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Woman Decides: Justice O'Connor and Due Process Rights of Choice, A

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A Woman Decides: Justice O'Connor and Due Process Rights of Choice*

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We have been asked to address Justice O'Connor's reproductive rights jurisprudence. Of course, the mention of Justice O'Connor in a sentence with reproductive rights calls to mind a familiar narrative: a story of opposition to—and vindication of—*Roe v. Wade*'s[1] central holding. Its subject is the constitutional principle that state regulation of a woman's decision whether to continue or abort a pregnancy must be measured in ways that reflect the fundamental importance, in our constitutional scheme, of uncoerced decision making about such life-defining matters as marriage, procreation, parenting, and the manner of one's death.[2] Its hero is Justice O'Connor. The story's basic plot is as follows: a president opposed in principle to the termination of pregnancies by abortion appointed Justice O'Connor to the Supreme Court bench in the hope that she would supply a vote crucial to overturning *Roe* and returning to states the authority to prohibit and criminalize abortion. In decisions spanning her first ten years on the Supreme Court bench, the Justice developed an influential critique of the reasoning of *Roe*. In 1992, however, she joined fellow centrists on the Court to reaffirm *Roe*'s central holding and to reaffirm as well the broader constitutional right to a significant measure of freedom from state coercion in making basic and intensely personal life choices. As the centrist Justices stated:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery

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1. 410 U.S. 113 (1973).
2. Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992).

> of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[3]

In these words, the Justices embraced what Cooper Davis has described as a national commitment, codified in the Reconstruction Amendments, to a definition of citizenship that includes human rights of self-determination, moral autonomy, and full civic participation.[4]

True, the centrist Justices weakened protection of the right to choose abortion, adopting an undue burden analysis in lieu of *Roe*'s trimester analysis.[5] The undue burden test, which was applied by a majority of the Court in 2000,[6] permits an as yet indeterminate constriction of rights of abortion choice, particularly in the first trimester. Still, affirmation of *Roe*'s central holding preserved an important liberty for women and strengthened the Court's commitment to meaningful protection of the range of liberty interests ranked as fundamental guarantees of the Fourteenth Amendment.

We do not propose to defend or correct the popular story of Justice O'Connor as a hero who saved *Roe*'s central holding by judiciously narrowing it.[7] Our project is to interrogate a significant gap in the story—to ask why Justice O'Connor's ten year critique of *Roe* led to reaffirmation of its central holding rather than to its repudiation. We argue that the Justice's respect for individual choice in matters that define one's personhood is related to an admirable capacity to appreciate equally the role of principles or first premises and the role of context in legal decisionmaking. We also argue, perhaps controversially, that the capacity to integrate premise-based and contextual analysis is a strength that must be developed against the grain of cultural and psycho-social pressures that are grounded in theories and stereotypes about gender but inhibit intellectual versatility in both men and women.[8] In arguing our second point, we take care not to run afoul of Justice O'Connor's sound advice that critiques involving gender difference harm women if they reinforce disabling

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3. *Id.* at 851 (citations omitted).

4. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 226-41 (1997).

5. *Id.* at 212.

6. *See* Stenberg v. Carhart, 530 U.S. 914, 921-22 (2000) (considering the constitutionality of a criminal prohibition of abortion by certain procedures).

7. We recognize, of course, that in reaffirming the central holding of *Roe*, the Court accepted limitations on the right of choice that had previously been struck on *Roe*'s authority. We also recognize that Justice O'Connor embraced, and in many respects cut, the doctrinal path for approving these new limitations. A focus on the limitations has led some to tell the story that culminates in *Casey*'s reaffirmation as a story of abortion opponents' success. *See, e.g.*, Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003, 1027 (1993) (emphasizing that the *Casey* court "severely weakened . . . [the right of abortion choice] by giving states greater latitude to regulate abortion during the first and second trimester of a woman's pregnancy"). We believe the story of reaffirmation is important and expect that it will be more enduring.

8. We do not argue, as others have, that women are contextual thinkers and men are abstract thinkers. *See* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 587-89 (1986). We argue, rather, that integration of contextual analysis into reasoning about matters in public and professional spheres is inhibited by a mix of psychological and cultural forces.

gender-based stereotypes.[9] Here is a map of what follows: In section I, we explain what we do—and do not—intend when we say that gender can be relevant to the development of strength in judicial decisionmaking. In Part II, we explain how reliance on gender stereotypes, and a concomitant disregard of complexity, can distort and impoverish legal reasoning. In Part III, we show how Justice O'Connor has avoided gender stereotypes, faced complexity, and mined context, in her analyses of the meaning and scope of due process liberty. We conclude Part III by arguing for even greater vigilance lest due process liberty be inappropriately circumscribed in the reproductive rights context.

I. WHAT WE MEAN BY DIFFERENT VOICES

The preceding road map suggests an irony in our argument. Parts II and III seem to be premised in part on the idea that to resort to gender stereotypes is a bad thing, yet we promise to advance the overarching proposition that Justice O'Connor's reproductive rights jurisprudence has revealed strengths that have to do with gender. Are we falling prey to the vice we condemn? Are we suggesting that Justice O'Connor is a stereotypical woman deciding constitutional questions in Gilligan's "different voice" of relationship and care?[10] Of course we are not. Our argument—like Gilligan's underlying work—is both more complex and more defensible. We argue that Justice O'Connor—like many capable women, and like many capable men—has the intellectual courage and versatility to reason from principles without losing sight of the difficult facts which principles compete and that different situations shed different light on a principle's meaning and proper scope. Development of these qualities requires some level of conscious or unconscious resistance to suppressing, in professional and other "public" spheres, the relational, inductive, and particularizing aspects of reasoned problem solving. To develop this argument properly, we must review aspects of Gilligan's account of male and female psycho-social development and its implications for assessing modes of reasoning.

