Why Roe v. Wade Should Be Overruled

Arnold H. Loewy

OBSERVATION

WHY *ROE V. WADE* SHOULD BE OVERRULED

ARNOLD H. LOEWY†

Recently, in *Webster v. Reproductive Health Services*,[1] the United States Supreme Court granted certiorari to consider some of the peripheral aspects of *Roe v. Wade*,[2] and possibly to overrule that decision. For an academic to advocate the overruling of a case so firmly entrenched, at least according to the Court's most recent opinion on the subject,[3] requires more than a demonstration that the case is wrong. Academics think that many cases are wrong, and a healthy respect for stare decisis requires that simple wrongness not be the predicate for overruling a decision that the Court recently and resoundingly endorsed. *Roe v. Wade*, however, is not simply wrong; it is *Wrong* in a fundamental way that few, if any, recent decisions of the Supreme Court can match. The unique *Wrongness* of *Roe* lies in its utter lack of support from any source that is legitimate for constitutional interpretation, coupled with its wholesale denial to a substantial portion of the populace of a meaningful opportunity to effectuate legislative change.

I. NO LEGITIMATE SOURCE

To support my claim of lack of support from any legitimate source, it is necessary to canvass the sources that might be deemed legitimate. This in turn requires some reference to the interpretive versus noninterpretive debate.[4] Before the collective sigh of the readership gets too overwhelming, let me assure you that this will be brief. One does not need to know the exact parameters of legitimate constitutional adjudication to know when something is illegitimate.[5] Consequently, I can cheerfully join with Justice Black in his condemnation of a

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1. 109 S. Ct. 1739 (1989), *granting cert. to* 851 F.2d 1071 (8th Cir. 1988).

2. 410 U.S. 113 (1973).

3. *See* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

4. These terms were probably inspired by Professor Thomas Grey's classic article. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975). Since then, Professor Grey has suggested that we employ the terms "textualists" and "supplementers." Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984). Because old habits die hard, I shall stick to the original terms.

5. To use a sports analogy, one may have difficulty ascertaining what constitutes a flagrant foul in basketball. One has no difficulty, however, ascertaining that chasing an opposing player off the court and punching him in the nose constitutes a flagrant foul. In my view, *Roe v. Wade* is that type of flagrant foul.

strict construction of constitutional rights,[6] and with Justice Brennan in his recognition that the framers' specific intent does not always resolve today's constitutional questions.[7] And, although the question is surely more difficult, I assume *arguendo* that the ninth amendment[8] permits some noninterpretivism.[9] The question is, how much?

Justice Goldberg, who in his concurrence in *Griswold v. Connecticut*[10] did much to revive the ninth amendment, suggested that its protections focus on "fundamental personal rights."[11] Of course, this is not much of a limitation. Whoever heard of a judge who did not claim to be protecting a "fundamental personal right," while imposing a nontextual disability on a legislature. To make this limitation less illusory, Justice Goldberg would have limited the source for determining fundamentality: "[J]udges 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.' "[12] I am willing to assume, again *arguendo*, that because the due process clause, and arguably the ninth amendment, are evolving concepts, that certain rights could be deemed fundamental today even though traditionally they have not been regarded as fundamental.

I do think that this must be the limit of noninterpretivism, however, unless we are prepared to accept a benevolent (it is hoped) judicial dictatorship. Consequently, I do reject the extreme form of noninterpretivism that measures the goodness or badness of a decision purely in political terms.[13] I am confident that such Machiavellian (might makes right) jurisprudence[14] would be unacceptable to the populace. To illustrate, when I propose a constitutional amendment to my class that provides that "no State shall enact any law that the Supreme Court says is bad for us," I get no takers. I get only slightly more takers for an amendment providing that "no State shall pass any law which

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6. A close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon.

