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Mark L. Rienzi

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## ARTICLES

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### THE CONSTITUTIONAL RIGHT NOT TO PARTICIPATE IN ABORTIONS: *ROE*, *CASEY*, AND THE FOURTEENTH AMENDMENT RIGHTS OF HEALTHCARE PROVIDERS

Mark L. Rienzi\*

*The Fourteenth Amendment rights of various parties in the abortion context—the pregnant woman, the fetus, the fetus’s father, the state—have been discussed at length by commentators and the courts. Surprisingly, the Fourteenth Amendment rights of the healthcare provider asked to provide the abortion have not. Roe and Casey establish a pregnant woman’s Fourteenth Amendment right to decide for herself whether to have an abortion. Do those same precedents also protect her doctor’s right to decide whether to participate in abortion procedures?*

*The Court’s substantive due process analysis typically looks for rights that are “deeply rooted” in our history and traditions. Accordingly, this article addresses the historical basis for finding that providers do indeed have a Fourteenth Amendment right not to participate in abortions. This historical analysis shows that this right to refuse passes the Court’s stated test for Fourteenth Amendment protection. In fact, the right to refuse actually has better historical support, and better satisfies the Court’s stated tests, than the abortion right itself.*

*Beyond this historical case, a healthcare provider’s right to make this decision also fits squarely within the zone of individual decision making protected by the Court’s opinions in Casey and Lawrence v. Texas, and*

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\* Assistant Professor of Law, The Catholic University of America, Columbus School of Law. I am grateful to Mary Ann Glendon, Eugene Volokh, Rick Garnett, Kevin Walsh, Nathan Chapman, and my colleagues at Catholic University for their helpful comments on this article. Will Haun, Stephen Braunlich, Kristen Morgan, and Eric Tysarczyk provided superb research assistance.

*protects providers from the types of psychological harm that the Court recognized in Roe and Casey. For these reasons, under Roe and Casey, a healthcare provider has a Fourteenth Amendment right not to participate in abortions.*

## INTRODUCTION

Dr. Lisa Harris had performed abortions for years. But while performing one particular abortion, she experienced what she called a “brutally visceral” emotional response. At the time, Dr. Harris was pregnant, and she had felt her own baby kick while she was performing the abortion. She described the experience as “one of the more raw moments” of her life.<sup>1</sup>

From that point on, Dr. Harris found that performing abortions “did not get easier,” and that she grew to find the process “sadder.”<sup>2</sup> Still, Dr. Harris chose to continue providing abortions. Indeed she wrote about her experience to draw attention to the psychological impact of providing abortions.<sup>3</sup> Dr. Harris hopes that an open discussion of the psychological burdens of providing abortions will strengthen the pro-choice movement and help make abortions more widely available.<sup>4</sup>

Different doctors, of course, have different approaches to the question of whether or not to perform abortions. Some choose not to perform them at all. Others perform abortions for their entire careers, enduring protests, threats, and physical violence to provide a service they deem critically important.<sup>5</sup> Still others perform abortions for a time and later decide they wish to stop,<sup>6</sup> or decide midcareer to

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1 Lisa H Harris, *Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse*, 16 REPROD. HEALTH MATTERS 74, 76 (2008).

2 *Id.*

3 *Id.* at 75.

4 *Id.*

5 See David Barstow, *An Abortion Battle, Fought to the Death*, N.Y. TIMES, July 26, 2009, at A1 (discussing the life and death of abortion provider George Tiller). Dr. Tiller devoted his entire career to performing abortions, focusing particularly on late-term abortions that few other doctors will provide, and enduring bombings, death threats and multiple attempts on his life. Dr. Tiller was murdered by an abortion opponent on May 31, 2009. *Id.*

6 See, e.g., BERNARD NATHANSON, THE HAND OF GOD 140–41 (1996) (explaining that Nathanson, cofounder of the National Association for the Repeal of Abortion Laws (the original “NARAL”), oversaw “tens of thousands of abortions” before leaving the practice. Nathanson later created the controversial video called “The Silent Scream,” showing an abortion as it happened on ultrasound).

begin providing abortions.<sup>7</sup> In short, physicians—like the rest of us—have come to a variety of opinions about abortion. Those opinions quite naturally influence whether they are willing to participate in abortions or not.

What does the Constitution say about this state of affairs? Suppose after the abortion described above, Dr. Harris had experienced a change of heart and decided she no longer wished to provide abortions. Does she have the constitutional right to make that decision on her own? Or could the government force her to continue to provide abortions against her will, perhaps as a condition of being a licensed obstetrician?

Courts and commentators have repeatedly examined the Fourteenth Amendment rights of various parties in the abortion context, including the pregnant woman,<sup>8</sup> the fetus,<sup>9</sup> the states,<sup>10</sup> and the

7 See, e.g., Emily Bazelon, *The New Abortion Providers*, N.Y. TIMES MAG., July 18, 2010, at 30 (describing a Chicago family practice physician who began providing abortions several years into her career).

8 See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 851 (1992) (reaffirming *Roe*'s central holdings and emphasizing that the Fourteenth Amendment protects a liberty interest of self-determination in matters involving abortion and the ability to make those decisions without "compulsion of the State"); *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (holding that the pregnant woman has a Fourteenth Amendment right to decide whether or not to abort a fetus, subject to limited state regulation as the pregnancy progresses); B. Jessie Hill, *Reproductive Rights as Healthcare Rights*, 18 COLUM. J. GENDER & L. 501, 502 (2009) (arguing that the abortion right should be considered a "right to health"); Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. WOMEN & L. 91, 96 (1997) ("This article will review how women are victimized by other women's free exercise of self-centered and unlimited personal liberty. The salient point is that sex selection abortion is illustrative of the fact that abortion in general is destructive to women. What was once hailed as the choice that would free all women has come to shackle the future of women as a gender."); Elizabeth Spiezer, Comment, *Recent Developments in Reproductive Health Law and the Constitutional Rights of Women: The Role of the Judiciary in Regulating Maternal Health and Safety*, 41 CAL. W. L. REV. 507, 507 (2005) ("In order to ensure women full rights as 'persons' entitled to personal liberty under the Constitution, the Supreme Court must mandate that laws regulating women's reproductive health and safety clearly and unequivocally value women as autonomous persons rather than as functions of a socially defined maternal role." (footnote omitted)).

9 See, e.g., *Roe*, 410 U.S. at 158–59 (holding that a fetus is not a "person" and therefore lacks Fourteenth Amendment or other constitutional rights until birth, but stating that "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer" to the question of when life begins); Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600 (1986) ("Any legal recognition of the fetus should be scrutinized to ensure that it does not infringe on women's constitutionally protected interests in liberty and equality during pregnancy."); Law-

father.<sup>11</sup> These decisions often presume and rely upon the presence of a willing doctor to perform the abortion.<sup>12</sup> To date, though, no scholars have explored in any depth whether the healthcare provider has Fourteenth Amendment rights to decide for herself whether to participate in abortions.<sup>13</sup> In short, we know that under the Fourteenth Amendment the government cannot compel a woman to abort her own fetus—the question asked here is, can it force her to abort someone else’s?

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rence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155, 156 (2009) (arguing that prenatal humans should not be recognized as persons because to do so would cause women to lose fundamental rights and therefore create a “constitutional anomaly”); Tracy Leigh Dodds, Note, *Defending America’s Children: How the Current System Gets it Wrong*, 29 HARV. J.L. & PUB. POL’Y 719, 719–20 (2006) (exploring “the connection between the mistreatment of children and the dehumanization of unborn children” and offering “an alternative framework . . . that explicitly recognizes the innate right of all individuals to have their existence recognized and honored by the government and courts”); Amy Lotierzo, Note, *The Unborn Child, A Forgotten Interest: Reexamining Roe In Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279, 280 (2006) (“[C]hanges in the law that have expanded fetal rights have eroded the fundamental assumption on which the right to abortion depends—that the unborn do not have protected life and liberty interests under the Fourteenth Amendment of the United States Constitution.”).

10 See, e.g., *Casey*, 505 U.S. at 871; *Roe*, 410 U.S. at 164 (formulating the woman’s right to choose abortion in opposition to the power of states, in certain circumstances, to regulate abortion to protect the state’s interest in fetal life or to protect the health of the mother).

11 See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 70 (1976) (invalidating a state law designed to allow fathers the right to participate in the abortion decision); Melanie G. McCulley, *The Male Abortion: The Putative Father’s Right to Terminate His Interests in and Obligations to an Unborn Child*, 7 J.L. & POL’Y 1, 7–8 (1998) (“[A] putative father should have the same right to escape [the responsibilities of supporting a child] as that of an unwed mother.”); Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman’s Womb is Not a Man’s Castle*, 55 BROOK. L. REV. 1359 (1990) (discussing paternal rights and arguing against paternal rights before birth).

12 See, e.g., *Roe*, 410 U.S. at 163 (noting that limits on state interference in pre-viability abortions means that “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”). Elsewhere in the opinion, the Court notes that physicians hold a range of views about abortion. See *id.* at 116.

13 Courtney Miller, Note, *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. CAL. REV. L. & WOMEN’S STUD. 327, 347–48 (2006) (dismissing the possibility, after one paragraph, that “the Court could extend the autonomy logic of its substantive due process . . . to also protect the conscience rights of health care providers” as “unlikely” as long as “the abortion right . . . remains confined to situations of mutual agreement between an individual and her physician”).

For much of our history, this question has been largely irrelevant. Until quite recently the right not to be forced to perform abortions has been protected by a variety of other mechanisms, including pre-*Roe* laws banning most abortions,<sup>14</sup> express state and federal statutory conscience protections enacted after *Roe*,<sup>15</sup> and a strong view of the Free Exercise Clause that subjected government burdens on individual religious exercise to strict scrutiny under *Sherbert v. Verner*,<sup>16</sup> and *Wisconsin v. Yoder*.<sup>17</sup> These overlapping factors largely ensured that the government could not compel an unwilling individual to participate in an abortion. There was little need to consider or explore whether the Fourteenth Amendment provided independent protection.

Recent developments, however, make the question of a Fourteenth Amendment right for healthcare providers more relevant. Legal developments have made it much more difficult for a religious plaintiff to assert a First Amendment Free Exercise claim.<sup>18</sup> Medical developments such as the availability of RU-486 (also called the “abortion pill”) and emergency contraception (also called the “morning after pill,” and marketed as “Plan B” and “ella”) have expanded the pool of healthcare providers likely to be asked to participate personally in procedures they may consider to be abortions.<sup>19</sup> The Depart-

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14 See, e.g., *Roe*, 410 U.S. at 174–77 (Rehnquist, J., dissenting) (reviewing legal prohibitions on abortion at the time of the Fourteenth Amendment); see also *infra* Part III.A–B.

15 See, e.g., Church Amendment, Pub. L. No. 93-45, § 401(b), 87 Stat. 91 (1973) (codified at 42 U.S.C. § 300a-7 (2006)) (“The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require . . . (2) such entity to (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions . . . .”); MD. CODE ANN., HEALTH-GEN. § 20-214 (LexisNexis 2009) (“A person may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy.”); see also *infra* Part III.C–D.

16 374 U.S. 398, 406–07 (1963).

17 406 U.S. 205 (1972).

18 See, e.g., *Emp’t Div. v. Smith*, 494 U.S. 872, 884–85 (1990) (deeming *Sherbert* analysis inapplicable in the face of certain neutral and generally applicable laws).

19 For example, as understood by individuals who believe that life begins at conception (i.e., the union of egg and sperm), Plan B’s mechanism of action can cause an abortion because it can prevent the implantation of an already-fertilized egg in the uterus. See PLAN B ONE-STEP, FULL PRESCRIBING INFO., <http://www.planbonestep.com/pdf/PlanBOneStepFullProductInformation.pdf> (last visited Sept. 25, 2011) (noting that Plan B “may inhibit implantation”). Plan B has resulted in numerous

ment of Health and Human Services has recently rescinded administrative regulations allowing for conscience-based objections by healthcare workers.<sup>20</sup> President Obama and members of Congress have promised passage of legislation known as the Freedom of Choice Act, which some argue would strip healthcare workers and institutions of even state statutory protections against compelled participation in abortions.<sup>21</sup> New legislation establishing greater government involvement in the healthcare system will likely present additional conflicts between government mandates and provider conscience.

These developments have coincided with actions by private employers, government regulators, and courts to require healthcare providers to participate in what they understand to be abortions. In Alaska, for example, private hospitals have been forced by state courts

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federal and state lawsuits by pharmacists objecting to laws forcing them to dispense the drug, because they believe they would be participating in abortion. *See, e.g.,* *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373 (Ill. 2008). The recently approved drug “ella” can be taken up to five days after sex and, according to its FDA-approved label, may prevent pregnancy through “alterations to the endometrium that may affect implantation.” *How Ella is Different*, ELLA, <http://www.ella-rx.com/hcp/howiselladifferent.asp> (last visited Sept. 25, 2011) (also noting that the drug caused “embryofetal loss . . . in all pregnant rats and half of the pregnant rabbits” to which it was administered).

20 *See* Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88) (rescinding in part and revising in part a 2008 Final Rule concerning conscience protections). The 2011 Final Rule states that it is not designed to reduce existing statutory conscience protections, but that fund recipients will no longer be required to certify their compliance with those statutes.

Despite these actions, President Obama has publicly stated his support for at least some type of “sensible” conscience protection, but has not provided details at to whom it would protect or how it would work. *See, e.g.,* President Barack Obama, Remarks by the President in Commencement Address to the University of Notre Dame (May 17, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-notre-dame-commencement>) (“Let’s . . . draft a sensible conscience clause, and make sure that all of our health care policies are grounded not only in sound science, but also in clear ethics . . .”).

21 *See* Kristen L. Burge, Comment, *When It Rains, It Pours: A Comprehensive Analysis of the Freedom of Choice Act and Its Potential Fallout on Abortion Jurisprudence and Legislation*, 40 CUMB. L. REV. 181, 237 (2009); Memorandum from the Office of General Counsel, United States Conference of Catholic Bishops (Aug. 15, 2008), *available at* <http://old.usccb.org/prolife/issues/FOCA/analysis.pdf>; *The “Freedom for Partial-Birth Abortionists Act”—Pro-Abortion Lawmakers Propose “FOCA” to Invalidate All Limits on Abortion*, NAT’L RIGHT TO LIFE (Apr. 25, 2007), <http://www.nrlc.org/foca/LawmakersProposeFOCA.html>. This prospect prompted at least one Catholic bishop to publicly consider the closing of all Catholic hospitals, which provide approximately one-third of all hospital services nationwide. Tim Townsend, *Federal FOCA Bill Sparks Threats of Hospital Closings*, ST. LOUIS POST-DISPATCH, Mar. 6, 2009, at A1.

to allow their facilities to be used for abortions against their will.<sup>22</sup> The state of California sued the United States government in 2005, asserting that the state had the ability “to take disciplinary action against either health care entities or health care providers who refuse to provide abortion related services” in certain situations.<sup>23</sup> Since 2005, other states have used their power over pharmacy licenses to require distribution of drugs known as “emergency contraceptives,”<sup>24</sup>

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22 See, e.g., *Valley Hosp. Ass’n v. Mat-Su Coal. for Choice*, 948 P.2d 963 (Alaska 1997) (requiring a private hospital to permit abortions because it had accepted public funds). The court’s decision that abortions were required as a matter of Alaska state law is reminiscent of developments shortly after *Roe*, in which some federal courts ordered hospitals to permit or provide abortions as a matter of federal law. See, e.g., *Doe v. Bellin Mem’l Hosp.*, 479 F.2d 756 (7th Cir. 1973) (describing and reversing the decision of a federal judge in Wisconsin to order a private hospital to perform abortions).