In retrospect, we suspect that the title of Gilligan's *In a Different Voice* has caused a confusing oversimplification of Gilligan's basic ideas. The sound-bite summary of Gilligan's work is that it purports to show that women reason in a "different" voice of relationship and care. To imagine only that women reason in a different voice is to focus on the middle of a complex developmental and cultural story that begins, in infancy, with deeply relational human beings of both sexes.

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9. *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1553 (1991) (arguing that the "New Feminism" is "troubling . . . because it so nearly echoes the Victorian myth of the 'True Woman' that kept women out of law for so long").

10. CAROL GILLIGAN, IN A DIFFERENT VOICE 1-2 (2d ed. 1993).

Gilligan observed, as did Chodorow,[11] that in circumstances and cultures in which women are the primary care-givers for children, the relational intensity of the parent-child bond is (or is made to seem) in tension with the emerging sexual identity of male, but not of female toddlers.[12] In ongoing research, Gilligan charts male toddlers' more emphatic individuation, providing new evidence of developmental responses to the expectation, in a world of predominantly female infant caregiving, that "masculinity is defined through separation while feminity is defined through attachment."[13] Because this tension does not exist (or is not culturally encouraged) for female toddlers, they are better able to embrace relationship and less motivated to maintain a stance of sharp individuation.

Discussions of Gilligan's work are too often preoccupied with her insights concerning the differences that emerge in the toddler phase—with the idea that girls tend to be more comfortable than boys in valuing relationship and reasoning according to a relational logic. But Gilligan's observations concerning the toddler phase mark only the beginning of the developmental and cultural lessons of her work. Gilligan's tragic, and in many ways most consequential, observation is that, over the course of childhood, comfort in relationships is compromised, and relational intelligence is inhibited, for both boys and girls. The comfort in relationship that is compromised for boys at the toddler phase is compromised for girls during the second individuation that accompanies adolescence. As girls seek their identity at the edge of adulthood, they find relationship and relational reasoning valued only in domestic and other presumptively nurturing contexts. Their cultures are apt to value relational approaches in domains like mothering, teaching, or nursing, but to deny or disparage them in equally relational, but largely male-dominated domains like business, law, medicine, or politics. In better compensated and higher status pursuits, relational reasoning seems to be eschewed as firmly as it is in the socialization of male toddlers, such that in these domains inductive, contextual, and psychological analyses are suspect while deductive, rule-based, and nonsubjective analyses are valorized.[14]

Because suppression of the relational comes later for girls, and because relational reasoning is affirmed in the domestic and other nurturing domains within which girls receive far more cultural approval than boys do, girls seem to eschew relational logic less completely. But they suppress it nonetheless. Girls seem always to retain, at some level, a lingering confidence in the importance of relationship and the power of relational logics. Girls are also able, in domestic and other "nurturing" contexts, to value relationship without encountering cultural disapproval.

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11. NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 150, 166-67 (1978).

12. GILLIGAN, *supra* note 10, at 7-8.

13. *Id.* at 8.

14. *See* Workways, *at* http://www.law.nyu.edu/workways (describing how this pattern of disparagement manifests itself in law).

Nonetheless, in political, market, and broader social contexts, girls tend increasingly in the adolescent years to yield to the culturally dominant view that relational represents powerlessness, wishy-washy-ness, and an absence of reason.

To a greater or lesser extent, then, we all suffer the loss of Gilligan's different, relational voice. This suppression of relational values leaves a person in a state of dissociation—a two-mindedness in which one feels compelled to operate in terms of an incomplete set of relevant principles. To the extent that women are more conscious of suppressed relational values, we are likely to have a greater sense of a need to inhibit social or political assertion of our thoughts, desires, and judgments and defer to the thoughts, desires, and judgments of others. For us, the different, relational voice is more often understood as a suppressed voice of the self. But relational values are available to all; the capacity for intersubjectivity is one of humankind's greatest gifts. Few would deny that problems are better solved with an array of intellectual tools that includes relational—as well as other forms of—reasoning.[15] Dissociation must occur for men and women alike, and it must diminish us all.

We have said that women tend to be aware, in the process of dissociation, of a need to suppress a voice, or set of reasoning styles, that we associate with our selves, or personhood. We have also said that, as a general matter, relational modes are culturally devalued while apparently contrasting modes are culturally privileged. We believe that these two factors exert a subordinating effect, such that adolescent girls go beyond suppressing relational modes to adopting stances of self-effacement and selflessness. This observation is at the heart of both the greatest misconception about Gilligan's work and the greatest loss of women's dissociation: whereas Gilligan is commonly perceived as a thinker who seeks to valorize selflessness and self-sacrifice, her starkest finding is that girls tend to take on in adolescence, and too often fail to overcome in adulthood, patterns of deference and self-sacrifice that are frankly pathological. Selflessness is not a mode of reasoning through problems; its only logic is simple deference. Problems are not satisfactorily resolved by a denial of the needs and interests of the self. Gilligan's prescription is not that women valorize selflessness. Denial of self-interest is inappropriate and self-destructive. This is especially true when one is reasoning in terms of relationship, whether in caregiving domains or in domains in which caregiving is not a central function.[16] Gilligan's prescription is that we integrate relational and other modes of reasoning

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15. We emphasize that we do not seek the suppression of modes of reasoning other than the relational. To note the subordination of relational values and reasoning is not to wish for the subordination of generalization or deductive reasoning. It is, rather, to encourage conceptual versatility in efforts to resolve law's—and life's—problems.