Schmerber v. California, 384 U.S. 757, 776-77 (1966) (Black, J., dissenting) (brackets in original, quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

7. "But an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." School District v. Schempp, 374 U.S. 203, 234 (1963) (Brennan, J., concurring).

8. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

9. Arguably if one needs to rely on the ninth amendment, one already has rejected noninterpretivism. By that definition, I suppose that I have rejected it.

10. 381 U.S. 479 (1965).

11. *Id.* at 493.

12. *Id.* (brackets in original, quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

13. *See, e.g.*, Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

14. In an earlier article, borrowing from Judge Learned Hand, I referred to this jurisprudence as the "Platonic Guardian approach." *See* Loewy, *Abortive Reasons and Obscene Standards: A Comment on the Abortion and Obscenity Cases*, 52 N.C.L. REV. 223, 229 (1973). On reflection, I think "Machiavellian jurisprudence" is more appropriate.

violates rights that the Supreme Court thinks are fundamental." The question becomes close when I propose that "no State shall pass any law which violates fundamental principles embodied in the collective conscience of our people."

Having concluded that a holding of unconstitutionality can be justified only by a relevant textual provision, however broadly construed, or by a law which fails the "collective conscience" standard, we need to analyze *Roe* in those terms. The Court did not even try to justify *Roe* in terms of a specific constitutional prohibition. Unlike its predecessor, *Griswold v. Connecticut*,[15] *Roe* was justified exclusively on fourteenth amendment due process grounds.

The Court's reasoning in *Roe* was as simple as one, two, three. One, the right to privacy is fundamental; two, the right to obtain an abortion is part of the right to privacy; therefore three, the right to obtain an abortion is protected by the fourteenth amendment.[16] The major error in this reasoning is the Court's failure to deal with the multifaceted character of privacy: some aspects of privacy are fundamental, others are not. To illustrate, if a statute mandated that the government was to install a surveillance camera in every home,[17] I have little doubt that the statute would be condemned as a violation of privacy contrary to the collective conscience of our people.[18] On the other hand, a law forbidding the use of cocaine in one's home is also inconsistent with privacy, but could not be condemned as contrary to the collective conscience of our people.[19] Thus, the issue in *Roe* should have been whether the right to an *abortion* is fundamental in the sense that denying it offends our collective conscience, not whether the right to *privacy* is fundamental and the right to an abortion follows from the right to privacy.[20]

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15. 381 U.S. 479 (1965).

16. *Roe*, 410 U.S. at 152-54.

17. *Cf.* G. ORWELL, 1984 (1949).

18. Of course, a court wouldn't reach that question since the statute obviously violates the fourth amendment.

19. A defender of *Roe* might argue that *Roe* did hold "that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in the guarantee of personal privacy." 410 U.S. at 152. Consequently, the *Roe* defender would probably say that cocaine in one's home isn't part of the constitutional guarantee of privacy. In other words, if it isn't "fundamental," it isn't "privacy."

Unfortunately, the Court gives us no hint as to what it means by the term "fundamental" other than to list those cases that it now categorizes as having been predicated on the right to privacy. The Court certainly doesn't seem to define "fundamental" in the collective conscience sense of the term. Indeed, it is difficult to read its conception of "fundamental" as anything more than a euphemism for a right that the Court wants to protect by Machiavellian jurisprudence.

20. In this regard the Court's analysis was almost identical to the infamous Lochner v. New York, 198 U.S. 45 (1905). In *Lochner* the Court determined that liberty of contract required extraordinary protection from majoritarian processes and thus invalidated a law limiting the number of hours that a baker could work (contract his labor). *Id.* at 64-65. As with privacy, there is no doubt that some protection for liberty of contract is required by the collective conscience of our people. For example, a law that required all contracts of whatever nature to be submitted to a Federal Bureau of Contracts before they could be valid might well be inconsistent with our collective conscience. This, however, has nothing to do with whether a 60 hour workweek for bakers is inconsistent with our collective conscience.

