job in the first place. Are these considerations relevant when the Court interprets the Constitution? Do you think that the Court implicitly considered them in *DeShaney*?

c. Judicial Oversight of the Provision of Government Services

Justice Brennan asserted that the petitioners should have had an opportunity to demonstrate that Joshua’s injuries were the result not of professional judgment, but of arbitrary action by the government agency. Are the courts competent to draw such distinctions? What if, in its discretion, DSS had chosen not to give Joshua’s case high priority because the agency had limited resources and was busy dealing with several even more pressing cases of child abuse? And if the constitutional defect is that the state failed to protect Joshua after affirmatively assuming an obligation to do so, why does it matter whether the failure to protect was because of what turned out ultimately to be a faulty prediction or instead was because of neglect or arbitrariness?

Yet is the Court’s approach preferable? The Court asserted that the remedy for someone like Joshua lies with the democratic process—presumably, to change the law to require action from the state, or to permit suits for damages when it fails to provide adequate protection. Even if this approach might prevent some abuse, is this a satisfying resolution for the DeShaneys?
d. Equal Protection

In a footnote in its opinion, the Court stated, “The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.” Under this view, if the state had failed to protect Joshua because of, say, his race or religion, he would have had a valid claim under the Equal Protection Clause. Yet even in such a case, it would still be the state’s “inaction” that gave rise to the claim. Is this view consistent with the Court’s insistence that the government has no affirmative obligation to act to protect its citizens? Or would the unconstitutional decision represent a form of “action” after all?

e. Substantive Due Process or Procedural Due Process?

The Court in DeShaney held that the substantive component of the Due Process Clause does not require the state to protect the well being of its citizens against the acts of other private citizens. In a portion of the opinion omitted here, the Court “decline[d] to consider” whether the state’s child-protection statutes gave Joshua an “entitlement” to receive protective services of which he could not be deprived without adequate procedural protections. As we will see in Chapter 9, the Due Process Clause (not surprisingly) has a procedural component, which generally requires the state to give notice and some kind of hearing when it seeks to deprive a person of a “protected” liberty or property interest.

In Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005), the Court confronted a claim that the town had violated the Due Process Clause when its police officers did not respond to the plaintiff’s repeated reports over several hours that her estranged husband was violating the terms of a restraining order by kidnapping their children, whom he subsequently murdered. The respondent argued that the failure to respond had deprived her of a property interest because she had a legitimate expectation, based on the terms of the restraining order, that the police would respond to her calls. The Court rejected her claim, reasoning that because “a ‘benefit is not a protected property or liberty entitlement if government officials may grant it or deny it in their discretion,’” respondent did not enjoy a protected property interest in favorable police action.

6. Death

The Court in Casey and Lawrence stated that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” Does this definition of liberty embrace a right to define the circumstances under which a person may end his or her life?
Chapter 8  Substantive Due Process

Cruzan v. Director, Missouri Dep’t of Health

497 U.S. 261 (1990)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Lester and Joyce Cruzan, Nancy’s parents and co-guardians, sought a court order directing the withdrawal of their daughter’s artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy’s desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. We [affirm].

[T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a “right to die.” *** The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905), for instance, the Court balanced an individual’s liberty interest in declining an unwanted smallpox vaccine against the State’s interest in preventing disease. *** Just this Term, in the course of holding that a State’s procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, we recognized that prisoners possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.” Washington v. Harper, 494 U.S. 210, 221-222 (1990). *** Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person’s liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent’s wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Whether or not Missouri’s clear and convincing evidence requirement comports with
the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, “[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient.” A State is entitled to guard against potential abuses in such situations.

In our view, Missouri has permissibly sought to advance these interests through the adoption of a “clear and convincing” standard of proof to govern such proceedings. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual’s life-sustaining treatment.

