The Fourteenth Amendment Right of Conscience: *Roe*, *Casey*, and the Constitutional Right to Refuse

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ABSTRACT: Supreme Court precedents in *Roe* and *Casey* establish a pregnant woman's right to decide for herself whether to have an abortion. Do those same precedents also protect her doctor's right to decide whether to *perform* abortions? 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 physician asked to perform the abortion have rarely been explored. 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 physicians do indeed have a Fourteenth Amendment right to refuse to perform abortions. Ultimately, this historical analysis shows that the right to refuse actually has better historical support, and better satisfies the Court's stated tests, than the abortion right itself. A physician's right to make this decision without government compulsion also fits squarely within the zone of individual decision-making protected by the Court's opinions in *Casey* and *Lawrence v. Texas*, and protects physicians from the types of psychological harm that the Court recognized in *Roe* and *Casey*. For these reasons, under *Roe* and *Casey*, a physician has a Fourteenth Amendment right to refuse to perform abortions.[1]

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.

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Harris was herself 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.[2]

From that point on, Dr. Harris found that performing abortions "did not get easier" and that she grew to find the process "sadder."[3] Still, Dr. Harris chose to continue providing abortions. Indeed she wrote about her experience to draw attention to the psychological impact of providing abortions, in hopes that full and frank discussion would strengthen the pro-choice movement and help make abortions more widely available.[4]

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.[5] Still others perform abortions for a time and later decide they wish to stop.[6] 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 personally perform abortions or not.

What does the Constitution say about this state of affairs? Suppose that after the abortion described above Dr. Harris had 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,

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[2] Lisa H. Harris, "Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse," *Reproductive Health Matters* 16 (2008): 74.

[3] Ibid.

[4] Ibid.

[5] See David Barstow, "An Abortion Battle, Fought to the Death," *The New York 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 (ibid.).

[6] Bernard Nathanson, *The Hand of God: A Journey from Death to Life by the Abortion Doctor Who Changed His Mind* (Chicago IL: Regnery, 1996), pp. 140-141, explaining that Nathanson, co-founder 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.

perhaps citing the frequently reported shortage of willing physicians?[7]

Courts and commentators have repeatedly examined the Fourteenth Amendment rights of various parties in the abortion context, including the pregnant woman,[8] the fetus,[9] the states,[10] and the fetus's father.[11]

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[7] See, e.g., Rob Stein, "Abortions Hit Lowest Number since 1976," *The Washington Post* (January 17, 2008), noting that 87% of U.S. counties have no abortion provider.

[8] See, e.g., *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 progressed; *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 851 (1994), 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"; B. Jessie Hill, "Reproductive Rights as Healthcare Rights," *Columbia Journal of Gender & Law* 18 (2009): 502, arguing that the abortion right should be considered a "right to health"; 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," *California Western Law Review* 41 (2005): 507: "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"; Lynne Marie Kohm, "Sex Selection Abortion and the Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics," *William & Mary Journal of Women & Law* 4 (1997): 96: "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."

[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; Lawrence J. Nelson, "Of Persons and Prenatal Humans: Why the Constitution is Not Silent on Abortion," *Lewis & Clark Law Review*. 13 (2009): 156, 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, "Defending America's Children: How the Current System Gets it Wrong," *Harvard Journal of Law & Public Policy* 29 (2006): 720: "explor[ing] the connection between the mistreatment of children and the dehumanization of unborn children" and "offer[ing] an alternative framework, one that explicitly recognizes the innate right

These decisions often presume and rely upon the presence of a willing doctor to perform the abortion.[12] To date, though, none has explored in any depth whether the doctor has any Fourteenth Amendment rights to decide for herself whether to participate in abortions.[13]

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of all individuals to have their existence recognized and honored by the government and courts"; Amy Lotierzo, "The Unborn Child, A Forgotten Interest: Re-Examining *Roe* in Light of Increased Recognition of Fetal Rights," *Temple Law Review* 79 (2006): 280: "changes 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"; Dawn E. Johnsen, "The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection," *Yale Law Journal* 95 (1987): 600: "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."

[10] See, e.g., *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; *Casey*, 505 U.S. at 871.

[11] See, e.g., *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69-70 (1976), invalidating a state law designed to allow fathers the right to participate in the abortion decision; Melane G. McGulley, "The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to an Unborn Child," *Journal of Law & Policy* 7 (1998): 7-8, proposing "that 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, "Potential Fathers and Abortion: A Woman's Womb is Not a Man's Castle," *Brooklyn Law Review* 55 (1990): 1359, 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, e.g., id. at 116.

[13] Courtney Miller, Note, "Reflections on Protecting Conscience for Healthcare Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations," *Southern California Review of Law & Social Justice* 15 (2006): 347-48: dismissing the possibility, after one paragraph, that "the Court could extend the autonomy logic of...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."

Roe and *Casey* teach that the Fourteenth Amendment protects a pregnant woman's right to decide for herself whether or not to have an abortion. *Casey* in particular emphasizes that the Fourteenth Amendment protects not only the right to have an abortion but also the right to make the abortion decision without government compulsion.[14] *Casey* recognizes that the act of abortion is "fraught with consequences," not only for the woman who requests it but also "for the persons who perform and assist in the procedure."[15] Yet *Casey* is silent as to whether those asked to perform abortions have Fourteenth Amendment rights to decide for themselves whether to participate in abortions.

One possibility is that the same Fourteenth Amendment that protects a woman's right to decide for herself whether or not to *have* an abortion also protects the physician's right to decide for herself whether or not to *perform* one. Another is that, despite the Fourteenth Amendment, the government can compel an objecting physician to perform an abortion against her will. 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?

Until recently, that question has been largely irrelevant, because the right not to perform an abortion has been mostly secured through other mechanisms. Performing abortions was illegal for a large portion of our history, meaning that physicians were obligated by law *not* to provide them, and surely were not compelled by the government to do so.[16] When abortion became widely available after *Roe*, Congress and state legislatures enacted statutory conscience provisions to ensure that healthcare providers could not be forced to perform abortions against their will.[17] Moreover, at the time of the *Roe* decision, free exercise

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[14] *Planned Parenthood v. Casey*, 505 U.S. 833, 851, noting of the liberty interest 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."

[15] Ibid. at 852.

[16] See, e.g., *Roe* at 174-77 and n1 (Rehnquist, J., dissenting), reviewing legal prohibitions on abortion at the time of the Fourteenth Amendment); see also Part II infra.

[17] See, e.g., "Church Amendment," Public Law No. 93-45, § 401(B), 87 Stat. 91 (1973): "The receipt of any grant, contract, loan, or loan guarantee

claims under the First Amendment – historically the most popular vehicle for constitutional conscience claims against the government – were judged under the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). That test subjected substantial government burdens on religion to strict scrutiny – invalidating them unless narrowly tailored to support a compelling state interest.[18] These overlapping protections largely ensured that the government could not compel an unwilling individual to perform an abortion. There was little need to consider or explore whether the Fourteenth Amendment provided an independent layer of protection.

Recent developments, however, make the question of a Fourteenth Amendment conscience right particularly relevant now, both in the context of surgical abortion and beyond. Medical developments such as the availability of RU-486 (also called the "abortion pill") and emergency contraception (also called "Plan B," "ella," or the "morning after pill") have broadened the spectrum of healthcare providers likely to be asked to participate personally in what they may consider an abortion.[19] State laws permitting assisted suicide[20] and state protocols

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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 ;1225;1225in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions...." Md. Code Ann., Health-General § 20-214 (2010): ("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 Part II infra.

[18] Sherbert, 374 U.S. at 406-07.

[19] For example, for 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 Product Information," http://www.planbonestep.com/pdf/PlanBOne StepFullProductInformation.pdf, noting that Plan B "may inhibit implantation" (last visited April 24, 2010). Plan B has resulted in numerous federal and state lawsuits by pharmacists objecting to laws forcing them dispense the drug, because they believe they would be participating in abortion. See, e.g., *Morr-Fitz et al. v. Blagojevich*, 901 N.E.2d 373 (2008).

[20] See, e.g., *Oregon Rev. Stat*. § 127.800-127.897 ("Death With Dignity Act").

requiring physician participation in executions[21] have opened other arenas in which similar questions of life, death, patient rights and provider conscience may arise. The Supreme Court has discontinued its use of the conscience-friendly *Yoder* and *Sherbert* tests in favor of the *Smith* test, making it more difficult (though not impossible[22]) for religious plaintiffs to establish that government coercion violates the Free Exercise clause of the First Amendment.

Even more recently, the Department of Health and Human Services has begun to rescind administrative regulations allowing for conscience-based objections by healthcare workers, stating that those regulations were overly broad.[23] 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.[24] Increased government involvement pursuant to the recently-

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[21] See, e.g., *North Carolina Department of Corrections v. North Carolina Medical Board*, 675 S.E.2d 641 (N.C. 2009), rejecting authority of state medical board to declare participation in executions as unethical.

[22] See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

[23] See Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," 74 CFR 10207-1 (proposed Mar. 10, 2009). Despite this action, President Obama has publicly claimed that he is in favor of conscience protection but has not provided details. See, e.g., President Barack Obama, Commencement Address to the University of Notre Dame (May 17, 2009), transcript available in the White House Press Office: "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...."

[24] See, e.g., Kristen L. Burge, "When It Rains, It Pours: A Comprehensive Analysis of the Freedom of Choice Act and its Potential Fallout on Abortion Jurisprudence and Legislation", *Cumberland Law Review* 40 (2009-2010): 237; U.S. Conference of Catholic Bishops, Legal Analysis of General Counsel, http://www.usccb.org/prolife/FOCAanalysis.pdf (last visited April 24, 2010); National Right to Life, "Pro-Abortion Lawmakers Propose FOCA to Invalidate All Limits on Abortion," http://www.nrlc.org/foca/LawmakersProposeFOCA.html (last visited April 24, 2010); 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, "Catholic Hospitals Threaten Civil Disobedience over Proposed Abortion Bill,"

enacted healthcare legislation will likely present additional conflicts between government mandates and physician conscience.[25]

In light of these developments, an examination of whether the Fourteenth Amendment protects a physician's right to refuse to perform abortions is now needed. That examination, presented in the pages that follow, shows that the Fourteenth Amendment does indeed protect this right.

