Note

Meet Me at the (*West Coast*) Hotel: The *Lochner* Era and the Demise of *Roe v. Wade*

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"The life of the law has not been logic: it has been experience."
Oliver Wendell Holmes, Jr.[1]

On September 14, 2004, the United States Court of Appeals for the Fifth Circuit denied a motion to reopen the case of *Roe v. Wade*.[2] Norma McCorvey, also known as Jane Roe,[3] brought the motion after years defending abortion rights. Regretful of the effect that *Roe* has had on women and society,[4] McCorvey assembled a massive amount of evidence, including 1,000 affidavits of women who testified that their abortions had a negative effect on their lives.[5] McCorvey claimed that this in-

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1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Transaction Publishers 2005) (1881).

2. McCorvey v. Hill, 385 F.3d 846, 850 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 1387 (2005); *Court Rejects Motion to Overturn* Roe v. Wade, CNN.COM, Sept. 14, 2004, http://www.cnn.com/2004/LAW/09/14/roe.v.wade.

3. Shannen W. Coffin, *A Tough Boat to* Roe, Sept. 16, 2004, NAT'L REV. ONLINE, http://www.nationalreview.com/coffin/coffin200409160630.asp.

4. *Id.*; *see also Effort to Reopen* Roe v. Wade*: Jane Roe: Something I've Wanted Since Day One*, CNN.COM, Feb. 19, 2004, http://www.cnn.com/2004/LAW/02/19/roev.wade.ap.ap/index.html.

5. *See McCorvey*, 385 F.3d at 850 (Jones, J., concurring); *see also* Operation Outcry, Post-Abortive Women's Affidavits, http://www.operationoutcry.org/stories/storiesDir.asp (last visited Nov. 5, 2005) (providing a sample of the affidavits). In addition, McCorvey's team presented new information relating to fetal development and viability, as well as the mechanics of the abortion industry. *McCorvey*, 385 F.3d at 850–52 (Jones, J., concurring); *see also* Aff. of David C. Reardon, Ph. D., Operation Outcry, http://www.operationoutcry

formation undermines the rationale of the original holding in *Roe*, and pursuant to Rule 60(b) of the Federal Rules of Civil Procedure,[6] *Roe* should be reopened and vacated.[7] The Fifth Circuit denied the motion, stating that the issue was moot since Texas had implicitly repealed its antiabortion statute.[8]

Perhaps the most interesting part of the ruling was the concurring opinion filed by Judge Edith Jones as an addendum to her own majority opinion. Judge Jones excoriated the Supreme Court's abortion jurisprudence and made a compelling case that it had to be reexamined in light of the growing amount of information about abortion and its adverse effects on women and society.[9]

Judge Jones's concurring opinion raises an interesting question: What do we do with new information that suggests the decision to terminate one's pregnancy has actually hurt women and has not validated the original justifications upon which the *Roe* decision was based, such as protecting the patient-doctor relationship, ensuring every child is a wanted child by reducing poverty and child abuse, and protecting the dignity of women?[10]

.org/DavidReardonexpertopinion-Roe-Final.pdf (last visited Nov. 5, 2005); Aff. of Theresa Burke, M.A., Ph. D., Operation Outcry, http://www.operationoutcry .org/ExpertAffidavit(LASTFINAL)-TheresaBurke.pdf (last visited Nov. 5, 2005).

6. This rule allows for relief from a judgment if that ruling was based on fraud, mistake, or new evidence recently discovered or not considered during the case. FED. R. CIV. P. 60(b).

7. *McCorvey*, 385 F.3d at 848.

8. *Id.* at 848–50. Both the federal district court and the Court of Appeals for the Fifth Circuit denied McCorvey's motion, but on different grounds. The district court believed that McCorvey had not brought the Rule 60(b) motion within the statutory standard of "a reasonable time." *Id.* at 849–50 n.4. Overruling the rationale of the district court, but affirming the decision, the Fifth Circuit stated that because Texas had enacted legislation putting restrictions on abortion and abortion providers, it had implicitly invalidated its antiabortion statute, which has remained on the books. *See id.* at 849–50. McCorvey petitioned the United States Supreme Court for review, but certiorari was denied. 125 S. Ct. 1387 (2005).

9. In her concurrence, Judge Jones highlighted the fact that the evidence McCorvey had gathered could not have been heard because she did not meet the procedural threshold necessary to reopen the case. *See McCorvey*, 385 F.3d at 850 (Jones, J., concurring). Jones then went on to heavily criticize the Supreme Court's "exercise of raw judicial power" in reserving the controversial question of abortion within its own purview. *Id.* (quoting Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting)).

10. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860–62 (1992) (describing various cases that have been overturned by a change in the

Interestingly, the Supreme Court has worked through another historical moment in which the reality of lived experience and changed conditions necessitated a reconsideration of a fundamental right enshrined in the Court's jurisprudence. *Lochner v. New York*[11] construed the Constitution's Fourteenth Amendment to include a fundamental right to contract.[12] This right, while not absolute, could only be limited pursuant to a state's legitimate, narrowly defined police powers.[13] The right of contract was given what today might be called "strict scrutiny," requiring compelling justifications to subvert the right in the name of legitimate legislative goals. This holding elevated the right of contract to "fundamental status" until the economic crises of the Great Depression led to its demise in *West Coast Hotel Co. v. Parrish*.[14]

This Note argues that while constitutional principles such as privacy and the state's police power remain the same over time, our understanding of how they apply in a given context may change depending on new knowledge, new understandings of old knowledge, or lived experience.[15] Regarding abortion, this Note argues that while privacy remains an important constitutional value, the Court's designation of abortion as a fundamental right at the expense of democratic deliberation has been

factual circumstances that provided the rationale for the original holding).

11. 198 U.S. 45 (1905).

12. *See Lochner*, 198 U.S. at 53.

13. *See id.* at 53–55.

14. 300 U.S. 379 (1937).

15. This "theory" of constitutional adjudication resembles in spirit what has been called "translation" by Mark Tushnet and followed by Lawrence Lessig. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (suggesting a mode of the "translation" method that is faithful to the original meaning of texts); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800–01 (1983) (proposing that constitutional norms must be translated into new political contexts). The proposed theory of interpretation is similar to the concept of "Burkean Constitutionalism," *see* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 688 (1994) (articulating a theory of Burkean interpretation that simultaneously relies on history, precedent, and emerging knowledge), as well as a "legal process" approach advocated by William Eskridge that relies on new application of traditional doctrines in changed circumstances, *see* William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1048–52 (2004) (highlighting the importance of changed circumstances in constitutional interpretation and claiming that the Founders envisioned their provisions to be reinterpreted in light of new challenges).

undermined by the ever-expanding knowledge about abortion and its consequences. This historical moment is analogous to that of *West Coast Hotel*, which held that the right to contract remained a constitutional value, but one which yields in the face of a more sophisticated understanding of economics, such that democratic deliberation must be prioritized.[16] Just as the rationale of *Lochner* became untenable during the New Deal era, so have *Roe* and its progeny become untenable today.[17] *Roe* should be overturned and left to state legislatures to regulate as they see fit in light of the newest information.[18]

Part I of this Note analyzes the Supreme Court's right to contract jurisprudence between *Lochner* and *West Coast Hotel*, evaluating the Court's rationale for its vigorous defense of the right to contract, and the Court's subsequent preference for democratic decision making due to changed circumstances. Part II outlines the holding in the companion cases of *Roe v. Wade*[19] and *Doe v. Bolton*,[20] demonstrating that they were primarily cases about doctor-patient privacy and women's health, not sexual privacy as is commonly claimed. Furthermore, Part II briefly sketches the history of abortion law since *Roe*, focusing specifically on the effect of the *Planned Parenthood of Southeastern Pennsylvania v. Casey*[21] decision on abortion regulation, and commenting on the *Casey* plurality's own discussion of the *Lochner* line of cases. Part III describes factual developments that have taken place with regard to abortion since 1973. Finally, Part IV argues that moving from *Roe* to *Casey* to post-*Roe* is analogous to the move from *Lochner* to *Nebbia v. New York*[22] to *West Coast Hotel* because the factual and philosophical underpinnings that provided the rationale for

16. *West Coast Hotel Co.*, 300 U.S. at 389–91.

17. *See* Joseph D. Grano, *Teaching* Roe *and* Lochner, 42 WAYNE L. REV. 1973, 1973 (1996) (stating that "*Roe* and *Lochner* are identical" and that the "legitimacy or illegitimacy of the two cases must be the same").

18. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 797 n.5 (1986) (White, J., dissenting) ("The Court's decision in [*Lochner*] was wrong because it rested on the Court's belief that the liberty to engage in a trade or occupation without governmental regulation was somehow fundamental—an assessment of value that was unsupported by the Constitution. I believe that [*Roe*]—and today's decision as well—rests on similarly extraconstitutional assessments of the value of the liberty to choose an abortion.").

19. 410 U.S. 113 (1973).

20. 410 U.S. 179 (1973).

21. 505 U.S. 833 (1992).

22. 291 U.S. 502 (1934).

each original holding have changed and evolved in an analogous fashion. *Nebbia* and *Casey* represent turning points in each line of cases because while preserving the essential holdings of *Lochner* and *Roe*, respectively, the jurisprudential framework that each constructed laid the foundation for the subsequent reversal of the latter cases. This Note charts the development in the *Lochner* line of cases as a way of demonstrating how long-standing precedent can be overruled in a principled manner due to changes in factual circumstances, while at the same time preserving important constitutional values.

I. TRAVELING THE ROAD FROM *LOCHNER* TO *WEST COAST HOTEL*

Recent scholarship has all but debunked the theory that the *Lochner* era was dominated by laissez-faire, social-Darwinist Justices who had to be tempered by the famous court-packing plan of President Roosevelt that caused the "switch in time that saved nine."[23] Instead, historians and commentators have argued that the shift in constitutional values from *Lochner* to *West Coast Hotel* was the result of developments in legal, economic, and political theory, as well as the harsh realities of economic life during the Great Depression.[24] Taken together, these factors were a powerful reason for the constitutional development embodied in *West Coast Hotel*.[25]

23. *See, e.g.*, MARK WARREN BAILEY, GUARDIANS OF THE MORAL ORDER: THE LEGAL PHILOSOPHY OF THE SUPREME COURT, 1860–1910, at 127–29 (2004) (refuting the progressive myth that the Justices of the *Lochner* era were Spencerian Social Darwinists); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 3–6 (1998); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836–1937, at 193–98 (1991); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 14–15 (2000); David E. Bernstein, *The Story of* Lochner v. New York*: Impediment to the Growth of the Regulatory State*, *in* CONSTITUTIONAL LAW STORIES 325 (Michael C. Dorf ed., 2004).