16. *See* Peggy Cooper Davis, *A Reflection on Three Verbs: To Father, To Mother, To Parent, in* MOTHER TROUBLES: RETHINKING CONTEMPORARY MATERNAL DILEMMAS 250, 269-74 (Julia E. Hanigsberg & Sara Ruddick, eds., 1999) (arguing that nurturing an emotionally healthy child requires engaging the child in the management of both the child's and the caregivers' needs rather than offering selfless devotion).

and find the confidence, in all areas of human endeavor, to exercise judgment *instead of yielding to tendencies to defer.*

As Gilligan's prescription to women suggests, dissociation is not without remedy. Both women and men are capable of looking behind social stereotypes—and working through conflicts associated with psycho-social development—so that they are able to embrace a full range of reasoning styles. For men, this may require coming to terms with deep-seated associations between relational thinking and loss of identity. For women, it may require overcoming a deeply ingrained fear that genuine political and social assertiveness will lead to our rejection and isolation. But for both it is possible to develop the capacity to alternate comfortably between deductive and inductive, contextual and generalizing, and relational and rule-based reasoning modes.

How will these ideas inform our analysis of Justice O'Connor's reproductive rights jurisprudence? We will use them in two senses: first, to make a very narrow point about one of the many factors contributing to the wisdom of the Justice's jurisprudence, and second, to make a somewhat broader point about the difficulty of safeguarding a right of autonomous decision making in a context in which the decision-makers are necessarily female. The narrower point is that Justice O'Connor's intellectual versatility suggests a capacity to overcome dissociation and use a full range of reasoning and problem solving modes. The broader point is that Justice O'Connor has helped—and should continue to help—the Supreme Court to overcome the conceptual difficulty of giving appropriate recognition to women's right to make procreative choices in a world in which: a) women are not stereotypically thought of as agents and decision makers; b) modes of reasoning that are stereotypically associated with women are culturally devalued; and c) both women and men fail to fully appreciate the intellectually complex reasoning that is required of a woman experiencing an unplanned, poorly-planned, or dangerous pregnancy or carrying a child with diagnosed disabilities.

II. WHAT HAPPENS WHEN JUDGES HEAR STEREOTYPICAL VOICES

Professor Lea VanderVelde is responsible for an illuminating and pioneering study of the effects stereotyped thinking can have in the interpretation and evolution of legal doctrine.[17] On the basis of painstaking research of an important body of English and American common law contract cases, she established a relationship between a gendered perception of employees and an important change in American contract law.[18] The law in question was the "*Lumley* rule"—named for the English case involving opera singer Johanna Wagner.[19] The *Lumley* rule provides that in

17. Lea S. VanderVelde, *The Gendered Origins of the* Lumley *Doctrine: Binding Mens Consciences and Women's Fidelity*, 101 YALE L.J. 775, 784-99 (1992).

18. *Id.* at 776-83.

19. Lumley v. Wagner, 42 Eng. Rep. 687, 693 (Ch. 1852).

appropriate circumstances courts may enforce employment contracts by enjoining the employee from serving a competitor of the employer.[20] When first announced in the British court system, this doctrine was contrary to prevailing American law and unpersuasive to American jurists.[21] American free labor ideology had led courts to respect each employee as "the master of his fate." Placing an employee under restraints against working for a competitor of a former employer seemed inconsistent with that ideology. Nevertheless, by the end of the nineteenth century, courts in the United States overcame their initial resistance and embraced *Lumley*.

VanderVelde's research shows that the eventual acceptance of *Lumley* by American courts was facilitated by the gendered context in which the reported cases were decided.[22] When courts faced a string of cases in which the employee was a woman, the "master of his fate" imagery failed to manifest, and free labor ideology lost its force. As VanderVelde reports,

> all of the prominent cases in . . . [the] line [establishing acceptance of Lumley] involved the services of women[,] and only women performers were subjected to permanent injunctions against performing elsewhere for the duration of the contract. In the corpus of reported cases, no male performer was ever permanently enjoined from quitting and performing elsewhere during the entire nineteenth century.[23]

Having established that the *Lumley* rule was assimilated in contexts involving only female employees, VanderVelde offers the following explanations for the acceptance of *Lumley* by American courts:

> Nineteenth-century women performers were less likely [than males in any occupation] to be viewed as free and independent employees. Nineteenth century women were generally perceived as relationally bound to men. In this line of cases, that perception of women manifested itself in the need to bind actresses to their male theater managers. . . . [I]n the view of the dominant culture, women performers were more likely to be perceived as subordinate than were their male counterparts.[24]

VanderVelde concludes that a restricted "conceptualization of women in the nineteenth century paved the way for adoption of the *Lumley* rule in America."[25]

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20. *Id.* at 693.
21. VanderVelde, *The Gendered Origins of the Lumley Doctrine*, *supra* note 17, at 795-99 (1992).
22. *Id.* at 777-78.
23. *Id.* at 776-77.
24. *Id.* at 778-79.
25. *Id.* at 779.

This conclusion is supported by Cooper Davis's detailed analysis of narrative and metaphor in the *Lumely* line of cases.[26]