Part II of this article will review the analysis by which the Court typically decides whether to recognize a substantive right as protected by the Due Process Clause of the Fourteenth Amendment. This analysis will begin with *Roe* and *Casey,* which recognized a Fourteenth Amendment right to abortion. The Court's substantive due process analysis in *Roe* relied heavily on the history of abortion regulations and practices in the United States, finding that abortion historically had been "viewed with less disfavor" and had been more widely available than under then-current laws.[26] Based in large part on this analysis, the Court determined that the right to abortion was protected by the Fourteenth Amendment.[27] In *Casey*, the Court re-affirmed *Roe*, and emphasized the Fourteenth Amendment right as a personal autonomy right, protecting the right to make decisions about abortion without governmental compulsion, because the ability to make such decisions freely "define[s]

St. Louis Post-Dispatch (March 5, 2009), available at 2009 WLNR 4258592.

[25] For example, in Alaska, private hospitals that receive government funds have been required to permit their facilities to be used to perform abortions, despite their conscientious objections. See *Valley Hospital Association v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997). For an analysis of the implications of the 2010 healthcare reform bill on provider conscience, see The Federalist Society, "Comparison of Conscience Provisions in Health-Care Reform Bill" (March 18, 2010), http://www.fed-soc.org/publications/pubid.1801/pub_detail.asp (last visited April 24, 2010): "Both the House-passed and the Senate-passed health care reform bills include language that protects from discrimination health care providers who are unwilling to participate in abortions. However, the House language is broader in scope than the Senate language. Also, both bills have non-preemption clauses for federal conscience laws, but not for state conscience laws. Finally, neither bill includes conscience protection that would cover other controversial practices, such as the provision of emergency contraception or performance of sterilizations."

[26] *Roe*, 410 U.S. at 140-41.

[27] Ibid. at 164.

the attributes of personhood."[28]

Part II will also review the Court's constitutional test for recognizing substantive rights under the Fourteenth Amendment more broadly, focusing on the test as applied in three additional cases: *Cruzan v. Missouri Department of Public Health,*[29] *Washington v. Glucksberg,*[30] and *Lawrence v. Texas.*[31] Generally speaking, this analysis will show that the Court recognizes rights as protected under the Fourteenth Amendment when they are "fundamental rights and liberties that 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."[32]

With this test in mind, Part III provides a historical overview of a physician's ability to refuse to provide abortions. This historical review will show that at the time of the Founding, at the time of the Fourteenth Amendment, and to the present day, healthcare providers have generally been free to refuse to provide 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 conscience protections in statutory and common law.[33]

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[28] *Casey*, 505 U.S. at 846, 851: "These matters [marriage, procreation, contraception, family relationships, child rearing, and education], 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."

[29] 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.

[30] 521 U.S. 702, 728 (1997), rejecting an asserted right to physician-assisted-suicide.

[31] 539 U.S. 558, 567 (2003), finding a right to engage in private homosexual conduct.

[32] *Glucksberg*, 521 U.S. at 720-21, quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1932), recognizing rights protected by Due Process that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental…"; *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), finding those rights "implicit in the concept of ordered liberty" to be protected against state infringement by the Fourteenth Amendment Due Process clause.

[33] See Part II infra.

Part IV will then analyze whether this history shows that the right of physicians to refuse to perform 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 widely acknowledged importance of conscience and self-determination rights at the founding and throughout our history, the lack of any history of government forcing physicians to provide abortions, 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 immediately after *Roe*, this Part will conclude that a right to refuse abortions satisfies the Court's traditional analysis for protection under the Fourteenth Amendment.

Perhaps most surprisingly, this analysis also shows that the right to refuse to perform an abortion is not merely required by *Roe* and *Casey* – it actually *better* satisfies the required Fourteenth Amendment test than the abortion right itself. Indeed, the right of a physician to choose not to perform abortions has virtually never been questioned, was historically permitted (if not required) as a practical matter, and received strong and nearly ubiquitous legal protection immediately after *Roe*.[34] If the ability to procure an abortion – which was illegal, discouraged, and widely regarded as unethical for much of our pre-*Roe* history – passes the Fourteenth Amendment's historical inquiry, the conscience right does so with flying colors.[35]

This historical argument is bolstered by two additional points from *Roe*, *Casey* and their progeny. First, the physician's conscience right fits squarely within the zone of decision-making which the Court has deemed protected by the Fourteenth Amendment from government compulsion, because such decisions "define the attributes of personhood." When two individuals walk into an operating room – a pregnant woman and her doctor – there is little reason to believe that the Fourteenth Amendment protects only the rights of pregnant woman to "define [her] own concept of existence" by making her own decisions about the issue of abortion. Rather, the self-definition logic of *Casey*, as reaffirmed in *Lawrence*, suggests that the physician asked to actually perform the abortion likewise has a Fourteenth Amendment right to

[34] See Parts II and III infra.

[35] See Part III infra.

make her own decisions about whether to use her skills to end a pregnancy, and therefore to define her "own concept of existence."

Second, the conscience right is necessary to protect objecting physicians from the psychological consequences that they might face if forced to perform an abortion against their will. The Court's abortion cases recognize that protecting pregnant women from psychological harm related to the abortion decision was one of the reasons for establishing the abortion right in the first place.[36] Accounts from healthcare professionals who have performed or assisted with abortions – mostly from professionals who remain committed to keeping abortion legally available – make clear that they too can suffer psychological harm related to the abortion decision.[37] As with *Casey's* protected zone of decision-making, there is no reason to believe that the Fourteenth Amendment only protects one group of people (pregnant women) from psychological harm related to the abortion decision, but does so by permitting the government to force another group of people (namely, unwilling doctors) to suffer those psychological harms instead.

For these reasons, if *Roe*, *Casey*, and the Court's substantive due process analysis are to be taken seriously, those precedents require recognition of a physician's Fourteenth Amendment right to refuse to perform an abortion.

I. Understanding the Test

How Does the Court Determine 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. No great effort is required to find them; no one writes law review articles to prove their existence.

The task of identifying and enumerating substantive rights that are protected by the Fourteenth Amendment is more difficult. The word "conscience" does not appear in the Fourteenth Amendment. Nor, of course, do the words "abortion," "sex," or "refusal of lifesaving food

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[36] See Part I infra.

[37] See Part III infra.

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.[38] Regardless of the merits or demerits of this view, it is not currently the law in a strict sense, and the Court has found numerous substantive constitutional rights to be within the liberty interest protected by the Fourteenth Amendment.[39]

Analyzing whether the right of a physician to refuse to perform abortions is also within the liberty interest protected by the Fourteenth Amendment 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.

As to the standards, 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 decisionmaking in this unchartered area are scarce and open-ended."[40] 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."[41]

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[38] See, e.g., John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82 (1973): 920: "What is frightening about *Roe* is that this superprotected 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." At a deeper level, of course, one could argue that the absence of the word "substantive" before "due process" suggests that the framers of the Fourteenth Amendment simply meant that clause to provide procedural protections rather than substantive ones. As Michael Kent Curtis has explained in "No State Shall Abridge," the ratification debates for the Fourteenth Amendment suggest that the ratifiers understood the "privileges and immunities clause," if any clause at all, to guarantee substantive rights, not the due process clause.

[39] See, e.g., *Roe*, 410 U.S. at 129, finding constitutional right to abortion; *Lawrence v. Texas,* 539 U.S. 558 (2003), finding a right to engage in consensual homosexual sex in the privacy of one's home.

[40] *Glucksberg,* 521 U.S. at 720, quoting *Collins v. Harker Heiths*, 503 U.S. 115, 125 (1992).

[41] Ibid., quoting *Collins and Moore v. East Cleveland*, 431 U.S. 494, 502 (plurality opinion).

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 traditions, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[42] 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." 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."[43] For similar reasons, the Court has also "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest."[44]

Five cases from the modern era provide important guidance as to how the Court applies these factors to assertedly fundamental rights. Accordingly, before analyzing whether the physician's right to refuse to perform an abortion satisfies the test, it is worth reviewing these cases to develop our understanding of what types of rights do or do not meet the Court's requirements. The remainder of this section will therefore review how the Court made the historical determination in *Roe* and *Casey,* where it found a constitutional right to abortion, though never actually used the term "fundamental"; *Cruzan v. Missouri Dept. of Public Health*, 497 U.S. 261 (1990), which recognized a constitutional right to refuse unwanted medical treatment and assumed that the right extends to refusal of lifesaving food and hydration; *Washington v. Glucksberg*, 521 U.S. 702 (1997), which rejected an asserted right to physician-assisted-suicide; and *Lawrence v. Texas*, 539 U.S. 558 (2003), which found a right to engage in private homosexual conduct.

Each of these cases will help provide us with a roadmap as to how to properly analyze whether the Fourteenth Amendment protects the asserted right of conscience for physicians. In this regard, the historical

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[42] Ibid. at 720-21, quoting *Moore*, 431 U.S. at 503, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1932), and *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), (internal citations and quotation marks omitted).

[43] Ibid. at 722.

[44] Ibid. at 721.

analysis of abortion in *Roe* merits particular emphasis. As in other cases, the *Roe* history provides an example of the types of historical facts the Court looks for, and how those facts can satisfy the Court's test for Fourteenth Amendment protection. *Roe*'s history of abortion is especially relevant here, however, because it is in many ways the flip side of the history of conscience rights. That is, where abortion was illegal or widely viewed as unethical, it is very unlikely that governments were forcing physicians against their will to provide abortions. Moreover, the *Roe* history will be important as it relates to this article's ultimate conclusion, namely that the conscience right actually satisfies the Court's historical test for Fourteenth Amendment protection better than the abortion right does. For these reasons, let us begin with a close review of the historical analysis set forth in *Roe*.