24. *See* CUSHMAN, *supra* note 23, at 7; HOVENKAMP, *supra* note 23, at 204; WHITE, *supra* note 23, at 203–04.

25. A proper understanding of the shift in constitutional values during the New Deal based upon changed circumstances can be found in Lawrence Lessig's article, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 453 (1995). Lessig's account of the New Deal as constitutional "translation" is crucial because it demonstrates that both economic liberty and the police power remained important values; however, their application had to be reconsidered in light of a change of facts and the continued viability of the legal doctrine based on those facts. *Id.* at 460–61 (reading *West Coast Hotel* in light of this theory).

A. *LOCHNER V. NEW YORK*

In *Lochner*, the Supreme Court struck down a New York law that limited bakers' working hours.[26] While it is often taught as a case that enshrined the values of big business, at the time it was hailed as a victory for workers against the corrupt machinations and Tammany Hall politics of legislators and labor unions.[27] The case was primarily a victory for those workers who wanted to earn the wages for which they could contract. If they wanted to work longer hours than the statutory limit, they could. In other words, the case was a classic example of a dominant philosophy of economic "choice" and the moral autonomy of the individual—the right to choose one's hours, profession, and wage.[28]

Lochner contains three competing models of economic liberty: the majority opinion by Justice Rufus Peckham; the dissent by Justice Oliver Wendell Holmes, Jr.; and the dissent by Justice John Marshall Harlan.[29] In large part, the majority opinion was a reaffirmation of long-cherished constitutional values—the values of the state's police power and the liberty of contract.[30] The right to make a contract in one's business endeavors was not new, having been enunciated almost seven years earlier in *Allgeyer v. Louisiana*.[31] *Lochner* reaffirmed *Allgeyer* by holding that freedom of contract is a basic right protected by the Due Process Clause of the Fourteenth Amend-

26. Lochner v. New York, 198 U.S. 45, 64 (1905).

27. *See* Bernstein, *supra* note 23, at 347–48.

28. *See* BAILEY, *supra* note 23, at 160–61 (noting the importance of freedom of contract in upholding a system of moral accountability).

29. *See* CUSHMAN, *supra* note 23, at 54–56.

> [T]hree modes of reviewing legislation curtailing contractual liberty emerged in *Lochner*. Eight of the Justices shared common ideological commitments concerning liberty of contract and special legislation, and agreed on the analytic categories to be deployed to further those commitments. The dispute between Harlan and Peckham was over which branch of government should have the final say with respect to legislation that could reasonably be viewed as either consistent or inconsistent with those commitments. Holmes alone rejected the commitments, the categories and the vocabulary of substantive due process.

Id. at 56.

30. *See Lochner*, 198 U.S. at 53–54 (describing the Court's traditional doctrines regarding liberty of contract and the role of the police power).

31. 165 U.S. 578, 590–92 (1897).

ment.[32] But at the same time, the case protected the particular liberty interest in an unprecedented manner. It went a step further by saying that it was the judiciary's role to scrutinize carefully legislation interfering with the freedom of contract to make sure that it served a valid police purpose, thus imparting a sort of "strict scrutiny" standard of review.[33]

In its holding, the Court sought to protect economic liberties against legislation aimed at curtailing them during the Populist era.[34] The majority opinion's elevation of one constitutional value (liberty of contract) over another (legitimate police power action) was the establishment of a particular philosophical anthropology[35] that would guide the Court for over thirty years in deciding cases dealing with economic liberties.[36] At the heart of *Lochner* is the vision of the human person as one with

32. *See Lochner*, 198 U.S. at 53.

33. *Id*. at 56.

34. *See id*. at 64; *see also* BAILEY, *supra* note 23, at 147 (noting that the Justices of the *Lochner* era viewed social welfare legislation as inimical to both the individual and the common good because it produced corrupted individuals and immoral or antisocial behavior). If the police power were to go unchecked, the liberty of the Fourteenth Amendment was to have no meaning. This was less a defense of business interests than the Court's attempt to salvage a particular understanding of political economy. *See id*. at 113 (describing the two axiomatic principles of political economy that guided the Court).

35. *See* BAILEY, *supra* note 23, at 142 (noting the connection between economic liberty, character, and human development that was a bedrock principle of *Lochner*-era political economy). For the pro-*Lochner* Justices, the last relics of the neoclassical school of political economy, economics was less a science of empirical fact than a branch of moral philosophy. Thus, economics was tied to philosophical conceptions about rights and freedoms, rather than to discussions of wealth maximization, development, and social welfare. *See id.* (describing the academic moral philosophy that integrated economic theory and psychology into an anthropology that valued freedom, autonomy, and moral virtue). However, as the science of economics developed after *Lochner*, the Court's jurisprudence developed with it. *See* HOVENKAMP, *supra* note 23, at 204; Lessig, *supra* note 25, at 420–22, 468–69 (describing how changes in economic theory led to a "translation" of constitutional doctrines into new contexts). Changes in theory, as well as in facts, are also catalysts for a reorientation of enduring constitutional values. *See id.* at 453, 460–61.

36. *See* HOVENKAMP, *supra* note 23, at 171 ("The language of substantive due process spoke not of substantive regulatory standards but rather of individual constitutional right. Individuals were said to possess a 'liberty of contract' that gave them freedom from governmental interference—in this case, freedom to make choices affecting individual economic status."); *id.* at 204 ("The courts of the substantive due process era were guided by prevailing scientific doctrines much as courts are today. . . . When the dominant American economic ideology changed—not until the first three decades of the twentieth century—the legal ideology followed close behind.").

a degree of autonomy and freedom—one might argue a natural right—to contract his labor and services in the way he wishes, subject only to reasonable police power limitations.[37]

In a famous dissent, Justice Oliver Wendell Holmes criticized the Court for reading a particular political and economic theory into the Constitution.[38] Furthermore, he criticized what would later come to be known as substantive due process because it was an invitation to read rights into the Constitution that were not really there.[39] In terms of the validity of economic legislation, Holmes believed that the Constitution required complete deference to the legislatures except in egregious violations of rights that had always been part of the nation's traditions.[40] Holmes's theory left little room for the protection of economic liberties and even implied that they cannot be found within the text of the Fourteenth Amendment.[41]

While the majority opinion and Holmes's dissent represent the polar extremes in the debate over substantive due process, it was Justice Harlan's approach in *Lochner* that later provided the rationale for its eventual reversal in *West Coast Hotel*. Harlan's dissent is notable because, while it acknowledges the competing constitutional values, it seeks to give priority to legislative enactments rather than judicially created liberty inter-

37. *See id.* at 74 ("Liberty of contract and other rights recognized under the fourteenth amendment were not merely economic rights but moral and religious rights as well. Laissez-faire ideology was an important part of the religious individualism and self-determination that developed in America during the early nineteenth century.").

38. *Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting); *see also* HOVENKAMP, *supra* note 23, at 182 ("The Progressives' rejection of classicism provided the excuse, not the reason, for the passage of reform legislation. But Holmes's accusation that the majority relied on an *obsolete* economic theory is not nearly as important or as interesting as his recognition that it relied on an *economic* theory, whether right or wrong, obsolete or current.").

39. *See Lochner*, 198 U.S. at 74–76 (Holmes, J., dissenting).

40. *See id.* at 75–76 ("I think that the word liberty in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.").

41. Eventually, Holmes's vision of extreme judicial deference in economic matters would become part of constitutional law in the case of *Wickard v. Filburn*, 317 U.S. 111 (1942). *Wickard* would signal the very end of economic substantive due process and the almost total dominance of the police power. *See* JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 144–45 (2003) ("After *West Coast Hotel*, the liberty of contract is never used again by the Supreme Court to strike a statute . . . .").

ests.[42] Rather than subjecting regulations of individual liberties to strict scrutiny, Harlan advocated judicial deference to the legislature as the chief finder of fact and endowed with the most institutional competence.[43] While protecting individual liberties remained an important constitutional value, that goal would be subject to the common good, and only arbitrary and unreasonable regulations would be struck down.[44]

It would take some time for Harlan's theory to gain traction as the economic conditions for the twenty-five years following *Lochner* seemed to confirm the validity of the neoclassical economics espoused by the majority of the Justices.[45] However, as the economic situation deteriorated and neoclassical political economy waned as a legitimate theory,[46] Harlan's approach became a plausible alternative. Its merit was that it protected individual liberties without abandoning the constitutional doctrine that there were unenumerated economic liberties in the

42. *Lochner*, 198 U.S. at 72–73 (Harlan, J., dissenting).

43. *See id*. at 68; *see also* STONER, *supra* note 41, at 138 ("Harlan's *Lochner* dissent is not a dispute with the Court over jurisprudence, but a debate over whether the New York law was valid as a health regulation . . . against a majority convinced that the health rationale was a pretense covering favoritism for the laboring class.").

44. *See Lochner*, 198 U.S. at 67; *see also* John Marshall Harlan, Supreme Court Justice, Remarks at a banquet given by the bar of the Sixth Federal Circuit Court at Cincinnati (Oct. 3, 1896), *in The Supreme Court of the United States and its Work*, 30 AM. L. REV. 900 (1896), *reprinted in part in* AN AUTOBIOGRAPHY OF THE SUPREME COURT: OFF-THE-BENCH COMMENTARY BY THE JUSTICES 118, 118–21 (Alan F. Westin ed., 1963); BAILEY, *supra* note 23, at 126–27 (describing how Harlan attacked unrestrained majoritarianism, but sought to protect the will of the people as embodied in the legislature).

45. *See* HOVENKAMP, *supra* note 23, at 77 ("More than one Supreme Court justice attacked wage and hour legislation by arguing that the laboring class did not want such laws."). "For example, in *Adkins v. Children's Hospital* (1923) Justice Sutherland took judicial notice of the fact that wages in the United States were increasing; as a result, minimum wage laws were bad policy." *Id.* at 184. While Sutherland continued to uphold the right to contract and vigorously dissented in *West Coast Hotel*, his opinions demonstrate an understanding of the need to apply constitutional doctrines to changing scientific, economic and technological circumstances and knowledge. Thus, in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390–91 (1926), Sutherland upheld a municipal zoning plan on the grounds that the community has an interest in protecting the health of its citizens, citing the need for constitutional adaptation to modern urban life. *See also* STONER, *supra* note 41, at 141–42 (noting the similarity between Sutherland's holdings and Hughes's opinion in *West Coast Hotel*).