23 See Plaintiff’s Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 13, *California ex rel. Lockyer v. United States*, 450 F.3d 436 (9th Cir. 2006) (No. 05-00328), 2006 WL 1417043. In challenging a federal conscience provision known as the Hyde-Weldon Amendment, California argued that the conscience law was unconstitutional, because it would interfere with the state’s ability to require the performance of abortions where necessary to protect the “health of mothers.” *Id.* In the abortion context, “health” has been defined broadly to include “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health.” *Doe v. Bolton*, 410 U.S. 179, 192 (1973); see also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“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.”). Ultimately, the District Court found that California lacked standing and had not presented a ripe claim for relief. *California ex rel. Lockyer v. United States*, No. 05-00328, 2008 WL 744840 (N.D. Cal. Mar. 18, 2008). Likewise, the ACLU has recently urged the federal government that religious hospitals be required to provide abortions in “emergency” situations. See Letter from Laura W. Murphy, ACLU, et al., to Marilyn Tavenner, Centers for Medicare and Medicaid Services (July 1, 2010), available at [http://www.aclu.org/files/assets/Letter\\_to\\_CMS\\_Final\\_PDF.pdf](http://www.aclu.org/files/assets/Letter_to_CMS_Final_PDF.pdf).

24 See, e.g., *Morr-Fitz*, 901 N.E.2d at 381 (describing licensing requirements in Illinois). Author disclosure: I represent the pharmacists in this case. In April 2011, the trial court found that the Illinois regulation violated the Free Exercise Clause, because it was deliberately targeted at religious objectors and allowed refusals for a host of business reasons, but not for religion. Accordingly, the court found that the law was neither neutral nor generally applicable under *Smith*, and was therefore subject to strict scrutiny, which it failed. The court also found that the regulation violated two state statutes. Plaintiffs also presented a one paragraph Fourteenth



despite the fact that such drugs are believed to work after fertilization and implantation, which some pharmacists understand to be an abortion.<sup>25</sup> Yet state regulators nevertheless have required them to dispense the drugs, on threat of license revocation.<sup>26</sup> Although medical organizations have historically favored protecting conscientious objectors,<sup>27</sup> in 2007 the American College of Obstetricians and Gynecologists (ACOG) issued an ethical directive requiring physicians to either provide or refer for abortions, and that if a referral “might negatively have an impact on a patient’s physical or mental health, providers have an obligation to provide” abortions “regardless of the provider’s personal moral objections.”<sup>28</sup> Employees in private hospitals have reported being forced by their employers to participate in abortions against their will, on threats of termination and initiation of proceedings against their licenses.<sup>29</sup>

In light of these developments, and in light of the government’s expanding role in the healthcare system, the time is ripe for examination of healthcare providers’ Fourteenth Amendment rights to refuse to participate in abortions. That examination, presented in the pages

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Amendment argument, which the court deemed insufficient to carry Plaintiff’s burden of proving that the Fourteenth Amendment rights discussed in *Casey* and elsewhere apply to healthcare providers. See *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-000495 (7th Cir. Ill. Apr 5, 2011).

25 Although there has been some scientific dispute as to the mechanism of action of Plan B, both the FDA and the manufacturer acknowledge that the drug can stop implantation of an already-fertilized egg. See *PLAN B ONE-STEP*, *supra* note 19, which some pharmacists understand to be an abortion.

26 See *Morr-Fitz*, 901 N.E.2d at 386 (noting that failure to sell the drug could result in license revocation); *id.* at 390–91 (noting Governor Blagojevich’s alleged statements that objecting pharmacists “should find another profession” and should “fill prescriptions without making moral judgments”).

27 See *Roe*, 410 U.S. at 143–44, n.38.

28 See COMM. ON ETHICS, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, ACOG COMM. OP. 385, THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE 5 (2007) [hereinafter *ETHICS OPINION*], available at [http://www.acog.org/from\\_home/publications/ethics/co385.pdf](http://www.acog.org/from_home/publications/ethics/co385.pdf) (suggesting a physician’s obligation to provide abortions to avoid harm to even “a patient’s conception of well-being”). The 2011 Bulletin for the American Board of Obstetrics and Gynecology states that board certification can be revoked for “violation of ABOG or ACOG rules and/or ethical principles.” See AM. BD. OF OBSTETRICS & GYNECOLOGY, 2011 BULLETIN FOR BASIC CERTIFICATION IN OBSTETRICS AND GYNECOLOGY 7 (2010), available at <http://www.abog.org/bulletins/basic.bulletin.2011.pdf>.

29 See, e.g., Rob Stein, *New Health-Care Law Raises Concern About Respecting Providers’ Consciences*, WASH. POST, May 11, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/10/AR2010051003235.html> (describing case of Catherina Cenzone-DeCarlo, a nurse forced by Mt. Sinai hospital in New York to assist in the abortion of a 22-week fetus thought to have Down Syndrome).

that follow, shows that the Fourteenth Amendment does indeed protect this right.

Part I sets forth the historical test used by the Supreme Court to determine which rights merit substantive protection under the Fourteenth Amendment. Generally speaking, the Court's cases show that the Fourteenth Amendment protects "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and traditions,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"<sup>30</sup> Part I also explains that the Court gives special emphasis to recent history, is careful to protect citizens from psychological harms that might flow from denial of rights, and views the ability to form one's own beliefs about certain issues as itself protected by the Fourteenth Amendment.

With this test in mind, Part II provides a historical overview of a healthcare provider's ability to choose not to participate in abortions. This historical review shows that healthcare providers have generally been free to refuse to participate in abortions. The reasons for this long tradition have varied over time and include that, at various times, abortion was illegal, was expressly prohibited by established principles of medical ethics, and/or was the subject of express statutory conscience protections.<sup>31</sup>

Part III then analyzes whether this history shows that the right of healthcare providers to refuse to participate in abortions is, in fact, sufficiently rooted in the nation's history and traditions to fall within the Fourteenth Amendment's substantive protections. In light of the long history of legal and ethical prohibitions on abortion in many contexts until the 1970s, and the repeated, nearly unanimous, and nearly universal legislative actions to protect objectors after *Roe*, this Part concludes that a right to refuse to participate in abortions satisfies the Court's traditional analysis for protection under the Fourteenth Amendment.

Perhaps most surprisingly, this analysis also shows that the right not to participate in an abortion procedure is not merely required by *Roe* and *Casey*—it actually *better* satisfies the required Fourteenth Amendment test than the abortion right itself. If the ability to procure an abortion—which was illegal, discouraged, and/or widely

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30 *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted); *see also Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) (finding those rights "implicit in the concept of ordered liberty" to be protected against state infringement by the Fourteenth Amendment Due Process clause); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (recognizing rights protected by Due Process that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental").

31 *See infra* Part II.

regarded as unethical for much of our pre-*Roe* history—passes the Fourteenth Amendment's historical inquiry, the conscience right easily clears the hurdle.<sup>32</sup>

This historical analysis is bolstered by the fact that a refusal right fits squarely within the zone of individual decision making about abortion protected by the Court's decisions in *Casey* and *Lawrence v. Texas*.<sup>33</sup> In particular, the Court in *Casey* emphasized that the Fourteenth Amendment protects the ability to make one's own decisions about abortion without government interference, because making one's own decisions about such matters "define[s] the attributes of personhood."<sup>34</sup> Furthermore, recognition of a right to refuse protects healthcare providers from the types of psychological harm that the Court recognized as justifying protection for the abortion right in *Roe* and *Casey*. For these reasons, a proper application of *Roe*, *Casey*, and the Court's substantive due process analysis requires recognition of the rights of healthcare providers to decide for themselves whether or not to participate in abortions.

#### I. UNDERSTANDING THE TEST—DETERMINING WHICH SUBSTANTIVE RIGHTS ARE PROTECTED BY THE FOURTEENTH AMENDMENT

It is not difficult for courts and scholars to agree that there is a constitutional right to free speech, to the free exercise of religion, or to trial by jury. Each of these rights is expressly included in the text of the Constitution.<sup>35</sup> No great effort is required to identify them; no one writes law review articles to prove their existence.

The task of identifying and enumerating substantive rights protected by the Fourteenth Amendment is more difficult. The word

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<sup>32</sup> See *infra* Part III.

<sup>33</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("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."); see also *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851) (same).

<sup>34</sup> See *Lawrence*, 539 U.S. at 574; see also *Casey*, 505 U.S. at 852 (noting that the Fourteenth Amendment protects a pregnant woman's right to shape her own destiny based "on her own conception of her spiritual imperatives and her place in society").

<sup>35</sup> See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

“conscience” does not appear in the Fourteenth Amendment. Nor, of course, do the words “abortion,” “sex,” or “refusal of lifesaving food and hydration.” From one perspective, the absence of these words is tantamount to proof that the framers of the Fourteenth Amendment left these issues to be addressed by our political process, and not by constitutional mandates.<sup>36</sup> Regardless of the merits of this view, it is not currently the law: the Court has found numerous substantive constitutional rights to be within the liberty interest protected by the Fourteenth Amendment.<sup>37</sup>

Analyzing whether the right of a healthcare provider to refuse to participate in abortions fits within this liberty interest requires an understanding of both the standards articulated by the Court for recognizing such rights, and how those standards have been applied in a variety of cases.

#### A. *The “Deeply Rooted” Standard As Articulated By the Court*

The Court has acknowledged the inherent dangers of recognizing constitutional rights that are not anchored to express words in the constitutional text, noting that “guideposts for responsible decision making in this uncharted area are scarce and open-ended.”<sup>38</sup> For this reason, the Court has said it must “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.”<sup>39</sup>

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36 See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935–36 (1973) (“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.”); see generally, Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 560 (2009) (“[W]hen the terms of the Constitution are vague or silent on a question . . . we must develop doctrines or pass laws to make its words concrete or fill in gaps.”).

37 See, e.g., *Lawrence*, 539 U.S. at 558 (finding a right to engage in private consensual homosexual sex); *Roe v. Wade*, 410 U.S. 113, 129 (1973) (finding a constitutional right to abortion); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (finding a right to interstate travel); *Loving v. Virginia*, 388 U.S. 1 (1967) (finding a right to marry); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding a right “to engage in any of the common occupations of life”).

38 *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. Harker Heiths*, 503 U.S. 115, 125 (1992)).

39 *Id.* (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)) (internal citation omitted).

In light of these dangers, the Court has stated that the Fourteenth Amendment's "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."<sup>40</sup> The Court has noted that the "outlines" of the liberty interest protected by the Fourteenth Amendment, while "perhaps not capable of being fully clarified—have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition."<sup>41</sup> Requiring this historical foundation "tends to rein in the subjective elements that are necessarily present in due process judicial review" and "avoids the need for complex balancing of competing interests in every case."<sup>42</sup> For similar reasons, the Court has also "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."<sup>43</sup>

### B. *The "Deeply Rooted" Standard in Application*

Even with these tests in place, however, it is of course possible for reasonable minds to differ about how exactly to determine which rights satisfy the historical inquiry.<sup>44</sup> Accordingly, it is necessary to

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40 *Id.* at 720–21 (quoting *Moore*, 431 U.S. at 503 and *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)) (internal citations and quotation marks omitted). For an argument that this approach has been abandoned by the Court, see Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1936 (2004) (arguing that "*Lawrence's* focus on the role of self-regulating relationships in American liberty suggests that the . . . due process 'name that liberty' game arguably validated by *Glucksberg*" is replaced by a "focus on the underlying pattern of self-government . . . defined by the rights enumerated or implicit in the Constitution or recognized by the landmark decisions construing it").

41 *Glucksberg*, 521 U.S. at 722. *But see* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 90 (2006) ("Notwithstanding the Court's bold assertions in *Glucksberg*, the theory of historical tradition was not then and is not now the Court's 'established approach' to substantive due process.").

42 *Glucksberg*, 521 U.S. at 722.

43 *Id.* at 721. This is, of course, a crucial step in the process. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1087 (1990) ("What is novel about Justice Scalia's argument [in support of a tradition-based approach] is the implicit suggestion that historical traditions come equipped with something like instruction manuals explaining how abstractly the Court should describe them.").

44 See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (describing that the *identification* of the relevant tradition pertaining to the asserted right must be made at the most specific level possible); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 671 (1997) (arguing that specificity is required because "[a]iry generalities . . . are too

consider this standard as it has been applied by the Court in a variety of circumstances. Four principal lessons emerge.

1. The Historical Analysis Requires Only *De Facto* Freedom to Engage in the Activity

First and foremost, a review of the Court's substantive due process cases shows that much of the analysis is, as the test suggests, historical. Thus *Roe v. Wade*, for example, includes a long historical review of abortion laws in England, the United States, and even ancient cultures.<sup>45</sup> Likewise, *Cruzan v. Missouri Department of Public Health*<sup>46</sup>—in which the Court recognized a constitutional right to refuse unwanted medical treatment—also includes a review of the historical ability of patients to refuse treatment. The Court's decisions in *Lawrence v. Texas*<sup>47</sup> (right to engage in private homosexual conduct) and *Washington v. Glucksberg*,<sup>48</sup> (no right to physician-assisted suicide) do the same.<sup>49</sup>

Interestingly, in order to qualify as a “fundamental” right “deeply rooted” in the nation's traditions, the Court does *not* require a historical showing that the right was previously considered constitutional. Nor does it require that the right have been protected by prior statutes or at common law. The Court does not even require that the actions at issue were *legal*. Rather, the Court simply appears to be looking at whether, as a practical matter, individuals could, or could not, engage in the activity at issue.<sup>50</sup> Put differently, the historical

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imprecise to support legal analysis); John Safranek & Stephen Safranek, *Finding Rights Specifically*, 111 PENN ST. L. REV. 945 (2007) (arguing that Tribe and Dorf's criticisms of Scalia's opinions undermine their own theories, too); Tribe & Dorf, *supra* note 43 (arguing that Justice Scalia's approach requires a too specific description of the right).

45 *Roe v. Wade*, 410 U.S. 113, 129–47 (1973).

46 *Cruzan v. Mo. Dep't of Pub. Health*, 497 U.S. 261, 278–79 (1990) (recognizing a constitutional right to refuse unwanted medical treatment, and assuming the right extends to refusal of lifesaving food and hydration).

47 *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (finding a right to engage in private homosexual conduct).

48 521 U.S. 702, 728 (1997) (rejecting an asserted right to physician-assisted suicide).

49 *But see* Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517 (2008) (arguing that *Lawrence* and *Glucksberg* used different approaches, and that the *Gonzales* court implicitly adopted the *Glucksberg* approach); Tribe, *supra* note 40, 1921–25 (describing *Glucksberg* as employing a different approach than *Lawrence*).

50 As Professor Michael McConnell explains, it was not necessary for the right to be protected when the Fourteenth Amendment was enacted, “but only that it has enjoyed protection over the course of years.” McConnell, *supra* note 44, at 671.

analysis appears to be satisfied by a showing of only *de facto* freedom, even if that freedom historically had not been *de jure*, or officially recognized by the law.

