READING 9
The Right to Privacy

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Constitutional Law for a Changing America

Rights, Liberties, and Justice

11th Edition

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CHAPTER SIXTEEN

THE RIGHT TO PRIVACY

AMERICANS PLACE A HIGH VALUE on personal privacy. We believe that people have the right to be let alone; unnecessary government intrusion into people's private lives is generally unwelcome. But are the privacy interests of Americans protected by the Constitution?

Many are surprised to learn that privacy was not among the many liberties that the framers explicitly included in the Bill of Rights. In fact, the word *privacy* appears nowhere in the Constitution. Instead, the right to privacy became included among our protected liberties through judicial interpretation. In this chapter we discuss the right to privacy—its origins, constitutional status, and scope.

THE RIGHT TO PRIVACY: FOUNDATIONS

In today's legal and political context, the right to privacy has become almost synonymous with reproductive freedom. The reason may be that the case in which the Court first articulated a constitutional right to privacy, *Griswold v. Connecticut* (1965), involved birth control, and *Roe v. Wade* (1973), a decision coming on the heels of *Griswold*, legalized abortion.

Prior to these cases, the Court had contemplated privacy in somewhat different contexts. Following the common-law dictates that "a man's home is his castle" and all "have the right to be let alone," Louis Brandeis, a future Supreme Court justice, coauthored an 1890 *Harvard Law Review* article asserting that privacy rights should be applied to civil law cases of libel.[1] The article had enormous long-term influence, in no small part because it created a new legal "wrong"—the invasion of privacy.

After Brandeis joined the Court, he continued his quest to see a right to privacy etched into law. Among his best-known attempts was a dissent in ***Olmstead v. United States*** (1928), which involved the ability of federal agents to wiretap telephones without warrants. The Court ruled that neither the Fifth Amendment's protection against self-incrimination nor the Fourth Amendment's search and seizure provision protected individuals against wiretaps. Brandeis dissented, writing that the Fourth and Fifth Amendments prohibited such activity. He noted that the framers of the Constitution conferred on Americans "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

But not until *Griswold* did the Court rule that the Constitution protects the right to privacy.

(The opinion starts on the next page)

[1]Louis Brandeis and Samuel Warren, "The Right of Privacy," *Harvard Law Review* 4 (1890): 193. William L. Prosser notes that Brandeis and Warren wrote this piece in response to the yellow journalism of the day. See William L. Prosser, "Privacy," *California Law Review* 48 (1960): 383–423.

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Dr. C. Lee Buxton, center, medical director for the Planned Parenthood League of Connecticut, and Estelle Griswold, right, executive director of the Planned Parenthood League of Connecticut, appear at police headquarters after their arrest. The two were held for violating the state's anticontraception law.

Griswold v. Connecticut

381 U.S. 479 (1965)
http://caselaw.findlaw.com/us-supreme-court/381/479.html
Oral arguments are available at https://www.oyez.org/cases/1964/496.
Vote: 7 (Brennan, Clark, Douglas, Goldberg, Harlan, Warren, White)
2 (Black, Stewart)

OPINION OF THE COURT: *Douglas*
CONCURRING OPINIONS: *Goldberg, Harlan, White*
DISSENTING OPINIONS: *Black, Stewart*

FACTS:

In *Poe v. Ullman,* physician C. Lee Buxton tested Connecticut's 1879 law banning contraceptives on behalf of two of his patients. The majority of the Court voted to dismiss the case on procedural grounds, with the opinion for the Court pointing out that no prosecutions under the law had been recorded even though contraceptives were apparently "commonly and notoriously sold in Connecticut drug stores."

Griswold v. Connecticut was virtually a carbon copy of *Poe,* with but a few differences designed to meet some of the shortcomings of the earlier case.[6] Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Buxton opened a birth control clinic in 1961 with the intent of being arrested for violating the same Connecticut law at issue in *Poe.* Three days later, Griswold was arrested for dispensing contraceptives to a married couple.