46. *See* Lessig, *supra* note 25, at 468 (describing the displacement of noninterventionist economic theory during the 1930s).

Due Process Clause of the Fourteenth Amendment.[47] At the same time, these liberties, which were usually judicial gloss on a text,[48] would be subject to the common good. Of course, when *Lochner* was overruled, the pro-*Lochner* Justices interpreted their colleagues to be saying that the Constitution changes over time.[49] They assumed that the Constitution reflected fixed principles and believed other Justices did as well. However, it was not that constitutional principles or doctrines changed—there were economic liberties in the Due Process Clause, and the police power was an important political tool to achieve the legislative ends—but changes in the economic conditions of society forced a new application of them.[50]

B. *ADKINS V. CHILDREN'S HOSPITAL OF THE DISTRICT OF COLUMBIA*

The holding of *Adkins v. Children's Hospital of the District of Columbia*[51] strengthened *Lochner* and provided a farther-reaching defense of the liberty of contract. While recognizing the validity of the state's police power, the Court asserted that a minimum wage law for adult women served no valid police purpose.[52] In addition, the Court stated that "the right to contract about one's affairs is a part of the liberty of the individual protected by this [Due Process] clause, [and] is settled by the decisions of this Court and is no longer open to question."[53] While in some cases interference with the right to contract was found to be appropriate,[54] the Court rested its holding on a particular philosophical anthropology of the human person and

47. *See* BAILEY, *supra* note 23, at 169–73 (outlining Harlan's dissent and stating that he "preferred leaving to the legislature the task of finding wise means to fulfill its obligations to society").

48. *See* WHITE, *supra* note 23, at 243–44.

49. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting) ("It is urged that the question involved should now receive fresh consideration, among other reasons, because of 'the economic conditions which have supervened'; but the meaning of the Constitution does not change with the ebb and flow of economic events."). *But cf. supra* note 45 (noting Justice Sutherland's willingness to adapt constitutional doctrines to the needs of modern life).

50. *See* CUSHMAN, *supra* note 23, at 91.

51. 261 U.S. 525 (1923), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 388–400 (1937).

52. *Id*. at 544–45, 553–61.

53. *Id*. at 545.

54. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 421–23 (1908) (upholding a maximum-hours law for women).

that theory's consonant natural rights.[55] Justice Sutherland grounded his opinion in *Adkins* in moral terminology upholding the liberty of contract, along with the societal good that was to be achieved by sustaining the logic of economic choice.[56]

In another strong dissent, Justice Holmes decried the decision for finding a fundamental constitutional right in what was merely a gloss on the constitutional text. He noted that, "[c]ontract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty."[57] Justice Holmes articulated a powerful critique of substantive due process jurisprudence: it reads rights into the liberty of the Fourteenth Amendment's Due Process Clause that simply do not exist.

C. *NEBBIA V. NEW YORK*

Nebbia v. New York[58] called into question the holdings in *Lochner* and *Adkins*. In *Nebbia*, the Court upheld price controls on milk established by the New York Milk Control Board.[59] The case demonstrated that the orientation of constitutional values embodied in *Lochner* and *Adkins* began to shift in the face of the political factors that allegedly led to the Court's change of heart about protecting economic liberties.[60] *Nebbia* was the first sign of the jurisprudential transition that would take place in *West Coast Hotel*.[61]

Prior to *Nebbia*, the Court had erected a number of formal categories to distinguish particular types of economic activity.[62] It did so to maintain both the perception and the reality that some economic activity was beyond regulation, while upholding Populist-era social legislation. The court wished to preserve the

55. *See Adkins*, 261 U.S. at 545–46, 561; *see also* BAILEY, *supra* note 23, at 169–72 (explaining the philosophical rationale behind the holding in *Lochner*).

56. *Adkins*, 261 U.S. at 559–61; *cf.* Coppage v. Kansas, 236 U.S. 1, 25–26 (1915) (holding that it was not a legitimate exercise of the police power for the government to attempt to equalize bargaining power between employer and employee); Adair v. United States, 208 U.S. 161, 174 (1908) (noting that "it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another . . . .").

57. *Adkins*, 261 U.S. at 568 (Holmes, J., dissenting).

58. 291 U.S. 502 (1934).

59. *Id.* at 536–39.

60. *See* CUSHMAN, *supra* note 23, at 79–83.

61. *See id.* at 82–83.

62. *See id.* at 47–59.

classical jurisprudence that had guided the nation's affairs and culture since the Civil War, without sacrificing its popular legitimacy by striking down important legislation. This framework allowed the Court to appear principled while being extremely pragmatic. Although this jurisprudence may have worked in a simple economy, with the Industrial Revolution and the advent of sophisticated financial instruments, those distinctions appeared arbitrary.[63]

The so-called "principle of neutrality" was an embodiment of the Court's pre-*Nebbia* framework. Regulation of business and industry that had a particular public purpose or nature could be regulated under the police power because a public interest was involved.[64] However, the principle of neutrality prohibited the Court from meddling in purely private business affairs because judicial umpiring would give advantage to one economic actor over another.[65] Not only would this be unfair from a legal standpoint, it would violate prevailing economic orthodoxy.[66] However, as economic affairs and regulation became more complex, these categories were not particularly useful and handicapped what was considered a vital New Deal regulatory agenda.[67]

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63. *See id.* at 52–55 (describing the incoherence of maintaining a system of formal categories of economic regulation). Similar problems would plague the Court's trimester framework established in *Roe*, and later abandoned in the abortion-era equivalent of *Nebbia*: *Planned Parenthood of Southeastern Pennsylvania v. Casey*. *See infra* notes 98–115 and accompanying text.

64. *See* CUSHMAN, *supra* note 23, at 54–55.

65. *See id.* at 47; *see also* WHITE, *supra* note 23, at 203 (describing Cushman's analysis of the public/private distinction and the principle of neutrality in the Court's jurisprudence).

66. *Cf.* CUSHMAN, *supra* note 23, at 47 (discussing distinctions between public and private spheres and the principle of neutrality). Police powers jurisprudence from the Founding to the *Lochner* era was limited by the principle of radical equality, strengthened after the Civil War amendments, which sought to prevent a "factional politics." *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 61–64 (1993). Thus, during the rapid industrialization of the nineteenth century, courts took extreme care not to allow legislation that favored one group over another. *See id.* This sacrosanct principle remained intact until the fact of increasing economic inequality undermined the theory and made it untenable. *Nebbia* is the first sign of the new constitutional era ushered in by *West Coast Hotel*. *See generally id.* at 61–146 (describing the tension between judges that maintained the classical jurisprudence, and the unstable economic conditions and class tensions that appeared to necessitate a break with the old order and allow class-based legislation). Liberty of contract was linked inextricably with class-based legislation. *Id.* at 114.

67. *See* Nebbia v. New York, 291 U.S. 502, 531–33 (1934).

The *Nebbia* Court tore down this wall between private and public businesses by recasting the phrase "affected with a public interest," as simply meaning "subject to the exercise of the police power."[68] Thus, while regulations could not be unreasonable and arbitrary (the Court still maintained its commitment to long-standing constitutional values), every sort of private business could theoretically come under the purview of the police power.[69] The Court in *Nebbia* confined itself to the specific question of whether New York State could put price controls on milk sales, deemed the milk industry to have a significant public component, and left the broader question of whether all business activities were subject to the police power for another day.[70] However, *Nebbia* lowered the level of scrutiny some legislative enactments would receive, giving them deferential review along the model of Harlan's dissent in *Lochner*, and perhaps even going a step further by noting the Court's institutional incompetence to deal with such matters.[71]

D. *WEST COAST HOTEL CO. V. PARRISH*

West Coast Hotel Co. v. Parrish[72] sounded the death knell for *Lochner* and *Adkins*. Upholding a state minimum wage law for women, the Court specifically overruled *Adkins* and repudiated the judicial gloss on the "liberty" cited in the Due Process Clause that had been the basis for the previously asserted right to contract.[73] The Court stated:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law . . . . Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[74]

Justice Hughes stated that changes in economic conditions undermined the logic of *Adkins* and required its reversal.[75] Fur-

68. *Id*.

69. *See id*. at 536–37.

70. *See* CUSHMAN, *supra* note 23, at 79.

71. *See Nebbia*, 291 U.S. at 536–38; *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 598 (2d ed. 2002) (describing how the *Nebbia* decision signaled the imminent demise of *Lochner* by calling into question its basic premises).

72. 300 U.S. 379 (1937).

73. *See id.* at 397–98.

74. *Id.* at 391.

75. *Id.* at 389–91.

thermore, the Court held that economic conditions must determine the reasonableness of the protective power of the state.[76] Thus, the tension between fundamental rights and the common good as embodied in the state's police power was resolved by a thorough analysis of the social context and relevant facts.[77]

The rhetoric of *West Coast Hotel* is an inversion of the constitutional values established in *Lochner* and *Adkins*,[78] and an adoption of the Harlan dissent in *Lochner*.[79] While recognizing the importance of liberty in general, the Court gave priority to the communitarian impulses embodied in police power regulations.[80] Whereas the Court gave individual liberty highest priority and protection in *Lochner* and *Adkins*, the Court in *West Coast Hotel* placed a greater premium on the use of law as an instrument of social policy, embodied in legislation designed to protect the public welfare.[81] While individual states could protect the right to contract on the rationale of *Lochner*, the work-

76. *Id.* at 390.

77. *See id.*

78. *See generally* Lessig, *supra* note 25, at 453–72 (describing the process through which the New Deal Court "translated" constitutional values into a new context, reprioritizing the liberty of contract and the scrutiny given to police power legislation).

79. Prompted by Harlan's *Lochner* dissent, a movement arose to create a more "sociological jurisprudence" grounded in hard facts to assess the reasonableness of legislation—the same rationale that Justice Hughes would have used to overturn *Adkins* in *West Coast Hotel*. *See* GILLMAN, *supra* note 66, at 132–46.

80. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397–400 (1937); *see also* STONER, *supra* note 41, at 144 (noting Hughes's ability to accomplish a constitutional revolution by working within established precedent).