The *Lumley* analysis suggests that restricted conceptualizations of women influence jurists' interpretations of legal norms governing the economic sphere. We believe that restricted conceptualizations of women are likely to have an even greater effect on judges' interpretations of rights associated with personal and domestic matters. Reproductive rights cases, the ultimate subject of our inquiry, force a rare melding of the personal and the political: they require that discourses of law and politics be applied to decisionmaking about sexuality, partnering, parenting, and domestic governance. Cases involving rights of autonomy in choosing the manner of one's death—so-called "right-to-die" cases—seem more universal and less gendered, but they too require that courts address intensely personal matters in the discourses of law and politics. These cases therefore can yield significant insights about how judges conceptualize men and women in throes of intensely personal decisionmaking. Steven Miles and Allison August have conducted an analysis of right-to-die cases that suggests that the right of bodily-integrity and the freedom to choose death over life with a profound disability are, like the right to work as one chooses, more difficult to imagine when claimed by a woman.[27] Miles and August examined all appellate level state cases in which courts considered an application to forego life-sustaining treatment.[28] Their statistical account of the outcomes of these cases was striking. In the category of previously competent persons without living wills or other advance directives, Miles and August found, for example, that in seventy-five percent of cases involving men, but in only fourteen percent of cases involving women, courts "constructed the patient's own preference for medical care from the memories and insights of family and friends."[29] In each case, the constructed preference supported the termination of life-supporting treatment. This statistical evidence is buttressed by Miles and August's careful analysis of the patterns of stereotyped thinking reflected in the judicial opinions. Courts, according to Miles and August, described the opinions of men as "rational" and the similar opinions of women as "unreflective."[30] Courts recognized the "moral agency" of men, but not of women.[31] They applied higher standards of proof (like the clear and convincing standard applied by the state of Missouri with respect to Nancy Beth Cruzan[32]) in evaluating the previously expressed preferences of

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26. *See* Peggy Cooper Davis, *The Proverbial Woman*, 48 THE RECORD (of the Ass'n of the Bar of the City of New York) Jan./Feb. 1993 at 7, 12-15 (supporting VanderVelde's interpretation of the *Lumley* line of cases).

27. Steven H. Miles and Allison August, *Courts, Gender and "The Right to Die"* 18 LAW, MED. & HEALTH CARE 85 (1990).

28. *Id.* at 93 n.3.

29. *Id.* at 86.

30. *Id.* at 87.

31. *Id.*

32. Cruzan v. Missouri, 497 U.S. 261, 284 (1990).

women.[33] In constructing narrative accounts of the patients' situations, Miles and August assert that courts described "life-support dependent men as subjected to medical assault . . . [while] women were seen as vulnerable to medical neglect."[34] Women, and only women, were described in child-like terms—as in "fetal postures," in an "infantile state," or in need of "parens patriae" protection.[35] On the other hand, in contrast to these metaphors of infancy and childhood, we find in cases involving men an insistence that the patient be treated as an adult. Thus, the Massachusetts Supreme Court argued in a case involving a male patient that it was necessary to move "away from a paternalistic view of what is 'best' for a patient toward a reaffirmation [of] . . . what decision will comport with the will of the patient."[36]

Based on the VanderVelde and the Miles and August studies, a conclusion that a jurist's sense of the scope or weight of a liberty interest can be influenced by a gendered conception of the interest-bearing subject seems fair. In the *Lumley* line of cases, a spate of specific performance questions involving women in the performing arts seems to have influenced judges' sense of the reach and importance of common law notions of liberty and agency in the employment market. In right-to-die cases, it seems that it was more difficult for judges to give voice to women's previously expressed wishes or to imagine women deciding, or wishing to decide, the conditions of their survival. On the other hand, it may have been more difficult for judges to imagine men under the sway of depression or of caregivers motivated to reduce costs or end their own discomfort. These conceptual and interpretive differences may cause judges to unreasonably compromise women's right to choose the manner of their deaths: when evidence of a wish to end life-prolonging measures is discredited, paternalistic concern—often buttressed by a state's unqualified commitment to the preservation of life—will constrain too much the right to choose the manner of one's death. These same conceptual and interpretive differences may cause judges to guard too jealously the liberty interests of men: when evidence of a resolution to end life gracefully is too easily credited, libertarian concern may cause a court to give too little weight to the possibility of coercion, depression, change of heart or to a state's legitimate interest in the preservation of life.

Attentive readers will have anticipated that we see connections between the effects gender can have on elaboration of a right to work or a right to choose the manner of one's death and elaboration of a right to decide whether to continue a pregnancy. Of course, what one thinks of the right to choose abortion must be affected by the fact that a potential life turns on the choice. What one thinks about

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33. Miles and August, *supra* note 27, at 87.

34. *Id.*

35. *See id.* at 88 (citing *In re* Quinlan, 355 A.2d 647, 655 (1976); *In re* Conroy, 486 A.2d 1209, 1217 (1985); Rasmussen v. Fleming, 741 P.2d 674, 679 (1986); *In re* Colyer, 660 P.2d 738, 740 (1983); *In re* Longeway, 549 N.E.2d 292, 301 (1989)).

36. *Id.* (quoting Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626 (1986)).

choosing abortion therefore will depend enormously, and inevitably, on what one thinks about when fetal life begins and whether termination of a pregnancy is categorically wrong. But the central question for Supreme Court judges has not been whether deciding to have an abortion is categorically wrong, the question has been: who, as between a woman and the state, should make the decision?[37] The studies described above suggest that gender affects judges' sense of the importance of an individual's right to make life-defining decisions. Legal interpretations having to do with the reach and weight of a right of choice can be affected by the way the circumstances of choice are imagined as well as by how the person—or class of persons—facing the choice is conceptualized. The right to choose a professional affiliation and the right to choose the manner of one's death seemed to win less recognition when they were claimed by women, and this lack of recognition seemed attributable to stereotypes according to which women lack agency and decisionmaking competence. The right to choose whether and when to bear a child can only be held by a woman, for only a woman has the capacity to bear a child. There is reason, then, to fear that recognition of this right of choice will be less easily recognized than it would be if it were (or could be) claimed by men.

But there is more. The theories advanced in Part I suggest that recognition of the right to choose childbearing will be compromised for reasons that go beyond the stereotypical view of women as lacking agency and the capacity for competent decisionmaking. According to these theories, women are both culturally expected to be and psychologically at risk for being excessively self-sacrificing and deferential. If this is so, then recognition of a right to choose—or to reject—childbearing will have a greater cultural and psychological resonance than recognition of a right to work or a right to choose the manner of one's death. It will be perceived by the culture as a whole—and felt by pregnant women—as a disavowal of women's obligations of self-sacrifice to the caregiving function and deference to external norms. Indeed, although work outside the domestic sphere is perceived by some as inconsistent with women's proper role, and although a decision that hastens death may be perceived as an abandonment of loved ones, rejection or deferral of motherhood confounds the most basic cultural assumptions about women as it shakes the deep-seated expectation that maternal care will be unqualified, unquestioning, and uncompromised by competing interests.