In the U.S. Supreme Court, Griswold's attorney, Yale Law School professor Thomas Emerson, challenged the Connecticut law on some of the same grounds set forth in the *Poe* dissent. Emerson took a substantive due process approach to the Fourteenth Amendment, arguing that the law infringed on an individual liberty—the right to privacy. He also argued that the right to privacy argument could be found in five amendments: the First, Third, Fourth, Ninth, and Fourteenth.

ARGUMENTS:

For the appellants, Estelle T. Griswold and C. Lee Buxton:

- The Connecticut anticontraceptive statutes deny appellants the right to liberty and property without due process of law in violation of the Fourteenth Amendment.
- The rights involved are fundamental, rather than commercial, and the legislative objectives sought by the Connecticut statutes have never been clearly enunciated. Therefore, the Court owes only a minimal deference to the legislature.
- The statute considered as a public health or moral regulation is overbroad and arbitrary; other potential objectives, such as population control or restricting sexual intercourse to the propagation of children, are inappropriate legislative purposes.
- The statutes violate due process in that they constitute an unwarranted invasion of privacy as recognized by the Court. Regardless of whether one finds the right to privacy in the Third, Fourth, Fifth, Ninth, or Fourteenth Amendment, or some combination thereof, the right to privacy protects, at least, the sanctity of the home and the intimacies of the sexual relationship in marriage (the core elements of this case).

[6]For interesting accounts of *Griswold*, see Fred W. Friendly and Martha J. H. Elliot, *The Constitution: That Delicate Balance* (New York: Random House, 1984); and Bernard Schwartz, *The Unpublished Opinions of the Warren Court* (New York: Oxford University Press, 1985).

For the appellee, State of Connecticut:

- The ban on contraceptives is a proper exercise of the police power of the state. Other states have similar regulations that have been upheld, and the legislature has left open other birth control options, such as the rhythm method and withdrawal.
- There is no invasion of privacy because the proof of the offense was obtained legally and without coercion from voluntary witnesses.

MR. JUSTICE DOUGLAS DELIVERED THE OPINION OF THE COURT.

. . . [W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. . . . 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 the First Amendment has been construed to include certain of those rights.

By *Pierce v. Society of Sisters* [1925], 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. Nebraska* [1923], 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.

. . . Without those peripheral rights the specific rights would be less secure. . . .

. . . [Previous] 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. . . . 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."

The Fourth and Fifth Amendments were described in *Boyd v. United States* as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

We have had many controversies over these penumbral rights of "privacy and repose." 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." 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; harmony in living, not political faiths; 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, WITH 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. [I] 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.

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." The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. 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. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "the enumeration in the Constitution, of certain rights shall not be *construed* to deny or disparage others retained by the people" (emphasis added). . . .

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments.

In determining which rights are fundamental, 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 determine whether a principle is "so rooted [there] as to be ranked as fundamental." 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." "Liberty" also "gains content from the emanations of specific [constitutional] guarantees," and "from experience with the requirements of a free society." *Poe v. Ullman* (dissenting opinion of MR. JUSTICE DOUGLAS).

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."

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. . . .

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." For reasons stated at length in my dissenting opinion in *Poe v. Ullman,* 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.

Griswold was a landmark decision because it found a right to privacy in the Constitution and deemed that right fundamental. Under Griswold, governments may place limits on the right to privacy only if those limits survive "strict" constitutional scrutiny, which means that the government must demonstrate that its restrictions are narrowly tailored (necessary) to serve a compelling government interest.

The justices, however, disagreed about where that right exists within the Constitution. Douglas's opinion for the Court asserted that specific guarantees in the Bill of Rights have penumbras, formed by emanations from First, Third, Fourth, Fifth, and Ninth Amendment guarantees, "that help give them life and substance." In other words, Douglas claimed that even though the Constitution fails to mention privacy, clauses within the document create zones that give rise to the right.

Arthur J. Goldberg, writing for Earl Warren and William J. Brennan Jr., did not dispute Douglas's penumbra theory but chose to emphasize the relevance of the Ninth Amendment. In Goldberg's view, that amendment could be read to contain a right to privacy. His logic was simple: the wording of the amendment, cou-pled with its history, suggested that it was "proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essen-tial rights," including the right to privacy. Harlan wrote that the liberty interest in the due process clause of the Fourteenth Amendment embraces a right to privacy.