81. *See West Coast Hotel Co.*, 300 U.S. at 399–400. *West Coast Hotel* and other post-1937 cases represented a change in jurisprudence that caused the rise of the administrative/regulatory welfare state. Rather than understanding law as embodying the metaphysical truths of natural law that judges tried to "find" through the common law process, judges began to understand law as a creature of both policy and statute. *See* WHITE, *supra* note 23, at 167–70 (noting the various features of classical judicial "formalism"). Law was essentially made by legislatures and judges adapting "the Constitution to the demands of current American society." *Id.* at 173. Furthermore, liberty and equality—bedrock principles of classical jurisprudence—were now thought to be impossible without a basic level of economic security. In order to protect important constitutional values, traditional doctrines had to be reapplied to new contexts. *See* GILLMAN, *supra* note 66, at 152–53. These shifts in theory provided the underpinnings of the reorientation of constitutional values in the *West Coast Hotel* decision. *See* Lessig, *supra* note 25, at 461–62 (stating that developments in legal and economic theory were part of the process of "translating" constitutional values during the New Deal era).

ing model with regard to the Federal Constitution became deference to the state legislatures and Congress.

One can see in the cases from *Lochner* to *West Coast Hotel* a shift in emphasis of particular constitutional values in light of the economic situation that faced the nation. An examination of the abortion cases and the growth in knowledge about abortion in general since 1973 is necessary before exploring why the experience of the *Lochner* era provides an important lesson and precedent for reexamining the Court's abortion jurisprudence since *Roe*.

II. THE LOGIC WITHIN: *ROE* & *CASEY* CHART THEIR OWN DEMISE?

The companion cases *Roe v. Wade* and *Doe v. Bolton* that overturned the abortion laws of all fifty states in 1973 were just two of the many challenges to state abortion laws working their way through the courts.[82] While the fight over abortion has been framed as a struggle over women's equality and sexual privacy, *Roe* and *Doe* were originally conceived in the courts as a question of doctor-patient privacy.[83] The abortion question rose to national prominence primarily because of health concerns affecting women and the purported ban on doctors from dealing with them effectively, in some cases even being prosecuted for providing abortions to women with real health risks.[84] Doctors needed to help their patients survive, and women had the right to receive an abortion if the woman and her doctor so decided. The holdings of *Roe* and *Doe* were more about giving doctors options in treatment than winning a battle for women's sexual freedom.[85] This is particularly important because if *Roe*

82. Lucinda M. Finley, *The Story of* Roe v. Wade*: From a Garage Sale for Women's Lib, to the Supreme Court, to Political Turmoil*, *in* CONSTITUTIONAL LAW STORIES 359, 360–61 (Michael C. Dorf ed., 2004).

83. *See id.* at 389–97.

84. *Id.* at 367–74.

85. Justice Blackmun, who wrote the opinions, had served as legal counsel to the Mayo Clinic and was sensitive to the needs of physicians. *See* Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAG., Apr. 10, 2005, at 30. Blackmun also incorporated data regarding the ability of medical professionals to provide safe abortions into his opinion. *See* Roe v. Wade, 410 U.S. 113, 148–50 (1973). For a discussion of how early litigation efforts to overturn state abortion laws focused on doctors rather than pregnant women because it was believed that courts would be more favorable to a claim that their professional discretion was being violated, see Finley, *supra* note 82, at 376.

and *Doe* were grounded in health concerns that have ceased to exist, the logic of *West Coast Hotel* means their holdings are now in doubt.

A. *ROE*'S RATIONALE

Griswold v. Connecticut[86] laid the foundation for *Roe*. In *Griswold*, the Court stated that there was a right of privacy protected under the "penumbra of rights" outlined in the Bill of Rights.[87] A concurring opinion found a right to marital privacy in the Ninth Amendment.[88] Justice Harry Blackmun's opinion in *Roe* affirmed this basic holding, but went beyond the general notion of privacy outlined in *Griswold*, stating:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[89]

The real rationale behind the broad strokes painted in *Roe* are found in *Doe*, which includes an extensive thesis on the importance of physician control over whether a woman should have an abortion.[90] The chief accomplishment of *Roe* and *Doe*, at least in Justice Blackmun's eyes, was to give a broader scope of discretion to physicians when dealing with pregnant women.[91] However, *Roe*'s and *Doe*'s fundamental concern for

86. 381 U.S. 479 (1965).

87. *Id.* at 484–85.

88. *Id.* at 499 (Goldberg, J., concurring).

89. *Roe*, 410 U.S. at 153.

90. *See* Doe v. Bolton, 410 U.S. 179, 198–201 (1973).

91. Greenhouse, *supra* note 85, at 30 (noting that Blackmun found abortion restrictions troublesome not because they interfered with women's rights, but because they put doctors at risk). Beyond the basic physical health reasons why women might need an abortion, Justice Blackmun's opinion noted some normative considerations surrounding the psychological problems attached to having an unwanted child, as well as the affect that birthing the child may have on the quality of life of both mother and child. *Roe*, 410 U.S. at 153. However, Blackmun's assumptions have since been called into doubt. *See* George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277, 277 (1996) (concluding that access to abortion and the availability of contraception have caused a decline in the number of marriages after pregnancy which "accounts for a significant fraction of the increase in out-of-wedlock first births"); *see also* WILLIAM J. BENNETT, INDEX OF LEADING CULTURAL INDICATORS 46 (1994) (noting a thirty-year increase in illegitimate children); Philip Ney, M.D., *Relationship Between Abortion and Child Abuse*, 24 CAN. J. PSYCHIATRY 610, 610–17 (1979) (stating that the guilt from abortions has increased child battering of subsequent children by par-

women's health is problematic if abortion lacks the effects it was once believed to have.[92]

While asserting that the right of privacy found in the liberty of the Due Process Clause was broad enough to encompass a right to terminate one's pregnancy, *Roe* also asserted that this right was not absolute.[93] The Court said that the state had an interest in the protection of maternal health after the first trimester, as well as the protection of "potential life" after the fetus became viable.[94] States could regulate abortions after the first trimester to protect maternal health, and outlaw abortions after the third trimester as long as an exception was made for those abortions necessary to preserve the health or life of the mother.[95] But, according to *Doe*, "health" could mean almost any rationale of which the physician could conceive, making the states' ability to outlaw some abortions virtually nonexistent.[96] The Court defined "health" to mean anything where medical judgment is 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." [97]

B. *CASEY* REFORMULATES *ROE*

For twenty years following *Roe*, state abortion laws were continuously challenged, and most of those laws were overturned,[98] except for statutes that prevented government funding of abortion.[99] However, when it appeared *Roe* might be in

ents).

92. *Cf. Doe*, 410 U.S. at 208 (Burger, C.J., concurring) (noting that he is troubled that the Court took judicial notice of scientific data).

93. *Roe*, 410 U.S. at 155.

94. *Id*. at 162–63.

95. *Id*. at 163–64.

96. *See Doe*, 410 U.S. at 192.

97. *Id.*

98. *See, e.g.*, Hodgson v. Minnesota, 497 U.S. 417, 423 (1990) (holding unconstitutional a Minnesota parental notification statute); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 452 (1983) (striking an Ohio statute that required any abortion after the first trimester to be performed in a hospital); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 75 (1976) (finding unconstitutional Missouri's parental consent statute for minors seeking abortions).

99. *See* Harris v. McRae, 448 U.S. 297, 317–18 (1980) (upholding the constitutionality of the Hyde Amendment, which banned federal Medicaid funding of abortions except in limited instances).

danger due to the Court's changing composition, the Supreme Court reaffirmed it in *Planned Parenthood of Southwestern Pennsylvania v. Casey*.[100] *Casey* is notable not only because it abandoned the trimester framework (which relied on practical considerations about fetal and women's health) in favor of the "undue burden" standard,[101] but also because it made a shift from Blackmun's prudential rationale for the abortion right to one relying on philosophical conceptions of what freedom means, and abortion's place within that definition.[102]

The plurality opinion in *Casey* grounded its holding in the notion that stare decisis must be respected, and that the presence of liberalized abortion laws had created a reliance interest in millions of women who had ordered their lives around the fact that abortion was an available option to them.[103] Furthermore, the Court sweepingly stated, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[104] The Court went beyond a mere assertion of constitutional values and stated that abortion is part of the very nature of freedom itself. This mirrors the language employed in *Adkins* by Justice Sutherland, who asserted the right to choose one's working conditions was integral to the nature of liberty.[105]

The "undue burden" standard, purporting to be a lower level of scrutiny than the normal "strict scrutiny" applied to fundamental rights, has allowed only minimal regulation of abortion.[106] The Court defined the "undue burden" standard as any regulation that places substantial obstacles in the path of a woman seeking an abortion.[107] Most regulatory statutes have been struck down or eviscerated because of *Casey*'s ruling that abortion regulations require an exception for the life and the

100. 505 U.S. 833, 869–70 (1992).

101. *Id*. at 873, 876–77.

102. *See id*. at 869–79.

103. *Id*. at 854–56.

104. *Id*. at 851.

105. *See* Adkins v. Children's Hospital of the District of Columbia 261 U.S. 525, 545–46 (1923), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 388–400 (1937).

106. The *Casey* decision actually upheld Pennsylvania's twenty-four-hour waiting period for abortions, the requirement that physicians inform women of the availability of information about the fetus, a parental consent requirement, and reporting and record-keeping requirements. *Id.* at 879–901.

107. *Id.* at 877.

health of the mother.[108] While states have passed parental-notification laws, women's "right to know" laws, waiting periods, and other small measures, these regulations are generally limited by the requirement of a health exception. Because of *Doe*'s' construction of the term "health," these laws are incapable of limiting abortions.

Interestingly, the *Casey* decision included a discussion of the line of cases between *Lochner* and *West Coast Hotel*.[109] The Court described how changed circumstances in the *Lochner* line of cases warranted a change in the existing doctrine.[110] In 1937 it seemed clear that "the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimum levels of human welfare."[111] The plurality opinion in *Casey* went on to say that not only did the change in facts warrant a new choice of constitutional principle, but "required" it.[112] "[T]he clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law."[113]

With regard to abortion, however, the plurality noted this change had not taken place in the nation's consciousness, and overturning *Roe* on the grounds that the facts had changed would not have been a legitimate reorientation of constitutional principles.[114] In other words, the Court implied that overturning a prior decision gains a certain degree of legitimacy when society has generally agreed that the facts providing the rationale for the original holding have changed.[115] The Court, however, made no attempt to thoroughly examine whether the facts and societal attitudes about abortion had actually changed.