Roe v. Wade – Fourteenth Amendment Right to Abortion

Of course, the Court's most famous and controversial decision in the substantive due process area is *Roe v. Wade*.[45] *Roe's* constitutional analysis begins with a survey of "the history of abortion, for such insight as that history may afford us."[46] 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.[47] 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."[48]

The Court next explained that the various translations of the Hippocratic Oath all clearly prohibit abortion.[49] The Court observed that

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[45] Although *Griswold v. Connecticut*, 381 U.S. 479 (1965), is clearly a precursor to *Roe*, the right to marital use of contraceptives recognized in *Griswold* was based on the "penumbras" of the Bill of Rights rather than on Fourteenth Amendment substantive due process. See *Griswold*, 381 U.S. at 484: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." In his *Roe* concurrence, Justice Stewart argued that *Griswold* "can be rationally understood only" as a substantive due process case. See *Roe*, 410 U.S. at 167-68 (Stewart, J., concurring).

[46] 410 U.S. at 129.

[47] Ibid. at 130.

[48] Ibid.

[49] The Court notes two possible translations: "I will give no deadly

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."[50] 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.[51] At that point, "resistance against suicide and against abortion became common" and the "emerging teachings of Christianity were in agreement."[52] 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."[53]

The Court next reviewed the common law related to abortion. The Court declared it "undisputed" that abortions performed before "quickening – the first recognizable movement of the fetus in utero" – were not indictable at common law.[54] The Court attributed this distinction to "a confluence of earlier philosophical, theological, and civil and 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."[55] 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.[56]

The Court further explained that there was some debate over whether abortion of a "quick" fetus was a felony or a lesser crime.[57] Thirteenth-century authority appears to have deemed abortion a homicide, though later common law scholars viewed it as a lesser

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medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion" or "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give a woman an abortive remedy" (ibid. at 131).

[50] Ibid.

[51] Ibid. at 132.

[52] Ibid.

[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Ibid. at 134.

offense.[58] Coke, for example, took the position that such an abortion was "a great misprision, and no murder."[59] Blackstone reports that abortion had once been considered manslaughter but that then-modern law took a less severe view.[60] 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."[61]

This common law remained in effect in most States until the mid-nineteenth century.[62] In 1821, Connecticut enacted the first abortion legislation. The Court noted that the act banned abortion after quickening, but "the death penalty was not imposed" and that Connecticut did not statutorily ban pre-quickening abortion until 1860.[63] In New York, on the other hand, a statutory ban enacted in 1828 outlawed abortion of both unquickened and quickened fetuses, though abortion of a quick fetus was deemed only manslaughter, and abortion of an unquickened fetus was a misdemeanor.[64] The Court reported that by the end of the Civil War, "legislation began generally to replace the common law," and "[m]ost of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening."[65] The quickening distinction gradually disappeared in the middle and late nineteenth century.[66]

The Court discounted the importance of these statutory abortion bans, considering and rejecting three possible historical bases for the laws. First, the Court noted that "it has been argued occasionally" that the laws were created to "discourage illicit sexual activity."[67] Noting that "no court or commentator has taken the argument seriously," the Court next considered that the laws were adopted because abortion is a medical procedure that, at least in the mid-nineteenth century, was dangerous.

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[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Ibid at 135-36 and n26.
[62] Ibid. at 138.
[63] Ibid.
[64] Ibid.
[65] Ibid. at 139.
[66] Ibid.
[67] Ibid. at 148.

Although high abortion mortality rates may have justified the laws at the time of passage, the Court found that modern medicine had made the procedure "relatively safe," at least in the first trimester.[68]

The Court noted a third reason for the abortion bans – the "theory that a new human life is present from the moment of conception."[69] The Court observed, however, that parties challenging state abortion laws had "sharply challenged" this claimed purpose and suggested instead that the presence of the quickening distinction, and the fact that the laws generally targeted not the mother but the person performing the abortion suggested that the laws were not about protecting prenatal life. Rather, the Court found "some support" for the notion that these laws were actually about regulating the greater health hazards inherent in late-term abortions.[70] The Court summarized its historical review of abortion law as follows:

> 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 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.[71]

After reviewing these laws, the Court next turned to the opinions of the medical community and the bar, with a particular focus on recent developments. The Court began this survey by noting that the American Medical Association shared the "anti-abortion mood prevalent in this country in the late 19th century."[72] Accordingly, the AMA Committeee on Criminal Abortion "deplored abortion" and attributed the crime to the "widespread popular ignorance of the true character of the crime – a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening." The AMA criticized doubts regarding

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[68] Ibid. at 149.
[69] Ibid. at 150.
[70] Ibid. at 151-52.
[71] Ibid. at 140-41.
[72] Ibid. at 141.

"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."[73] The AMA resolved that it should be "unlawful and unprofessional" for any physician to take part in an abortion.[74]

"Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967."[75] At that time, the AMA revised its position on abortion to permit abortions in cases of rape, incest, "incapacitating physical deformity or mental deficiency" or upon "documented medical evidence" of a threat to the life or health of the mother.[76] Just three years later, the AMA recognized "rapid changes in state laws and by judicial decisions which tend to make abortion more freely available" and resolved to make abortion available based on the standards of "sound clinical judgment" and "informed patient consent."[77] 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."[78]

In addition to this historical review, the Court specifically relied on the physical, mental, and psychological harm to a woman that would result from government denial of the right to have an abortion:

> Specific and direct harm medically diagnosable even early in pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or 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.[79]

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[73] Ibid. at 141.

[74] Ibid. at 142.

[75] Ibid.

[76] Ibid.

[77] Ibid. at 143-44.

[78] Ibid. at 143 n38. The Court further noted that the American Bar Association had recently formulated a proposed Uniform Abortion Act permitting early term abortions. See ibid. at 146-47 and n40, n41.

[79] Ibid. In the companion case of *Doe v. Bolton*, the Court similarly explained that a health exception in a Georgia abortion statute should be read so

For these reasons, the Court found that the Fourteenth Amendment protects a "right of privacy" that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[80]

Planned Parenthood of Southeastern Pennsylvania v. Casey:
Reaffirming the Fourteenth Amendment Right to Abortion

In Casey, the Court "affirm[ed] *Roe*'s central holding" concerning the basic allocation of the rights of the pregnant woman and the fetus, again locating the abortion right in the Fourteenth Amendment.[81] Two key aspects of *Casey* merit additional discussion here.

First, *Casey* more explicitly lodged the abortion right within a Fourteenth Amendment liberty interest of self-determination in matters involving procreation, contraception, marriage and family relationships. "These matters," the Court held, "involve the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment."[82]

The *Casey* Court also made clear that the pregnant woman's Fourteenth Amendment liberty interest includes not only the *act* of abortion but also the freedom to *make her own decision* about such weighty matters. The Court explained: "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."[83] The Court determined that the Fourteenth Amendment protects the pregnant woman's right to make her own

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that the physician's "medical judgment may be exercised in the light of 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." See *Doe v. Bolton* 410 U.S. 179, 192 (1973).

[80] Ibid. at 153. Interestingly, although expressly based on history and tradition, neither *Roe* nor *Casey* used the Court's later language about "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and traditions."

[81] *Casey*, 505 U.S. at 861: "the stronger argument is for affirming *Roe's* central holding with whatever degree of personal reluctance any of us may have, not for overruling it."

[82] Ibid. at 851.

[83] Ibid.

decisions about certain issues without "compulsion of the State" because the making of such decisions "define[s] the attributes of personhood."[84] In this way the *Casey* Court expanded upon *Roe's* emphasis on the act of abortion itself and found Fourteenth Amendment protection for the right to make decisions about abortion without government compulsion.

Second, and relatedly, the Court discussed the physical and emotional burdens related to the abortion decision, even where those burdens were historically imposed. For example, the Court explained that a woman forced to carry a pregnancy to term "is subject to anxieties, to physical constraints, to pain that only she must bear.... Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[85] Likewise, the Court explained that a woman who chooses abortion makes a decision that is "fraught with consequences" for herself and others and that the State may legitimately regulate the informed consent procedure to make sure she has complete information to protect her from later suffering the "devastating psychological consequences" of learning additional facts that might have led to a different decision.[86]

Thus the *Casey* Court built upon the right established by *Roe*'s historical analysis, characterized the Fourteenth Amendment's protection as extending to the right to a woman's right to make her own decisions about abortion, to shape her life based on "her own conception of spiritual imperatives," and to avoid the psychological and other health effects inherent in the forcing her to make either decision (childbirth or abortion) against her own will.

In the next two cases – *Cruzan v. Missouri Dept. of Public Health* and *Washington v. Glucksberg* – we will see how the Court conducts its Fourteenth Amendment historical analysis when presented with questions related not to the beginnings of life, but to its end.

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[84] Ibid.

[85] Ibid. at 852.

[86] Ibid. at 862.