Petitioners alternatively contend that Missouri must accept the “substituted judgment” of close family members even in the absence of substantial proof that their views reflect the views of the patient. No doubt is engendered by anything in this record but that Nancy Cruzan’s mother and father are loving and caring parents. [But] we do not think the Due Process Clause requires the State to repose judgment on
these matters with anyone but the patient herself. [T]here is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent.

Justice O’CONNOR, concurring.

Today’s decision, holding only that the Constitution permits a State to require clear and convincing evidence of Nancy Cruzan’s desire to have artificial hydration and nutrition withdrawn, does not preclude a future determination that the Constitution requires the States to implement the decisions of a patient’s duly appointed surrogate. Nor does it prevent States from developing other approaches for protecting an incompetent individual’s liberty interest in refusing medical treatment. No national consensus has yet emerged on the best solution for this difficult and sensitive problem. Today we decide only that one State’s practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents’ liberty interests is entrusted to the “laboratory” of the States, in the first instance.

Justice SCALIA, concurring.

The various opinions in this case portray quite clearly the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it. The States have begun to grapple with these problems through legislation.

I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one’s life; that the point at which life becomes “worthless,” and the point at which the means necessary to preserve it become “extraordinary” or “inappropriate,” are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. *** To determine that [a deprivation of liberty without due process of law] would not occur if Nancy Cruzan were forced to take nourishment against her will, it is unnecessary to reopen the historically recurrent debate over whether “due process” includes substantive restrictions. It is at least true that no “substantive due process” claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); Bowers v. Hardwick, 478 U.S. 186, 192 (1986). That cannot possibly be established here. At common law in
England, a suicide [was] criminally liable. *** Case law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense.

It seems to me [that] Justice BRENNAN’s position ultimately rests upon the proposition that it is none of the State’s business if a person wants to commit suicide. Justice STEVENS is explicit on the point ***. This is a view that some societies have held, and that our States are free to adopt if they wish. But it is not a view imposed by our constitutional traditions, in which the power of the State to prohibit suicide is unquestionable.

Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of most of our protection—what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day, none of which horribles are categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me. This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

The right to be free from medical attention without consent, to determine what shall be done with one’s own body, is deeply rooted in this Nation’s traditions, as the majority acknowledges. This right has long been “firmly entrenched in American tort law” and is securely grounded in the earliest common law. Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of lifesaving surgery, or other medical treatment. *** Thus, freedom from unwanted medical attention is unquestionably among those principles “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).
The only state interest asserted here is a general interest in the preservation of life. But the State has no legitimate general interest in someone’s life, completely abstracted from the interest of the person living that life, that could outweigh the person’s choice to avoid medical treatment. *** [T]he State’s general interest in life must accede to Nancy Cruzan’s particularized and intense interest in self-determination in her choice of medical treatment.

This is not to say that the State has no legitimate interests to assert here. As the majority recognizes, Missouri has [an] interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. [But] until Nancy’s wishes have been determined, the only state interest that may be asserted is an interest in safeguarding the accuracy of that determination. *** Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan’s wishes or are at least consistent with an accurate determination. The Missouri “safeguard” that the Court upholds today does not meet that standard. The determination needed in this context is whether the incompetent person would choose to live in a persistent vegetative state on life support or to avoid this medical treatment. Missouri’s rule of decision imposes a markedly asymmetrical evidentiary burden. Only evidence of specific statements of treatment choice made by the patient when competent is admissible to support a finding that the patient, now in a persistent vegetative state, would wish to avoid further medical treatment. Moreover, this evidence must be clear and convincing. No proof is required to support a finding that the incompetent person would wish to continue treatment. *** Too few people execute living wills or equivalently formal directives for such an evidentiary rule to ensure adequately that the wishes of incompetent persons will be honored. While it might be a wise social policy to encourage people to furnish such instructions, no general conclusion about a patient’s choice can be drawn from the absence of formalities.

Justice STEVENS, dissenting.