108. *See id.* at 879; *see also* Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (holding that *Casey* requires all abortion regulations to have exceptions for the life or health of the mother).

109. *Casey*, 505 U.S. at 861–62.

110. *Id*. at 862.

111. *Id*. at 861–62.

112. *Id*. at 862.

113. *Id.*

114. *Id*. at 864.

115. *See* Eskridge, *supra* note 15, at 1078–80 (noting the wisdom of a jurisprudence that "domesticate[s] culture clashes" rather than igniting them, as did *Roe v. Wade*).

III. THE FACT IS . . . THE AFTERMATH OF *ROE* SINCE 1973

An emerging body of research chronicling the effects of legalized abortion on women and society raises the question of whether *Roe* was profoundly mistaken and, if so, whether it should be overturned and abortion regulation left to the states. The conclusion of this Note is that these new facts satisfy the standard of review referred to in *Casey* for overturning long-standing constitutional precedent and therefore warrant a change in existing abortion jurisprudence.

A. WOMEN'S HEALTH

The opinions in *Roe* and *Doe* stressed autonomy—for doctors and patients both—to make medical decisions.[116] In certain circumstances, abortion was seen as a preferred alternative to childbirth, and thus doctors, it was thought, needed the ability to advise patients to choose this procedure.[117] However, recent evidence has undermined the rationale for allowing abortion as a legitimate medical practice.[118]

Roe's rationale for only permitting state regulation after the first trimester was that abortion appeared statistically safer than childbirth if performed during the first trimester.[119] In his concurring opinion in *Doe*, Chief Justice Warren Burger expressed concern that the opinion had tied itself too closely to

116. *See* Doe v. Bolton, 410 U.S. 179, 195–201 (1973); Roe v. Wade, 410 U.S. 113, 153–54, 165–66 (1973).

117. *Roe*, 410 U.S. at 149.

118. While there is an abundance of new information regarding abortion's effect on women, reexamining the information available in 1973 proves quite surprising. In a *Roe* brief filed by a coalition of members of the American College of Obstetrics and Gynecology (ACOG), the doctors noted that "[a]ny consideration of the 'safety' of legally induced abortions must consider the full range of medical complications including early and late physical and psychological complications, as well as maternal and *child* mortality." *See* Brief of Amicus Curiae of Certain Physicians, Professors and Fellows of the Am. Coll. of Obstetrics & Gynecology at 2, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) (emphasis added). These doctors proceeded to describe a number of consequences of *legal* induced abortion including higher mortality rates, pelvic infection, perforation of the uterus, coma or convulsions, higher risk of premature delivery, sterility, ectopic pregnancies, endometriosis, and psychological breakdown. *Id*. at 32–58. The doctors of ACOG also rebutted the claims of the appellant's briefs that it had been definitively shown that abortion was safer than childbirth. *Id*.

119. *Roe*, 410 U.S. at 163.

medical statistics,[120] which could theoretically be disproved. His point was particularly prescient. It appears that one of the underlying assumptions of *Roe*'s trimester framework—that first trimester abortions are safer than childbirth—was wrong. Current studies demonstrate that childbirth is safer than abortions,[121] especially considering the negative physical and mental consequences that can follow a woman after an abortion.[122]

In January 2003, a team of researchers published a study in the journal *Obstetrical & Gynecological Survey* (OGS) chronicling long-term physical and psychological harm from abortion.[123] The OGS researchers found that women who have had abortions face a number of long-term consequences directly linked to abortion,[124] including higher rates of psychological trauma[125] involving depression, emotional distress, and deliberate self-harm;[126] suicide;[127] placenta previa;[128] pre-term birth

120. *Doe*, 410 U.S. at 208 (Burger, C.J., concurring).

121. *See* David C. Reardon et al., *Deaths Associated With Abortion Compared to Childbirth—A Review of New and Old Data and the Medical and Legal Implications*, 20 J. CONTEMP. HEALTH L. & POL'Y 279, 281 (2004); *see also* ELIZABETH RING-CASSIDY & IAN GENTLES, WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE 85–95 (2002) (providing an overview of various studies comparing the safety of childbirth and abortion).

122. *See* ROYAL COLL. OF OBSTETRICIANS AND GYNAECOLOGISTS, THE CARE OF WOMEN REQUESTING INDUCED ABORTION (Sept. 2004), *available at* http://www.rcog.org.uk/resources/Public/pdf/induced_abortionfull.pdf (reporting that the immediate physical complication rate of induced abortion was at minimum eleven percent); *see also* Shai Linn et al., *The Relationship Between Induced Abortion and Outcome of Subsequent Pregnancies*, 146 AM. J. OBSTETRICS & GYNECOLOGY 136, 140 (1983) (describing pregnancy complications that occur in later pregnancies with women who have had abortions).

123. John M. Thorp, Jr. et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion*, 58 OBSTETRICAL & GYNECOLOGICAL SURV. 67 (2003).

124. *Id.* at 67–68, 74–76.

125. *See id.* at 74; *see also* JOEL OSLER BRENDE, M.D. FAPA, Post-Trauma Sequelae Following Abortion and Other Traumatic Events (1994) http://www.lifeissues.net/writers/air/air_vol7no1_1994.html (last visited Nov. 5, 2005) (noting that postabortion stress resembles psychological trauma incurred from the death of loved ones).

126. *See* Thorp et al., *supra* note 123, at 74; *see also* Priscilla K. Coleman et al., *State-Funded Abortions Versus Deliveries: A Comparison of Outpatient Mental Health Claims Over Four Years*, 72 AM. J. ORTHOPSYCHIATRY 141, 141 (2002) (comparing the use of mental health services by women who have had abortions and those who have given birth and finding the rate of mental health claims for women who have had abortions was 17 percent higher); Jesse R. Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9 MED. SCI. MONITOR CR 157, 157

of subsequent children;[129] low birth weight in subsequent children;[130] and breast cancer.[131] Numerous studies have validated

(2003) (claiming that women who have had abortions suffer from a significantly higher risk of clinical depression); Jesse R. Cougle et al., *Generalized Anxiety Following Unintended Pregnancies Resolved Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth*, 19 J. ANXIETY DISORDERS 137, 141 (2005) (noting higher rates of generalized anxiety in women who have had abortions).

127. *See* Thorp et al., *supra* note 123, at 74; *see also* RING-CASSIDY & GENTLES, *supra* note 121, at 189–216 (discussing the links between abortion and a significantly increased risk of suicide); Mika Gissler, *Suicides After Pregnancy in Finland, 1987-94*, 313 BRIT. MED. J. 1431, 1433–34 (1996), *available at* http://bmj.bmjjournals.com/cgi/content/full/313/7070/1431 (noting that the risk of suicide was three times higher after abortion than childbirth); David C. Reardon et al., *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, 95 S. MED. J. 834, 836–37 (2002) (stating that the risk of suicide was twice as high after elective abortion).

128. *See* Thorp et al., *supra* note 123, at 70 (noting that the research team found that induced abortion increases the risk of placenta previa in subsequent pregnancies by thirty percent).

129. *See id.* at 75; *see also* Brent Rooney & Byron C. Calhoun, *Induced Abortion and Risk of Later Premature Births*, 8 J. AM. PHYSICIANS AND SURGEONS 46, 46 (2003) (claiming that forty-nine studies of abortion and subsequent premature births have established with ninety-five percent confidence that there is a connection between the two).

130. Thorp et al., *supra* note 123, at 75.

131. *Id.* at 77 (claiming that the connection between abortion and breast cancer is strong enough that as a matter of professional ethics, women seeking abortions should be notified about the possibility of an abortion-breast cancer link). The abortion-breast cancer link is highly controversial, with a plethora of studies present on both sides of the debate. Proponents of the link claim that abortion increases the chance of breast cancer by thwarting the well-recognized protection the first full-term pregnancy provides against breast cancer. *See id.* Additionally, proponents of the link make the more controversial claim that the proper interaction of hormones and breast tissue during pregnancy is thwarted by induced abortion. *See* Angela Lanfranchi, *The Abortion-Breast Cancer Link: The Studies and the Science*, *in* THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION 72, 75–79 (Erika Bachiochi ed., 2004). For further studies linking abortion and breast cancer, see *id.* at 72–86; RING-CASSIDY & GENTLES, *supra* note 121, at 17–34 (summarizing many of the studies demonstrating a link between induced abortion and breast cancer); Katrina Armstrong et al., *Assessing the Risk of Breast Cancer*, 342 NEW ENG. J. MED. 564, 566 (2000) (citing breast cancer as a risk of abortion); Joel Brind et al., *Induced Abortion as an Independent Risk Factor for Breast Cancer: A Comprehensive Review and Meta-Analysis*, 50 J. EPIDEMIOLOGY & COMMUNITY HEALTH 481 (1996); Janet R. Daling et al., *Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86 J. NAT'L CANCER INST. 1584 (1994) (the journal article that started the controversy); and John Kindley, *The Fit Between the Elements for an Informed Consent Cause of Action and the Scientific Evidence Linking Induced Abortion with Increased Breast Cancer Risk*, 1998 WIS. L. REV. 1595 (1998). *But see* Mads Melbye et al., *Induced Abortion and the Risk of Breast Cancer*, 336 NEW ENG. J.

the findings of the OGS team.[132] Abortion has also been linked to higher rates of sexually transmitted diseases[133] and eating disorders,[134] as well as drug and alcohol abuse.[135] Sadly, homicide has become the leading cause of death for pregnant women,[136] which may be largely due to their refusal to procure abortions.

New data also suggest that abortion has increased the sexual exploitation of women.[137] Far more men actually support the "right to choose" than women.[138] Studies show that a major-

MED. 81, 81–84 (1997) (refuting the link between abortion and breast cancer); Valerie Beral et al., *Breast Cancer and Abortion: Collaborative Reanalysis of Data From 53 Epidemiological Studies, Including 83,000 Women with Breast Cancer from 16 Countries*, 363 THE LANCET 1007, 1007, 1013–14 (2004) (same).

132. *See supra* notes 125–31; *see generally* DETRIMENTAL EFFECTS OF ABORTION (Thomas W. Strahan ed., 3d ed. 2001) (describing hundreds of studies demonstrating the negative effects of abortion).

133. *See, e.g.*, Jonathan Klick & Thomas Stratmann, *The Effect of Abortion Legalization on Sexual Behavior: Evidence From Sexually Transmitted Diseases*, 32 J. LEGAL STUD. 407, 417–30 (2003) (claiming that legalized abortion has caused an increase in the rate of sexually transmitted diseases due to abortion's use as a contraceptive).