For certain rights, the historical analysis is relatively simple. For example, the Court had no difficulty in *Cruzan* finding that individuals have long held the right to decide for themselves whether to receive particular medical treatments because the right had long been protected through causes of action for battery and for lack of informed consent.<sup>51</sup>

But the Court's cases suggest that the historical inquiry can be satisfied even without this type of long-standing legal protection. Thus, despite the absence of any laws affirmatively protecting abortion, despite undisputed prohibitions on abortion for most of the century prior to *Roe*, and despite common law indications that at least some abortions were illegal, the Court in *Roe* found the historical analysis satisfied because it determined women enjoyed "substantially broader" freedom to abort at earlier times:

It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.<sup>52</sup>

Likewise, in *Lawrence*, the Court again found an activity that had been widely criminalized to be a fundamental and deeply rooted right. The Court acknowledged that sodomy had long been illegal, but found sodomy laws had not generally targeted homosexual sodomy.<sup>53</sup> Furthermore, the Court found that the prosecutions in the historical record for consensual homosexual sodomy were sparse, making it "difficult to say that society approved of a rigorous and systematic punishment of consensual acts committed in private and by adults."<sup>54</sup>

Thus the Court's analysis shows that activities which were never expressly protected, and at times were expressly outlawed, can be rec-

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51 See *Cruzan*, 479 U.S. at 269.

52 *Roe v. Wade*, 410 U.S. 113, 140-41 (1973).

53 See *Lawrence v. Texas*, 539 U.S. 558, 567 (1997).

54 *Id.* at 569-70.

ognized as fundamental rights “deeply rooted” in the nation’s history and traditions. The test is satisfied if the historical analysis shows that, as a practical matter, individuals remained free to engage in the activity seeking constitutional protection.

## 2. Recent History Has Particular Importance

The Court’s opinions also demonstrate that the historical analysis places a particular emphasis on *recent* history. In *Roe*, for example, the Court emphasized the recent trends toward liberalization of attitudes about abortion among the medical and legal communities.<sup>55</sup> The Court ultimately aligned itself with these recent trends, despite the clear laws prohibiting abortion for much of the prior 150 years.<sup>56</sup> Likewise, in *Glucksberg*, the Court emphasized recent history, noting that all but one state that recently revisited its suicide laws had retained the ban against assisted suicide.<sup>57</sup>

In *Lawrence*, the Court emphasized the greater importance of recent history, saying “[i]n all events we think that our laws and traditions in the past half century are of most relevance” to the historical inquiry.<sup>58</sup> The Court noted that relatively few states had recently been specifically targeting homosexual sodomy for prosecution, and that many states had been moving toward abolishing their bans targeting homosexuals.<sup>59</sup> These more recent legal developments “show[ed] an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>60</sup>

Thus while the test’s language focuses on the nation’s “history and traditions,” the Court appears to emphasize recent developments and what they indicate about the scope of liberty that should be protected by due process.<sup>61</sup>

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55 *Roe*, 410 U.S. at 158 (explaining that because “throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today,” the Court would not find the unborn to be persons under the Fourteenth Amendment).

56 *See id.* at 139–41 (noting widespread laws banning abortion at the time the Fourteenth Amendment was ratified).

57 *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

58 *Lawrence*, 539 U.S. at 571–72.

59 *See id.* at 559 (“American laws targeting same-sex couples did not develop until the last third of the 20th century. Even now, only nine States have singled out same-sex relations for criminal prosecution.”).

60 *Id.* at 572.

61 *See also* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”).



### 3. The Court Considers the Burden Imposed by Denial of the Right, Including Psychological Burdens

Third, although not expressly mentioned as a separate part of the test, the Court analyzes the burdens imposed by denial of the asserted right. Thus in *Roe*, the Court emphasized the range of harms faced by a woman forced to continue her pregnancy. Notably, the Court focused not only on the physical burdens, but focused especially on mental and psychological burdens in determining whether to protect abortion, including “a distressful life and future” in which “mental and physical health may be taxed by child care,” “the distress . . . associated with the unwanted child,” and the “continuing stigma of unwed motherhood.”<sup>62</sup>

Likewise, in *Casey*, the Court emphasized the burdens it thought would be imposed upon women if it overruled *Roe* as one of the factors counseling against reversal. The Court explained that “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”<sup>63</sup> Therefore, the Court could not ignore the “certain cost of overruling *Roe* for people who have ordered their thinking and living around that case.”<sup>64</sup> *Casey* elsewhere explained that abortion is “fraught with consequences” and that a woman who chose abortion with incomplete information may later suffer “devastating psychological consequences.”<sup>65</sup> Thus, as in *Roe*, *Casey* demonstrates that the Court’s substantive due process decisions include some focus on the burdens they would impose by not recognizing a right, and expressly recognize the importance of avoiding government-imposed psychological burdens, particularly related to abortion.

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62 *Roe v. Wade*, 410 U.S. 113, 153 (1973).

63 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1994).

64 *Id.*

65 *Id.* at 882. Interestingly, the Court also seemed particularly concerned with the psychological impact of reversing *Roe* upon the faith of the citizenry in the Supreme Court. Thus the *Casey* plurality noted that a decision to overrule a prior precedent must “rest on some special reason over and above the belief that a prior case was wrongly decided,” and that a “decision to overrule *Roe*’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy” in the eyes of the public. *Id.* at 864, 869.

#### 4. The Fourteenth Amendment Protects the Right to *Make One's Own Decisions* Without "Compulsion of the State"

Finally, the Court's decisions emphasize the importance of permitting the individual to make personal decisions about issues such as procreation without government compulsion. Thus both *Casey* and *Lawrence* indicated that the Fourteenth Amendment protects rights not only for their importance when actually exercised, but also because the act of making one's own decisions about such matter is itself part of the liberty protected by the Fourteenth Amendment:

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 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.*<sup>66</sup>

Thus, the Fourteenth Amendment's protections extend not only to actions, but also to the right to make one's own decisions without "compulsion of the State." The Court determined that freely making such decisions about certain issues—namely those implicating one's "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"—"define[s] the attributes of personhood" and is therefore within the liberty interest protected by the Fourteenth Amendment.<sup>67</sup> Accordingly, the Court held that the Fourteenth Amendment requires that the pregnant woman's destiny "must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."<sup>68</sup>

## II. HISTORICAL ANALYSIS: WERE HEALTHCARE PROVIDERS HISTORICALLY FREE TO CHOOSE NOT TO PARTICIPATE IN ABORTIONS?

With the Court's "deeply rooted" standard in mind, this Part will explore whether healthcare providers were required to participate in abortions in three different time periods: early English and American common law until the early 1800s (when the first American statutory abortion law was enacted); the early 1800s until *Roe v. Wade* in 1973; and the post-*Roe* era. As set forth below, this history suggests that

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<sup>66</sup> *Id.* at 851 (emphasis added) (citations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 852.

healthcare providers were generally free from government compulsion to participate in abortions.

*A. Healthcare Providers and Abortion in English Common Law  
and Early American Law*

1. Legal Restrictions on Abortion

The Court began its constitutional analysis in *Roe* with a historical survey of legal and ethical restrictions related to abortion.<sup>69</sup> After reviewing the regulation of abortion in ancient cultures<sup>70</sup> and discussing the impact of the Hippocratic Oath,<sup>71</sup> the Court provided a detailed overview of the common law related to abortion. The Court found that abortions performed before “quickening—the first recognizable movement of the fetus in utero”—were not indictable at common law.<sup>72</sup> The Court attributed the legal reliance on quickening to “a confluence of earlier philosophical, theological, and civil and

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69 *Roe v. Wade*, 410 U.S. 113, 129–52 (1973) (surveying history of abortion regulation from ancient times to the present).

70 The Court explained that regulation of abortion in ancient cultures varied—abortions were punished in the Persian Empire, practiced in the Greek Empire, and “resorted to without scruple” in the Roman Empire. *Id.* at 130 (quoting LUDWIG EDELSTEIN, *THE HIPPOCRATIC OATH* 10 (1943)). Where abortion was prosecuted in the ancient world, “it seems to have been based on a concept of a violation of the father’s right to his offspring.” *Id.*

71 The Court explained that the various translations of the Hippocratic Oath prohibited abortion. *See id.* at 131–32. The Court observed that the Oath “has stood so long as the ethical guide of the medical profession” and that Hippocrates has been described as the “Father of Medicine.” *Id.* at 130–31. After noting a theory that the Oath’s prohibition on abortion was not widely accepted even in its own times, the Court explained that the Oath became popular at the end of antiquity. *See id.* at 130–32. At that point, “[r]esistance against suicide and against abortion became common” and the “emerging teachings of Christianity were in agreement.” *Id.* at 132. For these reasons, the Oath—with its absolute prohibition on abortions—“‘became the nucleus of all medical ethics’ and ‘was applauded as the embodiment of truth.’” *Id.* (quoting EDELSTEIN, *supra* note 70, at 64).

72 *Id.* Historian James C. Mohr provides a typical exposition on the legal importance of quickening in this era in his book *Abortion in America*:

The common law did not formally recognize the existence of a fetus in criminal cases until after it had quickened. After quickening, the expulsion and destruction of a fetus without due cause was considered a crime, because the fetus itself had manifested some semblance of a separate existence: the ability to move. . . . Practically, because no reliable tests for pregnancy existed in the early nineteenth century, quickening alone could confirm with absolute certainty that a woman really was pregnant. Prior to quickening, each of the telltale signs of pregnancy could, at least in theory, be explained in alternative ways by physicians of the day. . . . The upshot was that American women in 1800 were legally free to attempt to terminate a condition that might turn

canon law concepts of when life begins,” principally focused on when the fetus was thought to be “formed” or “when a ‘person’ came into being, that is infused with a ‘soul’ or ‘animated.’”<sup>73</sup> “Due to the continued uncertainty” and “lack of any empirical basis” as to when these events occurred, the Court found that the common law focused on quickening as the critical point.<sup>74</sup>

The Court further explained that there was some debate over whether abortion of a “quick” fetus was a felony or a lesser crime.<sup>75</sup> Thirteenth century authority appears to have deemed abortion a homicide, though later common law scholars viewed it as a lesser offense.<sup>76</sup> Edward Coke, for example, took the position that such an abortion was “a great misprision, and no murder.”<sup>77</sup> Blackstone reports that abortion had once been considered manslaughter, but that then-modern law took a less severe view.<sup>78</sup> Relying on studies that suggest that Coke may have deliberately misstated the law because of his opposition to abortion, the Court expressed doubt that abortion “was ever firmly established as a common law crime.”<sup>79</sup>

Based on this history, the Court found that women had a “substantially broader” freedom to obtain an abortion at common law than existed at the time of *Roe*. The Court does not claim, however, that this broader historical freedom included the ability to have the government force healthcare providers to participate in abortions.<sup>80</sup>

Historian James Mohr provides a similar account of the common law related to abortion. Mohr reports that information on abortion and abortifacients was available “from midwives and midwifery texts”<sup>81</sup> and from “[h]erbal healers . . . and . . . other irregular practitioners”

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out to have been a pregnancy until the existence of that pregnancy was incontrovertibly confirmed by the perception of fetal movement.

JAMES C. MOHR, *ABORTION IN AMERICA* 3–4 (1978).

73 *Roe*, 410 U.S. at 133.

74 *Id.* at 134.

75 *Id.*

76 *Id.*

77 *Id.* at 135 (citation omitted).

78 *Id.*

79 *Id.* at 135–36 & n.26.

80 Indeed the Court’s decision just four years later in *Maher v. Roe*, 432 U.S. 464 (1977)—in which the Court emphasized that the abortion right in *Roe* does not require government funding of abortion—suggests that the Court viewed the historical right recognized in *Roe* to be a right to be free from governmental interference, rather than an affirmative right to compel governments or individuals to provide services; see also *Harris v. McRae*, 448 U.S. 297, 315 (“The Hyde Amendment, like the Connecticut welfare regulation at issue in *Maher*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy . . .”).

81 See MOHR, *supra*, note 72, at 11.

of the day.<sup>82</sup> Mohr argues that the “regular physicians” of the day “clearly possessed” the knowledge and skills to end pregnancy and that he had “little reason to doubt” that they “sometimes” used their skills to do so.<sup>83</sup> Indeed, Mohr suggests that these physicians could have felt business pressures from their patients to perform abortions prior to quickening—i.e., when pregnancy “was impossible to diagnose”—for fear of losing their patients to competitors.<sup>84</sup>

Despite suggesting that physicians may have felt business-related pressure from patients to perform pre-quickening abortions, Mohr reports that there were no laws at the time which governed abortion at all, noting that “[i]n 1800 no jurisdiction in the United States had enacted any statutes whatsoever on the subject of abortion.”<sup>85</sup> Mohr’s discussion of post-1800 laws focuses entirely on laws designed to restrict or prohibit abortion, not promote it. Thus Mohr’s account, like the account in *Roe*, supports the notion that healthcare providers were not compelled by the government to provide abortions at common law.<sup>86</sup>

Much of the history recited in *Roe* is derived from the work of Cyril C. Means, Jr.<sup>87</sup> Means argued that abortion was not criminal at all in England or America prior to the nineteenth century—not even after quickening—and that abortion laws were enacted in the nineteenth century to protect the health of the mother, and not out of concern for the life of the fetus.<sup>88</sup> From this premise, Means argued for an abortion right based either on the common law or the Ninth Amendment.<sup>89</sup>

Yet Means’s history also contains no suggestion that healthcare providers could be forced by the government to provide abortions. To the contrary, Means explains that the common law merely “toler-

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82 *Id.*

83 *Id.* at 14.

84 *Id.* at 14–15.

85 *Id.* at vii.

86 Mohr also points out that in this early period abortion “was not thought to be a means of family limitation.” *Id.* at 17. Instead, “an overwhelming percentage of the American women who sought and succeeded in having abortions did so because they feared the social consequences of an illegitimate pregnancy.” *Id.* at 16–17. In light of this societal disapproval of sex outside of marriage, it seems unlikely that the government would have been simultaneously compelling physicians to provide these women with abortions, or that such compulsion would not appear in the public record.

87 *Roe v. Wade*, 410 U.S. 113, 132–35 (1973).

88 Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971).

89 *See generally id.*

ated” abortions, but did not legalize them. As a result, doctors who chose to perform abortions did so at great risk to themselves, because if the woman did not survive the abortion, “he who had performed it was *hanged*.”<sup>90</sup> As Means explains, even if abortion was “tolerated” at common law, this strong governmental response to error provided a powerful disincentive for physicians to perform abortions:

Thus the abortionist was, in law, made an insurer of the success of the procedure, on the penalty of his life, at a time when every abortion was a serious gamble. This being so, few physicians, at common law, could have ever performed anything but therapeutic abortions. Thus, the abortion-seeking woman had two problems. Firstly, to find someone willing to perform the abortion who was as well qualified as possible; and, secondly, to survive the procedure.<sup>91</sup>

This legal regime, with its severe treatment of abortion providers, strongly suggests that the government was not simultaneously forcing doctors to perform abortions against their will.

Furthermore, although Means made his arguments almost entirely based on the common law, he apparently saw no inconsistency with *Roe*-era laws that included conscience protections for unwilling healthcare providers. For example, while discussing one of the liberalization laws considered in New York, Means explained that it “quite properly provides a ‘conscience’ clause enabling any doctor or hospital employee to opt out of participating in abortions.”<sup>92</sup>

Ultimately, the *Roe*/Mohr/Means version of abortion history—which was echoed in a historians’ brief filed with the Supreme Court in *Casey*<sup>93</sup>—suggests the following about whether physicians could historically be compelled to provide abortions. First and foremost, there is no indication in these histories that healthcare providers ever were, or ever could be, forced by the government to provide abortions. Such evidence, if it existed, would have powerfully supported the cen-

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90 Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 437 (1968) (emphasis added).

91 *Id.* at 437–38.

92 *Id.* at 434 n.54 (citing proposed legislation which would have included the language: “(b) No hospital employee or member of a hospital medical staff shall be required to participate in a procedure authorized by this title who shall inform the hospital of his or her election not to participate hereunder. (c) No physician shall be required to give advice with respect to, or participate in, any procedure authorized by this title who shall inform a patient that the failure or refusal to do so is based on his or her election not to give such advice or to participate in any such procedure.”).