Cruzan v. Missouri Dept. of Public Health: Fourteenth Amendment Right to Refuse Lifesaving Food and Hydration

In *Cruzan v. Missouri Dept. of Public Health*, 497 U.S. 261 (1990), the Court considered whether the Due Process Clause of the Fourteenth Amendment precluded Missouri from adopting a "clear and convincing evidence" test to determine an incompetent's wishes for the withdrawal of life-sustaining treatment.[87]

In rejecting that claim, the Court discussed whether the Fourteenth Amendment protects a liberty interest in refusing unwanted medication. As in *Roe*, the Court began its analysis with a history lesson, starting with the common law.[88] The Court noted that, at common law, "even the touching of one person by another without consent and without legal justification was a battery."[89] The Court explained that this "notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."[90] The doctrine of informed consent is "firmly entrenched" in American law.[91]

From the doctrine of informed consent, the Court explained that there is a "logical corollary" that a patient "generally possesses the right not to consent, that is, to refuse treatment."[92] The Court noted that most early "right to refuse" cases involved persons who refused treatment on religious grounds, thus implicating both free exercise interests and "common-law rights of self-determination."[93] After reviewing state court decisions on this issue, the Court concluded that a competent individual has "a constitutionally protected liberty interest in refusing unwanted medical treatment."[94] The Court assumed – though it did not expressly hold – that this liberty interest would include a "constitutionally protected right to refuse lifesaving hydration and nutrition."[95]

As in *Roe* and *Casey*, the Court acknowledged the profound importance of individual decision-making about matters of life and

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[87] Ibid. at 268-69.
[88] Ibid.
[89] Ibid. at 269.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] Ibid. at 278.
[95] Ibid. at 279.

death, noting that the "choice between life and death is a deeply personal decision of obvious and overwhelming finality."[96] For this reason, the Court found that Missouri "may legitimately safeguard the personal element of this choice through the imposition of heightened evidentiary requirements," namely requiring clear and convincing evidence of the patient's wishes.[97]

Washington v. Glucksberg: No Fourteenth Amendment Right to Assisted Suicide

Seven years later, in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court was asked to rule on the issue of whether a terminally ill patient had a Fourteenth Amendment right not only to refuse treatment, but to seek assistance in actively ending his or her life. Although its historical analysis had led the Court to assume a constitutional right to refuse treatment, the Court unanimously rejected the argument that the Fourteenth Amendment creates a constitutional right to physician-assisted suicide.[98]

The Court began its discussion by noting that the assisted suicide right it was asked to address had been formulated in a host of different ways by different parties and courts. Rejecting broad and vague characterizations of the right as the "right to die," the "liberty to choose how to die," "control of one's final days," "the right to choose a humane, dignified death," and "the liberty to shape death," the Court described the asserted interest much more specifically: "[T]he question before us is whether the 'liberty' specially protected by the Due Process

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[96] Ibid. at 281.

[97] Ibid.

[98] Every concurring opinion within *Glucksberg* agrees with the majority that no right to engage in physician-assisted suicide is constitutionally protected. See, e.g., 521 U.S. at 736 (O'Connor, J. concurring): "I join the Court's opinions because I agree that there is no generalized right to "commit suicide"; ibid. at 738 (Stevens, J. concurring), agreeing that "our holding today is fully consistent with a continuation of the vigorous debate about the morality, legality, and practicality of physician-assisted suicide"; ibid. at 752 (Souter, J. concurring), noting his separate agreement with the Court that "the statute's application to the doctors has not been shown to be unconstitutional"; ibid. at 789 (Ginsburg, J. concurring), agreeing with Justice O'Connor's concurrence; ibid. at 789 (Breyer, J. concurring), noting his agreement with Justice O'Connor's concurrence.

Clause includes a right to commit suicide which itself includes a right to assistance in doing so."[99]

Having so formulated the right – and thereby satisfied itself that it was now addressing a "carefully described" asserted right – the Court proceeded to test that right against the nation's history and practice. As in *Roe,* much of the Court's discussion focused on the laws of the states, and how they had treated the practice over time. The Court found that virtually every state had made it a crime to assist suicide. These criminal laws were "longstanding expressions of the States' commitment to the protection and preservation of all human life."[100] In fact, the Court noted that the tradition of outlawing both suicide and assisting suicide traced back for over 700 years during which the "Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[101] The Court noted that punishments for suicide sometimes varied. In the thirteenth century, for example, the punishment for committing suicide to avoid conviction and punishment (forfeiture of all real and personal property to the King) was more severe than for those who committed suicide "in weariness of life" or to avoid further pain (forfeiture of only movable property).[102] In either case, however, the suicide was deemed a felony. This common law tradition was generally adopted by the American colonies.[103]

The colonies eventually abandoned the harsh penalty of forfeiture, which of course fell on innocent offspring and spouses. The Court noted that this abandonment of the penalty for suicide "did not represent an acceptance of suicide; rather..., this change reflected the growing consensus that it was unfair to punish the suicide's family for his wrongdoing."[104] Thus although imposition of a penalty became disfavored, "courts continued to condemn [suicide] as a grave public wrong."[105] Thus suicide was deemed a "grievous, though non-felonious,

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[99] Ibid. at 722-23.

[100] Ibid. at 710.

[101] Ibid. at 711.

[102] Ibid. at 712, citing Bracton, *Laws and Customs of England*, ed. G. Woodbine, trans. S. Thorne (1968), vol. 2. pp. 423-24.

[103] Ibid. at 712.

[104] Ibid. at 713.

[105] Ibid. at 714.

wrong."[106]

The Court further explained that even though early American law did not impose a penalty on the person who committed suicide, they continued to view *assisting* suicide as akin to murder, on the principle that one cannot consent to homicide.[107] These common-law prohibitions did not contain any exception for those who were near death.[108] Statutory laws explicitly banning the assisting of suicide first appeared in 1828 and "[b]y the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide."[109]

As in *Roe* and *Casey*, the Court turned from its historical overview to modern treatments of assisted suicide. The Court stressed that, except for Oregon's "Death With Dignity Act" for terminally ill adults, the States have generally reaffirmed their assisted suicide bans, and that initiatives to change those bans have been overwhelmingly defeated. The Court noted that the federal government also expressed its condemnation of assisting suicide, with the Federal Assisted Suicide Funding Restriction Act of 1997.

In applying its substantive due process analysis to this history, the Court found itself "confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues to explicitly reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." Accordingly, the Court determined that the Fourteenth Amendment does not create a right to assisted suicide.[110]

Lawrence v. Texas: Fourteenth Amendment Right to Private Homosexual Conduct.

In 2003, the Supreme Court considered the constitutionality of a Texas statute outlawing homosexual sodomy. Revisiting its 1986 decision in *Bowers v. Hardwick*, the Court determined that such conduct is within the liberty interest protected by the Fourteenth Amendment.[111]

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[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid. at 715.
[110] Ibid. at 728.
[111] *Lawrence v. Texas,* 539 U.S. 558, 564 (2003).

As usual, the Court began with a historical overview. Less than two decades earlier in *Bowers*, the Court had rejected the claim of a fundamental right to homosexual sodomy, finding that proscriptions against such conduct had "ancient roots."[112] In *Lawrence,* the Court noted that there were "fundamental criticisms of the historical premises relied upon" in *Bowers*.[113] Upon examination of those historical criticisms, the Court found that the relevant historical premises from *Bowers* were "not without doubt and, at the very least, overstated."[114]

The *Lawrence* Court began by noting that there is "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter."[115] Rather, in both English and early American legal systems, the relevant laws generally prohibited nonprocreative sexual conduct regardless of whether the participants were of the same or different sexes.[116] The Court further noted that most prosecutions under the sodomy laws were for "predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault."[117] Moreover, of the "reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995," the Court found that "a significant number involved conduct in a public place."[118]

In contrast, the historical analysis showed that prosecutions for consensual sexual activity between adults in private were relatively rare. Such prosecutions were made even harder by common law evidentiary principles, which prohibited testimony by a consenting partner because the partner was deemed an accomplice.[119] The Court found that, whatever the reason, the "infrequency [of prosecutions] makes it difficult to say that society approved of a rigorous and systematic punishment of consensual acts committed in private and by adults."[120]

The Court ended its analysis by focusing on more modern history.

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[112] *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).
[113] *Lawrence,* 539 U.S. at 567.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.

The Court noted that, starting in the 1970s, some states began singling out homosexual conduct for criminal prosecution. However, only nine states had done so.[121] More importantly, the Court found that "over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them."[122]

Based on this history – on the lack of prosecutions under existing criminal laws, on the fact that historically laws had banned the relevant conduct for all citizens rather than just homosexuals, and the fact that states had recently been liberalizing their laws – the Court determined that the Fourteenth Amendment in fact provided substantive protection for the plaintiffs.

In addition to its emphasis on history (and its different view of that history as compared to *Bowers*), the Court also relied on *Casey*'s emphasis on personal autonomy and decision-making.[123] In particular, the Court explained that this aspect of *Casey* "cast [the *Bowers*] holding into even more doubt" because it affirmed that the Fourteenth Amendment protects "personal decisions" and the "autonomy of the person in making these choices" related to procreation and sexuality.[124] The Court again observed that the ability to make one's own decisions about the "concept of existence, of meaning, of the universe, and of the mystery of human life...define the attributes of personhood" and could not do so were they "formed under compulsion of the State."[125]

Summarizing The Analysis: Four Principal Lessons.

The above analysis of *Roe*, *Casey*, *Cruzan*, *Glucksberg*, and *Lawrence* yields some important lessons about how the Court actually applies the substantive due process analysis in the search for those "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." Four principal lessons emerge.

(1) The historical analysis requires only *de facto* freedom to engage

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[121] Ibid.

[122] Ibid.

[123] Ibid. at 573-74.

[124] Ibid.

[125] Ibid. at 574.

in the activity. First and foremost, these cases teach that much of the analysis is, as the test suggests, historical. 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 practice was even *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. Put differently, the historical analysis appears to be satisfied even by a showing of only *de facto* freedom, even if that freedom had not been *de jure*, i.e., 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.[126] These rights have been protected for centuries by tort law, through the causes of action for battery and for lack of informed consent.[127] But the Court's cases suggest that the historical inquiry can be satisfied even without this type of longstanding legal protection. Thus, despite the absence of any laws affirmatively protecting abortion, 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, and that early abortions had been punished less harshly than late abortions.[128]

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 that the law did not target homosexual sodomy in particular.[129] 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

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[126] See *Cruzan,* 479 U.S. at 269.

[127] Ibid.

[128] See *Roe*, 410 U.S. at 151-52.

[129] See *Lawrence*, 539 U.S. at 567.

punishment of consensual acts committed in private and by adults."[130]

Thus the Court's analysis shows that activities which were never expressly protected, and at times were expressly outlawed, can be recognized as fundamental rights "deeply rooted" in the nation's history and traditions.

(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. The Court ultimately aligned itself with these recent trends, despite the clear laws prohibiting abortion for much of the prior 150 years, including at the time of the Fourteenth Amendment. Likewise, in *Glucksberg*, the Court emphasized that all but one state to recently revisit its suicide laws had retained the ban against assisted suicide.