Consequently, I view *Roe* and *Lochner* as being much closer to identical twins than did John Hart Ely in his seminal article on *Roe*. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 940 (1973); *see infra* notes 56-69 and accompanying text.

One reason that the *Roe* right is so difficult to classify as fundamental in the collective conscience sense is that it is the only one of the privacy rights that is not victimless. Although a fetus is not a person within the meaning of the fourteenth amendment as *Roe* so correctly held,[21] it can certainly attain the status of a victim.[22] Consequently, a decision maker, be it a court or a legislature, has to determine whether the rights of the woman (who, because she is a person in the fourteenth amendment sense of the term, could justly be deemed a greater entity than the fetus) should prevail over the fetus whose interest—life itself—normally exceeds that of its mother.[23]

To reduce this to mathematical terms, what the decision maker is trying to do is balance the greater entity's (G.E.) lesser interest (L.I.) against the lesser entity's (L.E) greater interest (G.I.). When G.E. $\times$ L.I. is greater than (>) L.E. $\times$ G.I., the abortion should be allowed. But, when G.E. $\times$ L.I. is less than (<) L.E. $\times$ G.I., the abortion should not be allowed. For some people, the solution is easy: the fetus (L.E.), at least to a certain point, is worth zero. Because zero times anything is zero, the mother (G.E.) always prevails. For others, the answer is easy in the other direction. The fetus (L.E.) is a human being from the moment of conception. Therefore, the fetus and mother are equal as entities, and because the fetal interest in life almost always exceeds the maternal interest in health, economics, or convenience, the fetus should nearly always win.[24] Of course, for still others (perhaps a majority?), the question depends on two variables: the proximity of the lesser entity to personhood (a factor that the Court deemed relevant[25]) and the strength of the greater entity's interest. The mother prevails to avoid serious health risks, but not social inconvenience (a factor that the Court did not even address).

With such imponderables, it is hardly surprising that the country has no "collective conscience" on the question. The decision maker can do no more than put largely intangible weights into the formula to decide which side should prevail. For a legislature to act on intangibles is not problematic. Legislatures are supposed to make policy judgments reflecting the values of their constituents. Courts called upon to invalidate legislation on constitutional grounds, on the other hand, are asked to upset the judgment of the people's representatives. Here, there is no room for acting on intangibles. If the Court is going to upset

21. 410 U.S. at 156-59. Based on any reasonable construction of the Constitution, this portion of the holding, if not all of its reasoning, was correct. There is not a shred of historical evidence, of which I am aware, that would suggest that the framers thought of fetuses as persons against whom the State could not act except with due process of law. Furthermore, no serious argument could be made that laws punishing murder deny equal protection because fetuses are not included as victims. In addition, states do not always treat fetuses as persons for purpose of suits against tortfeasors. *See generally* Kader, *The Law of Tortious Prenatal Death Since* Roe v. Wade, 45 MO. L. REV. 639 (1980) (both before and after *Roe*, some states have denied wrongful death actions for the death of a fetus).

22. *See* Ely, *supra* note 20, at 926; Loewy, *supra* note 14, at 225.

23. *But see* Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979). Professor Regan argues that the law should not view a helpless person's interest in life as superior to a potential samaritan's interest in not suffering substantial bodily inconvenience to preserve that life. *Id.* at 1610. I discuss Professor Regan's thesis further in Section III.

24. *But see supra* note 23.

25. *Roe*, 410 U.S. at 163 (1973).

such a judgment, it ought to have a very good reason. Machiavellian jurisprudence simply will not do. As Justice Jackson once put it: "Power should answer to reason none the less because its fiat is beyond appeal."[26]

II. SUBORDINATION OF DEMOCRACY

At this juncture, I believe that I have established that *Roe* was wrong. As I suggested at the outset, however, I do not believe that wrongness simpliciter warrants overruling. What makes *Roe* and its progeny *wrong* is their subordination of democratic values to the judiciary. But, you might ask, don't all decisions invalidating legislation subordinate democratic values to the judiciary? The answer is yes, but not to the same extent.