93 See Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006403.

tral arguments of these writers. Second, abortion was illegal after quickening, thus confirming that physicians were not likely to be forced by the government to perform post-quickening abortions, and therefore not likely to be forced to perform abortions once pregnancy was firmly established. Third, as to pre-quickening abortions—i.e., abortions during the stage of pregnancy at which it was not yet provable that a woman was actually pregnant—many of them were performed with essentially home remedies, or by midwives or “irregular practitioners.”<sup>94</sup> While “regular practitioners” may have at times provided what turned out to be abortions during this stage, there is no evidence to suggest that they were compelled to do so by the government. Fourth, even if abortion was tolerated during this period, it was not expressly legalized, and there were severe government-imposed disincentives for physicians to provide them.

The *Roe/Mohr/Means* historical treatment of abortion is not accepted by all scholars. Some critics argue that the Court misread both the English and early American common law treatment of abortion, and that abortion had actually been a crime for centuries.<sup>95</sup> For example, in his 2004 book *Dispelling the Myths of Abortion History*, Joseph Dellapenna argues that “Anglo-American law has always treated abortion as a serious crime, generally even including early in pregnancy, presenting evidence of prosecutions and even executions, occurring as long as 800 years ago in England, and less serious punishments in colonial America.”<sup>96</sup> If *Roe*’s critics are correct about this

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94 *Id.* at \*14.

95 See, e.g., Jeffrey D. Jackson, *Blackstone’s Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 218 (2010) (“Although Justice Blackmun’s majority opinion in *Roe* attempted to infuse some doubt into the status of the common law crime of abortion, stating at one point that research ‘makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus,’ his opinion was based on faulty history and was quickly debunked by scholars.” (quoting *Roe v. Wade*, 410 U.S. 113, 136 (1973))); John Keown, *Back to the Future of Abortion Law: Roe’s Rejection of America’s History and Traditions*, 22 ISSUES L. & MED. 3 (2006) (concluding that abortion was, in fact, a crime at common law); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 106 (1993) (“These decisions, together with the dozens of abortion prosecutions reported in the digests, lay to rest the doubt expressed in *Roe* that ‘abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.’”); Lynn D. Wardle, *“Time Enough”*: *Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 928 (1989) (noting that *Roe*’s suggestion that abortion was not established as a common law crime has been thoroughly discredited).

96 JOSEPH DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* xii (2004). Dellapenna quotes several early commentators on the common law to suggest that

history—a question that is beyond the scope of this article—then abortion was a serious crime at both English and colonial American common law. Under this historical view, providers were compelled by the government *not* to provide abortions (and therefore obviously ‘free’ to follow the law and not provide them).

## 2. The Common Law Right to Refuse Patients

The apparent historical freedom of healthcare providers to choose not to participate in abortions is consistent with the more general ability to choose whether or not to accept a particular patient for treatment. At common law, healthcare providers (including both physicians and pharmacists) were free to decide whether or not to accept a patient.<sup>97</sup>

Interestingly, this common law freedom to refuse to provide medical services even extended to situations of medical emergency, in which a patient needed services to save his or her life or avoid serious bodily harm. As a general matter, the common law did not require one to help another person in an emergency. In 1965, the Restatement (Second) of Torts described the common law on this point as creating

a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law.<sup>98</sup>

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abortion has been a criminal act since the inception of the common law. For instance, around 1250, Bracton wrote “[i]f one strikes a pregnant woman or gives her a potion in order to procure an abortion, if the foetus is already formed or animated, especially if it is animated, he commits homicide.” *Id.* at 132. Dellapenna argues that “[a]ny supposed ‘common law liberty of abortion’ is as mythical on this side of the Atlantic as it is on the other side,” citing as examples two cases in which men were charged with murder for inducing pre-quickening abortions in Maryland. *Id.* at 220.

<sup>97</sup> See, e.g., SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 62:12 (4th ed. 2002) (“In the absence of a statute, a physician is under no obligation to engage in practice or to accept professional employment.” (citing cases)). This principle has generally continued in effect. See, e.g., *Lyons v. Grether*, 239 S.E.2d 103, 105 (Va. 1977) (“In the absence of a statute, a physician has no legal obligation to accept as a patient everyone who seeks his services.”); *Oliver v. Brock*, 342 So. 2d 1, 3 (Ala. 1976) (citing 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 96). The same common law rule applies to pharmacists. See, e.g., 28 C.J.S. *Drugs and Narcotics* § 100 (“A druggist [absent statute] is not obliged to fill any and all prescriptions, but may refuse to fill one for good reason.”).

<sup>98</sup> RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965).



This harsh common law rule also applied to healthcare providers. Thus, for example, in 1901, the Supreme Court of Indiana rejected the notion that a physician had a common law duty to treat all patients who sought his or her services, even in an emergency, even when the physician has an ongoing relationship with the patient as a family physician, and even when the physician had no particularly good reason not to help. The court explained that because the physician had no duty to “render professional service to everyone who applied” and that acceptance of a license did not obligate the physician to “practice at all or on other terms than he may choose to accept,” the physician had no duty to treat the patient.<sup>99</sup>

### 3. Emerging Codes of Medical Ethics

In addition to the evidence from the historical accounts concerning abortion and the general historical freedom of healthcare professionals to refuse patients, emerging codes of medical ethics at the end of the eighteenth and into the nineteenth century further support the notion that physicians likely were not compelled to provide abortions.

For example, the Court in *Roe* explained that the Hippocratic Oath which “has stood so long as the ethical guide of the medical profession” prohibited doctors from providing abortions.<sup>100</sup> The

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99 *Hurley v. Eddingfield*, 59 N.E. 1058, 1058 (Ind. 1901) (“At and for years before decedent’s death appellee was a practicing physician at Mace, in Montgomery county, duly licensed under the laws of the state. He held himself out to the public as a general practitioner of medicine. He had been decedent’s family physician. Decedent became dangerously ill, and sent for appellee. The messenger informed appellee of decedent’s violent sickness, tendered him his fee for his services, and stated to him that no other physician was procurable in time, and that decedent relied on him for attention. No other physician was procurable in time to be of any use, and decedent did rely on appellee for medical assistance. Without any reason whatever, appellee refused to render aid to decedent. No other patients were requiring appellee’s immediate service, and he could have gone to the relief of decedent if he had been willing to do so. Death ensued, without decedent’s fault, and wholly from appellee’s wrongful act. The alleged wrongful act was appellee’s refusal to enter into a contract of employment. Counsel do not contend that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to every one who applied. The act [regulating medical practice] is a preventive, not a compulsive, measure. In obtaining the state’s license (permission) to practice medicine, the state does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept.” (internal citation omitted)); *see also*, *Findlay v. Bd. of Supervisors*, 230 P.2d 526, 531 (Ariz. 1951) (“Physicians are not public servants who are bound to serve all who seek them, as are innkeepers, common carriers, and the like.” (quoting 41 AM. JUR. *Physicians and Surgeons* § 4)).

100 *Roe v. Wade*, 410 U.S. 113, 130 (1973).

Court explained that after antiquity, the abortion-prohibiting Oath “became the nucleus of all medical ethics and was applauded as the embodiment of truth.”<sup>101</sup> It seems highly unlikely that governments had the power to compel doctors to violate the Oath’s prohibition on abortions.

Similarly, the first modern written code of medical ethics, which appeared at the end of the eighteenth century, likewise prohibited abortion. In 1794, British physician Thomas Percival published his *Medical Jurisprudence or a Code of Ethics and Institutes Adopted to the Professions of Physic and Surgery*.<sup>102</sup> Percival’s *Medical Jurisprudence* was the first code of medical ethics of its kind, either in England or the United States.<sup>103</sup> The code was revised and circulated more broadly under the title *Medical Ethics* in 1803.<sup>104</sup> Percival wrote the following: “To extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man.”<sup>105</sup> Percival’s *Medical Ethics* was well received in the United States, and would later become the basis for the American Medical Association’s initial code of medical ethics.<sup>106</sup>

#### *B. Healthcare Providers and Abortion Law From the Early 1800s Until Roe*

Whatever disputes exist between the competing histories of abortion at common law, they give way to broad agreements about the state of abortion law beginning in the early 1800s. Historians on all sides agree that during the nineteenth century, most American jurisdictions enacted express statutory abortion bans.

In 1821, Connecticut passed the nation’s first criminal abortion statute, which banned the use of poisons to conduct abortions. By 1828, Missouri, Illinois, and New York had all followed suit. By 1868—the time the Fourteenth Amendment was adopted—thirty-six state and territorial legislatures had enacted laws restricting abortion.<sup>107</sup>

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101 *Id.* at 132.

102 See THE AMERICAN MEDICAL ETHICS REVOLUTION, at xiii, xv (Baker et al. eds., 1999). The American Medical Association relied heavily on Percival’s code for its own initial code of medical ethics in 1847, and later called Percival’s “the most significant contribution to Western medical ethical history subsequent to Hippocrates.” See ALBERT R. JONSEN, A SHORT HISTORY OF MEDICAL ETHICS (2000).

103 Robert Baker, *Codes of Ethics: Some History*, 19 PERSPECTIVES ON THE PROFESSIONS 3 (1999).

104 See *id.* at 4.

105 FREDERICK N. DYER, THE PHYSICIANS’ CRUSADE AGAINST ABORTION 10 (2005).

106 See *id.*

107 See *Roe v. Wade*, 410 U.S. 113, 175 & n.1 (1973) (Rehnquist, J., dissenting).

Although these laws varied as to whether they applied before quickening and the severity of the punishment, they were part of an overall legislative push that meant most abortions were banned by statute by the end of the century.<sup>108</sup> The quickening distinction gradually disappeared entirely in the middle and late nineteenth century.<sup>109</sup>

Most of the earliest bans on abortion were bans on chemical abortions, and thus would have barred pharmacists or apothecaries from providing drugs designed to induce abortion. For example, England's first abortion statute, Lord Ellenborough's Act of 1803, criminalized the conduct of

any person or persons . . . [who] willfully and maliciously administer to, or cause to be administered to, or taken by any woman, any medicines, drug, or other substance or thing whatsoever, or shall use or employ, or cause or procure to be used or employed any instrument or other means whatsoever, with intent thereby to cause or procure the miscarriage.<sup>110</sup>

The Act went on to make clear that even providing such medicines was punishable:

their counselors, aiders, and abettors, knowing of and privy to such offence, shall be and are hereby declared to be guilty of felony, and shall be liable to be fined, imprisoned, set in and upon the pillory, publicly or privately whipped . . . or to be transported beyond the seas for any term not exceeding fourteen years, at the discretion of the court before which such offender shall be tried and convicted.<sup>111</sup>

American law was in accord.<sup>112</sup>

These legislative developments occurred against a backdrop in which medical authorities, the popular press, and religious leaders publicly and unequivocally denounced abortion. For example, an 1803 medical treatise declared abortion "a most unnatural crime" that

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108 See *id.* at 117–18 nn.1–2 (Rehnquist, J. dissenting).

109 See *id.* at 139.

110 Malicious Shooting or Stabbing Act, 1803, 43 Geo. 3, c. 58, § 2 (Eng.); see also, Suzanne M. Alford, Note, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L.J. 1011, 1020 (2003) (noting a 1602 English case, *Regina v. Webb*, in which a woman was indicted for self-aborting with the use of poison).

111 Alford, *supra* note 110, at 1020 n.57.

112 See, e.g., CONN. GEN. STAT., § 20-14 (1821) (making it a crime to cause abortion by giving a pregnant woman a "poisonous substance"); see also *Roe*, 410 U.S. at 138 (describing the Connecticut statute as having adopted part of Lord Ellenborough's Act). According to Mohr, this first abortion ban was "aimed primarily at apothecaries and physicians." MOHR, *supra* note 72, at 22.

could not “be viewed without horror.”<sup>113</sup> Medical societies of the day likewise opposed abortion.<sup>114</sup> In 1859, the American Medical Association (AMA) unanimously approved a report deeming abortion the “unwarrantable destruction of human life.”<sup>115</sup> The AMA criticized doubts regarding “the actual and independent existence of the child before birth, as a living being” as “based, and only based, upon mistaken and exploded medical dogmas.”<sup>116</sup> The AMA resolved that it should be “unlawful and unprofessional” for any physician to take part in an abortion.<sup>117</sup> The report closed with resolutions for medical schools to teach students to oppose abortion and for the members to “repudiate and denounce the conduct of abortionists” and “hold no intercourse with them either professionally or otherwise.”<sup>118</sup> Moreover, as the Court reported in *Roe*, the Hippocratic Oath prohibited abortions and was accepted as “the nucleus of all medical ethics.”<sup>119</sup> Physicians at the time frequently referred to the Oath when condemning abortion.<sup>120</sup>

As the medical profession continued their opposition to abortion, both the press and organized religion also publicly criticized the practice.<sup>121</sup> For example, *The New York Times* condemned abortion in

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113 WILLIAM BUCHAN, *DOMESTIC MEDICINE* 361 (1803).

114 For example, in 1854, the Massachusetts Medical Society expelled a doctor for “culpably procuring an abortion.” JOSEPH KETT, *THE FORMATION OF THE AMERICAN MEDICAL PROFESSION: THE ROLE OF INSTITUTIONS, 1780–1860*, 25 (1968). Three years later, the Society was petitioned by local members to declare abortion “wicked” and lobby the state legislature to oppose it. *See Medical*, N.Y. TIMES, June 27, 1857, at 8. In 1860, the New York Medical Society called for more stringent legislation against abortion. *See New York Medical Society*, N.Y. TIMES, Feb. 9, 1860, at 5. A few years later, the Society’s president, in his inaugural address, called on the state legislature to eliminate the quickening requirement from anti-abortion statutes and for members to safeguard the public from abortifacients. *State Medical Society*, N.Y. TIMES, Feb. 7, 1868, at 5.

115 Am. Med. Ass’n, *Minutes of the Annual Meeting* 1859, 12 Transactions of Am. Med. Ass’n 27 (1859).

116 *Id.*

117 *Id.* A report by the AMA Committee on Criminal Abortion called abortion providers “modern Herods” and “Judas-like.” *See* W.L. Atlee & D.A. O’Donnell, *Report of the Committee on Criminal Abortion*, 22 TRANSACTIONS OF AM. MED. ASS’N, 239, 251 (1871). The committee called for abortionists to be “marked as Cain was marked” and “be made outcasts of society.” *Id.* at 256.

118 Atlee & O’Donnell, *supra* note 117, at 258.

119 *Id.*

120 DYER, *supra* note 105, at 12.

121 *See generally* MARVIN OLASKY, *THE PRESS AND ABORTION 1833–1988* (1988); *see also* *From Buffalo. The Case of Dr. Bigler, The Alleged Abortionist—Receipts of Flour and Grain*, N.Y. TIMES, Dec. 27, 1856, at 1; *General News*, N.Y. TIMES, Nov. 23, 1862, at 4; *Local Intelligence*, N.Y. TIMES, Mar. 26, 1867, at 3; *Seduction, Abortion, and Death in Chi-*

an 1871 editorial titled "The Evil of the Age," noting that "thousands of human beings are . . . murdered before they have seen the light of this world."<sup>122</sup> Similarly, the *New York Tribune* criticized "[t]he murder of children, either before or after birth."<sup>123</sup> In 1869, the Catholic Bishop Spaulding of Baltimore stated: "The murder of the infant before its birth is . . . as great a crime, as would be the killing of a child after birth."<sup>124</sup> The Maine Conference of the Congregational Church described the practice as "the darkest picture that reason or taste could allow" and suggested that it was worse than "the horrors of intemperance, of slavery and of war."<sup>125</sup>

In light of the widespread focus by the medical profession, the media of the day, and organized religion, one would expect to find a clear historical record if the government were forcing healthcare providers to violate these legal and professional rules and participate in abortions during these pre-*Roe* periods. The absence of any such record suggests that no such compulsion took place.