REPRODUCTIVE FREEDOM AND THE RIGHT TO PRIVACY: ABORTION

Many of the issues following from *Griswold*—such as drug testing and the right to die—are hotly debated, as we shall see in the next sections, but those discussions are comparatively mild compared to the controversy stirred up by the Court's use of the right to privacy doctrine to legalize abortion in *Roe v. Wade* (1973). Since this decision, abortion has taken center stage in public discourse. It has affected the outcomes of many political races; occupied preeminent places on legislative, executive, and judicial agendas; and become a heated topic for discussion in the nomination proceedings for Supreme Court and lower federal court judges.

Roe v. Wade

410 U.S. 113 (1973)
http://caselaw.findlaw.com/us-supreme-court/410/113.html
Oral arguments are available at https://www.oyez.org/cases/1971/70-18.
Vote: 7 (Blackmun, Brennan, Burger, Douglas, Marshall,

2 (Rehnquist, White)

OPINION OF THE COURT: *Blackmun*
CONCURRING OPINIONS: *Burger, Douglas, Stewart*
DISSENTING OPINIONS: *Rehnquist, White*

FACTS:

In August 1969, Norma McCorvey, a twenty-one-year-old carnival worker living in Texas, claimed to have been raped and to be pregnant as a result of that rape.[7] Her doctor refused to perform an abortion, citing an 1857 Texas law, revised in 1879, that made it a crime to "procure an abortion" unless it was necessary to save the life of a mother. He provided her with the name of a lawyer who handled adoptions. The lawyer, in turn, sent her to two other attorneys, Linda Coffee and Sarah Weddington, who he knew were interested in challenging the Texas law.

Coffee and Weddington went after the Texas law with a vengeance, challenging it on all possible grounds: privacy, women's rights, due process, and so forth. Their efforts paid off, and a three-judge district court panel ruled in their favor, mostly on Ninth Amendment privacy grounds. But because the district court ruling did not overturn the state law, McCorvey, using the pseudonym Jane Roe, and her attorneys appealed to the U.S. Supreme Court.

ARGUMENTS:

For the appellants, Jane Roe, et al.:

- The Texas statute infringes fundamental personal rights, namely the right to medical care and the right to marital and personal privacy—of which the right to abortion is a part—secured by the First, Fourth, Ninth, and Fourteenth Amendments.
- The statute is not rationally related to any legitimate public health concern, any legitimate interest in regulating private sexual conduct, or any interest in protecting human life.

For the appellee, Henry Wade, District Attorney of Dallas County, Texas:

- The Constitution does not guarantee women the right to abortion.
- Personal and marital privacy are not absolute rights.
- Modern science clearly establishes that life begins at conception. Therefore, the state has a compelling interest in preserving the life of a fetus, even if this abridges some privacy right of the mother.

MR. JUSTICE BLACKMUN DELIVERED THE OPINION OF THE COURT.

The Constitution does not explicitly mention any right of privacy. In a line of decisions, 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. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, procreation, family relationships, and child rearing and education.

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 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... Psychological harm may be imminent. 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. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in what-ever way, and for whatever reason she alone chooses. With this we do not agree. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. . . .

We . . . 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. . .

[We hold:]

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. . . .

This holding, we feel, is consistent with the relative weights of the respective interests involved...The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The 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. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

Keep reading for Rehnquist's dissent.

MR. JUSTICE REHNQUIST, DISSENTING.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. . . .

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York* (1905), the result it reaches is more closely attuned to the majority opinion . . . in that case. 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." . . . 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.