Choices about death touch the core of liberty. *** Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life’s significance. It may, in fact, be impossible to live for anything without being prepared to die for something.

Missouri asserts that its policy is related to a state interest in the protection of life. In my view, however, it is an effort to define life, rather than to protect it, that is the heart of Missouri’s policy. Missouri insists, without regard to Nancy Cruzan’s own interests, upon equating her life with the biological persistence of her bodily functions. *** But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is “life” as that word is commonly understood, or as it is used in both the Constitution and the Declaration of
Independence. The State's unflagging determination to perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity.

In my view, [the] best interests of the individual, especially when buttressed by the interests of all related third parties, must prevail over any general state policy that simply ignores those interests. Indeed, the only apparent secular basis for the State's interest in life is the policy's persuasive impact upon people other than Nancy and her family. *** However commendable may be the State's interest in human life, it cannot pursue that interest by appropriating Nancy Cruzan's life as a symbol for its own purposes.

Points for Discussion

a. The Right to Die

What exactly is embraced by the “right to die”? Consider these possibilities: (1) The right to refuse medical treatment; (2) The right to refuse life support; (3) The right to withdraw life support once connected; (4) The right of a person who is terminally ill but who does not require life support to the assistance of a physician in ending his or her life; (5) The right of a terminally ill person who is not on life support to commit suicide; (6) The right of a healthy person to physician assistance in committing suicide; (7) The right of a healthy person to commit suicide.

Did the Court in *Cruzan* find that any of these actions is constitutionally protected? Is it possible that some are protected and that others are not? If so, is it because the state has a greater interest in regulating some than in regulating others, or instead because there simply is no liberty interest at all in some of these actions?

b. Competing Evidence and Competing Claims of Familial Rights

Nancy Cruzan's parents argued that their daughter wished to refuse medical treatment, and no one apparently contested this view. But what if her parents' evidence had been contradicted by evidence presented by her husband, who argued that she in fact wished to continue medical treatment and be kept alive? Are there any constitutional limits on the way that the state may referee these competing claims?

What if the patient had left a living will expressing her wishes that she not be maintained on life support, but her husband nevertheless wanted her to remain on life support? Are there any circumstances under which the wishes of a family member can trump the wishes of a terminally ill person?

c. Defining Life

Recall that the Court grappled in *Roe* with the general question of how to define life, and with the specific question of when life begins. In his dissent in *Cruzan*, Justice Stevens asserted that the state effectively (and impermissibly) sought to define life in erecting an obstacle to the termination of life support for a patient with “no consciousness and no
chance of recovery.” How (if at all) does Justice Stevens define “life”? Is his point that each individual gets to define his or her own life, and therefore the circumstances under which it should end? If so, is Justice Stevens in effect asserting (as Justice Scalia suggested that he was) that there is a constitutional right to commit suicide?

d. Meaning of the Opinion

A key sentence in the Court’s opinion is: “[For] the purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.” The meaning of this sentence was disputed when the opinion came out, and remains so today.

One possibility is that the Court meant: “We hold that a competent person has the right to refuse lifesaving measures.” Many commentators initially read the Court’s decision in this way. See, e.g., Linda Greenhouse, Justices Find a Right to Die, but the Majority See Need for Clear Proof of Intent, N.Y. Times, Jun. 26, 1990, at A1 (“Eight members of the Supreme Court, venturing for the first time into the sensitive ‘right to die’ issue, said in a ruling today that a person whose wishes are clearly known has a constitutional right to the discontinuance of life-sustaining treatment.”). Under this interpretation, the Court decided both the substantive due process question of whether a right exists and the procedural due process question of whether the state could require clear and convincing evidence of an intent to exercise this right.