III. THE SUPREME COURT'S EAR FOR WOMEN'S DECISIONMAKING

The Supreme Court's right-to-die jurisprudence does not provide an adequate basis for testing the hypothesis that gender can affect the conceptualization of patients in right-to-die cases. It does, however, provide some evidence of a

37. We set aside, for purposes of this analysis, the important, but derivative questions concerning the involvement of parents, fathers, and other private parties in abortion decision making.

correlation between conceptualizing the patient as one in the grip of a complex and profound decision and recognizing the constitutional significance of failing to honor the patient's choice. The Court's first significant right-to-die case involved a young woman, Nancy Beth Cruzan, who was living in a persistent vegetative state at the time of the Court's deliberations and decision.[38] The Court held that state-imposed limits on recognition of surrogate choice by an incompetent patient were drawn with sufficient care to fulfill any state obligation to respect patient choice.[39] Subsequently, the Court addressed the constitutionality of state laws prohibiting assisted suicide; it upheld these laws in a set of cases, each involving three anonymous patients who died before the cases reached the Court.[40] The Court was not definitive in these cases as to whether the United States Constitution protects a suffering patient's right to forego treatment or end his or her life,[41] and in each a majority rejected the patients' constitutional claims. Nonetheless, some Justices made clear their view that the Constitution does protect a patient's right of self-determination. These Justices, and only these Justices, spoke with particularity about the *decisionmaking process* faced by gravely ill patients or by their surrogates.

In *Cruzan*, for example, the opinion of the Court described the patient's condition,[42] but gave little attention to her state of mind; it simply reported the trial court's conclusion that the patient had "expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration,"[43] and summarized the evidence at trial as consisting "primarily of Nancy Cruzan's statements made to a housemate about a year before her accident that she would not want to live should she face life as a 'vegetable,' and other observations to the same effect."[44] By contrast, concurring and dissenting Justices who indicated more clearly that they would recognize a constitutional right of patient choice spoke with particularity of the patient's subjective state. Whereas the majority opinion focused primarily on the patient's right to avoid an unwanted battery or touching,[45] Justice Brennan argued that there were "affirmative reasons

38. Cruzan v. Missouri, 497 U.S. 261, 261 (1990).

39. *Id.* at 292.

40. *See* Vaco v. Quill, 521 U.S. 793, 797 (1997); Washington v. Glucksburg, 521 U.S. 702, 707 (1997).

41. *See Cruzan*, 497 U.S. at 279 (assuming, without deciding, a liberty interest in freedom from unwanted medical intervention); *Glucksburg*, 521 U.S. at 723 (limiting the due process question to "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so").

42. *Cruzan*, 497 U.S. at 311 n.10.

43. *Id.*

44. *Id.* at 285.

45. *Id.* at 270-74.

why someone like Nancy might choose to forgo artificial nutrition and hydration . . . .":[46]

> Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence. "In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve."[47]

Quoting the opinion of a Maryland court, he probed the state of mind of another patient contemplating life in a comatose state, noting a concern not only with invasive medical instruments, but also with "the utter helplessness of the permanently comatose person, the wasting of a once strong body, and the submission of the most private bodily functions to the attention of others."[48] The Justice added that these conditions "are, for many, humiliating to contemplate, as is visiting a prolonged and anguished vigil on one's parents, spouse, and children."[49] Justice Stevens, like Justice Brennan, made clear his belief that the Constitution protects a patient's right of choice; as he put it, "[o]ur duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly so rooted in the traditions and conscience of our people as to be ranked as fundamental." And Stevens, like Brennan, saw beyond a right of bodily integrity, saying, "the constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein."[50] The process due in determining with particularity the wishes Nancy Cruzan would have expressed had she been able to do so was, for Justice Stevens, a process rooted in an empathetic conception of the patient's position:

> Insofar as Nancy Cruzan has an interest in being remembered for how she lived rather than how she died, the damage done to those memories by the prolongation of her death is irreversible. Insofar as Nancy Cruzan has an interest in the cessation of any pain, the continuation of her pain is irreversible. Insofar as Nancy Cruzan has an interest in a closure to her life consistent with her own beliefs rather than those of the Missouri Legislature, the State's imposition of its contrary view is irreversible. To deny the importance of these consequences is in effect to deny that Nancy

46. *Id.* at 310.
47. *Id.* at 310-11 (citation omitted).
48. *Id.* at 311 (quoting *In re* Gardner, 534 A.2d 947, 953 (Me. 1987)).
49. *Id.*
50. *Id.* at 343.

> Cruzan has interests at all, and thereby to deny her personhood in the name of preserving the sanctity of her life.[51]

Justice O'Connor sounded similar themes in *Cruzan*. Although she concurred in the Court's result and joined in its opinion, she also issued a concurring opinion[52] in which she expressed a clear view that due process liberty includes a right of self-determination for a gravely ill patient and grounded that view in comprehension of the weight and personal significance of the patient's choice.[53] She wrote that "[r]equiring a competent adult to endure . . . [artificial feeding and hydration] procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment,"[54] and drew the conclusion that "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water."[55] Similarly, in *Glucksburg* and *Quill*, she concurred specially to contextualize the decisions involved and to reaffirm the importance of the rights at issue. In *Glucksburg*, she began her opinion with the perspective of the dying patient: "Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms."[56] The Justice then integrated the inductive, contextual process of elaborating the interests that were and were not at stake in the cases before her with a precise analysis of the rule to be extracted from the Court's holding. She took pains to distinguish the situations at bar, in which palliative care was available regardless of whether it would hasten death, from situations in which the Court might legitimately hold that a constitutional right had been violated because options available to the patient were unjustifiably constrained.[57]

Justice O'Connor has seemed to have a sensitive ear for individuals facing complex moments of personal choice in situations other than right-to-die cases. In *Troxel v. Granville*,[58] she wrote for a court faced with the always difficult responsibility of bringing law to bear in the domestic sphere to reconcile rights of parental choice and a state's obligation to promote the best interests of children. At issue was the constitutionality of a Washington statute providing that any person

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51. *Id.* at 353.