Note from Professor Epstein: After *Roe v. Wade*, the next major abortion case was *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992. Because of membership changes on the Court, some commentators thought the justices would overrule *Roe*. But predictions of Roe's demise were wrong. The Court, in a joint opinion (written by Justices O'Connor, Kennedy, and Souter), did not overrule *Roe*; to the contrary, it reaffirmed the "central holding" of the 1973 decision that a woman should have "some" freedom to terminate a pregnancy. And yet the joint opinion gutted the core of *Roe*. The trimester framework and its compelling interest analysis were gone. Under *Casey*, states could enact laws—regulating the entire pregnancy—that further their interest in potential life so long as those laws do not put an undue burden on the right to terminate a pregnancy. If they did place an undue burden—a substantial obstacle—the Court would presumably invalidate them.

In 2022, Court overruled *Roe* and *Casey* in *Dobbs*.

Dobbs v. Jackson Women's Health Organization
597 U.S. ___ (2022)
Opinion of the Court: Alito
Vote: 6 (Alito, Barrett, Gorsuch, Kavanaugh, Roberts, Thomas)
3 (Breyer, Kagan, Sotomayor)
Opinion of the Court: Alito
Concurring Opinions: Kavanaugh, Roberts, Thomas
Dissent Opinion: Filed jointly by Breyer, Kagan, Sotomayor

Mississippi's Gestational Age Act, passed in 2018, provides that generally prohibits abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as "viable" outside the womb. The Act makes exceptions for a medical emergency or in the case of a severe fetal abnormality.

Jackson Women's Health Organization, an abortion clinic, and one of its doctors challenged the Act in federal district court, alleging that it violated precedents establishing a constitutional right to abortion, in particular *Roe* v. *Wade* (1973) and *Planned Parenthood of Southeastern Pa.* v. *Casey* (1992). The district ruled for the Jackson Women's Health, reasoning that Mississippi's 15-week restriction on abortion goes against Supreme Court precedent forbidding states to ban abortion pre-viability. The Fifth Circuit affirmed.

In the Supreme Court, the state defended its Act on the grounds that *Roe* and *Casey* were wrongly decided and that the Act is constitutional because it satisfies rational-basis review.

Justice Alito delivered the opinion of the Court.

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."

The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law. Indeed, when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy. The abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of "liberty." *Roe*'s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called "fetal life" and what the law now before us describes as an "unborn human being."

Stare decisis, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.

It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "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." That is what the Constitution and the rule of law demand….

We begin by considering the critical question whether the Constitution, properly understood, confers a right to obtain an abortion…

The *Casey* Court…grounded its decision solely on the theory that the right to obtain an abortion is part of the "liberty" protected by the Fourteenth Amendment's Due Process Clause….

The underlying theory on which this argument rests—that Fourteenth Amendment's Due Process Clause provides substantive, as well as procedural, protection for "liberty"—has long been controversial. But our decisions have held that the Due Process Clause protects two categories of substantive rights.

The first consists of rights guaranteed by the first eight Amendments. Those Amendments originally applied only to the Federal Government but this Court has held that the Due Process Clause of the Fourteenth Amendment "incorporates" the great majority of those rights and thus makes them equally applicable to the States. The second category—which is the one in question here—comprises a select list of fundamental rights that are not mentioned anywhere in the Constitution.

In deciding whether a right falls into either of these categories, the Court has long asked whether the right is "deeply rooted in [our] history and tradition" and whether it is essential to our Nation's "scheme of ordered liberty."…

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*…

The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. …

We next consider whether the doctrine of *stare decisis* counsels continued acceptance of *Roe* and *Casey*. *Stare decisis* plays an important role in our case law, and we have explained that it serves many valuable ends… "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges."

We have long recognized, however, that *stare decisis* is "not an inexorable command," and it "is at its weakest when we interpret the Constitution." …

Some of our most important constitutional decisions have overruled prior precedents, [including] *Brown* v. *Board of Education (1954)*, the Court repudiated the "separate but equal" doctrine, which had allowed States to maintain racially segregated schools and other facilities. In so doing, the Court overruled the infamous decision in *Plessy* v. *Ferguson* (1896), along with six other Supreme Court precedents that had applied the separate-but-equal rule…

Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision. In this case, [those] factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error… and the absence of concrete reliance.