But another possibility is that the Court meant: “We merely assume, without deciding, that there is a constitutionally protected right to refuse lifesaving measures.” See, e.g., John E. Nowak & Ronald Rotunda, Constitutional Law 920 (6th ed. 2000) (“The majority opinion *** assumed for the purposes of the case (but did not decide) that the ‘liberty’ protected by the due process clauses *** included a right of mentally competent individuals to refuse live saving or life sustaining medical treatment. Even assuming that such a right existed, the majority found that the state could limit the ability to refuse such treatment ***.”). Under this interpretation, the Court did not decide the substantive due process question, but concluded that no procedural due process violation occurred even if the substantive right did exist.

In reading the opinion, which meaning appears more likely? Did the Court give reasons for its conclusion that the Constitution protects a right to refuse lifesaving measures? Could the Court decide whether the procedural requirement for invoking the right was constitutional on the assumption that the right exists without actually determining whether the right exists? Which approach would have been more likely to gather eight votes? The Supreme Court has never clarified this ambiguity, as a careful reading of the following case will show.
The question presented in this case is whether Washington’s prohibition against “caus[ing]” or “aid[ing]” a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.

We “ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended.” *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field,” lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed,” *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest. Our Nation’s history, legal traditions, and practices thus provide the crucial “guideposts for responsible decisionmaking” that direct and restrain our exposition of the Due Process Clause. *** This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review. In addition, by establishing a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.

Turning to the claim at issue here, the [respondents, doctors and terminally ill patients to whom they provide care,] assert a “liberty to choose how to die” and a right to “control of one’s final days,” and describe the asserted liberty as “the right to choose a humane, dignified death” and “the liberty to shape death.” *** The Washington statute at issue in this case prohibits “aid[ing] another person to attempt suicide,” and, thus, the question before us is whether the “liberty” specially protected by the Due Process Clause includes a right to
commit suicide which itself includes a right to assistance in doing so.

[We] are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State. Respondents contend, however, that the liberty interest they assert is consistent with this Court’s substantive-due-process line of cases, if not with this Nation’s history and practice. Pointing to *Casey* and *Cruzan*, respondents read our jurisprudence in this area as reflecting a general tradition of “self-sovereignty,” and as teaching that the “liberty” protected by the Due Process Clause includes “basic and intimate exercises of personal autonomy.” *** The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct.

[Respondents also rely on *Casey*.] The Court’s opinion in *Casey* described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment. *** That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.

The history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it. That being the case, our decisions lead us to conclude that the asserted “right” to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause. The Constitution also requires, however, that Washington’s assisted-suicide ban be rationally related to legitimate government interests. This requirement is unquestionably met here. *** Washington has an “unqualified interest in the preservation of human life.” The State’s prohibition on assisted suicide, like all homicide laws, both reflects and advances its commitment to this interest. *** Relatedly, all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. The State has an interest in preventing suicide, and in studying, identifying, and treating its causes.

The State also has an interest in protecting the integrity and ethics of the medical profession. [The] American Medical Association, like many other medical and physicians’ groups, has concluded that “[p]hysician-assisted suicide is fundamentally incompatible with the physician’s role as healer.” And physician-assisted suicide could, it is argued, undermine the trust that is essential to the doctor-patient relationship by blurring the time-
honored line between healing and harming. Next, the State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes. *** The State’s assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person’s suicidal impulses should be interpreted and treated the same way as anyone else’s. Finally, the State may fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.

We need not weigh exactlying the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington’s ban on assisted suicide is at least reasonably related to their promotion and protection. We therefore hold that [Washington’s prohibition on assisted suicide] does not violate the Fourteenth Amendment, either on its face or “as applied to competent, terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.” *** Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.

Justice SOUTER, concurring in the judgment.

I conclude that the statute’s application to the doctors has not been shown to be unconstitutional, but I write separately to give my reasons for analyzing the substantive due process claims as I do. *** My understanding of unenumerated rights [avoids] the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. That understanding begins with a concept of “ordered liberty,” comprising a continuum of rights to be free from “arbitrary impositions and purposeless restraints.” [Justice Souter then quoted from Justice Harlan’s dissent, excerpted earlier in this Chapter, in Poe v. Ullman, 367 U.S. 497 (1961).] This approach calls for a court to assess the relative “weights” or dignities of the contending interests, and to this extent the judicial method is familiar to the common law.