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.[131] 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. 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."[132]

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.[133]

(3) The court considers the burden imposed by denial of the right, including psychological burdens. Although not expressly mentioned as a separate part of the test, the Court clearly analyzes the burdens imposed by denial of the asserted right in deciding whether it should be

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[130] Ibid.

[131] *Lawrence* at 571-72.

[132] Ibid. at 572.

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

protected. 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.”[134]

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.”[135] Therefore, the Court could not ignore the “certain cost of overruling *Roe* for people who have ordered their thinking and living around that case.”[136] *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.”[137] 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.

(4) The Fourteenth Amendment protects not only the action but the right to make one’s own decisions without “compulsion of the state.” The Court’s decisions emphasize the importance of permitting the individual to make decisions about certain issues without government

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[134] Ibid.

[135] *Casey,* 505 U.S. at 856.

[136] Ibid.

[137] 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. *Casey* at 864, 869.

compulsion. Thus 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 such matters without government compulsion is itself part of the liberty protected by the Fourteenth Amendment:

> 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.[138]

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." 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" – "define[s] the attributes of personhood" and is therefore within the liberty interest protected by the Fourteenth Amendment.

II. Historical Analysis: Were Physicians Historically Free To Refuse To Perform Abortions?

As described above, the Supreme Court's analysis of whether a particular right falls within the liberty interest protected by the Fourteenth Amendment focuses heavily on history. Deciding whether the right of a physician to refuse to perform an abortion is "objectively, deeply rooted in this Nation's history and traditions," thus requires an analysis of whether physicians historically were free to refuse to perform abortions or, conversely, whether the government could force them to

[138] *Casey* 505 U.S. at 851 (citations omitted).

participate against their will.

As set forth below, the history in this regard tells a remarkably consistent story in the period prior to *Roe v. Wade*. While the common law English and colonial American treatments of abortion have been the subject of much dispute, both competing versions of that history suggest that physicians could not be compelled to perform abortions. Early medical ethics codes in the late-eighteenth and early-nineteenth centuries confirm that physicians were instructed not to participate in abortions – an injunction that would be difficult to follow if the state could force the physician to perform abortions against his will. From the middle of the nineteenth century until the time of *Roe*, abortion was largely illegal, and widely regarded as unethical, again making it highly unlikely that physicians could be compelled by the government to perform abortions.

After *Roe*, Congress and the state legislatures made the physician's right to refuse to perform abortions explicit. Both *Roe* and its companion *Doe v. Bolton*, acknowledged the variety of views among physicians about abortion, and relied upon the presence of a willing physician, acting in concert with a patient, deciding to perform an abortion. The Court in *Doe* noted that individual and institutional refusals to perform abortions were the subject of "appropriate protection" by state laws.[139] After *Roe* and *Doe*, both Congress and virtually every state government in the country adopted explicit statutory protection for individuals and hospitals to prevent them from being forced to perform or provide abortions.

In sum, this history strongly suggests that physicians were historically free from government compulsion to perform abortions.

Physicians & Abortion in English Common Law & Early American Law

The early history of abortion laws is the subject of heated dispute. *Roe* expressly grounded the right to abortion in its historical analysis, thus making the history of abortions laws a central battlefield in the abortion debate. Not surprisingly, the Court's emphasis on history has resulted in two competing views of the historical treatment of abortion. What may be surprising – and what is critically important here – is that the stories told by *both* camps in this heated dispute tend to confirm that

[139] *Doe v. Bolton,* 410 U.S. at 197-98 (1973).

physicians historically could not be forced by the government to provide abortions.

Roe, Mohr, and Means: The Court's Version of Early Abortion History

The view of abortion history set forth in *Roe* and championed by it supporters suggests that abortion was legal in the early stages of pregnancy at common law, and even later in pregnancy was punished less harshly than murder. Yet nothing in *Roe* or the historical accounts with which it is often associated suggests that physicians could ever be forced by the government to provide abortions.

The history presented in *Roe*, and described above, focused heavily on the concept of "quickening," i.e., the time at which the pregnant woman first felt fetal movement.[140] According to the Court, abortion had not been a crime at all prior to quickening, either at English common law or in pre-nineteenth century American colonies and states.[141] The Court acknowledged that abortion after quickening was a crime, but emphasized that it carried a lesser penalty than murder.[142]

For proponents of *Roe's* version of events, 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 out to have been a pregnancy until the existence of that pregnancy was incontrovertibly confirmed by the perception of fetal movement.[143]

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[140] Ibid. at 132-34.

[141] Ibid.

[142] Ibid.

[143] James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (New York NY: Oxford Univ. Press 1978), at pp. 3-4. This version of abortion history was also endorsed by a group of 250 history professors who submitted an *amicus* brief to the Supreme Court in

Mohr also discusses a range of techniques used by early American women to end their pregnancies, chiefly relying on "the home medical literature of the day."[144] In addition, Mohr reports that information on abortion and abortifacients was available "from midwives and midwifery texts"[145] and from "herbal healers...and other irregular practitioners of the day."[146] 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.[147] 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.[148]

Despite suggesting that physicians may have felt business-related pressure from patients to perform pre-quickening abortions, however, Mohr is quite clear in his assertions that there were absolutely 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."[149] Mohr's discussion of post-1800 laws focuses entirely on laws designed to restrict or prohibit abortion, not promote it. Thus Mohr's account supports the notion that physicians could not be compelled by the government to provide abortions at common law.[150]

Indeed, none of the key historical accounts relied upon by the pro-

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Casey. See 1992 WL 12006403 at *5: "Both common law and popular American understanding drew distinctions depending upon whether the fetus was 'quick,' i.e. whether the woman perceived signs of independent life."

[144] Mohr, p. 6.

[145] Mohr, p. 11.

[146] Mohr, p. 11.

[147] Mohr, p. 14.

[148] Mohr, pp. 14-15.

[149] Mohr, p. vii.

[150] Mohr also points out that in this early period abortion "was not thought to be a means of family limitation" (p. 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" (ibid.). In light of the societal disapproval of sex outside of marriage, it is highly unlikely that the government would simultaneously compel physicians to provide these women with abortions.

Roe camp suggests that the government ever had this power. For example, the Court in *Roe* discusses the long history of how society has treated abortion in a variety of cultures since ancient times. Central to *Roe*'s argument is the notion that "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today."[151] Yet nowhere in *Roe* does the Court suggest that any government in England, colonial America, or the United States had ever affirmatively forced physicians to provide abortions against their will. Such evidence, if it existed, would have powerfully supported the Court's central argument.

Much of the history recited in *Roe* is derived from the work of Cyril C. Means, Jr.[152] Means was the general counsel of the National Association for the Repeal of Abortion Laws (NARAL)[153] and his work was funded by the Association for the Study of Abortion, a group working to liberalize abortion laws.[154] 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.[155] From this premise, Means argued for an abortion right based either on the common law or the Ninth Amendment.[156]

Yet nowhere does Means even suggest that physicians could be forced by the government to provide abortions. To the contrary, Means explains that the common law merely "tolerated" 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

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[151] *Roe*, 410 U.S. at 140-41.

[152] Ibid. at 132-35.

[153] The original NARAL later became the National Abortion Rights Action League, the National Abortion and Reproductive Rights Action League, and now NARAL-Pro Choice America.

[154] Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham NC: Carolina Academic Press, 2004) at p. 14.

[155] Cyril C. Means, "The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?" in *New York Law Forum* (1971): 335.

[156] Ibid.

abortion, "he who had performed it was *hanged.*"[157] As Means explains, even if abortion was "tolerated" at common law, this strong governmental response to error provided a strong 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.[158]

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 physicians. 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.[159]

Ultimately, the *Roe*/Mohr/Means version of abortion history – which was echoed in historians' briefs filed with the Supreme Court in *Casey*[160] – suggests the following about whether physicians could historically be compelled to provide abortions. First and foremost, there is no

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[157] Means, p. 437 (emphasis supplied).

[158] Ibid.

[159] Means, "The Law of New York concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality" (pt. 1), *New York Llaw Forum* 14 (1968): 434 (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."

[160] See 1992 WL 12006403.

indication in these histories that physicians ever were, or ever could be, forced by the government to provide abortions. Such evidence, if it existed, would have powerfully supported the central arguments of these historians. 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." 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, there were severe government-imposed disincentives for physicians to provide them. In sum, nothing in the *Roe* version of history suggests that physicians were compelled to provide abortions during this time.

Critics of *Roe's* Version of Abortion History

Opponents of the *Roe* version of abortion history tell a different story about the historical legality of abortion. In particular, they 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.[161]

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[161] See also Lynn Wardle, "Time Enough: *Webster v. Reproductive Health Services* and the Prudent Pace of Justice," *Florida Law Review* 41 (1989): 985, noting that *Roe*'s suggestion that abortion was not established as a common law crime "has been thoroughly discredited"; Jeffrey D. Jackson, "Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights," *Oklahoma Law Review* 62 (2010): 218: "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"); Paul Benjamin Linton, "*Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court," *St. Louis University Public Law Review* 13 (1993): 106: "These decisions, together with the dozens of abortion prosecutions reported in the digests, lay to rest the doubt expressed in *Roe* that

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."[162] Dellapenna quotes several early commentators on the common law to suggest that abortion has been a criminal act since the inception of the common law. For instance, around 1250 Lord 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."[163] Dellapenna focuses on the disjunctive description "formed *or* animated" to argue that "[i]f 'animation' means 'quickening' (as it would later be understood) then Bracton did not require 'quickening' before there would be a 'homicide'; the foetus merely must be formed even if it is not yet animated."[164]

Dellapenna also cites a case from 1281, *Rex v. Code*, to show that "'quickening' in the modern sense was not required."[165] In this case, four men were charged, and three convicted, of causing a woman to "give birth to a certain abortive child of such an age that it was unknown whether it was male or female."[166] The fact that the sex could not be determined indicates the abortion was pre-quickening.[167] More importantly, writes Dellapenna, "none of the defendants made an issue of the gestational age of the dead child."[168]

'abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus'"; John Keown, "Back to the Future of Abortion Law: *Roe*'s Rejection of America's History and Traditions," *Issues in Law & Medicine* 22 (2006): 3, concluding that abortion was, in fact, a crime at common law.