The nature of the Court's error. An erroneous interpretation of the Constitution is always important, but some are more damaging than others…

Roe was on a collision course with the Constitution from the day it was decided, *Casey* perpetuated its errors, and those errors do not concern some arcane corner of the law of little importance to the American people…. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from *Roe*.

Reliance interests. We.. consider whether overruling *Roe* and *Casey* will upend substantial reliance interests.

Traditional reliance interests arise "where advance planning of great precision is most obviously a necessity." In *Casey*, the controlling opinion conceded that those traditional reliance interests were not implicated because getting an abortion is generally "unplanned activity," and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."…

Unable to show concrete reliance on *Roe* and *Casey* themselves, the Solicitor General [who filed an amicus brief supporting Jackson Women's Health Organization] suggests that overruling those decisions would "threaten the Court's precedents holding that the Due Process Clause protects other rights." (citing *Obergefell*, *Lawrence*, *Griswold*). That is not correct…. As even the *Casey* plurality recognized, "[a]bortion is a unique act" because it terminates "life or potential life." And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion…

We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of *stare decisis*, and decide this case accordingly.

We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives.

We must now decide what standard will govern if state abortion regulations undergo constitutional challenge and whether the law before us satisfies the appropriate standard.

Under our precedents, rational-basis review is the appropriate standard for such challenges. As we have explained, procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history.

It follows that the States may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social and economic beliefs for the judgment of legislative bodies." That respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance.

A law regulating abortion, like other health and welfare laws, is entitled to a "strong presumption of validity." It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests. These legitimate interests include respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability.

These legitimate interests justify Mississippi's Gestational Age Act. The Mississippi Legislature's findings recount the stages of "human prenatal development" and assert the

State's interest in "protecting the life of the unborn." The legislature also found that abortions performed after 15 weeks typically use the dilation and evacuation procedure, and the legislature found the use of this procedure "for nontherapeutic or elective reasons [to be] a barbaric practice, dangerous for the maternal patient, and demeaning to the medical profession." These legitimate interests provide a rational basis for the Gestational Age Act, and it follows that respondents' constitutional challenge must fail.

Justice Breyer, Justice Sotomayor, and Justice Kagan, dissenting.

Today, the Court says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs. An abortion restriction, the majority holds, is permissible whenever rational, the lowest level of scrutiny known to the law. And because, as the Court has often stated, protecting fetal life is rational, States will feel free to enact all manner of restrictions. The Mississippi law at issue here bars abortions after the 15th week of pregnancy. Under the majority's ruling, though, another State's law could do so after ten weeks, or five or three or one—or, again, from the moment of fertilization. States have already passed such laws, in anticipation of today's ruling. More will follow…

But some States will not stop there. Perhaps, in the wake of today's decision, a state law will criminalize the woman's conduct too, incarcerating or fining her for daring to seek or obtain an abortion.

The majority tries to hide the geographically expansive effects of its holding. Today's decision, the majority says, permits "each State" to address abortion as it pleases. That is cold comfort, of course, for the poor woman who cannot get the money to fly to a distant State for a procedure…

Whatever the exact scope of the coming laws, one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens. Yesterday, the Constitution guaranteed that a woman confronted with an unplanned pregnancy could (within reasonable limits) make her own decision about whether to bear a child, with all the life-transforming consequences that act involves. And in thus safeguarding each woman's reproductive freedom, the Constitution also protected "[t]he ability of women to participate equally in [this Nation's] economic and social life." But no longer…

And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. See *Griswold* v. *Connecticut*. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. See *Lawrence* v. *Texas* and *Obergefell* v. *Hodges*. They are all part of the same constitutional fabric, protecting autonomous decisionmaking over the most personal of life decisions. The majority (or to be more accurate, most of it) is eager to tell us today that nothing it does "cast[s] doubt on precedents that do not concern abortion." But how could that be? The lone rationale for what the majority does today is that the right to elect an abortion is not "deeply rooted in history." … The same could be said, though, of most of the rights the majority claims it is not tampering with. The majority could write just as long an opinion showing, for example, that until the mid-20th century, "there was no support in American law for a constitutional right to obtain [contraceptives]." So one of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching

back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.