Common-law method is subject, however, to two important constraints in the hands of a court engaged in substantive due process review. First, such a court is bound to confine the values that it recognizes to those truly deserving constitutional stature, either to those expressed in constitutional text, or those exemplified by “the traditions from which [the Nation] developed” or revealed by contrast with “the traditions from which it broke.”

The second constraint, again, simply reflects the fact that constitutional review, not judicial lawmaking, is a court’s business here.

*** It is no justification for judicial intervention merely to identify a reasonable resolution

Food for Thought

Justice Souter’s approach clearly embraces the idea that constitutional protections can evolve to embrace new rights. How different is this approach from Chief Justice Rehnquist’s approach? Does Chief Justice Rehnquist’s opinion leave any room for a “living tradition” that would establish new fundamental rights over time?
of contending values that differs from the terms of the legislation under review. It is only when the legislation's justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.

Just as results in substantive due process cases are tied to the selections of statements of the competing interests, the acceptability of the results is a function of the good reasons for the selections made. It is here that the value of common-law method becomes apparent, for the usual thinking of the common law is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles. Common-law method tends to pay respect instead to detail, seeking to understand old principles afresh by new examples and new counterexamples.

In my judgment, the importance of the individual interest here, as within that class of “certain interests” demanding careful scrutiny of the State's contrary claim, cannot be gainsaid. Whether that interest might in some circumstances, or at some time, be seen as “fundamental” to the degree entitled to prevail is not, however, a conclusion that I need draw here, for I am satisfied that the State's interests [are] sufficiently serious to defeat the present claim that its law is arbitrary or purposeless. [It] is enough to say that our examination of legislative reasonableness should consider the fact that the Legislature of the State of Washington is no more obviously at fault than this Court is in being uncertain about what would happen if respondents prevailed today. We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. The answer has to be [that] the legislative process is to be preferred.

Justice O'CONNOR, concurring.

I join the Court's opinions because I agree that there is no generalized right to “commit suicide.” But respondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges to the [Washington] laws at issue here. The parties and amici agree that [a] patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death. In this light, even assuming that we would recognize such an interest, I agree that the State's interests in protecting those who are not truly competent or facing imminent death, or those whose decisions to hasten death would not truly be voluntary, are sufficiently weighty to justify a prohibition against physician-assisted suicide.

Justice STEVENS, concurring in the [judgment].

Today, the Court decides that Washington's statute prohibiting assisted suicide is not invalid “on its face,” that is to say, in all or most cases in which it might be applied. That holding, however, does not foreclose the possibility that some applications of the statute might well be invalid. *** A State, like Washington, that has authorized the death penalty,
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and thereby has concluded that the sanctity of human life does not require that it always be preserved, must acknowledge that there are situations in which an interest in hastening death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection. *** In my judgment, [it] is clear that the so-called “unqualified interest in the preservation of human life,” Cruzan, 497 U.S., at 282, is not itself sufficient to outweigh the interest in liberty that may justify the only possible means of preserving a dying patient’s dignity and alleviating her intolerable suffering.

Justice BREYER, concurring in the [judgment].

I do not agree [with] the Court’s formulation of [respondents’] claimed “liberty” interest [as] a “right to commit suicide with another’s assistance.” [I] would not reject the respondents’ claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a “right to die with dignity.” But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering ***. I do not believe, however, that this Court need or now should decide whether or a not such a right is “fundamental.” That is because, in my view, the avoidance of severe physical pain (connected with death) would have to constitute an essential part of any successful claim and because, as Justice O’CONNOR points out, the laws before us do not force a dying person to undergo that kind of pain.