Consider, for example, *Eisenstadt v. Baird*,[27] in which the Court invalidated a Massachusetts law forbidding the distribution of contraceptive devices to unmarried people. The Court reasoned that equal protection mandated equal access to contraceptives for unmarried and married people.[28] If the Court had held that unmarried people had a right to engage in sexual intercourse,[29] such a holding would have been coherent. Because it did not, the Court's invalidation of the statute on equal protection grounds was clearly wrong.[30]

Nevertheless, *Eisenstadt* is not *wrong* in the sense that *Roe* is *wrong*. Although the legislative will was wrongly overridden, no great harm transpired. There was no huge throng of people whose most cherished values had been placed beyond the pale. Indeed, long before *Eisenstadt*, condoms were openly sold in Massachusetts pharmacies.[31] Consequently, insofar as their impact on democratic values is concerned, *Eisenstadt* and *Roe* are polar opposites.

I can think of only two lines of cases that approach *Roe* in their impact on the democratic process: those spawned by *Brown v. Board of Education*[32] and *School District of Abington Township v. Schempp*.[33] Because I think that both of these cases were rightly decided, I am not troubled by their impact on the democratic process. Indeed, if laws are unconstitutional, they are supposed to impact on the democratic process. There are those, however, who do think one of these cases or their progeny are wrong. For example, Professor Lino Graglia thinks

26. Jewell Ridge Coal Corp. v. Local No. 6167, United Mineworkers of Am., 325 U.S. 161, 196 (1945) (Jackson, J., dissenting opinion).

27. 405 U.S. 438 (1972).

28. *Id.* at 446-55.

29. Whether such a holding would be possible within the confines of either the penumbras of the Bill of Rights or an acceptable level of noninterpretive jurisprudence as outlined in Part I of this Article is a question on which I take no position.

30. Space does not permit an extensive analysis of *Eisenstadt*. For a more complete explanation of its deficiencies, see Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C.L. REV. 1, 5-6 (1978).

31. As a student of Boston University and Harvard in the late fifties and early sixties, I can personally attest to the availability of such items. I suppose they were sold for the prevention of disease, but that hardly makes a difference to my point that *Eisenstadt* had a minimal impact on those members of the Massachusetts populace that supported the law.

32. 347 U.S. 483 (1954).

33. 374 U.S. 203 (1963).

that most of *Brown's* progeny were wrongly decided.[34] How, if at all, are they different from *Roe*?

For me, the best testing case is *Edwards v. Aguillard*,[35] one case descended from *Schempp* that I think the Court got wrong.[36] In *Edwards* the Court invalidated a statute designed to ensure balanced treatment for teaching creationism in public schools in which evolution is taught.[37] The Court upheld the district court's refusal to hear expert testimony concerning the scientific validity of creationism on the ground that the legislature was motivated by a desire to endorse religion.[38] Consequently, even if creationism were scientifically valid, the improper legislative motivation invalidated the law. In my view, the Court should not have limited the teaching of a scientifically valid theory (which creationism almost certainly was not, but must be assumed to be in light of the posture of the litigation) simply because the teaching was required by an improperly motivated legislature.[39] Although *Edwards* probably frustrated the democratic process nearly as much as *Roe*, and, like *Roe*, reached a constitutionally wrong result, it was not *wrong* in the sense that *Roe* was *wrong*. The difference between the cases is that *Edwards* simply misapplied a value (nonestablishment of religion) that is unquestionably in the Constitution, whereas *Roe*, in a Machiavellian manner, made up a constitutional value. Similarly, for anybody who thinks that *Brown* and its progeny were wrong, their wrongness would lie in their misconstruction of a constitutional value—racial equality—rather than in their creation of a totally new value.