134. *See* Jean G. Spaulding & Jesse O. Cavenar, Jr., *Psychoses Following Therapeutic Abortion*, 135 AM. J. PSYCHIATRY 364, 364–65 (1978) (citing examples of women developing eating disorders following abortions).

135. *See, e.g.*, Albert D. Klassen & Sharon C. Wilsnack, *Sexual Experience and Drinking Among Women in a U.S. National Survey*, 15 ARCHIVES SEXUAL BEHAV. 363, 376–77 (Oct. 1986) (noting the possibility of a link between abortion and heavy drinking).

136. *See, e.g.*, Isabelle L. Horon & Diana Cheng, *Enhanced Surveillance for Pregnancy-Associated Mortality—Maryland, 1993–1998*, 285 J. AM. MED. ASS'N 1455, 1455 (2001) (concluding that homicide was the most likely cause of death for pregnant or recently pregnant women in Maryland); Kim Curtis, *Murder: The Leading Cause of Death for Pregnant Women*, NATIONAL ORGANIZATION FOR WOMEN, Apr. 23, 2003, http://www.now.org/issues/violence/043003pregnant.html; National Abortion Federation, The National Abortion Federation Urges Congress to Protect Pregnant Women Without Endangering Abortion Rights, (Feb. 26, 2004) http://www.prochoice.org/news/releases/archive/20040226.html (stating that murder is the leading cause of death for pregnant women).

137. *See The Consequences of* Roe v. Wade *and* Doe v. Bolton*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. (June 23, 2005) (statement of Teresa Stanton Collett), *available at* http://judiciary.senate.gov/testimony.cfm?id=1553&wit_id=4396; *see also* RING-CASSIDY & GENTLES, *supra* note 121, at 217–23 (describing the connection between abortion, failed interpersonal relationships, and male coercion).

138. *See* Quinnipiac University, U.S. Voters Back *Roe v. Wade* 2-1, Support Filibusters, Quinnipiac University National Poll Finds, (May 25, 2005), http://www.quinnipiac.edu/x11385.xml?ReleaseID=738; *see also* ARTHUR B.

ity of women choose abortion due to problems in their sexual relationships or their desire to avoid single parenthood because of male irresponsibility.[139] Abortions often result from male coercion.[140] In particular, the right to abortion for minors has allowed some men to escape statutory rape and abuse charges.[141] Under the Court's current jurisprudence, even the minimal statutes that combat this problem have been subject to withering scrutiny and often struck down.[142]

One of the major claims of abortion proponents both in 1973 and today is that if abortion is made illegal, women will have to resort to "back-alley" abortions where their lives will be in significant danger. This claim does not hold up under the weight of the facts. According to the Centers for Disease Control and Prevention's National Center for Health Statistics, from 1940 to 1972, deaths due to illegal abortions declined from 1,313 to 41 annually.[143] If *Roe* were overturned today, the inci-

SHOSTAK & GARY MCLOUTH WITH LYNN SENG, MEN AND ABORTION: LESSONS, LOSSES, AND LOVE (1984) (chronicling male attitudes toward abortion).

139. *See* Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions*?, 20 FAM. PLAN. PERSP. 169, 169 (1988) (citing the fear of single parenthood as a major cause of abortion); *see also* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL AND REPROD. HEALTH 110, 112–13 (2005) (citing relationship problems, desire to avoid single parenthood, and unstable/abusive relationships as major reasons for procuring an abortion).

140. RING-CASSIDY & GENTLES, *supra* note 121, at 221; *see generally* THE ELLIOT INSTITUTE, FORCED ABORTION IN AMERICA: A SPECIAL REPORT, http://www.afterabortion.info/petition/Forced_Abortions.pdf (last visited Nov. 5, 2005) (claiming that eighty percent of abortions are due to some sort of economic, social, or psychological coercion, and that most women would choose not to have them given the choice).

141. *See Hearing on H.R. 748 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (Mar. 3, 2005) (statement of Teresa Stanton Collett), *available at* http://judiciary.house.gov/Hearings.aspx?ID=90.

142. *See, e.g.*, Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 937 (9th Cir. 2004) (striking down Idaho's parental consent statute), *cert. denied*, 125 S. Ct. 1694 (2005); Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53, 65 (1st Cir. 2004) (striking down New Hampshire's parental notification statute), *cert. granted sub nom.* Ayotte v. Planned Parenthood of N. New Eng., 125 S. Ct. 2294 (2005) (No. 04-1144).

143. Candace C. Crandall, *Three Decades of Empty Promises*, *in* THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION, *supra* note 131, at 17 (citing NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., SUPPLEMENT TO THE MONTHLY VITAL STATISTICS REPORT: ADVANCE REPORTS 1986: SERIES 24, COMPILATIONS OF DATA ON NATALITY, MORTALITY, MARRIAGE, DIVORCE, AND INDUCED TERMINATIONS OF PREGNANCY, NO. 3 (1986)).

dences of abortion deaths from illegal abortions would most likely be drastically less than in 1972 due to developments in technology, antibiotics, and the safety procedures of medical practice. A large percentage of illegal abortions performed prior to *Roe* were by licensed physicians.[144] There is no reason to think this would be different today.

Additionally, far from living up to *Roe*'s expectations about the future of women's health, abortion has become a full-fledged multimillion-dollar industry in its own right.[145] Former workers in abortion clinics have testified to a "cattle herd" mentality[146] of abortion clinics that seek to be as efficient as possible. Fewer hospitals and fewer doctors are performing abortions, forcing more patients into larger, urban clinics.[147] Because of privacy issues, many abortion clinics keep few records, and what they do keep is collected haphazardly.[148] Most women who experience complications from abortion seek medical assistance from clinics other than the abortion provider, where the problem is rarely linked to, or recorded as, an abortion complication.[149] Thus, we truly do not know the full extent of the medical complications resulting from abortions.

144. *See id.* (citing Mary Calderone, *Illegal Abortion as Public Health Problem*, 50 AM. J. PUB. HEALTH 951 (1960) (noting that prior to *Roe*, nine out of ten illegal abortions were performed by licensed physicians)); *see also* Finley, *supra* note 82, at 369 (noting that California's hearings to liberalize its abortion laws in the 1960s would simply codify "what doctors were, in fact, doing").

145. *See* Phyllis Schlafly, *Ashcroft Stands Up to Abortion Industry*, TOWNHALL.COM, Mar. 8, 2004, http://www.townhall.com/columnists/phyllisschlafly/ps20040308.shtml (describing Planned Parenthood's revenues and government funding).

146. *See* Women's Med. Ctr. of Nw. Houston v. Archer, 159 F. Supp. 2d 414, 428 (S.D. Tex. 1999) (abortion provider described abortion clinics as having a "cattle herd" mentality) *aff'd in part and rev'd in part by* Women's Med. Ctr. of Nw. Houston v. Bell, 248 F.3d 411 (5th Cir. 2001).

147. *See* Maureen Kramlich, *The Abortion Debate Thirty Years Later: From Choice to Coercion*, 31 FORDHAM URB. L.J. 783, 783–89 (2004) (describing the failing business model of abortion clinics and their push for government money to stay in business).

148. *See* RING-CASSIDY & GENTLES, *supra* note 121, at 5–9 (describing the reasons for the underreporting of data concerning postabortion complications); *see also* David C. Reardon, *Limitations on Post-Abortion Research: Why We Know So Little*, http://www.afterabortion.org/limits.html (last visited Nov. 5, 2005) (exploring the relative difficulty in obtaining accurate postabortion statistics).

149. *See* RING-CASSIDY & GENTLES, *supra* note 121, at 255–68 (describing how research limited to short-term follow-up examinations limits the accuracy of postabortion research).

B. POLITICAL CONSENSUS

In their commentary on the *Lochner* line of cases, the three Justices of the *Casey* plurality opinion stated that in 1937, a social consensus had been reached that *Lochner* was wrongly decided.[150] They went on to state that the sort of consensus that existed in 1937 was not present with regard to abortion (at least not in 1992).[151] Leaving aside the question of the Justices' historical accuracy, their statement implies that polls may play a role in determining whether a reversal of precedent is justified. Is it enough to have academic consensus stating that a case was wrongly decided, or is there a need for public consensus? Judging from the plurality opinion's desire to achieve some sort of social compromise on this divisive issue, *Casey* suggests that the Court considers the pulse of the nation important when adjudicating cases involving abortion.[152]

The polls, however, indicate that the nation as a whole is less divided on the issue than is commonly portrayed. Much common ground exists among the populace regarding appropriate regulations of abortion—regulations that are frustrated by the Court's current jurisprudence. In a 2004 poll conducted by Zogby International, 56 percent of the population agreed with the proposition that at a maximum, abortion should be legal only in cases of rape, incest, or to preserve the life of the mother.[153] Another 25 percent believed abortions should only be allowed during the first three months of pregnancy.[154] Thus, 81 percent of the population rejected the current abortion jurisprudence of the Supreme Court. A 2003 CBS News Poll indicated that 62 percent of those polled believed there should be stricter limits on abortion.[155] Over 70 percent of those polled by USA Today/CNN/Gallup in 2003 stated that they would allow such regulations as "right to know" acts, waiting periods, parental consent for minors, spousal notification, and a ban on

150. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–62 (1992).

151. *Id.* at 864 ("Because the cases before us present no such occasion it could be seen as no such response.").

152. *See id.* at 854–55.

153. Steven Ertelt, *New Poll: Majority of Americans, Students, Blacks, Pro-Life on Abortion*, ZOGBY INTERNATIONAL, Apr. 26, 2004, http://www.zogby.com/Soundbites/ReadClips.dbm?ID=8087.

154. *Id.*

155. CBS News, Abortion Polls, (July 2003), http://www.sba-list.org/polls08072003.cfm.

partial-birth abortion (D & X).[156] The information from these polls reflects basic American attitudes toward abortion.[157] Thus, there appears to be a broad consensus that the current abortion regime is too lax and does not comport with the sensibilities of the people. If the Justices are looking for public opinion to help justify a reversal of precedent, ample polling data supports some kind of reversal of *Roe*.