Points for Discussion

a. Physician-Assisted Suicide and Federalism

As the Court predicted, the decision in this case allowed the debate over physician-assisted suicide to continue in the States. To date, only Oregon has adopted a law that allows this practice. In 2006, the United States Attorney General announced that physicians assisting patients to commit suicide pursuant to Oregon’s Death with Dignity Act faced the loss of their federal licenses to prescribe drugs under the Controlled Substances Act. After doctors filed suit to enjoin the Attorney General from taking action, the Court rejected the Attorney General’s view of the Controlled Substances Act while avoiding any implication that there is a “right” to physician-assisted suicide. Gonzales v. Oregon, 546 U.S. 243 (2006). Was the Attorney General’s approach consistent with the Court’s call for state experimentation on the question of the propriety of physician-assisted suicide? If not, is there some other justification for federal intervention?

b. Competing Approaches

Although Chief Justice Rehnquist and Justice Souter agreed on the outcome in the case, they disagreed on the reasoning. Justice Souter employed a “common-law” approach that he believed to be superior because of its focus on the relative importance of the contending interests—governmental and individual—at stake. By contrast, Chief Justice Rehnquist
believed that his approach—which defines the liberty interest narrowly and focuses on tradition—was superior precisely because it “avoids the need for complex balancing of interests in every case.”

What are the advantages and disadvantages of Justice Souter’s more ad hoc, flexible approach? What are the advantages and disadvantages of Chief Justice Rehnquist’s approach? Looking back at the substantive due process cases that we have considered in this Chapter, has one approach typically prevailed over the other? If so, why do you think that is?

c. Reconciling *Glucksberg* with *Lawrence*

The Court in *Glucksberg* stated that a right falls within the substantive reach of the Due Process Clause only if, after it has been “carefully described,” it is “deeply rooted in the Nation’s history and tradition.” Is this approach consistent with the approach of the Court only six years later in *Lawrence v. Texas*, which we considered earlier in this Chapter? For an argument that it is not, see Yale Kamisar, *Foreword: Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 Mich. L. Rev. 1453 (2008).

d. Facial v. As-Applied Challenges

The Court treated respondents’ claim as a facial challenge to the Washington statute. Justices O’Connor, Stevens, and Breyer indicated that they might be open to a properly argued as-applied challenge. Does that mean that, in their view, the right to assistance in committing suicide is a fundamental liberty interest under the Due Process Clause? Can you articulate what sort of as-applied challenge these Justices might have found convincing? Are there individual interests that might trump a state’s ban on assisted suicide in some circumstances? What are they?

e. “Death With Dignity”

Justices Breyer, O’Connor, and Stevens all suggested that terminally ill people in severe pain might have a constitutional right to choose the manner of their death—to “die with dignity.” But there is no suggestion in their opinions that people who are not terminally ill—including people in physical pain or those suffering from emotional and mental afflictions—enjoy a similar right. What justifies such a distinction? Are there historical justifications for this view, perhaps in the Nation’s common-law traditions? Or are the Justices effectively applying the balancing test advocated by Justice Souter and weighing the interests of the patients against the interests of the State?
Executive Summary of this Chapter

Under the doctrine of substantive due process, the Court has held that the Due Process Clauses protect forms of liberty that the government cannot impair even after providing procedural protections. Although the Court held in the late nineteenth and early-twentieth centuries that the Due Process Clauses protect a freedom to contract, *Lochner v. New York* (1905); *Adkins v. Children’s Hospital* (1923), the Court has since held that government regulation of social and economic matters is generally subject only to review for rationality, *West Coast Hotel Co. v. Parrish* (1936); *Williamson v. Lee Optical Co.* (1955).

Although the Court has abandoned the cases holding that economic liberty is entitled to heightened protection under the Due Process Clauses, the Court has held that the Clauses do protect fundamental rights regardless of the level of procedure that accompanies governmental efforts to impair them.