The restrictive abortion laws enacted during this period generally remained in effect through the first half of the twentieth century, a period described as "remarkably free from debate about abortion."<sup>126</sup>

### C. Discussion of Healthcare Providers in *Roe*, *Doe*, and *Casey*

The Court in *Roe*, *Doe*, and *Casey* did not directly address whether providers have a constitutional right to refuse to participate in abortions. Nevertheless, those cases' discussion of the abortion right—and particularly the discussion of medical personnel—is instructive for our thinking about the historical ability of healthcare workers to decide whether or not to participate in abortions.

First, the discussion of the abortion right in *Roe* suggests that a physician will ultimately decide whether or not to perform the abor-

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cago, N.Y. TIMES, Aug. 8, 1857, at 5; *The Hideous Vice. Close of the Trial of Dr. Wolff for Abortion*, N.Y. TIMES, Jan. 27, 1871, at 3; *The Ryan Malpractice Case—An Arrest*, N.Y. TIMES, Jul. 20, 1869, at 3 (malpractice was frequently the technical charge for criminal abortion).

122 Editorial, *The Evil of the Age*, N.Y. TIMES, Aug. 23, 1871, at 6; see also Editorial, "The Least of These Little Ones," N.Y. TIMES, Nov. 3, 1870, at 4 (calling abortion an offense that is "rank and smells to heaven.")

123 MOHR, *supra* note 72, at 180 (quoting N.Y. TRIB., Jan. 27 1868 (internal quotation marks omitted)).

124 *Id.* at 186 (quoting Pastoral Letter of the Most Reverend Archbishop and Suffragan Prelates of the Province of Baltimore, at the Close of the Tenth Provincial Council 9–11 (May 1869)).

125 *Id.* at 188–89.

126 LAURENCE H. TRIBE, ABORTION 34 (1990).

tion. Thus the Court explains that the decision to perform an abortion is for the “attending physician, in consultation with his patient.”<sup>127</sup> Prior to viability, the Court explains that the physician is “free to determine . . . that, in his medical judgment, the patient’s pregnancy should be terminated.”<sup>128</sup>

After discussing the physicians’ freedom to make the abortion determination, the Court actually lodges the right at least in part with the provider—noting that its decision “vindicates the *right of the physician* to administer medical treatment according to his professional judgment.”<sup>129</sup> The Court acknowledged that the abortion decision is “inherently and primarily, a medical decision” and that “basic responsibility for it must rest with the physician.”<sup>130</sup>

Second, the Court commends the abortion decision to the physician’s individual judgment with full knowledge that many doctors at the time opposed abortion. For example, the Court noted that the view that life begins at conception “is a view strongly held . . . by many physicians.”<sup>131</sup> The Court also cited to the AMA’s resolution that “[n]either physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.”<sup>132</sup>

Together, the Court’s characterization of the abortion right as (at least in part) a “right of the physician”<sup>133</sup> to exercise his or her own medical judgment, and its acknowledgment that many physicians would not perform abortions suggest that the Court did not understand its decision in *Roe* as requiring physicians to perform abortions.

To the extent *Roe* left any doubt on the issue, the Court in *Doe* described conscience protections in a Georgia abortion statute as follows:

[T]he hospital itself is otherwise fully protected. . . . [T]he hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions

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127 *Roe v. Wade*, 410 U.S. 113, 163 (1973).

128 *Id.*

129 *Id.* at 165 (emphasis added).

130 *Id.* at 166.

131 *Id.* at 161.

132 *Id.* at 143 n.38; *see also id.* at 146–47 & n.40–41 (quoting Proceedings of the AMA House of Delegates 220 (June 1970)) (noting that the American Bar Association had recently formulated a proposed Uniform Abortion Act permitting early term abortions).

133 *Id.* at 165.

obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital.<sup>134</sup>

The Court's reference to Georgia's conscience provisions as "appropriate protection"<sup>135</sup> for the hospital, the physician, "or any other employee"<sup>136</sup> suggests that *Roe* was not understood by the Court as requiring any person or organization to "participat[e] in the abortion procedure."<sup>137</sup>

In *Casey*, the Court again recognized the impact of abortion on healthcare providers, explaining that the abortion decision was "fraught with consequences"<sup>138</sup> not only for the woman who requests it but also "for the persons who perform and assist in the procedure."<sup>139</sup>

Together, *Roe*, *Doe*, and *Casey* demonstrate that the Court did not understand the abortion right to include a right to force healthcare providers to participate in abortions. Further, these decisions also suggest that the Court viewed personal or organizational participation in abortion to be matters which the providers would be "free to determine" for themselves, and that was at least an "appropriate" interest for governmental protection.<sup>140</sup>

#### *D. Response to Liberalization and Roe: Express State and Federal Conscience Protections for Healthcare Providers*

As the presence of the Georgia conscience protection in *Doe* makes clear, even before *Roe* was decided, states that permitted abortion were taking action to protect those physicians or hospitals who objected to participation in abortions. In 1971, New York enacted a criminal law prohibiting discrimination against any person for their refusal to participate in abortions.<sup>141</sup> Many other states—including

134 *Doe v. Bolton*, 410 U.S. 179, 197–98 (1973).

135 *Id.* at 198.

136 *Id.* at 197.

137 *Id.* at 198; *see also* *Doe v. Bellin Mem'l Hosp.*, 479 F.2d 756, 760 (7th Cir. 1973) ("The Georgia abortion statute which was reviewed in detail in *Doe v. Bolton* contained [a conscience] provision. The Supreme Court did not expressly pass on the validity of that provision, but since it was attacked in one of the amicus briefs, and since the Court reviewed the entire statute in such detail, it is reasonable to infer that it considered such authorization unobjectionable." (footnote omitted)).

138 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

139 *Id.* The Court also noted the "devastating psychological consequences" a woman might suffer if she procured an abortion and only later learned facts which might have led her to a different decision. *Id.* at 882.

140 *Roe v. Wade*, 410 U.S. 113, 163 (1973).

141 *See* N.Y. CIV. RIGHTS LAW § 79-i(1) (McKinney 2009) ("When the performing of an abortion on a human being or assisting thereat is contrary to the conscience or

Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Kansas, and Maryland—including explicit conscience protections for individuals and institutions in the same statutes that liberalized their abortion laws.<sup>142</sup>

That trend of protecting conscientious objectors to abortions continued and dramatically expanded in the aftermath of *Roe*. Today, virtually every state in the country has some sort of statute protecting individuals and, in many cases, entities who refuse to participate in providing abortions.<sup>143</sup> Most of these statutes arose in the decade fol-

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religious beliefs of any person, he may refuse to perform or assist in such abortion by filing a prior written refusal setting forth the reasons therefor with the appropriate and responsible hospital, person, firm, corporation or association, and no such hospital, person, firm, corporation or association shall discriminate against the person so refusing to act.”).

142 1970 Alaska Sess. Laws 1 (“Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.”); 1968–69 Ark. Acts 179; 1967 Colo. Sess. Laws 284; 57 Del. Laws 411 (1969–70); 1972 Fla. Laws 610; 1968 Ga. Laws 1436; 1970 Haw. Sess. Laws 1; 1969 Kan. Sess. Laws 452; 1968 Md. Laws 875.

143 See, e.g., NARAL PRO-CHOICE AM. FOUND., WHO DECIDES? THE STATUS OF WOMEN’S REPRODUCTIVE RIGHTS IN THE UNITED STATES 24 (2011), available at <http://www.prochoiceamerica.org/government-and-you/who-decides/who-decides-2011.pdf> (last visited Sept. 25, 2011) (noting that forty-seven states and the District of Columbia “allow certain individuals or entities to refuse to provide women specific reproductive-health services, information, or referrals”). While an exhaustive list of the varying formulations and purposes of state-law conscience protections is beyond the scope of this Article, some representative examples include the following: ALASKA STAT. § 18.16.010(b) (2010) (“Nothing in this section requires a hospital or person to participate in an abortion, nor is a hospital or person liable for refusing to participate in an abortion under this section.”); ARIZ. REV. STAT. ANN. § 36-2154(B) (Supp. 2010) (“A pharmacy, hospital or health professional, or any employee of a pharmacy, hospital or health professional, who states in writing an objection to abortion, abortion medication, emergency contraception or any medication or device intended to inhibit or prevent implantation of a fertilized ovum on moral or religious grounds is not required to facilitate or participate in the provision of an abortion, abortion medication, emergency contraception or any medication or device intended to inhibit or prevent implantation of a fertilized ovum.”); HAW. REV. STAT. ANN. § 453-16(e) (LexisNexis 2011) (“Nothing in this section shall require any hospital or any person to participate in an abortion.”); IDAHO CODE ANN. § 18-611 (Supp. 2011) (“(2) No health care professional shall be required to provide any health care service that violates his or her conscience.”); IOWA CODE ANN. § 146.1 (West 2005) (“An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual’s religious beliefs or moral convictions to perform, assist, or participate in such procedures.”); ME. REV. STAT. ANN. tit. 22, § 1903 (1964) (“No private institution or physician or no agent or employee of such institution or physician shall be prohibited from refusing to provide family planning services when such refusal is based upon religious or conscientious objection.”); MD. CODE ANN., HEALTH-GEN. § 20-214(a)(1), (b)(1) (LexisNexis 2009) (“A person



lowing *Roe*.<sup>144</sup> Some states expressly limit this protection to the practice of abortion, which is treated specially.<sup>145</sup> Other states protect conscience for other procedures as well.<sup>146</sup>

At the federal level, Congress likewise took almost immediate action after *Roe* to protect physicians and hospitals from being forced to perform abortions. In particular, as part of legislation known as the Church Amendment, Congress clarified that recipients of certain federal funds were not required to provide abortions, and that those facil-

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may not be required to perform or participate in, or refer to any source for, any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy. . . . A licensed hospital, hospital director, or hospital governing board may not be required: (i) To permit, within the hospital, the performance of any medical procedure that results in artificial insemination, sterilization, or termination of pregnancy; or (ii) To refer to any source for these medical procedures.”); MINN. STAT. ANN. § 145.414(a) (West 2011) (“No person and no hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion for any reason.”); N.J. STAT. ANN. §§ 2A:65A-1 to -2 (West 2011) (“No person shall be required to perform or assist in the performance of an abortion or sterilization . . . No hospital or other health care facility shall be required to provide abortion or sterilization services or procedures.”); CONN. AGENCIES REGS. § 19-13-D54 (“(f) No person shall be required to participate in any phase of an abortion that violates his or her judgment, philosophical, moral or religious beliefs.”).

144 See Lynn D. Wardle, *Protecting the Rights of Conscience of Health Care Providers*, 14 J. LEGAL MED. 177, 180 (1993) (“Most conscience clause provisions were adopted between 1973 and 1982, when the federal courts were broadly defining a new and very controversial constitutional privacy right to abortion. Concern about discrimination against individuals who, for religious or other moral reasons, objected to participating in providing abortion services led to the widespread adoption of conscience clause statutes.”).

145 See, e.g., HAW. REV. STAT. ANN. § 453-16 (LexisNexis 2011).

146 For example, Illinois has a Health Care Right of Conscience Statute. See 745 ILL. COMP. STAT. ANN. 70/2 (West 2010). The statute begins as follows:

The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care.

*Id.*

ities were prohibited from discriminating against employees who refused to participate in abortions.<sup>147</sup>

When inserting the particular language in the Church Amendment that protects individual conscience, Representative Heinz said the following:

Mr. Chairman, freedom of conscience is one of the most sacred, inviolable rights that all men hold dear. With the Supreme Court decision legalizing abortion under certain circumstances, the House must now assure people who work in hospitals, clinics, and other such health institutions that they will never be forced to engage in any procedure that they regard as morally abhorrent.

[In addition to protecting institutions from being forced to perform abortions,] we must also guarantee that that no hospital will discharge, or suspend the staff privileges of, any person because he or she either cooperates or refuses to cooperate in the performance of a lawful abortion or sterilization because of moral convictions. . . .

Congress must clearly state that it will not tolerate discrimination of any kind against health personnel because of their beliefs or actions with regard to abortions or sterilizations. I ask, therefore, that the House approve my amendment . . . .<sup>148</sup>

Without further discussion, the House promptly passed the amendment and the bill by an overwhelming margin: 372–1.<sup>149</sup> The Church Amendment was ultimately enacted and signed into law in 1973.<sup>150</sup>

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147 42 U.S.C. § 300a (2006) provides:

No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after June 18, 1973, may—(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or (B) discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

*Id.* at §300a-7(c)(1) (internal citations omitted).

148 119 CONG. REC. 17,462–63 (1973).

149 *See id.*

150 When the Senate considered the Church Amendment, Senator Ted Kennedy said the following:

Congress has the authority under the Constitution to exempt individuals from any requirement that they perform medical procedures that are objec-

In the years since *Roe*, Congress has enacted additional laws designed to protect healthcare workers who refuse to participate in abortions. For example, in 1996 Congress enacted the Danforth Amendment to prohibit “[a]bortion-related discrimination in governmental activities regarding training and licensing of physicians.”<sup>151</sup> In particular, the law prevents governments from discriminating against healthcare providers who refuse to provide a range of abortion-related services and protects doctors, medical students, and health training programs.<sup>152</sup> The Danforth Amendment protects refusals to participate in abortion or abortion-related services for any reason, and it is not limited to religious objections.<sup>153</sup> Likewise, in 2005, Congress enacted the Hyde-Weldon Amendment, designed to strip federal funding from any institution that forces an individual to participate in an abortion against her will.<sup>154</sup>

Thus in a variety of ways, and at both the state and federal levels, legislators acted quickly, decisively, and at times nearly unanimously to protect conscience rights in the wake of *Roe*. These protections extended not only to direct personal performance of an abortion, but more broadly to providers who have an objection to being forced to “participate,” “refer,” “assist,” “arrange for,” “admit any patient for,” “allow the use of hospital facilities for,” “accommodate,” or “advise” concerning abortion.<sup>155</sup> The speed and near ubiquity of these laws demonstrates that a great majority of Americans at the time—regard-

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tionable to their religious convictions. Indeed, in many cases, the Constitution itself is sufficient to grant an exemption to protect persons from official acts that infringe on their free exercise of religion.

119 CONG. REC. 9602 (1973). He therefore supported the “full protection to the religious freedom of physicians and others.” *Id.*

151 42 U.S.C. § 238(n) (2006).

152 *See id.* (“The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity [defined to include individuals] to discrimination on the basis that . . . the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions.”).

153 *See id.*

154 Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3163 (2004); *see also* Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 508 (d)(1), 121 Stat. 1844, 2209 (2009) (“None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”).

155 *See* 42 U.S.C. §300a-7(c)(1) (2006); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852, 882 (1992); NARAL PRO-CHOICE AM. FOUND., *supra* note 143.

less of their disputes as to the merits of the underlying abortion question—agreed that the government should not have the power to compel participation in abortions by unwilling individuals and institutions.