IV. THE PATH OF A CONSTITUTIONAL REORIENTATION

Constitutional values remain the same over time, but should be applied differently in regard to concrete historical circumstances. The *Lochner* era is the prototypical example of this sort of shift in constitutional values and provides a model for how today's Justices could overturn *Roe v. Wade*.[158] At the same time, this transition need not jeopardize important constitutional values like the right of privacy or the emerging doctrine of substantive due process as applied to noneconomic liberties.[159] A new "Harlanite" approach could forge a middle ground between the dogmatic assertion of a right that has its foundation in a judicial gloss on a particular constitutional text,

156. *See* Kathy Kiely, *Abortion Battle Hits Pivotal Point*, USA TODAY, Jan. 15, 2003, http://www.usatoday.com/news/nation/2003-01-15-abortion-usat_x.htm.

157. *See* Clark D. Forsythe, *An Unnecessary Evil*, 130 FIRST THINGS 21 (2003) (referencing recent polling data on abortion); Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson From the Abolitionists*, 62 ALB. L. REV. 853, 945–48 (discussing recent trends in abortion polling data).

158. Lessig describes the interpretive process as one that relies on particular degrees of certainty. *See* Lessig, *supra* note 25, at 410–14. If the meaning of the text or the idea behind the text is pretty certain, then courts may rule. In the New Deal context, prior to the 1930s, noninterventionism was largely assumed to be an absolute, unchanging truth. In that context, liberty clearly meant laissez-faire economics. However, as economic theory was challenged and contested, the Court had to take a more agnostic approach. *See id.* at 439. In this interpretive context, legislatures should get more deference. *See id.* The same principle applies to abortion. Since the facts and constitutional principles of *Roe* are highly contested, the court should adopt a more agnostic, interpretive approach and return the issue to the legislatures. *See id.*

159. As soon as the Court abandoned the old constitutional limitations on the police power, the Court crafted new ones in the famous "footnote 4" from *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). *See* GILLMAN, *supra* note 66, at 204. Footnote 4 prevented judicial review from being swallowed by the Court's new deference to the police power and Congress, and became the basis for noneconomic substantive due process. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 229–34 (2004) (discussing the advent of "Footnote Four").

and a Holmesian legal positivism that would leave unenumerated liberty interests for states to protect or not protect. This constitutional reorientation of values could provide a jurisprudential framework that would reaffirm the liberty interests associated with privacy, while taking the abortion issue out of the courts and into the legislatures for debate. As with right of contract jurisprudence during the New Deal, current abortion jurisprudence has prevented the enactment of an enormous amount of socially popular legislation restricting abortion.[160] It is time to return this issue to the legislature.

A. *LOCHNER* REVISITED: THREE COMPETING APPROACHES TO ABORTION

While there were three competing models for resolving the question of the balance of the police power and economic liberties in *Lochner*, only the dogmatic strain of fundamental rights embodied in the Peckham opinion and the legal positivism of Holmes's dissent are competing today. However, this Note seeks to resurrect a third approach—a "Harlanite" theory that balances important constitutional values and liberties, while at the same time addresses the changed factual situation since 1973.[161] This approach offers a way out of the current debate over the merits of substantive due process, while upholding constitutional principles that are becoming more deeply embedded in our constitutional framework.

160. Recently, federal courts have reviewed and struck down state parental notification and consent statutes that are enormously popular, as well as the federal partial-birth abortion ban that passed both houses of Congress by overwhelming majorities. *See, e.g.*, Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 921–24 (9th Cir. 2004); Planned Parenthood of N. New Eng. v. Heed, 390 F.3d 53, 59–61 (1st Cir. 2004) (invalidating New Hampshire's parental notification statute), *cert. granted sub nom.* Ayotte v. Planned Parenthood of N. New Eng., 125 S. Ct. 2294 (2005) (No. 04-1144) (striking down New Hampshire's parental notification statute); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 492–93 (S.D.N.Y. 2004) (finding the Federal Partial-Birth Abortion Ban of 2003 unconstitutional).

161. This does not take into account a fourth option, which is possibly the view of Justice Thomas, that there might be a right to life in the Constitution located in the Privileges and Immunities Clause of the Fourteenth Amendment. Justice Thomas has indicated that he is open to rethinking unenumerated rights under this clause. *See* Saenz v. Roe, 526 U.S. 489, 527–28 (Thomas, J., dissenting); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 68 (1989).

The first approach to abortion jurisprudence maintains and affirms a broad fundamental right of sexual and reproductive autonomy that encompasses contraception, same-sex relations, and reproduction. But rather than asserting a general right to privacy, this jurisprudence upholds the right to engage in these particular practices by framing the right in question as sexual autonomy (which encompasses abortion). This approach protects the broader scope of activities that fall under the heading of sexual autonomy. "It's my body, and I can do what I want with it" would be the underlying attitude that this theory upholds. If this is the case, then police power regulations in this area would be immediately suspect as intrusions into fundamental rights under the Fourteenth Amendment's Due Process Clause. This appears to be the philosophical basis for the plurality opinion in *Casey*.[162] As long as abortion is linked to a notion of privacy that encompasses sexual autonomy, states will find it continually difficult to pass legislation limiting or regulating abortion. This approach also mirrors that of the majority in *Adkins*, which attempted to uphold a vigorous doctrine of economic choice through the right of contract.[163]

Opposite the rigid commitment to fundamental rights is the approach adopted by Justice Scalia. This jurisprudence maintains that substantive due process is a complete aberration of constitutional theory. As a product of this line of jurisprudence, *Roe* (and perhaps, but not necessarily, *Griswold*) should be overturned and left to the states, as the Court should get its hands off an issue it had no business dealing with in the first place.[164] This approach echoes Justice Holmes's dissent in *Lochner*. Holmes believed that the constitutional text said nothing about the protection of particular economic liberties, and that the Court lacked the competency and the institutional mandate to do so.[165] Likewise, in today's heated culture wars, Justice Scalia believes the Court has no special competence or

162. *See* STONER, *supra* note 41, at 73 (stating that while purporting to offer greater latitude to abortion regulation, *Casey*'s long-term purpose is to better-ground the abortion right and expand the breadth of constitutionally-guaranteed sexual autonomy).

163. *See* Adkins v. Children's Hospital of the District of Columbia, 261 U.S. 525, 545–48 (1923), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 388–400 (1937).

164. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting).

165. *See* Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

authority to adjudicate controversial moral issues better left to the states.[166] The chief contribution of a "Harlanite" approach is that it provides an alternative to the dilemma between a rigid approach to fundamental rights and a broad legal positivism.

B. A "HARLANITE" APPROACH TO ABORTION

In *Lochner*, Justice Harlan gave priority to particular legislative solutions, while at the same time noting that there was a particular liberty interest called the right of contract.[167] However, he indicated that unless the intrusion was arbitrary or unreasonable, deference should be given to the legislature as the more appropriate finder of fact.[168] This approach, adopted by Justice Hughes in *West Coast Hotel*,[169] emphasized the community's interest in regulating "health, safety, morals and welfare"[170] over the of the prerogatives of the individual.

With regard to abortion, the Court could adopt a "Harlanite" approach that would overturn *Roe*, while at the same time upholding the constitutional value of privacy. How would this work? First of all, this approach to abortion jurisprudence would recognize that *Roe* has been subject to withering criticism on both sides of the abortion debate, and has undermined the Court's institutional legitimacy.[171] Next, it would note the new communitarian ethic present in the culture,[172] and then examine the increasing amount of factual data pre-

166. *See generally* KEVIN A. RING, SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE (2004) (citing numerous dissenting opinions where Scalia criticizes and laments the Court's attempt to adjudicate contested moral issues).

167. *Lochner*, 198 U.S. at 67 (Harlan, J., dissenting).

168. *Id.* at 68.

169. 300 U.S. 379, 391 (1937).

170. *Id.* at 391 (overruling *Adkins* and stating that liberty is qualified by the state's appropriate use of the police power); *see also* STONER, *supra* note 41, at 145–46 (highlighting various Justices' attempts to apply economic data to traditional categories of jurisprudence).

171. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973) (the most famous academic critique of *Roe*); *Ginsburg Touches on* Roe v. Wade *in Kansas*, WTOP RADIO NETWORK, Mar. 31, 2005, http://www.wtopnews.com/index.php?nid=343&sid=443760 (stating that *Roe* went past the confines of normal constitutional jurisprudence); *see also* ALAN M. DERSHOWITZ, SUPREME INJUSTICE 194–97 (2001) (comparing *Roe v. Wade* to *Bush v. Gore* as unwarranted judicial interventions into politics).

172. *See* David Brooks, *The Virtues of Virtue*, N.Y. TIMES, Aug. 7, 2005, at A29 (noting the rejection of the social experiments of the 1960s and 1970s).

sent with regard to both fetal development and abortion's adverse effect on women. Because of the data's complexity and abortion's increasing number of unwelcome externalities,[173] the rationale for the original holdings of *Roe* and *Doe* has been undermined, and *Roe* should be reversed and returned to the states for adjudication.

1. *Nebbia* Sets the Table

It may be that *Casey* is the new *Nebbia*, providing the jurisprudential shift that will allow for a new version of *West Coast Hotel* to overturn *Roe*. Just as *Nebbia* abandoned the principle of neutrality that made distinctions between public and private economic activity,[174] *Casey* abandoned *Roe*'s unworkable, judicially created trimester framework.[175] *Casey* also abandoned the strict framework of substantive due process, and refused to assert that abortion rights were "fundamental." The *Casey* opinion attempted to allow a number of abortion regulations as long as they did not create an "undue burden."[176] Gone is the emphasis on "privacy" (only mentioned three times in the opinion);[177] in its place sits a new balancing test for weighing the state's competing claims of interest in maternal and fetal health, as well as the reliance interest of women on the right to an abortion.[178] However, it is impossible to read the *Casey* opinion as thwarting privacy interests or devaluing personal autonomy. It appears that the Court made a failed attempt to construct a framework where the interest of protecting personal autonomy was balanced against important concerns about abortion's consequences and the need to apply at least modest regulations to ensure abortion remained an informed choice.[179]

Additionally, *Casey* prepared the way for a reconsideration of the factual underpinnings of *Roe* through its discussion of

173. *See supra* notes 117–57 and accompanying text.

174. *See* Nebbia v. New York, 291 U.S. 502, 530–37 (1934).

175. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872–73 (1992).

176. *See id.* at 879–901.

177. *See id.* at 883, 896, 900.

178. STONER, *supra* note 41, at 72 (describing the transition from doctor-patient privacy to general liberty between *Roe* and *Casey*).