The Supreme Court has held that the Due Process Clauses protect various personal decisions concerning intimate relationships, sex, and reproduction. In particular, the government cannot prohibit the use of contraceptives by married couples, *Griswold v. Connecticut* (1965), or by unmarried couples, *Eisenstadt v. Baird* (1972). The government also cannot make it a crime to engage in private, consensual sexual conduct, including homosexual sex. *Lawrence v. Texas* (2003).

The Due Process Clauses also protect a woman’s right to choose to have an abortion, at least under certain circumstances. *Roe v. Wade* (1973). The government may not prohibit a woman from choosing to terminate a pregnancy before viability, and the government may not impose an undue burden on that right. *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). The government may, however, regulate or prohibit abortions after the time of viability, except where necessary to preserve the life or health of the mother. *Id.* The government may also prohibit certain abortion procedures, such as “intact D & E,” to advance its interest in protecting the life of the fetus, as long as in doing so it does not impose an undue burden on the right to an abortion. *Gonzales v. Carhart* (2007).

The government also cannot use sterilization as a punishment for crime, at least when persons who commit similar crimes are exempt from that punishment. *Skinner v. Oklahoma* (1942).

The Supreme Court has held that the Due Process Clauses protect certain rights relating to marriage and family. Marriage is a fundamental right protected by the Due Process Clauses. *Loving v. Virginia* (1967). The state cannot limit the right to persons who choose to marry persons of the same race, *id.*, and cannot condition the right on a court’s permission for persons who are under the obligation to pay child support, *Zablocki v. Redhail* (1978).

The Due Process Clauses also protect the “liberty of parents and guardians to direct the upbringing and education of children under their control.” *Pierce v. Society of the Sisters* (1925); *Meyer v. Nebraska* (1923). This right embraces parental decisions about who can visit their children, *Troxel v. Granville* (2000), but does not limit the power of a state to

The Due Process Clauses do not impose an affirmative obligation on the government to guarantee a minimum level of personal security or safety. *DeShaney v. Winnebago County Dept. of Social Services* (1989). Nor do they prevent the government from insisting on clear evidence of an incompetent person’s desire to have life-sustaining treatment withdrawn, *Cruzan v. Director, Missouri Dept. of Health* (1990), or from prohibiting persons (including doctors) from assisting others to commit suicide, *Washington v. Glucksberg* (1997).
Does the Constitution protect unenumerated rights?

POINT: Peter J. Smith

The argument that the Constitution does not protect unenumerated rights has an appealing simplicity: the Framers would not have bothered to spell out some rights if others were entitled to the same judicial protection; and even if they thought that there were undefined rights that are entitled to protection, they would not have left it to unelected judges—and their largely unconstrained discretion—to decide what they are. But several uncontroversial propositions, when viewed together, suggest that the matter is substantially more complex.

First, there is general agreement that some rights that are not expressly defined in the Constitution’s text nevertheless are properly implied from the enumeration of other rights. As we will see in Chapter 17, for example, there is little dispute that the First Amendment’s explicit protections—for speech, religion, and so forth—also imply the existence of a “freedom of association,” even though the Amendment nowhere mentions such a right. See, e.g., *Scales v. United States*, 367 U.S. 203, 229 (1961).

Second, most of the Constitution’s express rights-granting provisions—such as the Due Process and Privileges or Immunities Clauses—are framed at very high levels of generality. As a result, the ordinary process of interpretation inevitably will lead to the identification of rights—such as the right, derived from the Due Process Clause, to insist that the government prove an allegation of criminal conduct beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970)—that are not explicitly mentioned in the constitutional text.

Once one accepts that expressly defined rights imply the existence of other rights, and that broadly defined rights necessarily entail the existence of specific (but not specifically defined) rights, one has essentially accepted the proposition that there are rights that the Constitution protects but that are not expressly enumerated in the document’s text. Moreover, if such rights exist, they must be judicially enforceable, or it would be misleading to refer to them as “rights.”