### III. THE CONSTITUTIONAL RIGHT NOT TO PARTICIPATE IN ABORTIONS

In light of these historical facts, can it be said that the healthcare provider's right not to participate in abortions is one of "those fundamental rights and liberties, which are, objectively, 'deeply rooted in this Nation's history and tradition,'"<sup>156</sup> "and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed"?<sup>157</sup> As discussed in more detail below, the answer is yes. The unique history of abortion-related conscience protections shows a collective judgment, arguably over the entire history of the nation, that healthcare providers should not be forced by the government to participate in abortions against their will. That history satisfies the Court's stated inquiry for protection of substantive rights under the Fourteenth Amendment. In fact, the historical analysis for a right to refuse satisfies the Court's test far better than the histories upon which the Court relied in *Roe* and *Lawrence*. Furthermore, the right to refuse falls within the scope of the Fourteenth Amendment liberty interest for self-definition as described in *Casey* and *Lawrence*, and is needed to protect providers from the types of psychological harm recognized as supporting the abortion right in *Roe*.

#### A. Broader Historical Underpinnings

The protection of individual conscience from governmental compulsion is a long-honored value in American history, pre-dating even the Constitution. While there have been intense debates about whether such protection is *required* under the Free Exercise Clause (at least for religion-based claims of conscience), or was and is simply a matter of legislative grace, there can be little dispute that such protection is deeply rooted in American history and culture.

Many of the earliest colonial settlements were established in order to secure the freedom of conscience on matters related to religion. When these original settlements proved to hold too cramped a view of freedom of conscience—allowing the freedom only to certain

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156 *Washington v. Glucksberg*, 521 U.S. 707, 721 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

157 *Id.* at 720–21 (quoting *Moore*, 431 U.S. at 503; *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1932)).

people or certain religious sects—new colonies emerged to provide even greater freedom.<sup>158</sup>

This emphasis on freedom of conscience had not waned by the time of the Founding. Thomas Jefferson, for example, wrote that the government had “authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit.”<sup>159</sup> Jefferson also maintained that forcing a person even to contribute money to a cause to which he or she abhorred was “tyrannical.”<sup>160</sup>

James Madison’s *Memorial and Remonstrance Against Religious Assessments* likewise asserted the inalienability of conscience rights: “The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right.”<sup>161</sup> In fact, Madison described conscience as “the most sacred of all property”<sup>162</sup> and considered it “the particular glory of this country, to have secured the rights of conscience which in other nations are least understood or most strangely violated.”<sup>163</sup>

George Washington wrote that “the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle,”<sup>164</sup> and believed that the government should accommodate persons on the basis of conscience: “[T]he conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.”<sup>165</sup>

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158 See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1424–25 (1990) (noting that Rhode Island was founded by Roger Williams as a refuge for dissenters from the Massachusetts establishment). Professor McConnell also describes how a variety of state and local governments provided exemptions from various laws to accommodate religious objectors. See *id.* at 1466–73. For an alternative view of this history as it relates to the Free Exercise Clause, see Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

159 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 265 (1782).

160 THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, in THE WRITINGS OF THOMAS JEFFERSON 439 (1779).

161 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (1785), in SELECTED WRITINGS OF JAMES MADISON 21–27 (Ralph Ketcham ed. 2006).

162 JAMES MADISON, *Property* (1792), in Madison *supra*, note 161, at 223.

163 James Madison, Speech in Congress on Religious Exemptions from Militia Duty (Dec. 22, 1790).

164 MICHAEL NOVAK & JANA NOVAK, WASHINGTON’S GOD 111 (2006).

165 GEORGE WASHINGTON, *Letter to the Annual Meeting of Quakers* (1789), in THE PAPERS OF GEORGE WASHINGTON 266 (Dorothy Twohig ed. 1993).

Not surprisingly, the Supreme Court has echoed the Founders' concerns about protecting conscience in a variety of contexts. For example, the Court has stated that "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."<sup>166</sup> Elsewhere, the Court considered a public school policy requiring students to recite the pledge of allegiance against their will.<sup>167</sup> The Court explained:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . .

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.<sup>168</sup>

In the course of interpreting statutory protections for conscientious objectors to military service, the Court viewed the protection broadly, as extending not only to religious objectors, but also to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."<sup>169</sup>

When the Court has deemed the Free Exercise Clause somewhat less protective of individual conscience rights, state and federal legislators have often acted to provide additional protections. For example, although the Court has never recognized a constitutional right of conscientious objectors to avoid military service, Congress has generally provided such protection.<sup>170</sup>

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166 *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

167 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

168 *Id.* at 642.

169 *Welsh v. United States*, 398 U.S. 333, 344 (1970). The Court noted that statutory exemptions for conscientious objectors had a long history. Early colonial charters and state constitutions spoke of freedom of conscience as a right, and during the Revolutionary War, many states granted exemptions from conscription to Quakers, Mennonites, and others with religious beliefs against war. *See id.* at 343.

170 *See, e.g.*, Universal Military Training and Service Act, Act of March 3, 1863, ch. 75, 12 Stat. 731 (1863) (providing exemption for Civil War era draft for members of religious groups objecting on moral grounds). Interestingly, the cases holding that there is no constitutional right to such exemptions pre-date the modern substantive due process regime, and therefore did not address whether the Fourteenth Amendment protects a substantive liberty interest in this regard.

Likewise, under cases such as *Wisconsin v. Yoder*<sup>171</sup> and *Sherbert v. Verner*,<sup>172</sup> the Supreme Court used to afford strong protections to individual claims of religious conscientious objection, requiring a compelling state interest before substantial burdens could be imposed. In 1990, however, the Court lessened this protection in *Smith*, allowing that substantial burdens on religious exercise would be permitted pursuant to neutral and generally applicable laws.<sup>173</sup> Believing the Court's test to be insufficient to protect religious objectors, Congress enacted the Religious Freedom Restoration Act (RFRA), to restore the standards from *Yoder* and *Sherbert*.<sup>174</sup> While RFRA remains in force as a statutory standard governing federal infringements on religion, the Court invalidated RFRA's provisions applicable to state governments.<sup>175</sup> In response, many state governments enacted their own RFRA laws, and state supreme courts interpreted their constitutional protections of free exercise consistent with the previous standard.<sup>176</sup>

*B. Abortion and Conscience—The Right Not to Participate in Abortions*

Our nation's general commitment to rights of conscience has been even greater in the specific context of abortion. Historically, healthcare providers had a general common law freedom to choose whether or not to accept a particular patient for treatment, even in emergencies.<sup>177</sup> There is no historical indication that this freedom was restricted in the abortion context. To the contrary, many historical accounts—including those by Mohr, Means, and the Court in *Roe*—clearly aim to show abortion as widely available, tolerated, and at least partially legal. Yet none presents evidence of any kind of government requirement that it be provided, much less that it be provided by any particular unwilling provider. Rather, all of these sources note that many providers refuse to perform abortions, but nowhere suggest that the law required (or even should require) otherwise. This is consistent with the common law ability of physicians to refuse patients generally, even in emergencies.

This record suggests that healthcare providers were historically free to refuse to participate in abortions. In fact, these historical accounts suggest that, far from requiring providers to perform abor-

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171 406 U.S. 205 (1972).

172 374 U.S. 398 (1963).

173 See *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

174 See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

175 See *id.*

176 See, e.g., Illinois Religious Freedom Restoration Act, 775 ILL. COMP. STAT. ANN. 35/1 (West 2001) (enacting a RFRA statute in the state of Illinois).

177 See *supra* Part II.A.2.

tions, these governments treated those who provided abortions quite harshly, in that they could be *hanged* if a woman died from an abortion—a severe disincentive to say the least. Likewise, both the Hippocratic Oath and the earliest English and American codes of medical ethics forbade providing abortions, which would be odd if, in fact, the government could require them.<sup>178</sup> Legal restrictions on providing abortions extended to pharmacists and apothecaries.

Furthermore, the emphasis on quickening in the *Roe* version of history tends to confirm that, at the very least, providers were never forced to perform abortions *once pregnancy was clearly established*. That is, for many centuries, quickening was the only sure sign of pregnancy; until quickening, pregnancy could not be definitively established. Given that even the *Roe* version of history suggests that abortions after quickening were illegal at English common law and in early American law, it seems clear that physicians were never forced to perform abortions once they were sure the woman was pregnant, because such abortions were illegal.

Other liberties have been granted Fourteenth Amendment protection with far more restrictive pasts. For example, the Court in *Roe* acknowledged that abortion was widely prohibited for more than a century prior to its decision, and was a crime after quickening for centuries before that. Yet the Court found that, historically, “abortion was viewed with less disfavor” and that women “enjoyed a substantially broader right to terminate a pregnancy” at common law than at the time of *Roe*.<sup>179</sup> The Court also noted that the law treated abortions earlier in pregnancy less punitively than later abortions.<sup>180</sup> Based on

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178 See *Roe v. Wade*, 410 U.S. 113, 129–48 (1973).

179 *Id.* at 140.

180 *Id.* at 140–41. The Court’s discussion of laws banning suicide in *Glucksberg* provides an interesting contrast on the question of how the Court thinks about different penalties. When asked to find a fundamental right to assisted suicide, the Court explained that suicide and assisting suicide had been crimes for centuries and that, even when penalties were lowered, “courts continued to condemn [suicide] as a grave public wrong” and that suicide was deemed a “grievous, though nonfelonious, wrong.” *Washington v. Glucksberg*, 521 U.S. 702, 714 (1997). Concurring in *Glucksberg*, Justice Souter explained: “The reasons for the decriminalization, after all, may have had more to do with difficulties of law enforcement than with a shift in the value ascribed to life in various circumstances or in the perceived legitimacy of taking one’s own.” *Id.* at 776–77 (Souter, J., concurring). Dellapenna argues quite plausibly that the quickening distinction, to the extent it existed, was largely the result of an evidentiary problem—until quickening, there was no clear evidence of pregnancy. The Court did not discuss this possibility when relying on the more relaxed criminal treatment of early term abortions in *Roe*. See DELLAPENNA, *supra* note 96.



this analysis, the Court found the abortion right to have sufficient historical grounding for Fourteenth Amendment protection.<sup>181</sup>

Likewise, in *Lawrence*, the Court noted that non-procreative sexual conduct was widely prohibited for centuries, but observed that there was “no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.”<sup>182</sup> The Court also found that the infrequency of prosecutions for engaging in such conduct made it “difficult to say that society approved of a rigorous and systematic punishment of consensual acts committed in private and by adults.”<sup>183</sup> Based on this history, the court found that the right upheld in *Lawrence* had sufficient historical grounding for substantive due process protection.

The apparent pre-*Roe* historical liberty of healthcare providers not to be compelled by government to participate in abortion procedures thus compares quite favorably to the liberty interests described in *Roe* and in *Lawrence*. In each of those cases, the Court took a practice which was actually expressly illegal and found it protected by the Fourteenth Amendment. In contrast, there is no historical evidence that it was illegal for a healthcare provider to refuse to participate in abortions. Far from being illegal, refusing to perform an abortion was affirmatively legally *required* conduct in many circumstances, to the extent abortion was criminalized at least at certain stages. Prosecutions for such refusals do not appear to be merely “infrequent” as in *Lawrence*—they appear to be nonexistent entirely. Those who performed abortions contravened accepted medical ethics and were punished severely by the government for errors made in the process. Based on this pre-*Roe* history alone, it seems clear that the right of providers to not perform abortions meets the Court’s historical test for Fourteenth Amendment protection, and does so better than other rights the Court has recognized.

But it is the near unanimous—and virtually immediate—action of state and federal governments to protect conscience in the wake of

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181 Justice Rehnquist offered an alternative interpretation of this history in his *Roe* dissent:

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.”

*Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

182 *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

183 *Id.* at 569–70.

*Roe* that marks the conscience right as fundamental and as unique in our history.

In the years prior to *Roe*, at least fourteen states had already liberalized their abortion laws.<sup>184</sup> The American Medical Association—which since its founding had vocally opposed abortion—in 1970 resolved to make abortion more available based on the standards of “sound clinical judgment” and “informed patient consent.”<sup>185</sup> As set forth above in Part II.D, this pre-*Roe* liberalization of abortion laws frequently came with the creation of express statutory protection for physicians and other healthcare personnel and institutions who refused to participate in abortions. For example, while supporting greater access to abortion, the AMA also resolved that “[n]either physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.”<sup>186</sup>

Once the Court’s decision in *Roe* established a constitutional right to abortion, state and federal legislatures acted quickly and decisively to confirm that no physician could be forced to provide an abortion. Today, nearly every state has a conscience statute or clause to protect providers from being forced to participate in abortions.<sup>187</sup> Federal legislators likewise moved immediately and with near unanimity to protect healthcare workers from being forced to participate in abortions.<sup>188</sup> Perhaps taking their cue from the AMA resolution that neither individuals nor institutions “shall be required to perform any act violative of personally-held moral principles,” these laws were not limited to the direct performance of abortion, but rather protected against compulsion to participate more broadly, including by referral or providing space.<sup>189</sup> There is no indication that these legislative actions were understood to be changing the pre-*Roe* status quo. To the contrary, they appear designed to protect the liberty of providers

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184 See *Roe*, 410 U.S. at 140–41 (“In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code . . .”).

185 *Id.* at 143.

186 *Id.* at 143–44 n.38; see also *supra* note 90 and accompanying text (discussing Cyril Means’s approval of New York liberalization bill protecting physician conscience).

187 For physicians whose objection to performing abortions is religious in nature, many states provide additional protections either directly through their constitutional protections of free exercise, or through state Religious Freedom Restoration Act statutes. See, e.g., Illinois Religious Freedom Restoration Act, 775 ILL. COMP. STAT. 35/1 (containing a RFRA statute).

188 See *supra* Part II.D.

189 See *id.*

to continue refusing to perform abortions once abortion was widely permitted.

Beyond the speed and near-unanimity with which conscience clauses appeared on the state and federal legislative scene, perhaps the most remarkable aspect of their development is the fact that many who strongly favor abortion rights also favor conscience rights. As noted above, Justice Blackmun referred to conscience provisions as “appropriate protection” for objecting physicians and other health-care personnel.<sup>190</sup> Senator Ted Kennedy—frequently criticized from the right for his support for legalized abortion—strongly supported conscience rights in the form of the Church Amendment.<sup>191</sup> President Obama identifies himself as a supporter of *Roe*,<sup>192</sup> but likewise says he supports some sort of conscience protection.<sup>193</sup> Indeed, even NARAL Pro-Choice America acknowledges that conscience protections for individual objectors “may” be appropriate.<sup>194</sup>

The speed and near unanimity of these legislative actions confirm that the right not to be forced by the government to perform abortions is implicit in the concept of ordered liberty. For decades, abortion has been the most divisive political, social, and ethical issue in the country. Partisans on the two sides disagree over everything. They cannot agree on science. (Can a fetus feel pain at twelve weeks or twenty or twenty-eight?) They cannot agree on history. (Was prequickenning abortion a crime at common law or not?) They cannot even agree on language. (Is it a “fetus”, “baby”, or the “products of conception”? Should the sides of the dispute be labeled as “pro-life,”

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190 See *Doe v. Bolton*, 410 U.S. 179, 198 (1973).

191 See *supra* note 150.

192 See *Statement of President Obama on the 36th Anniversary of Roe v. Wade*, THE WHITE HOUSE, [http://www.whitehouse.gov/the\\_press\\_office/StatementofPresidentObamaonthe36thAnniversaryofRoevWade/](http://www.whitehouse.gov/the_press_office/StatementofPresidentObamaonthe36thAnniversaryofRoevWade/) (last visited Sept. 25, 2011) (“I remain committed to protecting a woman’s right to choose. . . . [And] more broadly to ensuring that our daughters have the same rights and opportunities as our sons: the chance to attain a world-class education; to have fulfilling careers in any industry; to be treated fairly and paid equally for their work; and to have no limits on their dreams. That is what I want for women everywhere.”).