One piece of evidence on that score seems especially salient: The majority's cavalier approach to overturning this Court's precedents. … The majority has no good reason for the upheaval in law and society it sets off. *Roe* and *Casey* have been the law of the land for decades, shaping women's expectations of their choices when an unplanned pregnancy occurs. Women have relied on the availability of abortion both in structuring their relationships and in planning their lives. …

The constitutional regime we have lived in for the last 50 years recognized competing interests, and sought a balance between them. The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's)…

The majority makes this change based on a single question: Did the reproductive right recognized in *Roe* and *Casey* exist in "1868, the year when the Fourteenth Amendment was ratified"? The majority says (and with this much we agree) that the answer to this question is no: In 1868, there was no nationwide right to end a pregnancy, and no thought that the Fourteenth Amendment provided one.

The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. .. If the ratifiers did not understand something as central to freedom, then neither can we. Or said more particularly: If those people did not understand reproductive rights as part of the guarantee of liberty conferred in the Fourteenth Amendment, then those rights do not exist.

As an initial matter, note a mistake in the just preceding sentence. We referred there to the "people" who ratified the Fourteenth Amendment: What rights did those "people" have in their heads at the time? But, of course, "people" did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation. Indeed, the ratifiers—both in 1868 and when the original Constitution was approved in 1788—did not understand women as full members of the community embraced by the phrase "We the People." In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.

Casey itself understood this point… It recollected with dismay a decision this Court issued just five years after the Fourteenth Amendment's ratification, approving a State's decision to deny a law license to a woman and suggesting as well that a woman had no legal status apart from her husband. But times had changed. A woman's place in society had changed, and constitutional law had changed along with it. The relegation of women to inferior status in either the public sphere or the family was "no longer consistent with our understanding" of the Constitution.

So how is it that, as *Casey* said, our Constitution, read now, grants rights to women, though it did not in 1868? How is it that our Constitution subjects discrimination against them to heightened judicial scrutiny? How is it that our Constitution, through the Fourteenth Amendment's liberty clause, guarantees access to contraception (also not legally protected in 1868) so that women can decide for themselves whether and when to bear a child? How is it that until today, that same constitutional clause protected a woman's right, in the event contraception failed, to end a pregnancy in its earlier stages?

The answer is that this Court has rejected the majority's pinched view of how to read our Constitution. "The Founders," we recently wrote, "knew they were writing a document designed to apply to ever-changing circumstances over centuries." Or in the words of the great Chief Justice John Marshall, our Constitution is "intended to endure for ages to come," and must adapt itself to a future "seen dimly," if at all. *McCulloch* v. *Maryland* (1819). That is indeed why our Constitution is written as it is. The Framers (both in 1788 and 1868) understood that the world changes. So they did not define rights by reference to the specific practices existing at the time. Instead, the Framers defined rights in general terms, to permit future evolution in their scope and meaning. And over the course of our history, this Court has taken up the Framers' invitation. It has kept true to the Framers' principles by applying them in new ways, responsive to new societal understandings and conditions.

Nowhere has that approach been more prevalent than in construing the majestic but open-ended words of the Fourteenth Amendment—the guarantees of "liberty" and "equality" for all…. The Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply….

As a matter of constitutional method, the majority's commitment to replicate in 2022 every view about the meaning of liberty held in 1868 has precious little to recommend it. Our law in this constitutional sphere, as in most, has for decades upon decades proceeded differently. It has considered fundamental constitutional principles, the whole course of the Nation's history and traditions, and the step-by-step evolution of the Court's precedents. It is disciplined but not static. It relies on accumulated judgments, not just the sentiments of one long-ago generation of men (who themselves believed, and drafted the Constitution to reflect, that the world progresses). And by doing so, it includes those excluded from that olden conversation, rather than perpetuating its bounds…

Today's decision strips women of agency over what even the majority agrees is a contested and contestable moral issue. It forces her to carry out the State's will, whatever the circumstances and whatever the harm it will wreak on her and her family. In the Fourteenth Amendment's terms, it takes away her liberty. …

With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.