Thus, on the basis of its lack of relationship to any constitutional value, its failure to meet the collective conscience test for fundamentality, and its impact on the right of the populace to govern itself, *Roe* is *wrong* in a sui generis sense and should be overruled.

III. POSSIBLE ALTERNATIVES FOR UPHOLDING *ROE*

As one who believes that *Roe* is good social policy and that the policy that some legislatures might give us would not be so good, I cannot give up on *Roe* without exploring alternative rationales. Although I recognize (as the Court did not) that "the beauty of democracy is that it assures us that we will be governed no better than we deserve to be,"[40] women who may have to endure unwanted

34. *See* L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 32, 104-32, 160-202 (1976) (discussing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Keyes v. Denver School Dist., 413 U.S. 189 (1973)).

35. 107 S. Ct. 2573 (1987).

36. The Court probably also got Wallace v. Jaffree, 472 U.S. 38 (1985) wrong, but not so obviously. *See* Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049, 1065-69 (1986).

37. 107 S. Ct. at 2574. The statute forbade the teaching of evolution unless accompanied by instruction in the theory of creation science. *Id.*

38. *Id.* at 2583-84.

39. Because I am using *Edwards* only for illustrative purposes, I will honor my space limitations and elaborate no further on my reasons for thinking that the case was wrongly decided.

40. I have heard this quote attributed to George Bernard Shaw. If he did say it, I want him to have full credit for it. I, however, do not know where, or even whether, he said it. If he did not say

pregnancies ought to have every fair shot at saving *Roe*. One promising alternative rationale is Professor Donald Regan's provocative article entitled *Rewriting* Roe v. Wade.[41] Professor Regan contends that to the extent that an involuntarily pregnant woman cannot abort, she is compelled to be a good samaritan and allow her body to be used to house the fetus in a manner inconsistent with and greater than that required of other potential samaritans.[42] Regan's theory is not predicated on due process; that is, he does not contend that a state could not increase the burden on samaritans in general. He argues only that the states have not increased the burden on samaritans in general, and, therefore, the special burden that a state imposes on a pregnant woman denies her equal protection.[43] Moreover, because only women can be saddled with this burden, Regan's conclusion is buttressed by the heightened scrutiny available for gender-based discrimination.

On balance, I do not believe that this analysis works. One difference between abortion and other samaritan situations is that in the other situations the state is asking its citizen to change something for the better, such as rescue a drowning child. In the abortion situation, the state is precluding the woman from making the fetus' situation worse. To be sure, the woman did not put the fetus in her womb (a point Regan makes to justify treating abortion as an omission rather than an act).[44] On the other hand, neither did the state. Consequently, it is not unreasonable for the state to view this situation as sufficiently different from other samaritan situations to warrant different treatment.

Regan also suggests that even if the relationship of mother to fetus were such that some samaritan obligation would be appropriate, nine month's use of her body is too much.[45] He contrasts this situation to the case of a live child needing a bone marrow transplant from a parent who is unwilling to give it. Relying on a case in which a court refused to order a man to give such a transplant to save his cousin[46] and the general philosophic bias against compelled organ donations, Regan concludes that such a transplant probably would not be ordered.[47] Assuming that he is correct, use of the womb is different. Only a few people need bone marrow or organ transplants. Consequently, a rule requiring parents to be donors is not necessary to preserve the population. A more appropriate analogy would occur if some genetic mutation affected the human race so that it became biologically impossible for any child to survive past age seven unless she received a bone marrow transplant from one of her parents. In such a

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it, I would be happy to take credit for it. If any reader knows the source of this quote, I would appreciate your sharing it with me.

41. 77 MICH. L. REV. 1569 (1979).

42. *Id.* at 1569, 1593.

43. *Id.* at 1569-70, 1621-39.

44. *Id.* at 1594-95. I accept Regan's argument that the woman's mere act of voluntary sexual intercourse (in the nonrape situation) is not enough to attribute to her the placing of the fetus in the womb.