[162] Dellapenna, p. xii.

[163] Ibid. at 132.

[164] Ibid.

[165] Ibid. at 140.

[166] Ibid. at 138, quoting *Rex v. Code*, JUST 1/789, m.17 (Hampshire Eyre 1281).

[167] Ibid. at 140.

[168] Ibid. Dellapenna also cites a seventeenth-century English case in which a woman was convicted of aborting another woman before quickening (ibid. at 185).

As to colonial America, Dellapenna writes 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."[169] As an example, Dellapenna describes two cases in which men were charged with murder for inducing pre-quickening abortions in Maryland.[170]

Like the historians whose work supports the *Roe* version of this history, nothing in Dellapenna's work suggests that physicians were or could be forced to provide abortions Ultimately, if the Dellapenna view of history is correct, then abortion was a serious crime at both English and colonial American common law. Surely physicians were free to follow the law and not provide illegal abortions; indeed, under this view they were compelled by the government *not* to provide abortions.

Emerging Codes of Medical Ethics

In addition to the evidence from the conflicting historical accounts of the legality of abortion itself, emerging codes of medical ethics at the end of the eighteenth and into the nineteenth centuries further support the notion that physicians likely were not compelled to provide abortions.

For example, the Court in *Roe* explained that Hippocratic Oath which "has stood so long as the ethical guide of the medical profession" prohibited doctors from providing abortions.[171] The Court explained that, after antiquity, the abortion-prohibiting Oath "became the nucleus of all medical ethics and was applauded as the embodiment of truth."[172] 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*.[173] Percival's *Medical Jurisprudence*

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[169] Ibid. at 220.

[170] Ibid.

[171] Ibid.

[172] Ibid.

[173] See *The American Medical Ethics Revolution*, ed. Baker et al. (Baltimore MD: The Johns Hopkins Univ.Press, 1999), p. xv. The American Medical Association relied heavily on Percival's code for its own initial code of medical

was the first code of medical ethics of its kind, either in England or the United States.[174] The code was revised and circulated more broadly under the title *Medical Ethics* in 1803. 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."[175] 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.[176]

Physicians 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 – 36 state and territorial legislatures had enacted laws restricting abortion.[177] 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. The quickening distinction gradually disappeared entirely in the middle and late nineteenth century.[178]

These legislative developments occurred against a backdrop in which medical authorities, the popular press, and religious leaders

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ethics in 1847 and later called Percival's "the most significant contribution to Western medical ethical history subsequent to Hippocrates." See http://en.wikipedia.org/wiki/Thomas_Percival, citing AMA's "Short History of Medical Ethics."

[174] Robert Baker, *Codes of Ethics: Some History* (Illinois Institute of Technology Center for the Study of Ethics in the Professions), vol. 19, No. 1 (Fall 1999).

[175] Frederick N. Dyer, *The Physicians' Crusade Against Abortion* (Sagamore MA: Science History Publications, 2005), p. 10.

[176] See *The American Medical Ethics Revolution*, supra n173.

[177] See *Roe*, 410 U.S. at 175 and n. 1 (Rehnquist, J., dissenting).

[178] *Roe* at 139.

publicly and unequivocally denounced abortion. For example, *The New York Times* condemned abortion in 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."[179] Similarly, *The New York Tribune* criticized "[t]he murder of children, either before or after birth."[180] In 1869, 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."[181] 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."[182]

Likewise, medical authorities at the time expressly forbade participation in abortion. For example, in 1859 the AMA unanimously approved a report deeming abortion the "unwarrantable destruction of human life."[183] 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."[184] The AMA resolved that it should be "unlawful and unprofessional" for any physician to take part in an abortion.[185] Moreover, as the Court reported in *Roe*, the Hippocratic Oath prohibited abortions and was accepted as "the nucleus of all medical ethics."[186] Physicians at the time frequently referred to the Oath when condemning abortion.[187]

These highly restrictive abortion laws and ethical prohibitions on abortion generally remained in effect through the first half of the twentieth century, a period described as "remarkably free from debate

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[179] Editorial, "The Evil of the Age,"*New York Times* (Aug. 23, 1871) p. 6.

[180] Mohr, p. 180, quoting *New York Tribune* (Jan. 27 1868), internal quotation marks omitted.

[181] Ibid. at p. 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).

[182] Ibid. at 188-89.

[183] Mohr, p. 157.

[184] Ibid. at p. 141.

[185] Ibid. at p. 142.

[186] Ibid.

[187] Dyer, p. 12.

about abortion."[188] One would expect to find a clear historical record if the government were forcing physicians to violate these ethical requirements and perform abortions during these pre-*Roe* periods; yet no such record exists.

Discussion of Physicians in *Roe, Doe,* and *Casey*

The Court in *Roe*, *Doe*, and *Casey* did not directly address whether physicians have a constitutional right of conscience to refuse to participate in abortions. Nevertheless, the discussion of the abortion right in those cases – and particularly the discussion of physicians – is instructive for our thinking about the historical ability of physicians to decide whether to personally participate in abortions.

First and foremost, the abortion right discussed in *Roe* clearly suggests that a physician will ultimately decide whether or not to perform the abortion. Thus the Court explains that the decision to perform an abortion is for the "attending physician, in consultation with his patient."[189] 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."[190]

In fact, after discussing the physicians' freedom to make the abortion determination, the Court said its decision "vindicates the right *of the physician* to administer medical treatment according to his professional judgment."[191] 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."[192]

Second, the Court commends the abortion decision to the physician's individual judgment with full knowledge of the obvious fact that many doctors believe abortion to be the taking of innocent human life. For example, the Court noted that the view that life begins at conception, and that "this is a view strongly held...by many physicians."[193] The Court also cites to the AMA's resolution that "[n]either physician, hospital, nor hospital personnel shall be required

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[188] Laurence Tribe, *Abortion: The Clash of Absolutes* (1990), p. 34.
[189] *Roe*, 410 U.S. at 163.
[190] Ibid.
[191] Ibid. at 165-66 (emphasis supplied)
[192] Ibid. at 166.
[193] Ibid. at 160-61.

to perform any act violative of personally-held moral principles."[194]

Together, the Court's characterization of the abortion right as (at least in part) a "right of the physician" to exercise his or her own medical judgment, and its acknowledgment that many physicians would not perform abortions at least suggest that the Court did not envision 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 a Georgia 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 obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital.[195]

The Court's reference Georgia's conscience provisions as "appropriate protection" for physicians provides further evidence that *Roe* was not understood by the Court as requiring anyone to perform abortions.

In *Casey*, the Court again recognized the impact of abortion on the physician, explaining that the abortion decision was "fraught with consequences" not only for the woman who requests it but also "for the persons who perform and assist in the procedure."[196]

Together, *Roe*, *Doe*, and *Casey* strongly suggest that the Court viewed physician participations in abortion to be matters which the individual physicians would be "free to determine" for themselves.

Response to Liberalization and *Roe:* Express State and Federal Conscience Protections for Physicians

As the presence of the Georgia conscience protection in *Doe* makes clear, even before *Roe* was decided, states that permitted abortion were taking clear action to protect those physicians or hospitals who objected

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[194] Ibid. at 143 n38,.noting that the American Bar Association had recently formulated a proposed Uniform Abortion Act permitting early term abortions; se ibid. at 146-47 and n40, n41.

[195] *Doe*, 410 U.S. at197-98 (1973).

[196] Ibid. at 852. 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 (ibid. at 882).

to participation in abortions. In 1971, New York enacted a criminal law prohibiting discrimination against any person for their refusal to participate in abortions.[197]

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 provide abortions.[198] Most of these statutes arose in the decade following *Roe*.[199] Some states expressly limit this protection to the practice of abortion, which is treated specially.[200] Other states protect conscience more broadly.[201]

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[197] New York Civil Rights Law § 79-i: "Discrimination against person who refuses to perform certain act prohibited. 1. When the performing of an abortion on a human being or assisting thereat is contrary to the conscience or 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. A violation of the provisions of this section shall constitute a misdemeanor. 2. No civil action for negligence or malpractice shall be maintained against a person so refusing to act based on such refusal."

[198] See, e.g. "NARAL Pro-Choice America, Who Decides? The Status of Women's Reproductive Rights in the United States (2006)," http://www.naral.org/choice-action-center/in_your_state/who-decides/maps-and-charts/map.jsp?mapID=11 (last visited July 31, 2010), noting that forty-seven states and the District of Columbia "allow certain individuals or entities to refuse to provide women with specific health services, information, or referrals."

[199] See Lynn D. Wardle, "Protecting the Rights of Conscience of Health Care Providers," *Journal of Legal Medicine* 14 (1993): 180-81: explaining that "[m]ost 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."

[200] See, e.g., *Hawaii Rev. St.* 453-16.

[201] For example, Illinois has a Health Care Right of Conscience Statute. See 745 ILCS 70/2. 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

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 facilities were prohibited from discriminating against employees who refused to provide abortions.[202]

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....

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refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of healthcare 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 healthcare services and medical care" (ibid).

[202] § 300a-7(c)(1) 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."

> 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....[203]

Without further discussion, the House promptly passed the amendment and the bill 372-1.[204] The Church Amendment was ultimately enacted and signed into law in 1973.[205]

In the years since *Roe,* Congress has enacted additional laws designed to protect healthcare workers who refuse to perform 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." 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. The Danforth Amendment protects refusals to participate in abortion or abortion-related services for any reason, and it is not limited to religious objections. Likewise, in 2004, 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.

Thus in a variety of ways, and at both the state and federal levels, legislators acted quickly, decisively, and often nearly unanimously to protect conscience rights in the wake of *Roe*.

III. The Physician's Constitutional Right to Refuse to Perform Abortions.

In light of these historical facts, the final question to consider is whether a physician's ability to refuse satisfies the Court's historical test

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[203] *Congressional Record* 119 (1973): 17462-63.