179. *See* Stenberg v. Carhart, 530 U.S. 914, 960–64 (2000) (Kennedy, J., dissenting) (describing why *Casey* permitted states to enact statutes regulating the practice of abortion).

the *Lochner* line of cases.[180] By noting that constitutional precedents can be reversed when there are changed circumstances from the original holding,[181] the Court echoed the rationale of *West Coast Hotel*. While *Casey* failed to consider what *Roe* had wrought, it created a jurisprudential basis for a future Supreme Court to respond to Judge Edith Jones's exhortation[182] and reconsider the complexity of the abortion problem. Examining the facts, the Court should return the issue to the states as the more appropriate finder of fact. Perhaps *Casey* is not the "worst constitutional decision of all time."[183]

2. The Holding of "*West Coast Roe*"

A "Harlanite" abortion holding could come in many forms. The most basic would be to simply overturn *Roe* and return abortion to the states. This approach would leave *Griswold* intact, concluding that abortion was not part of the "privacy" found in either the Ninth Amendment or Due Process Clause of the Fourteenth Amendment. Both invasions of privacy generally, and doctor-patient privacy specifically, could continue to be given strict scrutiny, with abortion being removed from the privacy "penumbra" because of the state's interest in regulating its externalities[184] and protecting potential life.[185] A slightly modified version of this approach would alternatively identify abortion as a liberty interest in a category of doctor-patient privacy, or medical autonomy, which receives nondeferential rational basis review, or rational basis review "with bite."[186]

180. *See Casey*, 505 U.S. at 860–62.

181. *Id.* at 863–64.

182. *See supra* note 9 and accompanying text.

183. *See* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003) (discussing *Casey*).

184. *Casey*, 505 U.S. at 875–76.

185. *Id.* at 871.

186. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–36 (1995) (striking down a Colorado constitutional amendment banning special protection for gays); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (holding unconstitutional, on equal protection grounds, a city's denial of a housing permit to a home for the mentally challenged); *see also* Craigmiles v. Giles, 312 F.3d 220, 227–29 (6th Cir. 2002) (striking down Tennessee's casket-seller regulations as irrational restrictions on a basic liberty interest—the right to enter the profession of one's choice); Anthony B. Sanders, Comment, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in* Craigmiles v. Giles, 88 MINN. L. REV. 668, 680–85 (2004) (arguing that the Sixth Circuit's holding in *Giles* serves as a model for nondeferential rational basis review of liberty interests, particularly

Thus, unreasonable or arbitrary invasions into this sphere of relations, such as preventing the preservation of a woman's life, would be considered unconstitutional. This approach resembles right of contract jurisprudence prior to *Lochner*, which applied nondeferential rational basis review to interferences with private contracts.

Furthermore, a "Harlanite" approach need not leave abortion rights completely unprotected. While overturning *Roe*, the Court could forbid any regulation that prevents an adult from using the abortion providers in other states.[187] The Court could review overly broad or vague laws that criminalize abortion without providing clear direction regarding the boundaries of lawful activities.[188] Thus, broad and blanket bans on the procedure would be subject to exacting scrutiny. Finally, the Court could overturn *Roe*, but also redefine the *Doe* definition of "health" to mean "any situation where a woman's life or physical wellbeing is in *immediate* danger." Thus, abortion would remain a fundamental right in all circumstances where a competent medical professional deems it is necessary to preserve the "health" of the mother. Further provisions could also be made for extreme cases such as rape or incest. Thus, a "Harlanite" approach could preserve the doctor-patient privacy so important in 1973 when *Roe* was decided, while contemporaneously curbing the fear that some states will be too extreme in their regulation of abortion. Each of these approaches has the virtue of providing space for legislatures to address the abortion question, while at the same time affirming basic privacy and autonomy interests on which there is still broad consensus.

economic liberty).

187. *See* Saenz v. Roe, 526 U.S. 489, 501–04 (1999) (holding that the right to travel between states was protected by the Privileges and Immunities Clause of the Fourteenth Amendment).

188. This proposition seems to be similar to the view adopted by William Eskridge. Eskridge states that Justice Blackmun's original draft of the *Roe* opinion would have voided the Texas law (and the most intrusive abortion statutes) on vagueness grounds and returned the issue to the states to be adjudicated on the bases of the facts and the record. *See* Eskridge, *supra* note 15, at 1080. According to Eskridge, compromise and accommodation would have prevailed, and the cultural storm that followed the decision would have been avoided. *See id.*

3. A "Harlanite" Approach Does Not Jeopardize Other Liberties

Some may argue that overturning *Roe* will call into question important holdings in other cases such as *Griswold v. Connecticut*[189] and *Lawrence v. Texas*.[190] However, any of the "Harlanite" approaches outlined above would uphold these decisions because of the gross and largely irrational intrusion into basic and fundamental liberty interests at issue in those cases.[191] Government intrusion into private homes to regulate sex acts is both unenforceable and an arbitrary and deep intrusion into personal autonomy, thus conforming to the sort of exceptions that Justice Harlan's approach accounted for in *Lochner*.

Additionally, a "Harlanite" holding could take the more radical step of giving nondeferential rational basis review to privacy interests protected by the "liberty" of the Due Process Clause. This approach maintains the substantive rights protected by the Clause, but balances them against community police power interests. *Pierce v. Society of Sisters*,[192] *Meyer v. Nebraska*,[193] and *Lawrence v. Texas*[194] would be models, as each applies nontraditional substantive due process review to find arbitrary intrusions into basic liberty interests.[195] This ap-

189. 381 U.S. 479, 485–86 (1965) (holding that a general right to marital privacy is implicit in the provisions of the Constitution).

190. 539 U.S. 558, 578–79 (2003) (striking down state antisodomy as violative of the liberty guaranteed by the Fourteenth Amendment).

191. *See* Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1166–67 (2004) (claiming that *Lawrence* is a "gay rights *West Coast Hotel*" because it reflected a new understanding of the humanity of gays and their place in society as it overturned *Bowers v. Hardwick* and its purportedly faulty factual assumptions).

192. 268 U.S. 510, 534–36 (1925) (protecting the liberty of parents to direct upbringing).

193. 262 U.S. 390, 400–03 (1923) (providing teachers the right to teach and parents the right to have their children taught).

194. 539 U.S. 558, 577–79 (2003) (recognizing the freedom of thought, belief, expression, and intimate conduct).

195. Recall that *Griswold*, *Casey*, and *Lawrence* were decided on grounds that differed from traditional substantive due process methodology. In addition, the opinion in *Lawrence* does not use the classic terminology of substantive due process such as "fundamental rights" and "strict scrutiny." *See* Randy E. Barnett, *Grading Justice Kennedy: A Reply to Professor Carpenter*, 89 MINN. L. REV. 1582, 1585, 1587 (2005) (describing how Justice Kennedy's *Lawrence* opinion would have merited a poor grade on a first year constitutional law exam because of its minimal application of substantive due process methodology).

proach gives broad latitude to the state's police power, but recognizes its limitations in relationship to basic rights, especially privacy and relational self-determination. Once again, important constitutional values are preserved, even with a more radical holding.[196]

CONCLUSION

This Note calls for a new "Harlanite" approach in dealing with the question of abortion, and liberty interests in general.[197] This approach defers to legislative initiative, as well as serves as a bulwark against arbitrary intrusions into basic liberty interests. The *Lochner* line of cases provides a concrete historical example of how changes in factual circumstances can lead to a reprioritization of constitutional values. Strict constitutional protection of abortion is no longer necessary, and experience tells us that abortion has been harmful to women both physically and psychologically.

The question of abortion has unnecessarily poisoned national politics and has prevented important discussions from taking place on a number of important issues, particularly in

196. Theoretically, however, even the end of substantive due process altogether might not be a threat to basic rights such as privacy. *Griswold* was decided under the "penumbra" theory that would locate unenumerated rights within the sphere of the Ninth Amendment. *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965). Overturning *Roe* could be the end of the controversial methodology of substantive due process and an opportunity to locate unenumerated rights in other areas of the constitutional text, such as the Ninth Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment. *See generally* BARNETT, *supra* note 159, at 234–42 (arguing that the Constitution contains a presumption of liberty that should allow for the recognition of unenumerated rights, particularly within the Ninth Amendment).

197. The key to the return of a "Harlanite" approach is Justice Anthony Kennedy. Kennedy's opinions represent a "Harlanite" strain within the Court because he seeks to preserve liberties against arbitrary intrusions; however, he works outside the typical framework of substantive due process. His opinion in *Lawrence v. Texas* is a perfect example of a narrow holding that preserves a basic liberty interest without pulling the carpet out from underneath the police power. *See Lawrence*, 539 U.S. at 562–79. Likewise, he has shown great dissatisfaction with how *Casey* has been applied, and seems willing to revisit the question, especially in light of his about-face in the death penalty cases. *See* Roper v. Simmons, 125 S. Ct. 1183, 1187–2000 (2005) (holding unconstitutional juvenile death penalty laws). Judging from his dissenting opinion in *Stenberg*, Justice Kennedy seems to have wanted to make room for all sorts of regulations that do not interfere with the basic liberty interest of procuring an abortion, including even total bans after viability. *See* Stenberg v. Carhart, 530 U.S. 914, 956–79 (2000) (Kennedy, J., dissenting).

the selection of the judiciary. Had the Court not usurped states' authority to regulate abortion and imposed an extraordinarily radical and uniform system on the nation, it can be assumed that with the passage of time, a broad consensus would have developed, with some states having more liberalized laws than others.[198] Once the question is returned to the states, this conversation can occur in local communities, where there is a deeper sense of shared values than at the national level. There can be unity through diversity.[199]

198. *See* Eskridge, *supra* note 15, at 1080 (lamenting the Court's decision to impose a uniform system of abortion on states that were moving toward democratically liberalizing their abortion laws); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385–86 & n.81 (1985) (questioning the wisdom of *Roe* in light of the emergence of liberalized abortion laws prior to the decision).

199. *See* Benjamin Wittes, *Letting Go of* Roe, THE ATLANTIC MONTHLY, Jan.-Feb. 2005, at 48 (noting that the Democratic Party's commitment to preserving *Roe v. Wade* "has been deeply unhealthy for American democracy, for liberalism, and even for the cause of abortion rights itself"); *see also* Cynthia Gorney, *Imagine a Nation Without* Roe v. Wade, N.Y. TIMES, Feb. 27, 2005, at A16 (noting the diversity of abortion laws that would emerge following a reversal of *Roe*).