52. *Cruzan*, 497 U.S. at 287. See NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT (1996), for a thoughtful, thorough analysis of Justice O'Connor's strategic use of concurring and dissenting opinions to draw consensus around positions that reconcile competing principles.

53. *Cruzan*, 497 U.S. at 289.

54. *Id.* (emphasis added).

55. *Id.*

56. *Glucksburg*, 521 U.S. at 736.

57. *Id.* at 736-38.

58. 530 U.S. 57 (2000).

might at any time and for any reason petition for visitation with a child and that the petition would be granted if the presiding judge thought the visitation would serve the child's best interests.[59] The parties before the Court were Jenifer and Gary Troxel, the grandparents of two children of their deceased son, and Tommie Granville, the mother who bore and had always provided primary care for the children.[60] The grandparents had complained to a Washington court that their visitation with the children was inadequate and won the right to have it increased.[61] Granville argued on appeal that the Washington court's order was an unjustified intrusion into her family life that violated her due process rights to make family decisions and exercise childrearing authority so long as her children were not at risk of harm. Justice O'Connor wrote for the majority and held that application of the statute in Granville's case unconstitutionally interfered with her right to rear her children as she saw fit.[62] The Justice acknowledged the Due Process principle that parents hold a "fundamental right . . . to make decisions concerning the care, custody, and control of their children,"[63] and the presumption "that fit parents act in the best interests of their children."[64] Sensitive to the competing principle that states have authority to safeguard the welfare of children, she proceeded to consider whether the Troxel's visitation order was justifiable. Speaking consistently of the mother as a decision -maker,[65] O'Connor focused on the particulars of the dispute before her.[66] She observed that the mother's fitness was unquestioned and that the trial judge had overturned the mother's judgment without finding—or being required to find—that it was unreasonable.[67] O'Connor concluded that the basis of the visitation order was nothing more than a disagreement between the state and the mother as to how the children's best interests would be served.[68] Accordingly, she ruled that the Washington trial judge's decision to second guess and overrule Granville's judgment concerning the manner and terms under which her children

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59. The statute provided that "any person may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve the best interest of the child." *Id.* at 61.

60. *Id.* at 57.

61. The "dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays. . . . Granville did not oppose visitation but instead asked that the duration of any visitation order be shorter than that requested by the Troxels. While the Troxels requested two weekends per month and two full weeks in the summer, Granville asked the Superior Court to order only one day of visitation per month (with no overnight stay) and participation in the Granville family's holiday celebrations." *Id.* at 71 (citations omitted).

62. *Id.* at 67.

63. *Id.* at 72.

64. *Id.* at 68.

65. *Id.* at 69-70 (observing that the state "failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters"); *id.* at 72 (declaring "an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters").

66. *See id.* at 68-73.

67. *Id.* at 68-70.

68. *Id.* at 72 ("[T]his case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests.").

should visit their grandparents amounted to "an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters."[69]

We are struck by the respectful attention Justice O'Connor gave to parental decision making in *Granville*. Valuing Granville's decisional autonomy required an immunity or resistance to cultural pressures to demean domestic governance and to disregard women's decision making. We sense that O'Connor has understood, from the perspective of the right-holder, the seriousness and difficulty of parental decision making and the sense in which state intervention can thwart good parenting and blur lines of parental authority. We see a similar understanding in her opinions concerning patients' decisions about the quality of their lives and the manner of their deaths. We suspect that the capacity for this kind of understanding supported her recognition of the core constitutional issue in *Roe* and that it will serve her in the inevitably difficult cases in which the Court will elaborate its definition of what counts as an undue—and hence unconstitutional—burden on the right of abortion choice.

A focus on the decision maker in reproductive rights jurisprudence is badly needed. The opinion of the Court in *Roe* virtually ignored the pregnant woman's thought processes. Instead of developing the idea of abortion choice as an aspect of family autonomy and individual responsibility, it focused heavily on societal judgments across time about the acceptability of the practice[70] and characterized the abortion decision as a judgment guided or controlled by the pregnant woman's doctor. Speaking in dissent, Justice White called attention to abortion decisionmaking, but only to demean it. He saw the issue as involving, at its heart, "those recurring pregnancies that pose no danger whatsoever to the life or health of the mother but are, nevertheless, unwanted for any one or more of a variety of reasons—convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc."[71] Moving from this characterization of the situations and rationales of pregnant women claiming a right to choose between abortion and carrying a child to term, he characterized their constitutional argument as a claim "that for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure."[72] More egregiously, White twice described abortion choice as a matter of convenience, accusing the Court of valuing "the convenience of the pregnant woman more than the continued existence and development of the life or

69. *Id.* at 72.

70. *Roe*, 410 U.S. at 129-44 (implementing the Court's determination to assure objective analysis by placing "emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries").

71. *Id.* at 221.