[204] Ibid.

[205] 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 objectionable 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," *Congressional Record* 119 (1973): 9602. He therefore supported the "full protection to the religious freedom of physicians and others" (ibid.).

for protection under the Fourteenth Amendment. Can it be said that the physician's right to refuse is one of "those 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"?[206]

As discussed in more detail below, the answer is yes, for at least three reasons. First and foremost, the unique history of abortion-related conscience protections shows a collective judgment, arguably over the entire history of the country, that physicians should not be forced to perform abortions. That history satisfies the Court's stated inquiry and, in fact, does so far better than the histories upon which the Court relied in *Roe* and *Lawrence.* Second, the physician's right of conscience fits squarely within the sphere of liberty to make one's own decisions about such life-and-death issues "without government compulsion," which the Court said was protected by the Fourteenth Amendment. Third, recognition of the right is necessary to protect objecting physicians from governmental imposition of psychological harm if forced to perform abortions.

The Right to Refuse to Perform Abortions Satisfies the Historical Test and Does So Better than *Roe* and *Lawrence*.

The protection of individual conscience from governmental compulsion is a long-honored value in American history, pre-dating even the Constitution. 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 people or certain religious sects – new colonies emerged to provide even greater freedom.[207]

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[206] Ibid. at 720-21, quoting *Moore*, 431 U.S. at 503, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1932), and *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)) (internal citations and quotation marks omitted).

[207] See Michael W. McConnell, "The Origins and Historical Understanding of the Free Exercise of Religion," *Harvard Law Review* 103 (1989) 1424-25, noting that Rhode Island was founded by Roger Williams as a refuge for dissenters from the Massachusetts establishment. Judge McConnell also describes how a variety of state and local governments provided exemptions from various laws to accommodate religious objectors (pp. 1466-73).

This emphasis on freedom of conscience had not waned by the time of the Founding. Thomas Jefferson, for example, wrote that the government only had "authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit."[208] Jefferson also maintained that forcing a person even to contribute money to a cause to which he or she abhorred was "tyrannical."[209]

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.[210]

In fact, Madison described conscience as "the most sacred of all property"[211] 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."[212]

George Washington wrote that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle,"[213] 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.[214]

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[208] Thomas Jefferson, *Notes on Virginia* (1782).

[209] Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779).

[210] James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1875) (emphasis added).

[211] James Madison, *Property* (March 29, 1792).

[212] James Madison, Speech Delivered in Congress on Religious Exemptions from Militia Duty (Dec. 22, 1790).

[213] Michael Novak & Jana Novak, *Washington's God* (2006), p. 111

[214] George Washington, Letter to the Annual Meeting of Quakers (Sept. 1879).

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." *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940). In *West Virginia State Board of Education v. Barnette*, the Court considered a public school policy requiring students to recite the pledge against their religious convictions. 319 U.S. 624 (1943). 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 statute 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.[215]

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 part of an instrument of war."[216]

When the Court has seemed somewhat less protective of individual conscience right, 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. Likewise, under cases such as *Wisconsin v. Yoder* and *Sherbert v. Verner*, the Supreme Court used to afford strong protections to individual claims of religious conscientious objection, requiring a compelling state interest

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[215] *West Virginia State Board of Education v. Barnette* at 642.

[216] *Welsh*, 398 U.S. 333, 344 (1970), affirming *Seeger*, 380 U.S. 163 (1965).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 (ibid. at 343, quoting *Welsh*).

before substantial burdens could be imposed. In 1992, 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. 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*. While RFRA remains in force as a statutory standard governing infringements on religion by the federal government, the Court invalidated RFRA's provisions applicable to state governments.[217] 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.[218]

Our nation's general commitment to rights of conscience has been even greater in the specific context of abortion. First and foremost, the historical record is devoid of any indication that any Anglo-American government ever had, or ever tried to exercise, the right to force individual physicians to perform abortions. Many historical accounts – including those by Mohr, Means, and Justice Blackmun – 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. To the contrary, all of these sources note that many doctors refuse to perform abortions, but nowhere suggest that the law required (or even should require) otherwise.

This record suggests that physicians were historically free to refuse to perform abortions. Under one view of this history, abortion was illegal at all stages of pregnancy for most of the eight centuries before *Roe*, thus suggesting that it would have been illegal for physicians *not* to refuse. But even if abortion was legal before quickening (as *Roe* and other accounts suggest), there is no indication that physicians were forced to provide them. In fact, these historical accounts suggest that, far from requiring doctors to perform abortions, these governments treated physicians who provided abortions quite harshly, in that they could be hanged if a woman died from an abortion. Likewise, both the Hippocratic Oath and the earliest English and American codes of

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

[218] See, e.g., 775 ILCS 35 (Illinois Religious Freedom Restoration Act).

medical ethics forbade providing abortions, which would be odd if, in fact, the government could require them.

Furthermore, the emphasis on quickening in the *Roe* version of history tends to confirm that, at the very least, physicians 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 in either place 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." The Court also noted that the law treated abortions earlier in pregnancy less punitively than later abortions.[219] Based on this analysis, the Court found the abortion right to have sufficient historical grounding for Fourteenth Amendment protection.[220]

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[219] 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 non-felonious wrong" (*Glucksberg* at 714). 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" (ibid. at 775-77). 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*.

[220] 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

Likewise, in *Lawrence*, the Court noted that nonprocreative 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." 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." Based on this history, the court found that the right upheld in *Lawrence* had sufficient historical grounding for substantive due process protection.

The historical liberty of a physician not to be compelled by government to provide abortions 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 deemed it to satisfy the test of being "deeply rooted in the Nation's history and traditions." In contrast, there is no evidence that it has ever been illegal for a physician to refuse to provide abortions. Far from being illegal, refusing to perform an abortion was affirmatively legally *required* conduct in many circumstances. Prosecutions for such refusals do not appear to be merely "infrequent" as in *Lawrence* – they appear to be non-existent entirely. Based on this pre-*Roe* history alone, it seems clear that the right of physicians to not perform abortions meets the Court's historical test for Fourteenth Amendment protection.

But it is the near unanimous – and virtually immediate – action of state and federal governments to protect conscience in the wake of *Roe* that marks the conscience right as fundamental. In the years prior to *Roe*, at least fourteen states had already liberalized their abortion laws.[221] The American Medical Association, which since its founding had vocally opposed abortion, in 1970 resolved to make abortion more available

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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)).

[221] See *Roe v. Wade* 410 U.S. at 140: "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..."

based on the standards of "sound clinical judgment" and "informed patient consent."[222]

As set forth above in Part III.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."[223]

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 clause to protect physicians from being forced to perform abortions.[224] Federal legislators likewise moved immediately and with near unanimity to protect physicians from being forced to provide abortions. There is no indication that these legislative actions were understood to be changing the pre-*Roe* status quo; to the contrary, they were expressly designed to protect the liberty of physicians to continue refusing to perform abortions now that 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 surprising 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. Senator Ted Kennedy – frequently criticized from the right for his support for legalized abortion – strongly supported conscience rights in the form of the

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[222] Ibid. at 143-44.

[223] Ibid. at 143, n.38. The Court further noted that the American Bar Association had recently formulated a proposed Uniform Abortion Act permitting early term abortions. See ibid. at 146-147 and n. 40, 41. *See also supra* note __, discussing Cyril Means's approval of New York liberalization bill protecting physician conscience.

[224] 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., 775 ILCS 35 (Illinois Religious Freedom Restoration Act).

Church Amendment.[225] President Obama – often called the "most pro-abortion president" in history[226] – likewise says he supports some sort of conscience protection.[227] Indeed, even NARAL Pro-Choice America concedes that conscience protections for individual objectors "may" be appropriate.[228]

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 12 weeks or 20 or 28?). They cannot agree on history (was pre-quickening abortion a crime at common law or not?). They cannot even agree on language (is it a fetus? A baby? The products of conception? Should the sides of the dispute be labeled as "pro-life," "pro-choice," "anti-abortion," "pro-abortion" or something else?). Yet amidst this widespread, heated and seemingly unending disagreement, we see something remarkable – essentially unanimous agreement from state and federal governments that physicians cannot be forced to perform abortions.

Again, this broad agreement compares quite favorably to the recent liberalization trends the Court noted in *Roe* and in *Lawrence*. In *Roe*, the

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[225] 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 objectionable 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."

[226] See, e.g., Mark Imponmeni, "The Most Radically Pro-Abortion President in History," http://www.redstate.com/mark_i/2009/03/01/the-most-radically-pro-abortion-president-in-history/; Steven Ertelt, "Barack Obama the Most Pro-Abortion President Ever, Congressman Pence Says," http://www.freerepublic.com/focus/f-news/2435699/posts.

[227] See Obama, supra n22.

[228] See http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/fast-facts/refusal-to-provide-medical.html, opposing conscience protection for institutions such as Catholic hospitals, but conceding that "carefully crafted refusal clauses may be acceptable in some circumstances to protect individuals who oppose certain treatments."

Court noted "about one-third" of the states had changed their abortion laws.[229] In *Lawrence*, the Court observed that "over the course of the last decades" nine states had moved toward abolishing their laws targeting homosexual sex. In contrast, here virtually all of the states in the union and the federal government have declared their view that the government cannot compel physicians to perform 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.[230]

For these reasons, the physician's right to refuse to perform abortions qualifies under the Court's historical test for protection under the Due Process Clause of the Fourteenth Amendment.

The Right to Refuse to Perform Abortions Fits Squarely Within *Casey*'s Right of Self-Determination

The right to refuse to perform abortions also fits within the scope of the liberty interest defined in *Casey*, and reaffirmed in *Lawrence. Casey* and *Lawrence* explained that the Fourteenth Amendment protects a right of individual decision-making – without compulsion from the state – on certain matters "relating to marriage, procreation, contraception, family relationships, child rearing, and education." The Court noted that decisions about such matters are "central to personal dignity and autonomy, [and] central to the liberty protected by the Fourteenth Amendment." For this reason, the Court explained that the Fourteenth Amendment's liberty interest encompasses "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."