There are other reasons to conclude that the Constitution protects unenumerated rights. First, the Constitution’s text in several places seems to presuppose that such rights exist. The Ninth Amendment makes the point explicitly, and the Privilege or Immunities Clause of the Fourteenth Amendment plainly protects something, even though it does not specifically enumerate what it is. Second, in other contexts, proponents of the view that the Constitution does not protect unenumerated rights see no problem with implying, from constitutional structure or general “postulates” that underlie the text, limits on the government’s authority. In federalism cases such as *Printz v. United States*, 521 U.S. 898
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(1997), and *Alden v. Maine*, 527 U.S. 706 (1999), for example, the Justices who are most skeptical of claims of unenumerated rights have nevertheless discovered unenumerated “immunities” that the states enjoy from federal regulation. If the Constitution is properly interpreted to protect these unenumerated states’ rights, then it becomes more difficult to suggest that it does not also protect some unenumerated individual rights.

To be sure, concluding that the Constitution protects unenumerated rights does not tell us much about which rights it actually protects, and how to define them. There will always be disagreements at the margins about such questions of definition. But once we accept that there are rights that are not explicitly defined in the constitutional text but that nevertheless are entitled to judicial protection, the question simply becomes one of judgment. And that, of course, is what we ordinarily expect judges to exercise.

**Counterpoint: Gregory E. Maggs**

The Constitution does not secure unenumerated rights just because they may exist according to natural law or some political theory. Although the Supreme Court has decided otherwise, its decisions are incorrect as an originalist matter.

True, the Founders believed in natural-law rights. The *Declaration of Independence*, for instance, prominently appeals to the “Laws of Nature” in specifying how England had violated the rights of American colonists. But acknowledging that the Founders recognized natural law is different from concluding that the Constitution makes unenumerated rights judicially enforceable.

The text of the Constitution itself indicates that unenumerated natural-law rights are not protected. In Article I, §§ 9 & 10, the Constitution lists specific rights, including rights to be free from ex post facto laws, bills of attainder, suspensions of habeas corpus, and state impairments of contracts. The inclusion of these rights objectively indicates that similar rights, which are not enumerated, are not secured. Why list any rights if they are protected without enumeration based on a natural-law theory?

Additional support for this conclusion comes from a debate at the Constitutional Convention about whether to enumerate rights. Some delegates thought including an express prohibition against ex post facto laws was unnecessary because ex post facto laws are naturally void. But delegate Hugh Williamson disagreed, arguing: “Such a prohibitory clause is in the Constitution of N. Carolina, and tho it has been violated, it has done good there & may do good here, because the Judges can take hold of it.” 2 The Records of the Federal Convention of 1787 at 376 (Max Farrand ed. 1911). Given that Williamson’s view prevailed, a majority of the Convention presumably agreed that judges would enforce enumerated rights, but not unenumerated natural-law rights.

Subsequent events also confirm this was the original understanding. A major objection to ratification of the Constitution was the lack of enumerated rights. Opponents believed that only a listing of rights would guarantee their protection. The First Congress addressed their concern with the Bill of Rights, which would have been unnecessary if
courts could enforce unenumerated rights. Why expressly provide for freedom of speech, protection against cruel and unusual punishment, and so forth if courts could enforce any natural-law rights? Also significant is that early court decisions did not enforce unenumerated natural-law rights.

Although the Constitution does not secure unenumerated rights based on natural-law, it does protect one limited kind of unenumerated rights: those arising because the federal government has limited powers. For example, in *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court held that Congress lacks power to ban guns in school zones. This means that the defendant in the case had a correlative, although unenumerated, right against the federal government to possess a gun at school. The specific enumeration of other rights in the Constitution should not be construed to deny or disparage rights of this kind retained by the people because of our federal structure. See U.S. Const. amend. 9.