193 See Obama, *supra* note 20.

194 See *Refusal to Provide Medical Services*, NARAL PRO-CHOICE AM., <http://www.prochoiceamerica.org/what-is-choice/fast-facts/refusal-to-provide-medical.html> (last visited Sept. 25, 2011) (opposing conscience protection for institutions such as Catholic hospitals, but acknowledging that “[a]lthough carefully crafted refusal clauses may be acceptable in some circumstances to protect individuals who oppose certain treatments, broad refusal clauses deny women medically necessary information, referrals, and services. In addition, even if individual medical providers are protected, health-care corporations should not be allowed broadly to deny women access to necessary medical services and information.”).

“pro-choice,” “anti-abortion,” “pro-abortion” or something else?) Yet amidst this widespread, heated and seemingly endless disagreement, we see something remarkable: essentially unanimous agreement from state and federal governments that providers should not be forced to participate in abortions.

This broad agreement dwarfs the liberalization trends the Court noted in *Roe* and in *Lawrence*. In *Roe*, the Court noted “about one-third” of the states had recently changed their abortion laws.<sup>195</sup> In *Lawrence*, the Court observed that “[o]ver the course of the last decades” nine states had moved toward abolishing their laws targeting homosexual sex.<sup>196</sup> In contrast, here *virtually all* of the states in the union and the federal government have declared their view that the government cannot compel healthcare providers to participate in abortions. They have all done so “in the past half century”—i.e., the period of time the Supreme Court deems to have the “most relevance”—and they did so rapidly upon the legalization of abortion.<sup>197</sup>

This broad historical case and nearly-unanimous state and legislative agreement also rebuts the common argument that because providers enjoy a “monopolistic state-granted license[ ]” they should be required to “subordinat[e] personal religious or moral beliefs to the needs of patients.”<sup>198</sup> Since at least the mid-nineteenth century, the practice of medicine in the United States was regulated by the states. While the Court in *Roe* may have found a historically “broader right” to obtain abortions in earlier times,<sup>199</sup> there is no indication that freedom ever included the right or ability to compel participation by unwilling providers, whether through licensing or otherwise. Thus the historical argument suggests that, at least since that time, physicians and nurses were at liberty to refuse to perform abortions, even

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195 See *Roe v. Wade*, 410 U.S. 113, 140 (1973).

196 *Lawrence v. Texas*, 539 U.S. 558, 570 (2003).

197 *Id.* at 571–72.

198 See Martha S. Swartz, “Conscience Clauses” or “Unconscionable Clauses”: *Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL’Y L. & ETHICS 269, 277 (2006) (“[W]hile health care professionals should be encouraged to refuse to participate in treatment that violates the generally accepted professional standards of practice applicable to their professions, the monopolistic state-granted licenses that medical professionals receive should preclude these professionals from injecting their personal beliefs into their professional practices. . . . The provision of medically indicated health care should be the health care professional’s primary responsibility, subordinating personal religious or moral beliefs to the needs of patients.”).

199 See *Roe*, 410 U.S. at 140.

though no one forced them to become medical professionals,<sup>200</sup> and even though they were subject to government licensing standards.

This conclusion is strengthened by the nearly unanimous and nearly universal adoption of statutory conscience protections for medical professionals in the wake of *Roe*. By the 1970s, of course, the medical profession was highly regulated. These statutory protections thus confirm a long-held and broadly-held view that *licensed* healthcare providers, who had voluntarily chosen such careers,<sup>201</sup> retained the right to choose not to participate in abortions. Likewise, these laws show that the abortion right—even since *Roe*—has not been generally understood to include a right to force participation by unwilling providers, even licensed ones.

In any case, it is clear that the right to an abortion recognized in *Roe* is a right to be free from undue *governmental* interference with one's efforts to obtain an abortion.<sup>202</sup> Nothing in *Roe* or *Casey* sug-

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200 As a general matter, the argument that a person does not have to be a doctor, nurse, or pharmacist—or that a person can or should be forced to surrender constitutional rights as a condition of pursuing these professions—is at odds with our broader constitutional tradition. For example, in *Sweatt v. Painter*, 339 U.S. 629 (1950), the Court found that a black law student had a Fourteenth Amendment Equal Protection right to attend the then-segregated University of Texas Law School. In *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967), the Court found public school teachers had a First Amendment speech and association right to obtain such employment without being forced to certify whether they had ever been members of the Communist Party. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Court held that a candidate for public office had a right to pursue that office without being forced to “declare a belief in . . . ‘the existence of God.’” *Id.* at 490. In all of these cases, the Court could have argued that the plaintiff “didn’t have to be” a lawyer or a teacher or a public officeholder—and presumably all of the plaintiffs in the cases could have obtained employment in a different field. Yet in each case the Court accepted the plaintiff’s chosen career path and analyzed whether the government did or did not have the power to impose the relevant burdens.

201 The Fourteenth Amendment also separately protects the rights of individuals to choose “to engage in any of the common occupations of life.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). This right is particularly implicated where a government action would amount to “a complete prohibition of [one’s] right to engage in a calling.” *Conn. v. Gabbert*, 526 U.S. 286, 292 (1999). Thus the argument that “the government did not force you to become a doctor, nurse, or pharmacist” misses the mark—the question is not whether the government forced someone to enter a certain profession, but whether the government violates the Constitution by imposing certain requirements, or by prohibiting, for example, obstetricians or pharmacists from practicing unless they will agree to participate in abortions. *Cf. Shaw v. Hosp. Auth.*, 507 F.2d 625, 628 (5th Cir. 1975) (finding that a physician, “in seeking staff privileges at [a] hospital, seeks to engage in his occupation . . . and this is a liberty interest protected by the Fourteenth Amendment”).

202 Generally speaking, rights recognized or granted by the Constitution are rights against the government—they are not rights to force other private individuals to par-

gests that the right to an abortion includes the right to compel unwilling private healthcare providers to provide them. To the contrary, the Court in *Roe* established a right to abortion not only for pregnant women, but also for their physicians. Thus, the Court spoke of “the right of the physician” to perform abortions and to administer treatment according to her judgment.<sup>203</sup> Presumably this right to make judgments includes the option to make alternative judgments and decide *not to* perform abortions. In this manner, allowing a physician room to decide not to perform abortions is actually entirely consistent with *Roe*.<sup>204</sup>

Furthermore, the Court has found that the abortion right recognized in *Roe* does not even include the right to have the *government* provide or even *pay* for abortions. In *Maher v. Roe*, the Court rejected the argument that unwilling *governments* could be forced to provide or pay for abortions, finding that *Roe v. Wade* did not create any obligation on the state to affirmatively provide the service.<sup>205</sup> If the right established in *Roe* and *Casey* does not include even having the *government pay* for an abortion, it surely cannot include having the government use its power over licenses to make an *unwilling private individual actually perform one, even if that individual holds a government license*.

For these reasons, the healthcare provider’s right not to participate in abortions qualifies under the historical test for protection under the Due Process Clause of the Fourteenth Amendment.

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ticipate in or facilitate one’s own behavior. Thus, for example, although a shopper has a First Amendment right to purchase a Bible or a pornographic magazine (or both, since there is no constitutional requirement of consistency), that right does not include a right to have the government force any particular unwilling bookseller to sell either one. Likewise, *Lawrence* recognized a Fourteenth Amendment right to engage in private homosexual sex, but it would be absurd to suggest the right includes having the government force unwilling private individuals to participate in the exercise of that right.

203 See *Roe*, 410 U.S. at 163.

204 Likewise, for the reasons set forth above, such a right is also consistent with the discussion of physicians in *Doe* and *Casey*. Protection for this sphere of individual physician decision making is also quite consistent with the constitutional principle that the right to *do* something usually includes the right to decide *not to do it*. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (First Amendment right to free speech includes right not to speak); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Free Exercise Clause protects the right not to worship).

205 See *Maher v. Roe*, 432 U.S. 464 (1977); see also *Harris v. McRae*, 448 U.S. 297, 316 (1980) (“[I]t simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation.”).

C. *Refusal and the Casey/Lawrence Self-Definition Right*

The Court's substantive due process decisions also emphasize the importance of permitting the individual to make decisions about certain issues without government compulsion. Both *Casey* and *Lawrence* indicated that the Fourteenth Amendment will protect rights not only for their importance to individuals when those rights are exercised, but also because the act of *making one's own decisions* about certain matters *without government compulsion* is itself part of the liberty protected by the Fourteenth Amendment. As the Court explained:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "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." Our precedents "have respected the private realm of family life which the state cannot enter." 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 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.<sup>206</sup>

Thus, the Fourteenth Amendment's protections extend to not only to actions, but also to the right to *make one's own decisions* about certain subjects without "compulsion of the State."<sup>207</sup> The Court explained the reason for this protection, namely that the ability to make one's own decisions about these issues "define[s] the attributes of personhood" and is therefore protected from government invasion.<sup>208</sup>

In establishing an individual right to make one's own decisions about such matters, *Casey* builds on *Roe*. The Court's decision in *Roe* was premised on the idea that the judiciary is incapable of determining when life begins<sup>209</sup> and that government more broadly does not

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206 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (internal citations and emphasis omitted).

207 *Id.*

208 *Id.*

209 *See, e.g., Roe v. Wade*, 410 U.S. 113, 158-59 (1973) (holding that a fetus is not a "person" and therefore lacks Fourteenth Amendment or other constitutional rights until birth, but stating that "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer" to the question of when

have the power to “adopt[ ] one theory of life” and use it to override the rights of the pregnant woman.<sup>210</sup> *Casey* moves from this acknowledgement of governmental inability to make this decision to an affirmative recognition of an individual liberty interest in making the decision on one’s own, and without government compulsion.

It is commonly objected that the *Casey/Lawrence* “mystery of life” description of the Fourteenth Amendment liberty interest is too broad and philosophical to usefully describe the protected rights.<sup>211</sup> Indeed, generally speaking, courts have restricted use of this passage

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life begins); see also *Casey*, 505 U.S. at 851 (noting that the right to make such decisions and that “[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State”).

210 *Roe*, 410 U.S. at 162. In this regard, *Casey* also provides a strong rebuttal to arguments advanced to require pharmacists to sell the morning after pill. Some advocates of such laws argue that the morning after pill does not really cause abortions, because they simply inhibit pregnancy by stopping a fertilized egg from implanting. See, e.g., *Lou Dobbs Tonight* (CNN television broadcast Dec. 1, 2005) (statement of Illinois Governor Rod Blagojevich) (“[T]he rationale is that when a doctor or nurse has a moral objection to performing an abortion, which is a legitimate concern, that they would be precluded from having to do that. In the case of a pharmacist . . . the morning after pill or contraceptives don’t terminate pregnancies, what they do is prevent pregnancies, and that’s far different from performing an abortion.”). While of course the government is free to “adopt[ ] one theory of life” for certain purposes—for example, to classify Plan B or ella as contraceptives rather than abortifacient drugs—*Casey* does not provide room to force unwilling private actors to act accordingly. See *Roe*, 410 U.S. at 162. In this regard, the *Casey* self-definition principle functions similarly to other areas of constitutional law in which we generally do not permit courts or the government to “disprove” a stated religious belief or objection. See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981) (“However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *id.* at 715 (“We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is ‘struggling’ with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.”); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (“Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.”).

211 See, e.g., John H. Garvey, *Control Freaks*, 47 *DRAKE L. REV.* 1, 3, 4 (1998) (noting that the passage “sounds like a bad freshman philosophy paper” and arguing that the right as phrased “is too powerful,” and would allow each of us to claim a right to do virtually anything to define ourselves, and ultimately leaves us needing “to find a way to distinguish some choices from others”); see also *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (arguing that if the self-definition passage from *Casey* and *Lawrence* “calls into question the government’s power to regulate actions based on one’s self-defined ‘concept of existence, etc.,’ it is the passage that ate the rule of law”).



to cases involving abortion and gay rights (the subject matters of *Casey* and *Lawrence*).<sup>212</sup> When lower courts attempted to extend this passage to establish a right to assisted suicide, the Supreme Court resisted, explaining that *Casey* required a confluence of two factors: personal importance and history.

By choosing this language, 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. The opinion moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observation that "though the abortion decision may originate within the zone of conscience and belief, it is *more than a philosophic exercise*." 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 . . . .<sup>213</sup>

While it is certainly true that this right to self-definition is worded expansively—and it could not possibly actually protect *every* way in which an individual might choose to define herself—there are strong reasons to believe that this self-definitional right should extend to healthcare providers who do not wish to be compelled to participate in abortions. First, as set forth above in Parts II and III, there is a strong historical case to support the right to refuse. This places the right to refuse in much better standing than the rejected right to assisted suicide (which had been illegal for at least 700 years) and even better than the recognized rights to abortion and to engage in private homosexual sex (both of which had been illegal at least for large portions of our history). To the extent the "mystery of life" passage really means that the Fourteenth Amendment protects those rights that are both (a) strongly grounded in history and tradition, and (b) involve very important decisions about personal involvement in sexual matters and abortion, the right to refuse passes this test.

Second, while it is fair to speculate as to what *other* situations the "mystery of life" right should cover, no speculation should be needed in the abortion context because the Court has already deemed that

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212 See Trent L. Pepper, *The "Mystery of Life" in the Lower Courts: The Influence of the Mystery Passage on American Jurisprudence*, 51 How. L.J. 335 (2008) (cataloguing lower court uses of the passage since *Casey*).

213 *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) (citations and footnotes omitted).

particular decision to be one of the protected decisions, at least for the pregnant woman. As the Supreme Court has noted, abortion is simply different from all other medical procedures because other procedures “do not involve the termination of a potential human life.”<sup>214</sup> For a physician as much as for a pregnant woman, the ability to form one’s own “beliefs about . . . matters” such as abortion can “define the attributes of personhood.”<sup>215</sup> Likewise for the healthcare worker as much as for the pregnant woman “the abortion decision may originate within the zone of conscience and belief, [but] it is more than a philosophic exercise.”<sup>216</sup>

For these reasons, the Fourteenth Amendment should likewise protect the healthcare provider’s right to make that decision on her own, based on her own judgments about the value of life, rather than “under compulsion of the State.” A law compelling the provider to use her hands, mind, and skills to participate in abortions against her will would infringe upon *the provider’s* ability to define her own personhood—namely, as a person who would not participate in an abortion.<sup>217</sup> Such a law would deprive the worker of her right to define her own “concept of existence” and of the “mystery of human life” as to the abortion question.

Similarly, *Casey* acknowledges that the pregnant woman’s destiny “must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”<sup>218</sup> Forcing a healthcare provider to participate against her will would deprive her of the corresponding right to shape *her own* destiny based on “her own conception of her spiritual imperatives and her place in society.”<sup>219</sup> *Roe* and *Casey* teach us that the fetus does not enjoy these protections because it has

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214 *Maier v. Roe*, 432 U.S. 464, 480 (1977); *see also Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (“The abortion decision has implications far broader than those associated with most other kinds of medical treatment.”).

215 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

216 *Id.* at 852.

217 For example, the Christian Medical and Dental Association is a group of approximately 16,000 healthcare providers. According to their website, the group’s goals include “educating and equipping Christian doctors and students . . . to serve with professional excellence as witnesses of Christ’s love and compassion . . . .” *See CMDA Mission & Beliefs*, CHRISTIAN MED. & DENTAL ASS’N, [http://www.cmda.org/WCM/CMDA/Navigation/About/MissionsBeliefs/Missions\\_Beliefs.aspx](http://www.cmda.org/WCM/CMDA/Navigation/About/MissionsBeliefs/Missions_Beliefs.aspx) (last visited Sept. 25, 2011). The members of the group quite explicitly seek to define themselves, at least in part, by their refusal to participate in abortion. *See CMDA Ethics Statements*, CHRISTIAN MED. & DENTAL ASS’N, [http://www.cmda.org/WCM/media/pdf/CMDA\\_EthicsStatementsworeferences10.pdf](http://www.cmda.org/WCM/media/pdf/CMDA_EthicsStatementsworeferences10.pdf) (last visited Sept. 25, 2011).