72. *Id.*

potential life that she carries," and arguing that a statute criminalizing abortion "is not constitutionally infirm because it denies abortions to those who seek to serve only their convenience."[73]

We know, both from life experience and from Gilligan's longitudinal study of women who have faced unwanted pregnancy,[74] that abortion choice is no more likely to be a matter of convenience than is the choice to forego life support or the choice to regulate a child's contact with a grieving grandparent. Women who choose abortion are not people who have lost sight of the value of potential life. They are people who must confront the stark reality of impending life and feel intensely the value and growth of that life. The pregnant woman must then make a decision that does justice, not only in terms of the value of respecting and affirming life by carrying and nurturing the unborn child but also in terms of a web of additional considerations, including a parent's obligation of care, the quality of life for existing children, the quality of the expected child's life, the needs and strengths of the prospective father and of extended family, and the mother's own obligations—both to herself and to others. This characterization of abortion decisionmaking is supported by the more than seven-hundred letters filed with the Supreme Court in connection with *Webster v. Reproductive Health Services*,[75] by women who had terminated pregnancies, both before and after *Roe* made it possible for most women (and their doctors) to choose abortion without vulnerability to prosecution. The following excerpt is illustrative:

> In 1964, I was a nineteen-year old wife and mother of an infant daughter. My daughter, born five weeks premature, had been diagnosed soon after birth with a congenital heart defect. She would need open-heart surgery as soon as she was strong enough.
>
> When our little girl was a year old, I became pregnant as a result of a contraceptive failure. I tried very hard during this time to imagine caring for a second child. We considered our finances, our emotional resources and support system. We sadly had to admit that our marriage was already under incredible strain. It seemed impossible to have another child without doing irreparable harm to our existing family.
>
> Abortion was not legal. After several weeks of searching, I found someone who would perform the procedure, but his fee was more than we could afford. Beginning to feel desperate, I tried several times to abort

73. *Id.*

74. Gilligan, *supra* note 10, at 71-72. The study formed the basis of chapters 3-5, consisting of analyses of interviews with twenty-nine women referred by abortion and pregnancy counseling services. The women were interviewed twice—while they were in the process of deciding whether or not to abort their pregnancies and at the end of the following year. *Id.*

75. 492 U.S. 490 (1989).

> myself. Before I could do myself any more harm, the doctor, unlicensed in the U.S., agreed to reduce the fee to whatever we could afford . . . .
>
> Since that time, my daughter has had two successful heart operations, graduated from college and is a healthy productive woman. She also has a sister born in 1977.
>
> I have heard it said that abortion is just a convenience, especially for middle-class women. I assure you, pregnancy is no mere inconvenience. A pregnancy consumes a woman's body, energies and resources for nine months, many times with complications, sometimes at risk to the woman's life. After pregnancy, there is a child, life's most sacred responsibility, for eighteen years, for life . . . . Every woman must have the right to offer her child the best chance for life that she can. Every woman must have the right to enter into this life-absorbing responsibility when she decides that she can.[76]

The pregnant woman's decisionmaking process is at the heart of the constitutional interest that the Fourteenth Amendment, as understood in *Casey*, stands to protect in cases concerning abortion regulation. The decision whether to bear a child or abort a pregnancy is surely one of "the most intimate and personal choices a person may make in a lifetime." It is just as surely a choice "central to personal dignity and autonomy"—a choice that may not be made under "compulsion" if one is to have the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." The Court cannot give appropriate effect to the Fourteenth Amendment's mandate to protect the generalized right of personhood in the reproductive rights context unless it develops a particularized and respectful appreciation of the perspectives of pregnant women. Should the Court fail to address and appreciate the perspective of the pregnant woman or to focus on her as a decision maker, its undue burden test will prove too feeble to guarantee the full personhood that the Amendment promises.

The Court has not made clear whether its undue burden test addresses only obstacles to obtaining an abortion once abortion has been chosen or whether it also addresses obstacles that coerce or undermine a woman's decision whether to have an abortion.[77] Acceptance of the *Casey* rationale requires that the Court provide protection of both kinds, for, as *Casey*'s joint opinion recognizes, self-definition and integrity of personhood are at least as much compromised by coerced decisionmaking as by acts that frustrate implementation of a decision once it is

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76. Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees at 52, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605).

77. The joint opinion in *Planned Parenthood v. Casey* said that "a law designed to further the State's interest in fetal life which imposes *an undue burden on the woman's decision* before fetal viability" is unconstitutional. 505 U.S. 833, 877 (1992) (emphasis added). Further, an "undue burden is . . . shorthand for the conclusion that a state regulation has the purpose or effect of *placing a substantial obstacle in the path of a woman seeking an abortion* of a nonviable fetus." *Id.* (emphasis added).

made. Appropriate focus on pregnant women's decisionmaking should help the Court to understand what would count as an undue burden on the process of choice.

We illustrate the importance of safeguarding against burdens on decisionmaking by reference to the oft-litigated issue of the constitutionality of "informed consent" requirements for abortions performed during the first trimester. The *Roe* framework that was overturned by *Casey* established that states could regulate election of first trimester abortions only for the purpose of furthering their legitimate interest in protecting the pregnant woman's health. Before *Casey* the Court had held, consistently with *Roe*'s trimester framework, that during the first third of pregnancy states could not insist that pregnant women seeking abortion consider information designed not to further the State's interest in women's health but to persuade women to continue their pregnancies. The joint opinion in *Casey* rejected this approach, declaring that states should be free throughout pregnancy to regulate abortion by discouraging it.[78] Having done so, it readily approved the informed consent provision before it,[79] although it was "troubled" by, and considered at some length before ultimately rejecting them, arguments that the State's requirement of a twenty-four hour waiting period between the provision of the state's antiabortion materials and the performance of an abortion posed "a substantial obstacle to a woman's choice to terminate her pregnancy."[80] The Justices had little concern that the twenty-four hour waiting period between provision of antiabortion information and performance of a lawful abortion would have an impermissible effect on the decision making process that might lead to a choice to terminate or continue a pregnancy. Indeed, the authors of the joint opinion found reasonable "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection" after the provision of information offered by the state as an important "part of the background of the decision."[81]