45. *Id.* at 1579-83 (discussing the physical burdens of pregnancy and childbirth).

46. *Id.* at 1585 (citing McFall v. Shimp (Ct. of Comm. Pleas, Allegheny County, Pa., Civ. Div., July 26, 1978)).

47. Regan, *supra* note 23, at 1586.

situation, there is good reason to believe that the law would require one of her parents to make the donation.[48]

Perhaps the strongest argument against Regan's thesis is the military draft. He recognizes that the burdens on a draftee, compelled to serve in the military for two years, are no less than those imposed on a pregnant woman who is denied an abortion.[49] He distinguishes the situations, however, because the draftee serves the public whereas the pregnant woman is compelled to serve a specific individual, the fetus.[50] Why that should make a constitutional difference is not clear. Even if it should make such a difference, it is illusory in this context. Some draftees effectively serve specific individuals such as the general or sergeant, and until artificial wombs are perfected, natural ones will be necessary for the public purpose of perpetuating the human race.[51]

Furthermore, given *Rostker v. Goldberg*,[52] which held that the burdens of the draft could be limited to males, there is little basis for objecting to the burden of pregnancy being limited to females. The unwillingness of the government to draft females was hardly compelling, and certainly wasn't necessary.[53] The capacity to impose pregnancy on males, on the other hand, remains beyond human technology. Consequently, the Court would be hard pressed to justify upholding the draft over a claim of a gender discrimination, but invalidating abortion laws on that ground.

All of this is not to say that Regan's theory would not have been a better ground on which to predicate *Roe*. Had the Court done so, it would have at least been construing a real constitutional value—protecting women from invidious discrimination.[54] For that reason, the opinion would have been upgraded from *Wrong* to wrong in the sense that *Edwards v. Aguillard* was wrong.[55] Of course, when the Supreme Court reconsiders *Wrong* decisions, its job is not to make them wrong, but to make them right. Thus, I do not believe that the Court can legitimately save *Roe* by relying on Professor Regan's rationale.

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48. I am not suggesting that requiring a bone marrow transplant in the hypothesized situation requires denying the right to an abortion. Fetuses are not persons within the meaning of the fourteenth amendment and consequently a legislature could view them as lesser entities than seven-year-olds, *see supra* text accompanying notes 21-25, and consequently less entitled to the services of a samaritan. Regan's argument, however, is predicated on the assumption that fetuses are persons in the whole sense of that term. On that assumption, his analysis is faulty. In regard to the hypothesized situation, it is fascinating to surmise the methodology that a court or legislature would use to determine which parent would be compelled to be the donor.

49. Regan, *supra* note 23, at 1605.

50. Regan, *supra* note 23, at 1606-07.

51. Of course I am not saying that the human race would disappear forthwith unless we forbade voluntary abortions. I am suggesting, however, that the public/private dichotomy is not so clear as Regan would have us believe.

52. 453 U.S. 57 (1981) (decided after Regan's article).

53. *See* Loewy, *Returned to the Pedestal—The Supreme Court and Gender Classification Cases: 1980 Term*, 60 N.C.L. REV. 87, 95-97 (1981).

54. *See* Loewy, *supra* note 30, at 11-22 (discussing application of the equal protection clause in gender-based discrimination cases).

55. *See supra* notes 35-39 and accompanying text.