218 *Casey*, 505 U.S. at 852.

219 *Id.*

not been deemed a “person” under the Fourteenth Amendment. But the healthcare provider, of course, is a “person,” and it is logical to conclude that the Fourteenth Amendment should equally protect the right of each “person” in the room to be able to decide whether or not to participate based on her own “spiritual imperatives” and view of “her place in society.” This is particularly true where, as here, the two people are involved in the same event, at the same time, in the same place, and are facing the same moral question about the character and moral value of the fetus or embryo to be terminated.

One possible argument against this analysis might be the contention that the formation of beliefs about abortion is more personal and defining for the woman who procures an abortion than for the woman who performs it. At one level, this is undeniably true, as the abortion happens inside the body of only one of the two participants, and concerns the actual or potential offspring of only one of the participants. One might be tempted to say that *Casey*’s right-to-make-self-defining-decisions principle only applies to the decision of the pregnant woman, but not that of her physician.

This argument ultimately fails for four reasons. First, it provides no response to the historical argument that the freedom of healthcare providers to decide not to perform abortions is sufficiently established to merit constitutional protection under the Fourteenth Amendment.<sup>220</sup> Second, there is no evidence to support the notion that healthcare providers do not consider the services they provide to be self-defining. Indeed, for a provider who has made a religious, moral, or conscience-based decision not to participate in abortions, it is entirely likely that the decision is very much a part of her definition of herself.<sup>221</sup> Third, such an approach would wrongly suggest that “one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”<sup>222</sup> is implicated only in decisions related to sex and childbearing, but not in matters relating to whether one will use one’s mind, hands, and skills to terminate life or potential life. A physician forced against her will to provide abortions would have a strong argument that being forced to use her hands and instruments to reach into another’s womb and end a pregnancy as much implicates her beliefs about “the mystery of human life” and her self-definition as

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220 See *supra* Part III.B.

221 See *supra* note 217 (describing how the approximately 16,000 members of the Christian Medical and Dental Association expressly define themselves and their group by their unwillingness to provide abortions).

222 *Casey*, 505 U.S. at 581.

do her decisions about sexual matters.<sup>223</sup> It would be odd for the Fourteenth Amendment to protect the self-defining ability to make one's own decisions about the "mystery of life" and "one's own concept of existence" only when those decisions relate to personal sexual matters, but not when they directly relate to personal participation in abortions.

Ultimately, however, the strongest evidence that decisions about abortion are "personal" enough for healthcare workers to merit Fourteenth Amendment protection is provided by the words and experiences of those who have actually performed them. As set forth in the next section, even those who firmly believe in protecting the right to abortion indicate that performing abortions is an intensely personal experience, which often brings with it significant psychological burdens. These burdens would presumably be greatly intensified for a healthcare provider who believes she is taking innocent human life, and they provide a final argument for a constitutional conscience right.

#### *D. Refusal and Psychological Harm to Providers*

As set forth in more detail above, the Court's decisions in *Roe* and *Casey* expressly emphasize the importance of protecting women from the mental and psychological burdens they might face in the absence of an abortion right.<sup>224</sup> The Court in *Roe* explained that the absence of an abortion right could subject women to psychological harm including "a distressful life and future" and the "continuing stigma of unwed motherhood."<sup>225</sup> The Court in *Casey* emphasized that the abortion decision is fraught with psychological consequences for the pregnant woman and noted that a woman who regretted her abortion decision may face "devastating psychological consequences."<sup>226</sup>

Medical staff asked to provide or assist with abortions also face significant psychological consequences—even when they strongly support a woman's right to choose to have an abortion. In fact, some abortion providers have begun to publicly call for efforts to address abortion's psychological impact on those who perform them. For example, Dr. Lisa Harris—an abortion provider and professor of

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223 For a collection of stories of healthcare professionals who refused to participate in procedures that violated their consciences, see *Real-Life Examples of Discrimination in Healthcare*, CHRISTIAN MED. ASS'N, [http://freedom2care.org/docLib/20100920\\_Reallifestories.pdf](http://freedom2care.org/docLib/20100920_Reallifestories.pdf) (last visited Sept. 25, 2011) (recounting stories about claimed discrimination for such refusals, including many related to abortion).

224 See *supra* Part I.B.3.

225 *Roe v. Wade*, 410 U.S. 113, 153 (1973).

226 *Casey*, 505 U.S. at 882.

medicine at the University of Michigan—explains that performing abortions can be a “brutally visceral” and “raw” experience, and can cause “serious emotional reactions that produce[ ] physiological symptoms, sleep disturbances (including disturbing dreams), effects on interpersonal relationships and moral anguish.”<sup>227</sup>

Studies of abortion providers suggest that Dr. Harris’s experiences are not unique. For example, in a 1974 study, many providers reported “[o]bsessional thinking about abortions, depression, fatigue, anger, lowered self-esteem, and identify conflicts.”<sup>228</sup> A 1989 study reported similar effects:

Ambivalent periods were characterized by a variety of otherwise uncharacteristic feelings and behaviors including withdrawal from colleagues, resistance to going to work, lack of energy, impatience with clients and an overall sense of uneasiness. Nightmares, images that could not be shaken and preoccupation were commonly reported. Also common was the deep and lonely privacy within which practitioners had grappled with their ambivalence.<sup>229</sup>

Anecdotal evidence from abortion providers is remarkably consistent with these studies. For example, one study conducted by an abortion provider of his staff reported employees feeling “that the emotional strain affected interpersonal relationships significantly or

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227 Harris, *supra* note 1, at 76 (quoting Warren Hern & Billie Corrigan, *What About Us? Staff Reactions to D&E*, 15 *ADVANCES IN PLANNED PARENTHOOD*, no. 1, 1980 at 3). Dr. Harris described the intensely personal experience of performing an abortion for a patient while she herself was pregnant:

With my first pass of the forceps, I grasped an extremity and began to pull it down. I could see a small foot hanging from the teeth of my forceps. With a quick tug, I separated the leg. Precisely at that moment, I felt a kick—a fluttery “thump, thump” in my own uterus. It was one of the first times I felt fetal movement. There was a leg and foot in my forceps, and a “thump, thump” in my abdomen. Instantly, tears were streaming from my eyes—without me—meaning my conscious brain—even being aware of what was going on. I felt as if my response had come entirely from my body, bypassing my usual cognitive processing completely. A message seemed to travel from my hand and my uterus to my tear ducts. It was an overwhelming feeling—a brutally visceral response—heartfelt and unmediated by my training or my feminist pro-choice politics. It was one of the more raw moments in my life.

*Id.* Dr. Harris continues to provide abortions and asserts that the “moral status [of the fetus] is reasonably the subject of much disagreement” and that individual “doctors still need to sort out for themselves” the circumstances under which they will perform abortions.” *Id.* at 74–75.

228 Marianne Such-Baer, *Professional Staff Reaction to Abortion Work*, *SOC. CASEWORK*, at 435–36 (July 1974).

229 Kathleen M. Roe, *Private Troubles and Public Issues Providing Abortion Amid Competing Definitions*, 29 *SOC. SCI. MED.* 1191, 1197 (1989).

resulted in other behavior such as an obsessive need to talk about the experience.” Many other informal studies report providers tormented by horrifying dreams.<sup>230</sup> Because of these types of psychological effects, at least one post-residency abortion training program has initiated an annual psychological workshop for its fellows in order to help them deal with the psychological impact of performing abortions.<sup>231</sup>

These accounts indicate that the Court was correct when it suggested in *Casey* that the abortion decision was “fraught with consequences” for the healthcare providers asked to provide abortions.<sup>232</sup> The psychological consequences detailed above—all reported by practitioners who *support* the availability of abortion—may be expected to be worse for a physician who believes that providing an abortion is the wrongful taking of an innocent human life.<sup>233</sup> For example, one nurse allegedly forced by a private hospital to participate in an abortion reported that the experience left her feeling “violated, betrayed, like I had been raped,” and that she had undergone “extreme emotional, psychological and spiritual suffering.”<sup>234</sup> She described the trauma of being “forced to watch the doctor remove the bloody arms and legs of the child from its mother’s body with forceps” and being forced to “carry those body parts to another area of the operating room. . . . It felt like horror film unfolding.”<sup>235</sup>

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230 See, e.g., H.D. Kibel, *Editorial Staff Reactions to Abortion*, 39 OBSTETRICS & GYNECOLOGY 1 (1972) (“Their distress was typified by one nurse’s dream. This involved an antique vase she had recently wished to purchase. In the dream she was stuffing a baby into the mouth of the vase. The baby was looking at her with a pleading expression.”); Hern & Corrigan, *supra* note 227, at 5 (“Two respondents described dreams which they had related to the procedure. Both described dreams of vomiting fetuses along with a sense of horror . . . . In general it appears that the more direct the physical and visual involvement (i.e., nurses, doctor) the more stress experienced.”); Sallie Tisdale, *We Do Abortions Here*, HARPER’S MAG., Oct. 1987, 66, 70 (“I have fetus dreams, we all do here: dreams of abortions one after the other; of buckets of blood splashed on the walls; trees full of crawling fetuses. I dreamed that two men grabbed me and began to drag me away. ‘Let’s do an abortion,’ they said with a sickening leer, and I began to scream, plunged into a vision of sucking, scraping pain, of being spread and torn by impartial instruments that do only what they are bidden. I woke from this dream barely able to breathe . . . .”). All of the study authors supported abortion availability at the time of their writing. See RACHEL M. MACNAIR, PERPETRATION-INDUCED TRAUMATIC STRESS 76 (2002).

231 MACNAIR, *supra* note 230, at 75.

232 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992)

233 See MACNAIR, *supra* note 230, at 71 (noting that the psychological consequences of abortion would be expected to be worse “if abortion is the taking of a human life” than if abortion is “not violence at all.”).

234 Julia Duin, *Nurse Sues After Aiding Abortion, Says Hospital Violated Conscience Protections*, WASH. TIMES, July 31, 2009, at A18.

235 *Id.*

Recognition of a healthcare provider's right to refuse to perform abortions would avoid governmental imposition of such psychological harms, a factor which the Courts in *Roe*, *Doe*, and *Casey* all emphasized in finding a constitutional abortion right.

### CONCLUSION

A Fourteenth Amendment conscience right in the abortion context is particularly important now, as the nation moves forward with large-scale changes to its healthcare system, and as interest groups urge the government to require participation in abortions. The American College of Obstetricians and Gynecologists, for example, has asked Congress to require healthcare providers to refer for abortions<sup>236</sup> and has issued ethical directives dictating that objecting providers should be forced to perform abortions "regardless of the provider's personal moral objections" whenever refusal even "might negatively have an impact on a patient's . . . mental health" or "a patient's conception of well-being."<sup>237</sup> Both the historical account above and the autonomy logic of *Roe* and *Casey* demonstrate that decisions about whether to participate in abortions generally, or whether to perform them to protect a patient's "conception of well-being," fall

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236 See, e.g., News Release, Am. Ass'n of Pro-life Obstetricians & Gynecologists, Statement on ACOG Letter Urging U.S. Senators to Violate the Rights of Conscience of Physicians (Sept. 14, 2005), available at <http://www.aaplog.org/physician-conscience-rights/news-release-statement-on-acog-letter-urging-u-s-senators-to-violate-the-rights-of-conscience-of-physicians>.

237 ETHICS OPINION, *supra* note 28, at 1, 3, 5. Likewise, the ACLU has recently urged the federal government to require performance of abortions that are necessary to protect the life and health of the pregnant woman. See Letter from Laura W. Murphy, ACLU, et al. to Marilyn Tavenner, Centers for Medicare and Medicaid Services (July 1, 2010), available at [http://www.aclu.org/files/assets/Letter\\_to\\_CMS\\_Final\\_PDF.pdf](http://www.aclu.org/files/assets/Letter_to_CMS_Final_PDF.pdf) (arguing that religiously affiliated hospitals "cannot invoke their religious status to jeopardize the health and lives of pregnant women seeking medical care."). While there are of course some situations that are true life and death emergencies, the category of abortions considered necessary for health reasons has generally been defined quite broadly by the Supreme Court to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." *Doe v. Bolton*, 410 U.S. 179, 192 (1973); see also *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("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.").

squarely within the conscience right protected by the Fourteenth Amendment.

Recognition of a constitutional right to refuse in these cases, of course, does not necessarily mean the right is absolute. Other constitutional interests can be impinged if the government can show the burden is necessary to serve a sufficiently compelling governmental interest,<sup>238</sup> and presumably the government would be permitted to argue it has such interests in certain emergencies. Still, any such argument would need to begin with a governmental explanation as to why the government needs to forcibly conscript unwilling providers rather than providing the service directly by hiring willing providers, or by giving willing providers incentives to operate in underserved communities rather than more profitable urban centers. In the vast majority of cases, it would likely be impossible for the government to demonstrate that an interest is sufficiently compelling to trump the constitutional right to refuse, yet not quite compelling enough to justify direct government provision of or expenditures for the service.<sup>239</sup>

More broadly, acknowledgment that the Fourteenth Amendment can protect individuals from being forced to do what they understand to be killing raises interesting questions for other constitutional issues. For example, while the Supreme Court has determined that capital punishment is permissible under the Eighth Amendment, is there a historical case to be made that the Fourteenth Amendment and the *Casey/Lawrence* self-definition right should protect unwilling individuals from being compelled to participate in capital punishment, either as jurors, as witnesses, or as participants? Would similar logic protect

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238 See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (“[T]he Fourteenth Amendment ‘forbids the government to infringe . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” (citation omitted)); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (noting that a content-based speech restriction could be constitutional if the state can “show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end”).

239 Cf. *Riley v. Nat’l Fed’n of the Blind, Inc.*, 487 U.S. 781, 800 (1988) (noting that a compelled speech requirement was not narrowly tailored because “the State may itself” make the statements and thereby “communicate the desired information to the public without burdening a speaker with unwanted speech”). For example, in *Morr-Fitz v. Blagojevich*, the trial court found that a government requirement that pharmacies sell emergency contraceptives failed strict scrutiny under the First Amendment in part because the government failed to demonstrate that it could not serve its interest with less restrictive measures, such as “providing the drug directly, or by using its websites, phone numbers and signs to help customers find willing sellers.” *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-000495, at 7 (7th Cir. Ill. Apr 5, 2011).



doctors and pharmacists from being compelled to participate in assisted suicide where that practice is legal? Does the Fourteenth Amendment require a provision in a draft law for conscientious objectors, a question that has not been addressed in the post-*Roe* substantive due process era? Moreover, if the *Casey/Lawrence* “mystery of life” analysis is found to include a substantive due process right to same-sex marriage, would there be a concomitant conscience right for those with a different view to avoid government compulsion to participate in or facilitate such marriages?

The answers to these questions would depend on historical and legal analysis that is beyond the scope of this Article. Thus it is impossible at this stage to define the precise outer contours of the Fourteenth Amendment’s protection of conscience. But wherever that outer boundary should ultimately be established, for the reasons set forth above, it is clear that the Fourteenth Amendment includes some protection of conscience, and that protection at least includes the right to make one’s own decisions about personal participation in the central substantive due process issue of our time: abortion.