For a physician as much as for a pregnant woman, "beliefs about...matters" such as abortion can "define[s] the attributes of personhood." According to *Casey* and *Lawrence,* the Fourteenth Amendment protects her liberty to make that decision on her own, based on her own judgments about the value of life, rather than "under compulsion of the State." Casey acknowledges that the pregnant

[229] See *Roe v. Wade* 410 U.S. at 140.

[230] *Lawrence* at 571-72.

woman's destiny "must be shaped to a large extend on her own conception of her spiritual imperatives and her place in society."[231]

A law compelling the physician to use her hands, mind, and skills to perform abortions against her will would infringe upon her ability to define her own personhood – namely, as a person who would not perform an abortion. Such a law would deprive the physician of her right to define her own "concept of existence" and of the "mystery of human life," and deprive her of the right to shaper her own destiny based on "her own conception of her spiritual imperatives and her place in society."

Protection for this sphere of individual decisionmaking is actually quite consistent with the constitutional principle that the right to *do* something usually includes the right to decide *not to do it*. Thus, the First Amendment expressly protects a right to engage in speech, and the Court has expressly held that there is a corresponding constitutional right *not to* speak.[232] The Free Exercise Clause protects the right to worship a deity, and the Court has expressly found that it also protects the right not to worship a deity at all.[233] The Court in *Cruzan* deemed it the "logical corollary" of the right to consent to medical treatment that a patient "generally possesses the right not to consent, that is, to refuse treatment," and that such refusals implicated "common-law rights of self-determination."[234] *Roe* and *Casey* established a right to abortion, which the Court has held creates a corresponding right not to abort.

In a similar vein, *Roe* established "the right of the physician" to to perform abortions and to administer treatment according to her judgment.[235] As with the rights described above, it is logical to conclude that this right to perform abortions includes the option *not to* perform abortions.

Nor is recognition of the physician's independent decision-making ability in this sphere inconsistent in any way with a woman's right to abortion. Generally speaking, rights recognized or granted by the Constitution are rights against the government – they are not rights to

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[231] Ibid. at 852.

[232] See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977).

[233] See, e.g., *County of Allegheny v. American Civil Liberties Union*, 492 US 573 (1989).

[234] *Cruzan*, 497 U.S. at 269.

[235] *Roe*, 410 U.S. at 163

force other private individuals to respect or facilitate one's own behavior. Thus, for example, although a shopper has a First Amendment right to be able to purchase a Bible, it includes no right to have the government force any particular unwilling bookseller to sell one.

Lawrence provides a particularly apt example of this principle. In *Lawrence,* the Court recognized a right to engage in homosexual sex. It grounded that right in the Fourteenth Amendment, and specifically in the self-determination right to make one's own decisions about sexual matters. It would be absurd to suggest, however, that the right to homosexual sex in *Lawrence* includes the right to have the government force unwilling private individuals to facilitate or participate in the exercise of that right. Just as the plaintiffs in *Lawrence* have a protected Fourteenth Amendment right to form their own beliefs about sexual matters without "compulsion of the State," so too does any individual who wants to decline to participate. As with other rights, the sexual right recognized in *Lawrence* is simply a right against government interference; it includes no ability to have the government force unwilling individuals to participate.

This line of reasoning is even stronger in the abortion context. Indeed, in *Maher v. Roe*, the Court considered whether the abortion right recognized in *Roe v. Wade* included a right to have the government pay for one's abortion. The *Maher* Court rejected this argument, finding that the right to abortion is simply a right to procure an abortion without interference from the government, but it did not create any obligation on the state to affirmatively provide the service.[236] 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 make an *unwilling private individual actually perform one*.

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 some level, this is of course true, as the abortion happens inside the body of only one of the two participants, and stops only the pregnant woman from becoming a parent. One might be tempted to say that *Casey's* right-to-make-self-defining-decisions

[236] See *Maher v. Roe*, 432 U.S. 464 (1997).

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 physicians to decide not to perform abortions is sufficiently established to merit constitutional protection under the Fourteenth Amendment. Second, there is no evidence to support the notion that physicians do not consider the services they provide to be self-defining. Indeed, for a physician 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. Third, and relatedly, 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"[237] is implicated only in decisions related to sex, but not in matters relating to whether one will 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 do her decisions about sexual matters. 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 related to sex, but not when they directly relate to the termination of another's "existence."

Ultimately, however, any argument about whether decisions about abortion are "personal" enough for physicians to merit Fourteenth Amendment protection is doomed 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, of course, would presumably be greatly intensified for a physician who believes she is killing innocent human life, and they provide a final argument for a constitutional conscience right.

[237] *Casey*, 505 U.S. at 581.

The Right to Refuse to Perform Abortions is Needed to Protect Physicians from Imposition of Psychological Harm by the Government

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.[238] The Court explained that the absence of an abortion right could subject women to "a distressful life and future," including the "continuing stigma of unwed motherhood."[239] The Court in *Casey* emphasized that the abortion decision is fraught with psychological consequences for the pregnant woman and noted that a woman who chose abortion based on incomplete information may face "devastating psychological consequences."[240]

Medical staff asked to provide or assist with abortions apparently also face significant psychological consequences – even when they fervently believe in the right to 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 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."[241] Because of these effects, Dr. Harris notes that at least one

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[238] See discussion supra.

[239] *Roe* at 146-47.

[240] *Casey*, 505 U.S. at 852.

[241] Lisa H. Harris, "Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse," *Reproductive Health Matters* 16 (2008): 76, partially quoting Hern WM., "What about Us? Staff Reactions to D&E" in W.M. Hern and B. Corrigan, *Advances in Planned Parenthood* 15 (1980): 3-8. 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

post-residency abortion training program has begun to include an annual psychological workshop for future providers.[242]

Studies of abortion providers suggest that Dr. Harris's experiences are not unique. For example, in a 1974 study, many providers reported "obsessional thinking about abortion, depression, fatigue, anger, lowered self-esteem, and identify conflicts."[243] A 1989 study reported similar effects:

> Ambivalent periods were characterized by a variety of otherwise uncharacteristic feelings and behavior 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.[244]

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 resulted in other behavior such as an obsessive need to talk about the experience." Many other informal studies report providers tormented by horrifying dreams.[245] At least one post-residency abortion training program "has

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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."While Dr. Harris continues to provide abortions, she acknowledges that the "moral status [of the fetus] is reasonably the subject of much disagreement" and that "doctors still need to sort out for themselves" the circumstances under which they will perform abortions" (ibid. at pp. 75, 76).

[242] Ibid. at 78.

[243] M. Such-Baer, "Professional Staff Reaction to Abortion Work," *Social Casework* (1973): 435-41.

[244] K.M. Roe, "Private Troubles and Public Issues: Providing Abortion amid Competing Definitions," *Social Science and Medicine* 29 (1989): 1191-98.

[245] See, e.g., H.D. Kibel, "Editorial: Staff Reactions to Abortion," *Obstetrics and Gynecology* 39 (1972): 1, "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." W.M. Hern and B. Corrigan, "What About Us? Staff Reactions to the D and E Procedure," presented at the 1978 meeting of the Association of Planned Parenthood Physicians, San Diego (October 26, 1978): "Two respondents described dreams which they had related

initiated an annual psychological workshop for its fellows" in order to help them deal with the psychological impact of performing abortions.[246]

These accounts indicate that the Court was correct when it suggested in *Casey* that the abortion decision was "fraught with consequences" for the doctors asked to perform them. 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.[247] For example, one immigrant nurse allegedly forced by a private hospital to participate in an abortion in violation of her conscience 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."[248] 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."[249]

Recognition of a physician's right to refuse to perform abortions would avoid governmental imposition of such psychological harms, a

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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* (October 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 go 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 Stress: The Psychological Consequences of Killing* (1996) at p. 76.

[246] Ibid. at 78.

[247] See MacNair, supra at p. 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."

[248] Julia Duin, "Nurse Sues After Aiding Abortion, Says Hospital Violated Conscience Protections," *The Washington Times* (July 31, 2009), at A18.

[249] Ibid.

factor that the Courts in *Roe*, *Doe*, and *Casey* all emphasized in finding an abortion right.

Conclusion

For the reasons set forth above, the right of a physician to refuse to perform abortions satisfies the Court's historical test for protection under the Fourteenth Amendment. Physicians historically were free (and often were required) to refuse to perform abortions. After *Roe*, physicians were protected by the nearly unanimous and nearly universal adoption of conscience statutes – provisions which have been retained through nearly forty years of intense debate about abortion. The right to refuse is within the scope of the liberty described in *Casey* and *Lawrence* for decision-making about issues which the Court believes define one's own personhood. And the right avoids governmental imposition of real psychological harm upon unwilling physicians.

When compared with other constitutional rights the Court has recognized for Fourteenth Amendment protection, the physician's right to refuse actually satisfies the Court's historical test far better than other rights it has recognized, including the right to abortion. Indeed, a view of the Fourteenth Amendment that would protect the abortion right, but not the right of a physician to refuse to perform abortions, would require acceptance of a host of contradictory propositions. It would require that practices that have been illegal for decades or centuries are part of our historical liberty, but those that have been legal are not. Practices that were, at most, quietly tolerated and legally discouraged would be deemed integral to our historical liberty, but practices that were expressly protected by law would not. It would mean that the Fourteenth Amendment protects a right to make self-defining decisions if your self-definition happens to turn on sexual issues, but not if it turns on your personal involvement in abortions. It would create an abortion right in part to protect women from the psychological burdens of being denied an abortion, but do so by simply transposing the psychological burden to unwilling doctors who could be forced by the government to perform abortions against their will.

Nothing in the Constitution or the Court's decisions requires so cramped or contradictory a view of the Fourteenth Amendment. Rather, if we are to take *Roe* and *Casey* seriously, we must acknowledge that those cases establish Fourteenth Amendment principles that extend beyond pregnant women, and include, at least, the other persons in the

operating room who also must be free to make their own decisions about abortion.