IV. THE COUP DE GRACE

If *Roe* is going to be overruled, how should the overruling opinion be structured? I close this observation with one possible answer, an updated version of Justice Holmes classic *Lochner* dissent:[56]

> *Roe v. Wade* was decided upon a social theory which a large part of the country does not entertain. If it were a question whether we agreed with that theory, we should desire to study it further and long before making up our minds. Even then, we would probably be divided.[57] But we do not conceive that to be our duty, because we believe that our agreement or disagreement has nothing to do with the right of the 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 injudicious or if you like as tyrannical as this, and which equally interferes with the right to privacy. Limits on consuming drugs or drinking moonshine in the privacy of one's home are ancient examples. A more modern one is the requirement that seat belts be worn while riding in an automobile. The privacy of a citizen to do as she likes in her home, which has been a shibboleth for some well-known writers, is offended by pen registers on our telephones,[58] hidden transmitting devices on our friends,[59] and by the police sifting through our garbage.[60] The Constitution does not enact Justice Harry Blackmun's social ethics.[61] Just this term, we sustained a 400 foot overflight to spy on a man's greenhouse.[62] We based that decision on an earlier decision upholding a 1000 foot overflight to deliberately spy on a man's back yard.[63] Just three years ago we upheld the constitutionality of a statute that punishes private consensual homosexual activity.[64] The decision sustaining a zoning law precluding more than two unrelated people from living together is still recent.[65] Some of these practices and laws em-

56. Lochner v. New York, 198 U.S. 45, 74-76 (1905).

57. I am quite convinced of the social desirability of *Roe*. In view of the number of public officials who are not similarly persuaded, however, I suppose that at least some members of the current Supreme Court might find *Roe* to be undesirable social policy.

58. Smith v. Maryland, 442 U.S. 735, 745-46 (1979).

59. United States v. White, 401 U.S. 745, 751-52, *reh'g denied*, 402 U.S. 990 (1971).

60. California v. Greenwood, 108 S. Ct. 1625, 1628-29 (1988).

61. If this last statement seems unfair, consider the end of Justice Blackmun's opinion for the Court in Thornburgh v. American College of Obstetricians and Gynecologists:

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

476 U.S. 747, 772 (1986) (emphasis added).

To Justice Blackmun's credit, *Thornburgh*, unlike *Roe*, does analyze the fundamentality of the right to abortion rather than the more generic right to privacy. *See supra* notes 16-20 and accompanying text. Unfortunately, it does so in unusually strident, Machiavellian tones.

62. Florida v. Riley, 109 S. Ct. 693, 696 (1989).

63. California v. Ciraola, 476 U.S. 207, 212-15 (1986).

64. Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986).

65. Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974).

body convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular social theory, whether it be pro-life, or pro-choice. 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.[66]

General propositions do not decide concrete cases. The decision will depend on a judgment more subtle than any articulate major premise. But we think that the proposition just stated will carry us far toward that end. Every opinion tends to become a law. We think that the word liberty in the fourteenth 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 person 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.[67] It does not need research to show that no such sweeping condemnation can be passed upon the statute before us.[68] People whom we certainly would not pronounce unreasonable believe that substantial regulation of abortion is appropriate.[69]

Because it cannot stand consistent with the principles of the *Lochner* dissent, to which we have adhered for the last half century, *Roe v. Wade*, is overruled.

66. I do not mean to preclude the possibility that some of the practices discussed in this opinion should have been held unconstitutional under the fourth amendment. Indeed, some of the practices should have been so held. *See* Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1252-56 (1983). My point is that they are not unconstitutional under some amorphous concept of privacy.

67. As indicated earlier, I would not necessarily require that the traditions be as longstanding as that term ordinarily implies. *See supra* notes 12-13 and accompanying text.

68. Here I am referring to the statute invalidated in *Roe*. In *Webster*, the case which is actually before the Court, the contested statute precludes certain doctors from "encouraging or counselling" women to have abortions. Reproductive Health Serv. v. Webster, 851 F.2d 1071, 1078 (8th Cir. 1988), *cert. granted*, 109 S. Ct. 1739 (1989). I think that this aspect of the statute has serious first amendment problems which will not be resolved by simply overruling *Roe*.

69. These include, for example, Judge John Noonan, *see* Noonan, *The Root and Branch of* Roe v. Wade, 63 NEB. L. REV. 668 (1984), President Bush, immediate past President Reagan and probably the Secretary of HEW, Dr. Sullivan.