The findings of Gilligan's abortion study, read in the context of the analysis of psycho-social development summarized in Part II of this article, suggest that in this respect the joint opinion gave too little weight to the character and circumstances of abortion decision making. We have said that there is a developmental risk that women and girls will experience, and then have difficulty overcoming, a tendency to defer rather than assert their judgment. Women in the abortion study who were able to make a healthy decision were women who were able to decide rather than defer. Follow-up interviews indicated that women who deferred to the views of husbands, lovers, or others in deciding either to abort or to continue the pregnancy had less healthy outcomes, both in terms of emotional recovery and in terms of the avoidance (for those whose initial pregnancies could have been avoided by the

78. *Casey*, 505 U.S. at 882-83.

79. *See id.* at 883 (approving an informed consent measure designed both "to ensure an informed choice" and to further a state's interest to preserve life by "caus[ing] the woman to choose childbirth over abortion").

80. *Id.* at 885-86.

81. *Id.* at 885.

exercise of care) of additional unplanned pregnancies, than women who took responsibility for their decision. The pull to defer to another's wish that the pregnant woman abort or have the child reflected the "enormous power of the judgment of selfishness" in the women's thinking.[82] Women inclined to bear the child felt selfish in the face of opposition from people asserting competing claims on her time and attention. Women inclined to end the pregnancy felt selfish in the face of opposition from people asserting an interest in the potential lives they carried. A college student respondent who had terminated a pregnancy during her senior year overcame the pull to deference. She attributed her pregnancy to "a lapse of self-control, decision-making, and very much stupidity."[83] "What I had done," she said, "was so wrong that it came to light to me that I was not taking responsibility where I could have, and I could have gone on like I was, not taking responsibility."[84] As the abortion decision loomed, she thought "a lot about decisionmaking, and for the first time . . . wanted to take control of and responsibility for my own decisions in life."[85] The result was that she came to see herself as a competent, responsible adult.

If emotional health and responsibility in procreational choices are, as the abortion study suggests, correlated with choosing decision over deference, then an informed consent provision of the kind approved in *Casey* is misguided. The decision whether to continue or abort a pregnancy involves a clash of competing responsibilities and principles. As an informant in a study of college women put it, the complete avoidance of harm is impossible in view of the "tension and conflict" that life brings.[86] A provision that requires consideration of information designed to encourage deference to the state's unqualified commitment to potential life badly oversimplifies the problems and responsibilities posed by an unplanned or unhealthy pregnancy. It encourages deference to the views of the sovereign rather than acceptance of the responsibility and complexity of the decision that must be made. Such a provision is doubly perverse, for the state's interest in women's emotional health cannot be promoted by encouraging deference over complex and responsible decision making, and the state's long term interest in reducing abortions is disserved by encouraging deference over agency and adult responsibility.

The perverse qualities of this kind of abortion regulation underscore its liberty-inhibiting qualities. Dissenting from *Casey*'s validation of Pennsylvania's informed consent requirements, Justice Stevens gave attention not just to the general proposition that important, intimate, and self-defining life-choices must be made without state coercion but also to the particular circumstance of choosing abortion or childbirth. He observed that "[a] woman considering abortion faces 'a difficult choice having serious and personal consequences of major importance to her own

82. GILLIGAN, *supra* note 10, at 132.
83. *Id.*
84. *Id.* at 133.
85. *Id.*
86. *Id.* at 134.

future—perhaps to the salvation of her own immortal soul.'"[87] In words that resonate with Gilligan's findings, he characterized the decision as a "traumatic" yet "empowering . . . matter of conscience," and he concluded that liberty to make this decision is "an element of basic human dignity."[88] From this perspective, Justice Stevens observed that whereas the pregnant woman's interest in the fetus she carries is intensely particular, personal, and moral, the state's interest in fetal life is secular and general.[89] He argued that the Fourteenth Amendment permits abortion regulations that seek "to enhance the deliberative quality" of a pregnant woman's decision making,[90] but bars the state from forcing upon her, in the period immediately preceding her choice, "materials clearly designed to persuade her to choose not to undergo the abortion."[91] Speaking specifically of the twenty-four hour waiting period, and echoing Justice O'Connor's insistence in *Troxel* that simple disagreement about constitutionally-protected choice cannot be reason enough for a state to reverse that choice, he said:

> The decision to terminate a pregnancy is profound and difficult. No person undertakes such a decision lightly—and States may not presume that a woman has failed to reflect adequately merely because her conclusion differs from the State's preference. A woman who has, in the privacy of her thoughts and conscience, weighed the options and made her decision cannot be forced to reconsider all, simply because the State believes she has come to the wrong conclusion.[92]

In the final analysis, we regard Justice O'Connor's reproductive rights jurisprudence with a mix of respect and anxiety. We respect and celebrate the Justice for her role in *Casey*'s reaffirmation of the human right to self-definition. We applaud her recognition, in cases like *Cruzan*, *Quill* and *Troxel*, of both men's and women's need of agency. Still, we are sobered by *Casey*'s approval of abortion regulations that encourage women to defer to a sovereign's global preference rather than face the excruciating choice that a particular unplanned or unhealthy pregnancy presents. And evidence of gender bias in courts' appraisals of the human need for agency and choice leads us to urge for heightened vigilance lest the freedom to choose be differently respected when it is a woman who decides.

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87. *Casey*, 505 U.S. at 916.
88. *Id.*
89. *Id.* at 914.
90. *Id.* at 916.
91. *Id.* at 917.
92. *Id.* at 919.